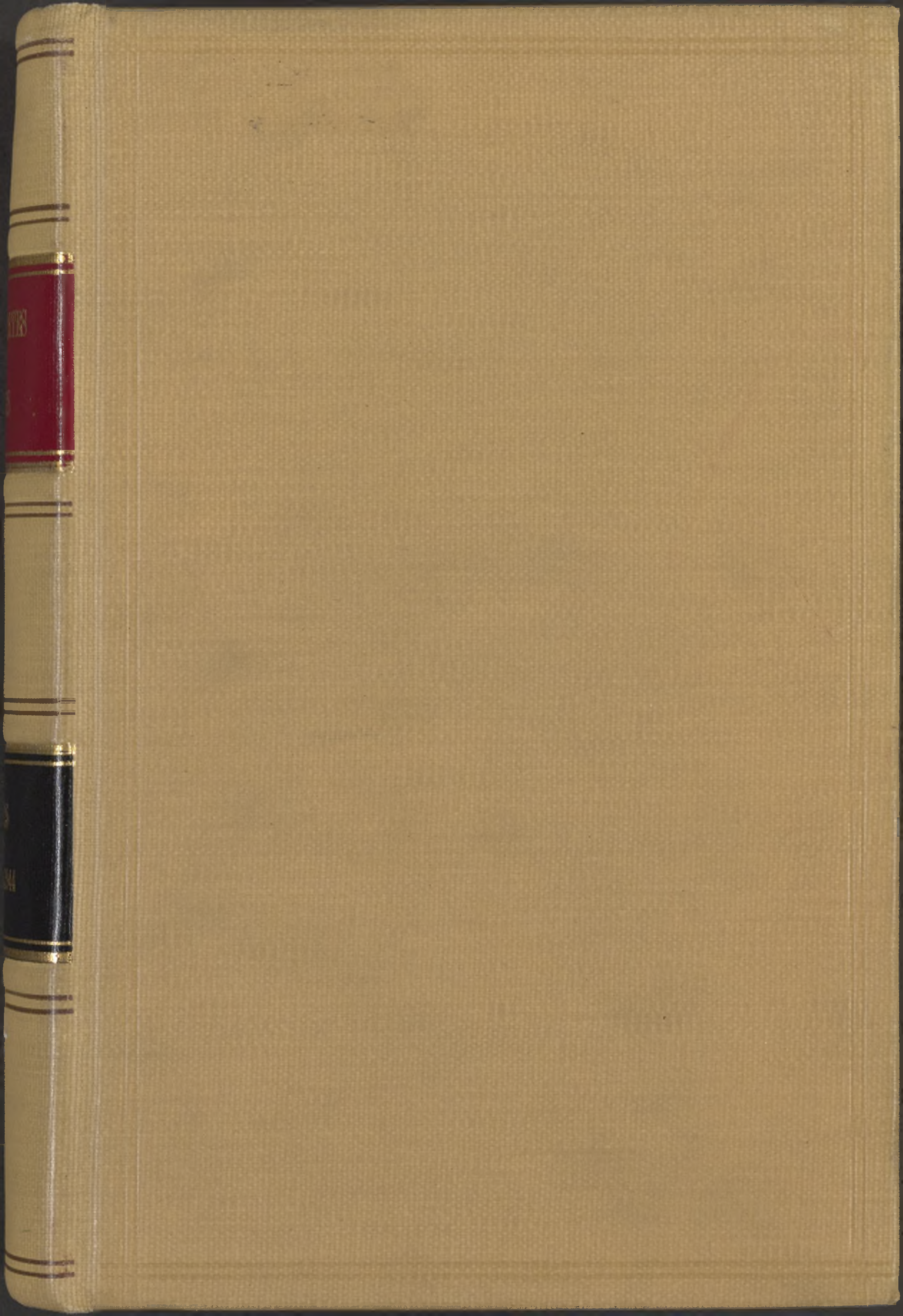

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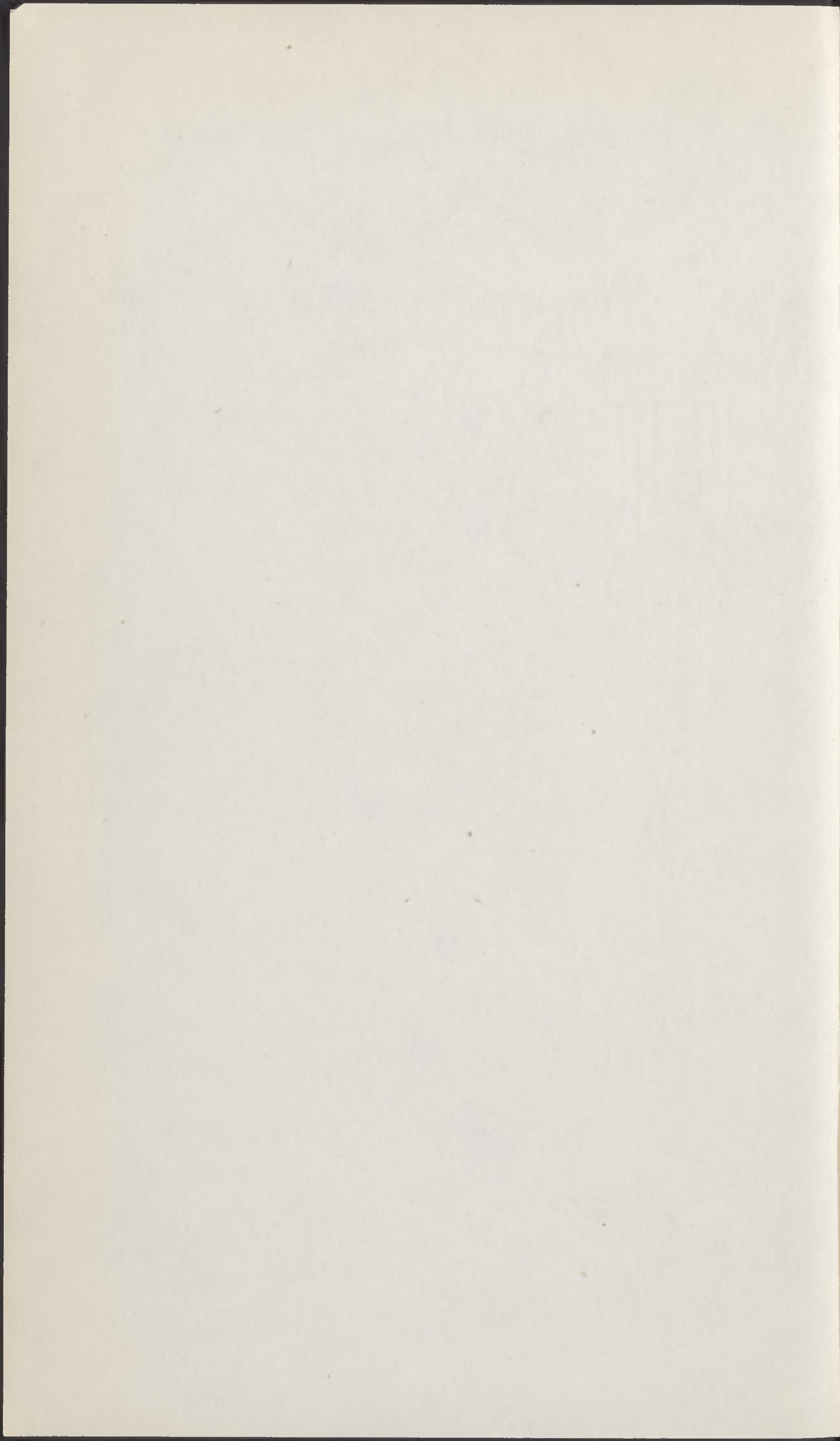

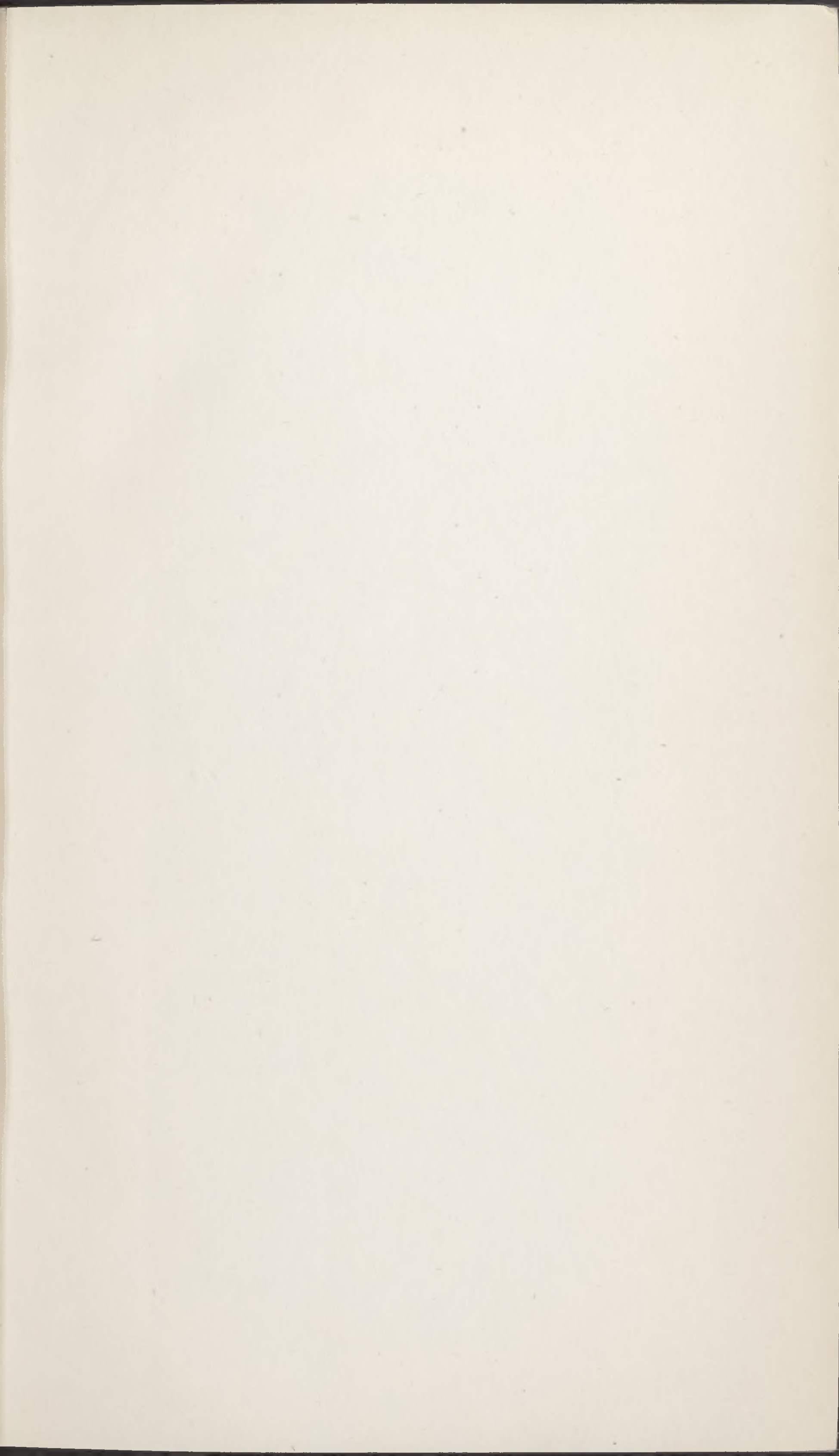

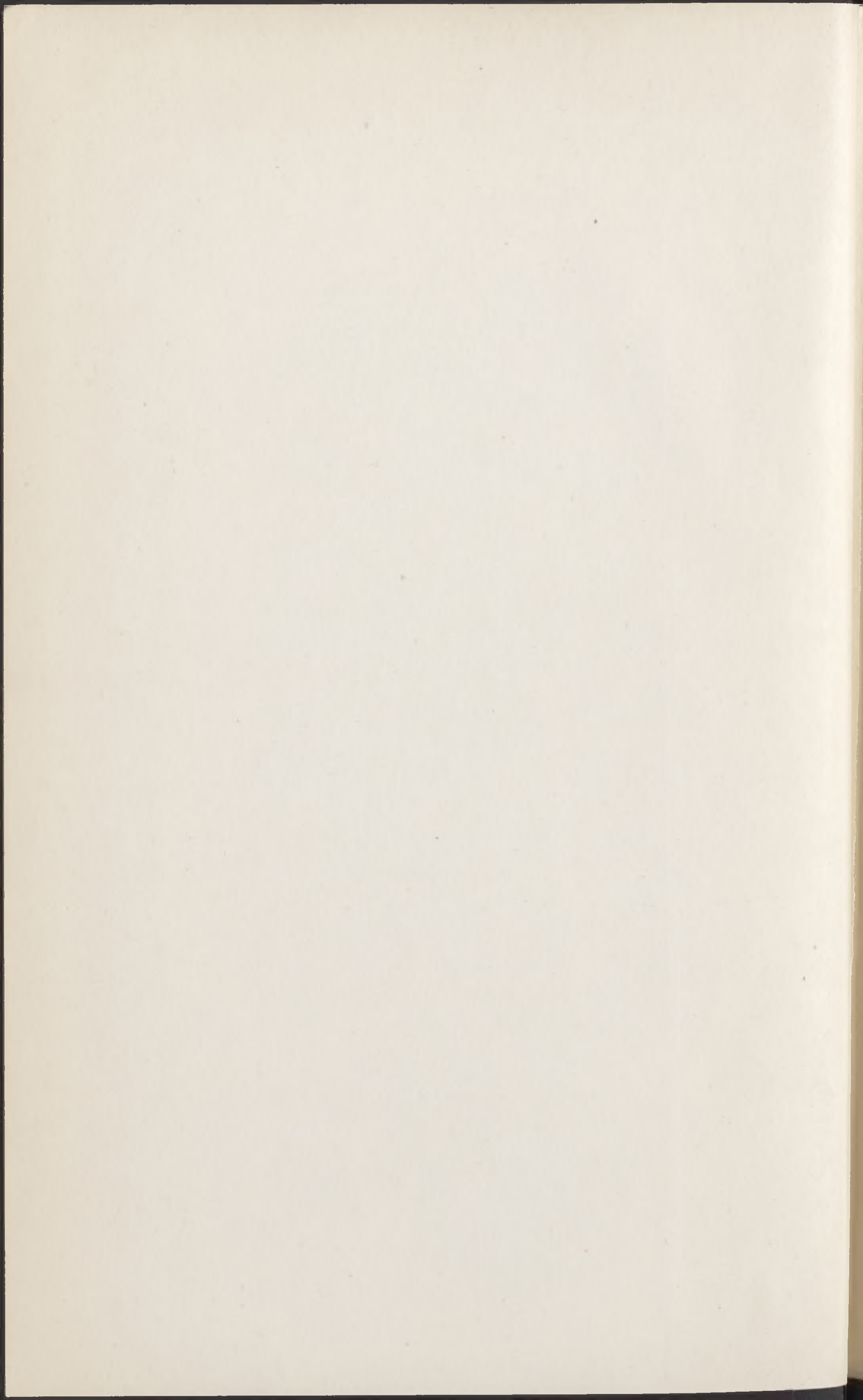

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IN

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AT

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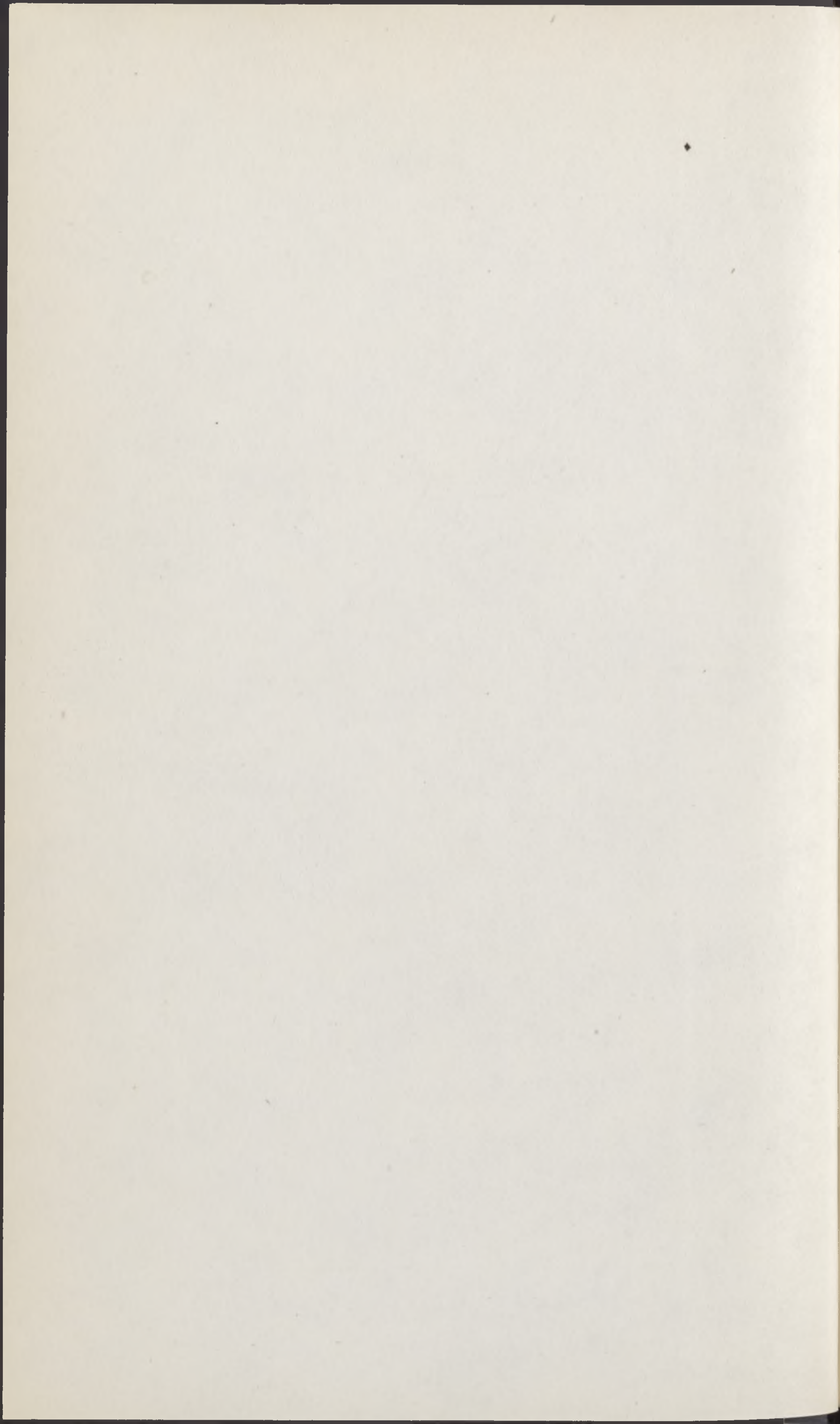

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FROM APRIL 23, 1945 (CONCLUDED) TO AND INCLUDING (IN PART)
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Errata.—In *United States* v. *Aluminum Company of America,* 320 U. S. 708, 322 U. S. 716, the citation of the report below should be 44 F. Supp. 97.

30853

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.

*On Monday, March 26, 1945, the Chief Justice announced the death, on March 22, 1945, at San Diego, Calif., of John Hessin Clarke, of Ohio, a former Associate Justice of this Court. Appointed by President Wilson, Mr. Justice Clarke took his seat October 9, 1916, and resigned as of September 18, 1922.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

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

For the First Circuit, FELIX FRANKFURTER, Associate Justice.

For the Second Circuit, ROBERT H. JACKSON, Associate Justice.

For the Third Circuit, OWEN J. ROBERTS, Associate Justice.

For the Fourth Circuit, HARLAN F. STONE, Chief Justice.

For the Fifth Circuit, HUGO L. BLACK, Associate Justice.

For the Sixth Circuit, STANLEY REED, Associate Justice.

For the Seventh Circuit, FRANK MURPHY, Associate Justice.

For the Eighth Circuit, WILEY RUTLEDGE, Associate Justice.

For the Ninth Circuit, WILLIAM O. DOUGLAS, Associate Justice.

For the Tenth Circuit, WILEY RUTLEDGE, Associate Justice.

For the District of Columbia, HARLAN F. STONE, Chief Justice.

March 1, 1943.

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

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1944.

CRAMER *v.* UNITED STATES.

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

No. 13. Argued March 9, 1944. Reargued November 6, 1944.—Decided April 23, 1945.

1. In a prosecution upon an indictment charging treason by adhering to enemies of the United States, giving them aid and comfort, in violation of § 1 of the Criminal Code, the overt act relied on, of which the Constitution requires proof by two witnesses, must be at least an act of the accused sufficient, in its setting, to sustain a finding that the accused actually gave aid and comfort to the enemy. P. 34.
2. The protection of the two-witness rule of the Constitution in such case extends at least to all acts of the defendant which are used to draw incriminating inferences that aid and comfort have been given. P. 33.
3. In a prosecution upon an indictment charging treason by adhering to enemies of the United States, giving them aid and comfort, in violation of § 1 of the Criminal Code, two of the overt acts alleged and relied on were:

"1. Anthony Cramer, the defendant herein, on or about June 23, 1942, at the Southern District of New York and within the jurisdiction of this Court, did meet with Werner Thiel and Edward John Kerling, enemies of the United States, at the Twin Oaks Inn at Lexington Avenue and 44th Street, in the City and State of New York, and did confer, treat, and counsel with said Werner Thiel

and Edward John Kerling for a period of time for the purpose of giving and with intent to give aid and comfort to said enemies, Werner Thiel and Edward John Kerling.

"2. Anthony Cramer, the defendant herein, on or about June 23, 1942, at the Southern District of New York and within the jurisdiction of this Court, did accompany, confer, treat, and counsel with Werner Thiel, an enemy of the United States, for a period of time at the Twin Oaks Inn at Lexington Avenue and 44th Street, and at Thompson's Cafeteria on 42nd Street between Lexington and Vanderbilt Avenues, both in the City and State of New York, for the purpose of giving and with intent to give aid and comfort to said enemy, Werner Thiel."

By direct testimony of two or more witnesses it was established that Cramer met Thiel and Kerling on the occasions and at the places charged; that they drank together; and that they engaged long and earnestly in conversation. There was no proof by two witnesses of what they said or in what language they conversed; no showing that Cramer gave them any information whatever of value to their mission or that he had any to give; no showing of any effort at secrecy, they having met in public places; and no evidence that Cramer furnished them shelter, sustenance or supplies, or that he gave them encouragement or counsel, or even paid for their drinks.

Held that overt acts 1 and 2 as proved were insufficient to support a finding that the accused had given aid and comfort to the enemy, and therefore insufficient to support a judgment of conviction. Pp. 36–37, 48.

137 F. 2d 888, reversed.

CERTIORARI, 320 U. S. 730, to review the affirmance of a judgment of conviction of treason.

Mr. Harold R. Medina, with whom *Mr. John McKim Minton, Jr.* was on the brief, for petitioner.

Solicitor General Fahy, with whom *Mr. Chester T. Lane* was on the brief on the reargument and *Assistant Attorney General Tom C. Clark, Messrs. Chester T. Lane, Robert S. Erdahl, Edward G. Jennings* and *Walter J. Cummings, Jr.* were on the brief on the original argument, for the United States.

MR. JUSTICE JACKSON delivered the opinion of the Court.

Anthony Cramer, the petitioner, stands convicted of violating Section 1 of the Criminal Code, which provides: "Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason."[1]

Cramer owed allegiance to the United States. A German by birth, he had been a resident of the United States since 1925 and was naturalized in 1936. Prosecution resulted from his association with two of the German saboteurs who in June 1942 landed on our shores from enemy submarines to disrupt industry in the United States and whose cases we considered in *Ex parte Quirin*, 317 U. S. 1. One of those, spared from execution, appeared as a government witness on the trial of Cramer. He testified that Werner Thiel and Edward Kerling were members of that sabotage crew, detailed their plot, and described their preparations for its consummation.

Cramer was conscripted into and served in the German Army against the United States in 1918. After the war he came to this country, intending to remain permanently. So far as appears, he has been of good behavior, never before in trouble with the law. He was studious and intelligent, earning $45 a week for work in a boiler room and living accordingly.

There was no evidence, and the Government makes no claim, that he had foreknowledge that the saboteurs were coming to this country or that he came into association with them by prearrangement. Cramer, however, had known intimately the saboteur Werner Thiel while the latter lived in this country. They had worked together,

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[1] 18 U. S. C. § 1, derived from Act of April 30, 1790, c. 9, § 1, 1 Stat. 112.

roomed together, and jointly had ventured in a small and luckless delicatessen enterprise. Thiel early and frankly avowed adherence to the National Socialist movement in Germany; he foresaw the war and returned in 1941 for the purpose of helping Germany. Cramer did not do so. How much he sympathized with the doctrines of the Nazi Party is not clear. He became at one time, in Indiana, a member and officer of the Friends of New Germany, which was a predecessor of the Bund. However, he withdrew in 1935 before it became the Bund. He says there was some swindle about it that he did not like and also that he did not like their drilling and "radical activities." In 1936 he made a trip to Germany, attended the Olympic games, and saw some of the Bundsmen from this country who went there at that time for conferences with Nazi Party officials. There is no suggestion that Cramer while there had any such associations. He does not appear to have been regarded as a person of that consequence. His friends and associates in this country were largely German. His social life in New York City, where he recently had lived, seems to have been centered around Kolping House, a German-Catholic recreational center.

Cramer retained a strong affection for his fatherland. He corresponded in German with his family and friends there. Before the United States entered the war he expressed strong sympathy with Germany in its conflict with other European powers. Before the attack upon Pearl Harbor, Cramer openly opposed participation by this country in the war against Germany. He refused to work on war materials. He expressed concern about being drafted into our army and "misused" for purposes of "world conquest." There is no proof, however, except for the matter charged in the indictment, of any act or utterance disloyal to this country after we entered the war.

Coming down to the time of the alleged treason, the main facts, as related on the witness stand by Cramer, are not seriously in dispute. He was living in New York; and in response to a cryptic note left under his door, which did not mention Thiel, he went to the Grand Central Station. There Thiel appeared. Cramer had supposed that Thiel was in Germany, knowing that he had left the United States shortly before the war to go there. Together they went to public places and had some drinks. Cramer denies that Thiel revealed his mission of sabotage. Cramer said to Thiel that he must have come to America by submarine, but Thiel refused to confirm it, although his attitude increased Cramer's suspicion. Thiel promised to tell later how he came to this country. Thiel asked about a girl who was a mutual acquaintance and whom Thiel had engaged to marry previous to his going to Germany. Cramer knew where she was, and offered to and did write to her to come to New York, without disclosing in the letter that Thiel had arrived. Thiel said that he had in his possession about $3,600, but did not disclose that it was provided by the German Government, saying only that one could get money in Germany if he had the right connections. Thiel owed Cramer an old debt of $200. He gave Cramer his money belt containing some $3,600, from which Cramer was to be paid. Cramer agreed to and did place the rest in his own safe-deposit box, except a sum which he kept in his room in case Thiel should want it quickly.

After the second of these meetings Thiel and Kerling, who was present briefly at one meeting, were arrested. Cramer's expectation of meeting Thiel later and of bringing him and his fiancée together was foiled. Shortly thereafter Cramer was arrested, tried, and found guilty. The trial judge at the time of sentencing said:

"I shall not impose the maximum penalty of death. It does not appear that this defendant Cramer was aware

that Thiel and Kerling were in possession of explosives or other means for destroying factories and property in the United States or planned to do that.

"From the evidence it appears that Cramer had no more guilty knowledge of any subversive purposes on the part of Thiel or Kerling than a vague idea that they came here for the purpose of organizing pro-German propaganda and agitation. If there were any proof that they had confided in him what their real purposes were, or that he knew or believed what they really were, I should not hesitate to impose the death penalty."

Cramer's case raises questions as to application of the constitutional provision that "Treason against the United States shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." [2]

Cramer's contention may be well stated in words of Judge Learned Hand in *United States* v. *Robinson:* [3]

"Nevertheless a question may indeed be raised whether the prosecution may lay as an overt act a step taken in execution of the traitorous design, innocent in itself, and getting its treasonable character only from some covert and undeclared intent. It is true that in prosecutions for conspiracy under our federal statute it is well settled that any step in performance of the conspiracy is enough, though it is innocent except for its relation to the agreement. I doubt very much whether that rule has any application to the case of treason, where the requirement affected the character of the pleading and proof, rather than accorded a season of repentance before the crime should be complete. Lord Reading in his charge in

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[2] Article III, § 3.

[3] 259 F. 685, 690 (S. D. N. Y. 1919).

Casement's Case uses language which accords with my understanding:

"'Overt acts are such acts as manifest a criminal intention and tend towards the accomplishment of the criminal object. They are acts by which the purpose is manifested and the means by which it is intended to be fulfilled.'"[4]

The Government, however, contends for, and the court below has affirmed, this conviction upon a contrary principle.[5] It said: "We believe in short that no more need be laid for an overt act of treason than for an overt act of conspiracy . . . Hence we hold the overt acts relied on were sufficient to be submitted to the jury, even though they perhaps may have appeared as innocent on their face." A similar conclusion was reached in *United States* v. *Fricke;*[6] it is: "An overt act in itself may be a perfectly innocent act standing by itself; it must be in some manner in furtherance of the crime."

As lower courts thus have taken conflicting positions, or, where the issue was less clearly drawn, have dealt with the problem ambiguously,[7] we granted certiorari[8] and after argument at the October 1943 Term we invited

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[4] This view was recently followed by Judge Clancy in District Court, in dismissing an indictment for treason. *United States* v. *Leiner*, S. D. N. Y. 1943 (unreported).

[5] *United States* v. *Cramer*, 137 F. 2d 888, 896.

[6] 259 F. 673, 677 (S. D. N. Y. 1919).

[7] "An overt act, in criminal law, is an outward act done in pursuance and in manifestation of an intent or design; an overt act in this case means some physical action done for the purpose of carrying out or affecting [sic] the treason." *United States* v. *Haupt*, 47 F. Supp. 836, 839 (N. D. Ill. 1942), reversed on other grounds, 136 F. 2d 661 (C. C. A. 7th, 1943).

"The overt act is the doing of some actual act, looking towards the accomplishment of the crime." *United States* v. *Stephan*, 50 F. Supp. 738, 742–43 n. (E. D. Mich. 1943).

[8] 320 U. S. 730.

reargument addressed to specific questions.[9] Since our primary question here is the meaning of the constitutional provision, we turn to its solution before considering its application to the facts of this case.

I

When our forefathers took up the task of forming an independent political organization for New World society, no one of them appears to have doubted that to bring into being a new government would originate a new allegiance for its citizens and inhabitants. Nor were they reluctant to punish as treason any genuine breach of allegiance, as every government time out of mind had done. The betrayal of Washington by Arnold was fresh in mind. They were far more awake to powerful enemies with designs on this continent than some of the intervening generations have been. England was entrenched in Canada to the north and Spain had repossessed Florida to the south, and each had been the scene of invasion of the Colonies; the King of France had but lately been dispossessed in the Ohio Valley; Spain claimed the Mississippi Valley; and, except for the seaboard, the settlements were surrounded by Indians—not negligible as enemies themselves, and especially threatening when allied to European foes. The proposed national government could not for some years become firmly seated in the tradition or in the habits of

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[9] May 22, 1944. Counsel for petitioner, although assigned by the trial court, has responded with extended researches. The Solicitor General engaged scholars not otherwise involved in conduct of the case to collect and impartially to summarize statutes, decisions, and texts from Roman, Continental, and Canon law as well as from English, Colonial, and American law sources. The part of the study dealing with American materials has been made available through publication in 58 Harv. L. Rev. 226 *et seq.* Counsel have lightened our burden of examination of the considerable accumulation of historical materials.

the people. There is no evidence that the forefathers intended to withdraw the treason offense from use as an effective instrument of the new nation's security against treachery that would aid external enemies.

The forefathers also had suffered from disloyalty. Success of the Revolution had been threatened by the adherence of a considerable part of the population to the king. The Continental Congress adopted a resolution after a report by its "Committee on Spies" [10] which in effect declared that all persons residing within any colony owed allegiance to it, and that if any such persons adhered to the King of Great Britain, giving him aid and comfort, they were guilty of treason, and which urged the colonies to pass laws for punishment of such offenders "as shall be provably attainted of open deed." [11] Many of the colonies complied, and a variety of laws, mostly modeled

[10] The Committee included John Adams, Thomas Jefferson, John Rutledge, James Wilson, and Robert Livingston. See C. F. Adams, Life of John Adams in 1 Works of John Adams (1856) 224–25.

[11] "*Resolved*, That all persons abiding within any of the United Colonies, and deriving protection from the laws of the same, owe allegiance to the said laws, and are members of such colony; and that all persons passing through, visiting, or make [sic] a temporary stay in any of the said colonies, being entitled to the protection of the laws during the time of such passage, visitation or temporary stay, owe, during the same time, allegiance thereto:

"That all persons, members of, or owing allegiance to any of the United Colonies, as before described, who shall levy war against any of the said colonies within the same, or be adherent to the king of Great Britain, or others the enemies of the said colonies, or any of them, within the same, giving to him or them aid and comfort, are guilty of treason against such colony:

"That it be recommended to the legislatures of the several United Colonies, to pass laws for punishing, in such manner as to them shall seem fit, such persons before described, as shall be provably attainted of open deed, by people of their condition, of any of the treasons before described." 5 Journals of the Continental Congress (1906) 475.

on English law, resulted.[12] Some of the legislation in later years became so broad and loose as to make treason of

[12] Nine states substantially adopted the recommendation of the Congress: Delaware, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, Virginia. (The Virginia law, though it did not copy in full the recommendation of Congress, was drawn by Jefferson, among others, and hence probably can be regarded as originating in the same source as the others.) Three states had basic treason statutes not patterned on the Congressional model, one antedating the latter: Connecticut, Maryland, South Carolina. Georgia is not found to have enacted any general treason statute, although it passed a number of separate acts of attainder.

The Maryland act declared that "the several crimes aforesaid shall receive the same constructions that have been given to such of the said crimes as are enumerated in the statute of Edward the third, commonly called the statute of treasons." None of the statutes contained negative language, limiting the definition of treason expressly to that set forth in the statute. In general, too, they added to the definition of the model recommended by Congress other specific kinds of treason. Thus a number defined treason as including conspiracy to levy war. Conspiracy to adhere to the enemy and give aid and comfort was also included in several, or incorporated by separate acts. Much explicit attention was given to the problem of contact with the enemy. Conveying of intelligence or carrying on of correspondence with the enemy were expressly mentioned. One typical provision declared guilty of treason those persons who were "adherent to . . . the enemies of this State within the same, or to the Enemies of the United States . . . giving to . . . them Aid or Comfort, or by giving to . . . them Advice or Intelligence either by Letters, Messages, Words, Signs or Tokens, or in any way whatsoever, or by procuring for, or furnishing to . . . them any Kind of Provisions or Warlike Stores . . ." Other provisions referred to "joining their Armies," "inlisting or persuading others to inlist for that Purpose," "furnishing Enemies with Arms or Ammunition, provision or any other Articles for such their Aid or Comfort," "wilfully betraying, or voluntarily yielding or delivering any vessel belonging to this State or the United States to the Enemies of the United States of America"; and to persons who "have joined, or shall hereafter join the Enemies of this State, or put themselves under the Power and Protection of the said Enemies, who shall come into this State and rob or plunder any Person or Persons of

mere utterance of opinion.[13] Many a citizen in a time of unsettled and shifting loyalties was thus threatened under

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their Goods and Effects, or shall burn any Dwelling House or other Building, or be aiding or assisting therein," or who should maliciously and with an intent to obstruct the service dissuade others from enlisting, or maliciously spread false rumors concerning the forces of either side such as to alienate the affections of the people from the Government "or to terrify or discourage the good Subjects of this State, or to dispose them to favor the Pretensions of the Enemy," or who "shall take a Commission or Commissions from the King of Great Britain, or any under his Authority, or other the Enemies of this State, or the United States of America."

A number of the statutes required "the testimony of two lawful and credible witnesses." But the requirement was not linked to the proof of overt acts, and there was no suggestion of the type of provision later embodied in the Constitution. Supplementary acts creating special treasonable offenses tended to omit any requirement as to quantum of proof.

See Hurst, *op. cit. supra,* 58 Harv. L. Rev. at 248 *et seq.*

[13] For example, the New York Act of March 30, 1781, after reciting that it was necessary to make further provision respecting treason in order to prevent adherence to the king, made it a felony to declare or maintain "that the King of Great Britain hath, or of Right ought to have, any Authority, or Dominion, in or over this State, or the Inhabitants thereof," or to persuade or attempt to persuade any inhabitant to renounce allegiance to the State or acknowledge allegiance to the king, or to affirm one's own allegiance to the king. A person convicted was to "suffer the Pains and Penalties prescribed by Law in Cases of Felony without Benefit of Clergy," except that the court might, instead of prescribing death, sentence to three years' service on an American warship. Laws of the State of New-York (Poughkeepsie, 1782) 4th Sess., Ch. XLVIII. Virginia imposed a fine not exceeding £20,000, and imprisonment up to five years "if any person residing or being within this commonwealth shall . . . by any word, open deed, or act, advisedly and willingly maintain and defend the authority, jurisdiction, or power, of the king or parliament of Great Britain, heretofore claimed and exercised within this colony, or shall attribute any such authority, jurisdiction, or power, to the king or parliament of Great Britain . . ." Laws, October, 1776, Ch. V, 9 Hening, Statutes at Large (1823) 170. See also Hurst, *op. cit. supra,* 58 Harv. L. Rev. at 265–67.

English law which made him guilty of treason if he adhered to the government of his colony and also under colonial law which made him guilty of treason if he adhered to his king.[14] Not a few of these persons were subjected to confiscation of property or other harsh treatment by the Revolutionists under local laws; none, however, so far as appears, to capital punishment.[15]

Before this revolutionary experience there were scattered treason prosecutions in the colonies,[16] usually not well reported. Some colonies had adopted treason statutes modeled on English legislation.[17] But the earlier colonial experience seems to have been regarded as of

[14] A similar situation prevailed during the Civil War, when treason prosecutions were instituted against citizens of some southern states for treason to the state, consisting of adherence to the United States. See Robinson, Justice in Grey, pp. 176, 199, 201, 202, 270, 289, 380, 385, 408.

[15] See Hurst, *Treason in the United States* (1944), 58 Harv. L. Rev. 226, 268–71. Although these acts, dealing with withdrawal to enemy territory, imposed in general only forfeiture and banishment, some did reinforce these penalties with the threat of death if the person should later be found within the state. *Id.*, 272.

[16] The only pre-Revolutionary treason trial of which there is an extensive record is *King* v. *Bayard* (1702), a New York prosecution under an Act of May 6, 1691, which made it treason "by force of arms or otherwise to disturb the peace good and quiet of this their Majestyes Government as it is now Established." (The act was thought by the home authorities to be objectionably broad and vague and was later repealed.) See The Trial of Nicholas Bayard, 14 Howell's State Trials 471; 10 Lawson, American State Trials, 518; Hurst, *op. cit. supra,* 58 Harv. L. Rev. at 233. For other material on colonial treason prosecutions, see Hurst, *op. cit. supra,* 58 Harv. L. Rev. at 234, n. 15.

[17] In the early part of the colonial period, charters and grants gave royal governors authority to use martial law for suppression of "rebellion," "sedition," and "mutiny," and references to treason were not in the traditional language. A provision of the General Laws of New Plimouth Colony, 1671, is representative:

"3. Treason against the Person of our Soveraign Lord the King,

a piece with that of England and appears not to have much influenced the framers in their dealings with the subject.

However, their experience with treason accusations had been many-sided. More than a few of them were descend-

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the State and Common-wealth of England, shall be punished by death.

"4. That whosoever shall Conspire and Attempt any Invasion, Insurrection, or Publick Rebellion against this Jurisdiction, or the Surprizal of any Town, Plantation, Fortification or Ammunition, therein provided for the safety thereof, or shall Treacherously and Perfidiously Attempt and Endeavor the Alteration and Subversion of the Fundamental Frame and Constitutions of this Government; every such Person shall be put to Death."

But the bulk of colonial legislation prior to the Revolution drew extensively on English law, especially the statute 25 Edward III. Some of the acts substantially adopted the language of the latter statute, with additions, and some simply declared that the offense of treason should follow the English law. With the exception of Georgia and New Jersey, all the colonies eventually adopted one or the other type statute. In addition, the English law of treason itself applied, to an undefined extent, and several colonial acts were disallowed on the theory that they covered ground already occupied by the mother country's legislation. The colonies which enacted their own statutes patterned after 25 Edward III did not narrow its terms. Several expressly included the treason of compassing the death of the king, and a couple even made an analogous offense of compassing the death of the proprietor. The offense of levying war against the king was given a broad definition; some of the colonies expressly included various forms of "constructive" levying of war which had been put into the English statute by judicial construction, in general extending the crime to domestic disturbances; and some of the statutes made conspiracy to levy war sufficient to constitute the crime of levying war. Some specific attention was given in separate legislation at various times to contact with the enemy, legislation comparable to that subsequently enacted during the Revolutionary period.

Most of the colonial treason acts contained two-witness requirements, without the additional qualification later adopted in the Constitution, that they must be witnesses to the same overt act, although it was required that they be witnesses to the same general kind of treason.

See generally Hurst, *op. cit. supra,* 58 Harv. L. Rev. at 226–45.

ants of those who had fled from measures against sedition and its ecclesiastic counterpart, heresy. Now the treason offense was under revision by a Convention whose members almost to a man had themselves been guilty of treason under any interpretation of British law.[18] They not only had levied war against their king themselves, but they had conducted a lively exchange of aid and comfort with France, then England's ancient enemy. Every step in the great work of their lives from the first mild protests against kingly misrule to the final act of separation had been taken under the threat of treason charges.[19] The Declaration of Independence may seem cryptic in denouncing George III "for transporting us beyond Seas to be tried for pretended offenses" but the specific grievance was recited by the Continental Congress nearly two years before in saying that ". . . it has lately been resolved in Parliament, that by force of a statute, made in the thirty-fifth year of the reign of king Henry the eighth, colonists may be transported to England, and tried there upon accusations for treasons, and misprisions, or concealments

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[18] "The men who framed that instrument remembered the crimes that had been perpetrated under the pretense of justice; for the most part they had been traitors themselves, and having risked their necks under the law they feared despotism and arbitrary power more than they feared treason." 3 Adams, History of the United States, 468.

"Every member of that Convention—every officer and soldier of the Revolution from Washington down to private, every man or woman who had given succor or supplies to a member of the patriot army, everybody who had advocated American independence . . . could have been prosecuted and might have been convicted as 'traitors' under the British law of constructive treason." 3 Beveridge, Life of John Marshall, 402, 403.

[19] This was doubtless the meaning of Franklin's quip at the signing of the Declaration of Independence that if the signers did not hang together they should hang separately. It was also the meaning of the cries of "Treason" which interrupted Patrick Henry in the speech in the Virginia House of Burgesses evoking the famous reply "If this be treason, make the most of it."

of treasons committed in the colonies; and by a late statute, such trials have been directed in cases therein mentioned." [20]

The Convention numbered among its members men familiar with government in the Old World, and they looked back upon a long history of use and abuse of the treason charge.[21] The English stream of thought con-

[20] 1 Journals of the Continental Congress, 65. See also 1 Burnett, ed., Letters of Members of the Continental Congress (1921) 43, 44, n. 36.

[21] The men who were responsible for framing our Constitution were influenced by eighteenth century liberal thought from both French and English sources. French influences, more philosophical than legal in character, were particularly strong with Franklin, who took a significant part in framing the treason clause. Franklin had been a member of the French Academy of Sciences since 1772 and had many friends among French intellectuals. He spent much time in England and in France, to which he was sent by the Continental Congress as Commissioner in 1776. He remained until 1783, when he signed the Treaty of Peace with England, and thereafter until 1785 as Minister to France. Becker, *Franklin,* 6 Dictionary of American Biography 585; 9 Encyclopedia Britannica (14th ed.) 693. Jefferson, a strong influence with the men of that period, was sent to France by the Continental Congress to assist Franklin, remaining there from 1784 to 1789, succeeding Franklin in 1785 as Minister. Jefferson was so closely in touch with French revolutionary thought that in July 1789 he was invited to assist in the deliberations of the Committee of the French National Assembly to draft a Constitution, but declined out of respect for his position. See Malone, *Jefferson,* 10 Dictionary of American Biography 17; 12 Encyclopedia Britannica (14th ed.) 988. See also, generally, Chinard, Thomas Jefferson, The Apostle of Americanism. Best known in America of the French writings was Montesquieu's L'Esprit des Lois, which appeared in French in 1748. (An English edition was published in London in 1750.) Book 12 thereof was devoted to his philosophical reactions to the abuses of treason. It is hardly a coincidence that the treason clause of the Constitution embodies every one of the precepts suggested by Montesquieu in discussing the excesses of ancient and European history.

Some of his precepts were: "If the crime of high treason be indeterminate, this alone is sufficient to make the government degenerate

cerning treasons began to flow in fairly definable channels in 1351 with the enactment of the great Treason Act, 25 Edw. III, Stat. 5, Ch. 2.[22] That was a monumental piece

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into arbitrary power." (Book 12, Ch. 7, Of the Crime of High Treason.) "The laws do not take upon them to punish any other than overt acts." (Book 12, Ch. 11, Of Thoughts.) "Nothing renders the crime of high treason more arbitrary than declaring people guilty of it for indiscreet speeches. . . . Words do not constitute an overt act; they remain only in idea. . . . Overt acts do not happen every day; they are exposed to the eye of the public; and a false charge with regard to matters of fact may be easily detected. Words carried into action assume the nature of that action. Thus a man who goes into a public market-place to incite the subject to revolt, incurs the guilt of high treason, because the words are joined to the action, and partake of its nature. It is not the words that are punished but an action in which the words are employed." (Book 12, Ch. 12, Of indiscreet Speeches.) "Those laws which condemn a man to death on the deposition of a single witness, are fatal to liberty." (Book 12, Ch. 3, Of The Liberty of the Subject.)

Both French and English influences on American thought as shown by Jefferson's writings are traced by Perry, Puritanism and Democracy (1945) 126, 130, 134, 158, 182, 184, 185.

[22] "*Declaration what offences shall be adjudged treason.* Item, whereas divers opinions have been before this time in what case treason shall be said, and in what not; the King, at the request of the lords and of the commons, hath made a declaration in the manner as hereafter followeth, that is to say; when a man doth compass or imagine the death of our lord the King, or of our lady his queen or of their eldest son and heir; or if a man do violate the King's companion, or the King's eldest daughter unmarried, or the wife the King's eldest son and heir; or if a man do levy war against our lord the King in his realm, or be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere, and thereof be probably attainted of open deed by the people of their condition: *And if a man counterfeit the King's great or privy seal, or his money; and if a man bring false money into this realm, counterfeit to the money of England, as the money called lushburgh, or other, like to the said money of England, knowing the money to be false, to merchandise or make payment in deceit of our said lord the King and of his people;* and if a man slea the chancellor, treasurer, or the King's justices of the one bench or the other, justices in eyre, or justices of assise, and

of legislation several times referred to in the deliberations of the Convention. It cut a bench-mark by which the English-speaking world tested the level of its thought on the subject [23] until our own abrupt departure from it in

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all other justices assigned to hear and determine, being in their places, doing their offices: and it is to be understood, that in the cases above rehearsed, that ought to be judged treason which extends to our lord the King, and his royal majesty: And of such treason the forfeiture of the escheats pertaineth to our sovereign lord, as well as of the lands and tenements holden of other, as of himself: *And moreover there is another manner of treason, that is to say, when a servant slayeth his master, or a wife her husband, or when a man secular or religious slayeth his prelate, to whom he oweth faith and obedience; and of such treason the escheats ought to pertain to every lord of his own fee.* And because that many other like cases of treason may happen in time to come, which a man cannot think or declare at this present time; it is accorded, that if any other case, supposed treason, which is not above specified, doth happen before any justices, the justices shall tarry without any going to judgement of the treason, till the cause be shewed and declared before the King and his Parliament, whether it ought to be judged treason or other felony. And if percase any man of this realm ride armed covertly or secretly with men of arms against any other, to slay him, or rob him, or take him, or retain him till he hath made fine or ransom for to have his deliverance, it is not the mind of the King nor his council, that in such case it shall be judged treason but shall be judged felony or trespass, according to the laws of the land of old time used, and according as the case requireth." 4 Halsbury's Statutes of England 273.

[23] Stephen said of it: "In quiet times it is seldom put in force, and if by any accident it is necessary to apply it, the necessity for doing so is obvious. For revolutionary periods it is obviously and always insufficient, and at such times it is usually supplemented by enactments which ought to be regarded in the light of war measures, but which are usually represented by those against whom they are directed as monstrous invasions of liberty. The struggle being over, the statute of 25 Edw. 3 is reinstated as the sole definition of treason, and in this way it has become the subject of a sort of superstitious reverence." 2 Stephen, History of the Criminal Law of England (1883) 250–51; see also 3 Holdsworth (4th ed. 1935) 287.

Blackstone says: "But afterwards, between the reign of Henry

1789, and after 600 years it still is the living law of treason in England. Roger Casement in 1917 forfeited his life for violating it.[24] We, of course, can make no independent judgment as to the inward meanings of the terms used in a six-century-old statute, written in a form of Norman French that had become obsolete long before our Revolution. We can read this statute only as our forebears read it—through the eyes of succeeding generations of English judges, to whom it has been the core of all decision, and of common-law commentators, to whom it has been the text.[25]

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the fourth and queen Mary, and particularly in the bloody reign of Henry the eighth, the spirit of inventing new and strange treasons was revived; among which we may reckon the offences of clipping money; breaking prison or rescue, when the prisoner is committed for treason; burning houses to extort money; stealing cattle by Welshmen; counterfeiting foreign coin; wilful poisoning; execrations against the king; calling him opprobrious names by public writing; counterfeiting the sign manual or signet; refusing to abjure the pope; deflowering, or marrying without the royal licence, any of the king's children, sisters, aunts, nephews, or nieces; bare solicitation of the chastity of the queen or princess, or advances made by themselves; marrying with the king, by a woman not a virgin, without previously discovering to him such her unchaste life; judging or *believing* (manifested by any overt act) the king to have been lawfully married to Anne of Cleve; derogating from the king's royal stile and title; impugning his supremacy; and assembling riotously to the number of twelve, and not dispersing upon proclamation . ." 4 Blackstone 86–87.

[24] *Rex* v. *Casement,* 1 K. B. 98 (1917); Knott, Trial of Roger Casement, 184, 185.

[25] Chief among these were Coke and Blackstone. Coke emphasized the salutary effects of the Statute of Edward III in limiting treason prosecution and strongly emphasized the overt-act requirement, probably quoting Bracton. Institutes of the Laws of England, 5th Ed. (1671) Part III, 14. He used as examples overt acts which of themselves appear to evidence treasonable intent. *Id.,* 2, 3, and 14. See 1 Hale, History of the Pleas of the Crown (1736) 86, 259. But we cannot be sure whether this was intended to imply that acts from

Adjudicated cases in English history generally have dealt with the offense of compassing the monarch's death;

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which intent would be less evident would suffice. Other authors known on this side of the water leave us with little light on our particular problem.

Hale (History of the Pleas of the Crown, Emlyn ed. London, 1736) frequently uses terminology, found in Coke and earlier writers, which might mean that the function of an overt act is to prove intent, saying that the overt act is to "manifest" or "declare" the compassing of the king's death, and so forth. *Id.*, 109. But, as in the other writers, the statements are usually open as well to the interpretation that the act must show translation of thought into action. In the latter sense, the act "declares" intent in that it shows, in the light of other evidence, that the defendant's thoughts were not mere idle desires. This is a different thing from saying that the overt act must of itself display an unambiguously traitorous character. Elsewhere Hale gives some support to the view that the act may itself be of an innocent character. Dealing with the principle that words alone cannot be an overt act, he says that "words may expound an overt-act to make good an indictment of treason of compassing the king's death, which overt-act possibly of itself may be indifferent and unapplicable to such an intent; and therefore in the indictment of treason they may be joined with such an overt-act, to make the same applicable and expositive of such a compassing." *Id.*, 115. He also declares that the mere meeting of persons with the intent of plotting the king's death is a sufficient overt-act for the treason of compassing the king's death. *Id.*, 108, 109. These remarks, however, deal only with compassing the king's death, and little light is given as to the overt act in connection with levying war and adhering to the enemy. With Coke, Hale takes the position that a mere meeting of persons to conspire, though sufficient under the compassing clause, is not sufficient for the levying-of-war clause. *Id.*, 130.

Foster's view of the overt act does not seem materially different from Hale's. (A Report of Some Proceedings on the Commission for the Trial of the Rebels in the Year 1746 in the County of Surry; and of other Crown Cases, 2d ed. 1791.) "Overt acts undoubtedly do discover the man's intentions; but, I conceive, they are not to be considered merely as evidence, but as the *means made use of to effectuate the purposes of the heart* . . . though in the case of the King overt-acts of less malignity, and having a more remote tendency to his destruction, are, with great propriety, deemed treasonable; yet still

only eleven reported English cases antedating the Constitution are cited as involving distinct charges of adherence to the king's enemies.[26] When constructive treasons were not joined on the face of the indictment, it is not possible to say how far they were joined in the minds of the judges. No decision appears to have been a factor in the deliberations of our own Constitutional Convention. Nor does any squarely meet our issue here, and for good reason—the Act of Edward III did not contain the two-witnesses-to-the-same-overt-act requirement which precipitates the issue here.

Historical materials are, therefore, of little help; necessity as well as desire taught a concept that differed from all historical models in the drafting of our treason clause. Treason statutes theretofore had been adapted to a society in which the state was personified by a king, on whose person were focused the allegiances and loyalties of the subject. When government was made representative of the whole body of the governed, there was none to say "I

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they are considered as *means to affectuate* [sic], not barely *as evidence* of the treasonable purpose." Foster also repeats the assertion that the mere meeting of persons with intent to plan the king's death is a sufficient overt act. *Id.*, 195. However, his discussion, too, is confined to the treason of compassing, and he says little that is helpful about levying war and adhering.

[26] These are: Trial of Sir Nicholas Throckmorton, 1 How. St. Tr. 869 (1 Mary, 1554); Trial of Sir Richard Grahme (Lord Preston's Case), 12 How. St. Tr. 645 (2 William & Mary, 1691); Trial of Sir John Freind, 13 How. St. Tr. 1, 4, 11 (8 William III, 1696); Trial of Sir William Parkyns, 13 How. St. Tr. 63, 67 (8 William III, 1696); Trial of Peter Cook, 13 How. St. Tr. 311, 346 (8 William III, 1696); Trial of Captain Vaughan, 13 How. St. Tr. 485 (8 William III, 1696); Trial of William Gregg, 14 How. St. Tr. 1371 (6 Anne, 1708); Trial of James Bradshaw, 18 How. St. Tr. 415 (20 George II, 1746); Trial of Dr. Hensey, 19 How. St. Tr. 1341 (32 George II, 1758); Trial of Francis De la Motte, 21 How. St. Tr. 687 (21 George III, 1781); and the Trial of David Tyrie, 21 How. St. Tr. 815 (22 George III, 1782).

am the State" and a concept of treason as compassing or imagining a ruler's death was no longer fitting. Nor can it be gainsaid that the revolutionary doctrine that the people have the right to alter or abolish their government relaxed the loyalty which governments theretofore had demanded—dangerously diluted it, as the ruling classes of Europe thought, for in their eyes the colonists not only committed treason, they exalted it.[27] The idea that loyalty will ultimately be given to a government only so long as it deserves loyalty and that opposition to its abuses is not treason [28] has made our government tolerant of opposition based on differences of opinion that in some parts of the world would have kept the hangman busy. But the basic law of treason in this country was framed by men who, as we have seen, were taught by experience and by history to fear abuse of the treason charge almost as much as they feared treason itself. The interplay in

[27] Philip Guedalla characterizes the figures of the American Revolution as they occur in British legend: "There they are oddly shrunken; they dwindle into a provincial pettiness; and their voices monotonously intone the dreary formulæ of sedition." Fathers of the Revolution, p. 8.

[28] Mr. Jefferson had referred to the Statute of Edward III as "done to take out of the hands of tyrannical Kings, and of weak and wicked Ministers, that deadly weapon, which constructive treason had furnished them with, and which had drawn the blood of the best and honestest men in the kingdom." 1 Writings of Thomas Jefferson (Library ed. 1903) 215.

Later, as Secretary of State, he wrote: "Treason . . . when real, merits the highest punishment. But most codes extend their definitions of treason to acts not really against one's country. They do not distinguish between acts against the *government,* and acts against the *oppressions of the government;* the latter are virtues; yet they have furnished more victims to the executioner than the former; because real treasons are rare; oppressions frequent. The unsuccessful strugglers against tyranny, have been the chief martyrs of treason laws in all countries." 8 Jefferson's Writings 332. Compare 7th Annual Message, 1807, 3 Jefferson's Writings 451, 452.

the Convention of their two fears accounts for the problem which faces us today.

II

We turn then to the proceedings of the Constitutional Convention of 1787 so far as we have record of them. The plan presented by Pinckney evidently proposed only that Congress should have exclusive power to declare what should be treason and misprision of treason against the United States.[29] The Committee on Detail, apparently not specifically instructed on the subject, reported a draft Constitution which left no such latitude to create new treasons. It provided that: "Treason against the United States shall consist only in levying war against the United States, or any of them; and in adhering to the enemies of the United States, or any of them. The Legislature of the United States shall have power to declare the punishment of treason. No person shall be convicted of treason, unless on the testimony of two witnesses. No attainder of treason shall work corruption of bloods, nor forfeiture, except during the life of the person attainted."[30]

This clause was discussed on August 20, 1787. Mr. Madison, who opened the discussion, "thought the definition too narrow. It did not appear to go as far as the Stat. of Edwd. III. He did not see why more latitude might not be left to the Legislature. It wd. be as safe in the hands of State legislatures; and it was inconvenient to bar a discretion which experience might enlighten, and which might be applied to good purposes as well as be abused."[31] Mr. Mason was in favor of following the language of the Statute of Edward III. The discussion shows some confusion as to the effect of adding the words "giving them aid and comfort," some thinking their effect restrictive

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[29] 2 Farrand, Records of the Federal Convention of 1787, 136.

[30] Art. VII, § 2, of draft reported August 6, 1787. 2 Farrand 182.

[31] The debates are at 2 Farrand 345–50.

and others that they gave a more extensive meaning. However, "Col. Mason moved to insert the words 'giving (them) aid comfort' as restrictive of 'adhering to their Enemies, &c'—the latter he thought would be otherwise too indefinite." The motion prevailed.

Mr. Dickenson "wished to know what was meant by the 'testimony of two witnesses', whether they were to be witnesses to the same overt act or to different overt acts. He thought also that proof of an overt act ought to be expressed as essential to the case." Doctor Johnson also "considered . . . that something should be inserted in the definition concerning overt acts."

When it was moved to insert "to the same overt act" after the two-witnesses requirement, Madison notes that "Doc'r Franklin wished this amendment to take place—prosecutions for treason were generally virulent; and perjury too easily made use of against innocence." James Wilson observed that "Much may be said on both sides. Treason may sometimes be practiced in such a manner, as to render proof extremely difficult—as in a traitorous correspondence with an Enemy."[32] But the motion carried.

By this sequence of proposals the treason clause of the Constitution took its present form. The temper and attitude of the Convention toward treason prosecutions is unmistakable. It adopted every limitation that the practice of governments had evolved or that politico-legal philos-

[32] James Wilson was not unlikely one of the authors of the treason clause, as a member of the Committee on Detail. He had participated in the Pennsylvania treason trials in 1778 as one of the defense counsel (*Respublica* v. *Malin,* 1 Dall. 33 (Pa. O. & T.), *Respublica* v. *Carlisle, id.* 35, *Respublica* v. *Roberts, id.* 39). In the Pennsylvania ratifying convention he made detailed statements in praise of the clause without its having been challenged. 2 Elliott, Debates, 469, 487. Later, he devoted a lecture to the clause in his law course delivered at the College of Philadelphia in 1790 and 1791. 3 Works of Hon. James Wilson (Bird Wilson, ed. 1804) 95–107.

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ophy to that time had advanced.[33] Limitation of the treason of adherence to the enemy to cases where aid and comfort were given and the requirement of an overt act were both found in the Statute of Edward III, praised in the writings of Coke and Blackstone, and advocated in Montesquieu's *Spirit of Laws*. Likewise, the two-witness requirement had been used in other statutes,[34] was advocated by Montesquieu in all capital cases,[35] and was a familiar precept of the New Testament[36] and of Mosaic law.[37] The framers combined all of these known protections and added two of their own which had no precedent. They wrote into the organic act of the new government a prohibition of legislative or judicial creation of new treasons. And a venerable safeguard against false testimony was given a novel application by requiring two witnesses to the same overt act.

Distrust of treason prosecutions was not just a transient mood of the Revolutionists. In the century and a half of our national existence not one execution on a federal treason conviction has taken place. Never before has this Court had occasion to review a conviction. In the few cases that have been prosecuted the treason clause has had its only judicial construction by individual Justices of this Court presiding at trials on circuit or by dis-

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[33] The convention did reject proposals that the states be denied authority to define treason against themselves and that participation in a civil war between a state and the United States be excepted. See 2 Farrand 345, 348–49; 3 *id.* 223.

[34] See note 16, *supra;* see also 9 Holdsworth (2d ed. 1938) 203–211.

[35] L'Esprit des Lois, Book XII, Chap. III.

[36] ". . . take with thee one or two more, that in the mouth of two or three witnesses every word may be established." Matt. xviii, 16.

[37] "One witness shall not rise up against a man for any iniquity, or for any sin, in any sin that he sinneth: at the mouth of two witnesses, or at the mouth of three witnesses, shall the matter be established." Deut. xix, 15.

trict or circuit judges.[38] After constitutional requirements have been satisfied, and after juries have convicted

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[38] The following is a summary, taken from the Appendix to the Government's brief, of all cases in which construction of the treason clause has been involved, omitting grand jury charges and cases in which interpretation of the clause was incidental:

Whiskey Rebellion cases: *United States* v. *Vigol,* 28 Fed. Cas. 376, No. 16,621 (C. C. D. Pa. 1795), *United States* v. *Mitchell,* 26 Fed. Cas. 1277, No. 15,788 (C. C. D. Pa. 1795) (constructive levying of war, based on forcible resistance to execution of a statute; defendants convicted and later pardoned). House tax case: *Case of Fries,* 9 Fed. Cas. 826, 924, Nos. 5126, 5127 (C. C. D. Pa. 1799, 1800) (constructive levying of war, based on forcible resistance to execution of a statute; defendant convicted and later pardoned). The Burr Conspiracy: *Ex parte Bollman,* 4 Cranch 75 (1807), *United States* v. *Burr,* 25 Fed. Cas. 2, 55, Nos. 14,692a, 14,693 (C. C. D. Va. 1807) (conspiracy to levy war held not an overt act of levying war). *United States* v. *Lee,* 26 Fed. Cas. 907, No. 15,584 (C. C. D. C. 1814) (sale of provisions a sufficient overt act; acquittal). *United States* v. *Hodges,* 26 Fed. Cas. 332, No. 15,374 (C. C. D. Md. 1815) (obtaining release of prisoners to the enemy is adhering to the enemy, the act showing the intent; acquittal). *United States* v. *Hoxie,* 26 Fed. Cas. 397, No. 15,407 (C. C. D. Vt. 1808) (attack of smugglers on troops enforcing embargo is riot and not levying of war). *United States* v. *Pryor,* 27 Fed. Cas. 628, No. 16,096 (C. C. D. Pa. 1814) (proceeding under flag of truce with enemy detachment to help buy provisions is too remote an act to establish adhering to the enemy). *United States* v. *Hanway,* 26 Fed. Cas. 105, No. 15,299 (C. C. E. D. Pa. 1851) (forcible resistance to execution of Fugitive Slave Law no levying of war). *United States* v. *Greiner,* 26 Fed. Cas. 36, No. 15,262 (E. D. Pa. 1861) (participation as member of state militia company in seizure of a federal fort is a levying of war). *United States* v. *Greathouse,* 26 Fed. Cas. 18, No. 15,254 (C. C. N. D. Cal. 1863) (fitting out and sailing a privateer is a levying of war; defendants convicted, later pardoned). Cases of confiscation of property or refusal to enforce obligations given in connection with sale of provisions to the Confederacy: *Hanauer* v. *Doane,* 12 Wall. 342 (1871); *Carlisle* v. *United States,* 16 Wall. 147 (1873); *Sprott* v. *United States,* 20 Wall. 459 (1874); *United States* v. *Athens Armory,* 24 Fed. Cas. 878, No. 14,473 (N. D. Ga. 1868) (mixed motive, involving commercial profit, does not bar finding of giving aid and comfort to the enemy). *United States* v. *Cathcart* and *United*

and courts have sentenced, Presidents again and again have intervened to mitigate judicial severity or to pardon entirely. We have managed to do without treason prosecutions to a degree that probably would be impossible except while a people was singularly confident of external security and internal stability.[39]

States v. *Parmenter,* 25 Fed. Cas. 344, No. 14,756 (C. C. S. D. Ohio, 1864). *Chenoweth's Case* (unreported: see *Ex parte Vallandigham,* 28 Fed. Cas. 874, No. 16,816, at 888 (S. D. Ohio, 1863)) (indictment bad for alleging aiding and abetting rebels, instead of directly charging levying of war). *Case of Jefferson Davis,* 7 Fed. Cas. 63, No. 3621a (C. C. D. Va. 1867–71) (argument that rebels whose government achieved status of a recognized belligerent could not be held for treason; Davis was not tried on the indictment); see 2 Warren, Supreme Court in United States History (1934 ed.) 485–87; Watson, Trial of Jefferson Davis (1915) 25 Yale L. J. 669. Philippine insurrections: *United States* v. *Magtibay,* 2 Phil. 703 (1903), *United States* v. *De Los Reyes,* 3 Phil. 349 (1904) (mere possession of rebel commissions insufficient overt acts; strict enforcement of two-witness requirement; convictions reversed); *United States* v. *Lagnason,* 3 Phil. 472 (1904) (armed effort to overthrow the government is levying war). *United States* v. *Fricke,* 259 F. 673 (S. D. N. Y. 1919) (acts "indifferent" on their face held sufficient overt acts). *United States* v. *Robinson,* 259 F. 685 (S. D. N. Y. 1919) (dictum, acts harmless on their face are insufficient overt acts). *United States* v. *Werner,* 247 F. 708 (E. D. Pa. 1918), aff'd, 251 U. S. 466 (1919) (act indifferent on its face may be sufficient overt act). *United States* v. *Haupt,* 136 F. 2d 661 (C. C. A. 7th, 1943) (reversal of conviction on strict application of two-witness requirement and other grounds; inferentially approves acts harmless on their face as overt acts). *Stephan* v. *United States,* 133 F. 2d 87 (C. C. A. 6th, 1943) (acts harmless on their face may be sufficient overt acts; conviction affirmed but sentence commuted). *United States* v. *Cramer,* 137 F. 2d 888 (C. C. A. 2d, 1943).

[39] In 1942 the Office of War Information suggested to Mr. Stephen Vincent Benet a short interpretative history of the United States for translation into many languages. In it he says:

"It had been a real revolution—a long and difficult travail, full of hardship, struggle, bitterness, and the overturning of old habits and customs. But it did not eat its children and it had no aftermath of vengeance. The Hessians who stayed in the country were not hunted

III

Historical materials aid interpretation chiefly in that they show two kinds of dangers against which the framers were concerned to guard the treason offense: (1) perversion by established authority to repress peaceful political opposition; and (2) conviction of the innocent as a result of perjury, passion, or inadequate evidence. The first danger could be diminished by closely circumscribing the kind of conduct which should be treason—making the constitutional definition exclusive, making it clear, and making the offense one not susceptible of being inferred from all sorts of insubordinations. The second danger lay in the manner of trial and was one which would be dimin-

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down and annihilated. Some loyalists who returned were harshly treated—others came back and settled down peacefully as citizens of the new state. There was neither blood bath nor purge. There was bitter political dispute—but no small group of men plotted in secret to overthrow the government by force of arms. There were a couple of minor and local revolts, based on genuine grievances—Shays' Rebellion in 1786—the Whisky Rebellion in 1794. Both collapsed when the government showed itself able to put down rebellion—and nobody was hanged for either of them. Shays and his temporary rebels received a general amnesty—the leaders of the Whisky Rebellion were convicted of treason and then pardoned by the President." Benet, America, pp. 49–50.

Speaking of the War Between the States he says:

"Again, there was no blood purge. There were no mass executions. No heads rolled.

"The handful of fanatics who had plotted the assassination of Lincoln and other government leaders were executed. His actual murderer was tracked down and shot. The half-crazy officer who commanded a notorious southern prison camp was hanged. The former President of the Confederacy, Jefferson Davis, was kept for a while in prison with certain of his associates and then released. But that was all.

"Not one of the great southern generals or statesmen, Lee, Johnson, Stephens, Hampton, Longstreet—was even tried for treason." *Id.*, 78.

ished mainly by procedural requirements—mainly but not wholly, for the hazards of trial also would be diminished by confining the treason offense to kinds of conduct susceptible of reasonably sure proof. The concern uppermost in the framers' minds, that mere mental attitudes or expressions should not be treason, influenced both definition of the crime and procedure for its trial. In the proposed Constitution the first sentence of the treason article undertook to define the offense; the second, to surround its trial with procedural safeguards.

"Compassing" and like loose concepts of the substance of the offense had been useful tools for tyranny. So one of the obvious things to be put into the definition of treason not consisting of actual levying of war was that it must consist of doing something. This the draft Constitution failed to provide, for, as we have pointed out, it defined treason[40] as merely "adhering to the enemies of the United States, or any of them."

Treason of adherence to an enemy was old in the law. It consisted of breaking allegiance to one's own king by forming an attachment to his enemy. Its scope was comprehensive, its requirements indeterminate. It might be predicated on intellectual or emotional sympathy with the foe, or merely lack of zeal in the cause of one's own country. That was not the kind of disloyalty the framers thought should constitute treason. They promptly accepted the proposal to restrict it to cases where also there was conduct which was "giving them aid and comfort."

"Aid and comfort" was defined by Lord Reading in the Casement trial comprehensively, as it should be, and yet probably with as much precision as the nature of the matter will permit: ". . . an act which strengthens or tends to strengthen the enemies of the King in the conduct of a

[40] Apart, of course, from levying war, which is not charged in this case and is not involved in the controversy.

war against the King, that is in law the giving of aid and comfort" and "an act which weakens or tends to weaken the power of the King and of the country to resist or to attack the enemies of the King and the country . . . is . . . giving of aid and comfort." Lord Reading explained it, as we think one must, in terms of an "act." It is not easy, if indeed possible, to think of a way in which "aid and comfort" can be "given" to an enemy except by some kind of action. Its very nature partakes of a deed or physical activity as opposed to a mental operation.

Thus the crime of treason consists of two elements: adherence to the enemy; and rendering him aid and comfort. A citizen intellectually or emotionally may favor the enemy and harbor sympathies or convictions disloyal to this country's policy or interest, but so long as he commits no act of aid and comfort to the enemy, there is no treason. On the other hand, a citizen may take actions which do aid and comfort the enemy—making a speech critical of the government or opposing its measures, profiteering, striking in defense plants or essential work, and the hundred other things which impair our cohesion and diminish our strength—but if there is no adherence to the enemy in this, if there is no intent to betray, there is no treason.

Having thus by definition made treason consist of something outward and visible and capable of direct proof, the framers turned to safeguarding procedures of trial and ordained that "No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." This repeats in procedural terms the concept that thoughts and attitudes alone cannot make a treason. It need not trouble us that we find so dominant a purpose emphasized in two different ways. But does the procedural requirement add some limitation not already present in the definition of the crime, and if so, what?

While to prove giving of aid and comfort would require the prosecution to show actions and deeds, if the Constitution stopped there, such acts could be inferred from circumstantial evidence. This the framers thought would not do.[41] So they added what in effect is a command that the overt acts must be established by direct evidence, and the direct testimony must be that of two witnesses instead of one. In this sense the overt act procedural provision adds something, and something important, to the definition.

Our problem begins where the Constitution ends. That instrument omits to specify what relation the indispensable overt act must sustain to the two elements of the offense as defined: viz., adherence and giving aid and comfort. It requires that two witnesses testify to the same overt act, and clearly enough the act must show something toward treason, but what? Must the act be one of giving aid and comfort? If so, how must adherence to the enemy, the disloyal state of mind, be shown?

The defendant especially challenges the sufficiency of

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[41] Hallam in his *Constitutional History of England* (1827) said: "Nothing had brought so much disgrace on the councils of government, and on the administration of justice, nothing more forcibly spoken the necessity of a great change, than the prosecutions for treason during the latter years of Charles II, and in truth during the whole course of our legal history. The statutes of Edward III and Edward VI, almost set aside by sophistical constructions, required the corroboration of some more explicit law; and some peculiar securities were demanded for innocence against that conspiracy of the court with the prosecutor, which is so much to be dreaded in all trials for political crimes." v. 2, p. 509.

Continuing, after comment on particular cases, he said: "In the vast mass of circumstantial testimony which our modern trials for high treason display, it is sometimes difficult to discern, whether the great principle of our law, requiring two witnesses to overt acts, has been adhered to; for certainly it is not adhered to, unless such witnesses depose to acts of the prisoner, from which an inference of his guilt is immediately deducible." v. 2, p. 516.

the overt acts to prove treasonable intention. Questions of intent in a treason case are even more complicated than in most criminal cases because of the peculiarity of the two different elements which together make the offense. Of course the overt acts of aid and comfort must be intentional as distinguished from merely negligent or undesigned ones. Intent in that limited sense is not in issue here. But to make treason the defendant not only must intend the act, but he must intend to betray his country by means of the act. It is here that Cramer defends. The issue is joined between conflicting theories as to how this treacherous intention and treasonable purpose must be made to appear.

Bearing in mind that the constitutional requirement in effect is one of direct rather than circumstantial evidence, we must give it a reasonable effect in the light of its purpose both to preserve the offense and to protect citizens from its abuse. What is designed in the mind of an accused never is susceptible of proof by direct testimony. If we were to hold that the disloyal and treacherous intention must be proved by the direct testimony of two witnesses, it would be to hold that it is never provable. It seems obvious that adherence to the enemy, in the sense of a disloyal state of mind, cannot be, and is not required to be, proved by deposition of two witnesses.

Since intent must be inferred from conduct of some sort, we think it is permissible to draw usual reasonable inferences as to intent from the overt acts. The law of treason, like the law of lesser crimes, assumes every man to intend the natural consequences which one standing in his circumstances and possessing his knowledge would reasonably expect to result from his acts. Proof that a citizen did give aid and comfort to an enemy may well be in the circumstances sufficient evidence that he adhered to that enemy and intended and purposed to strike at his

own country.[42] It may be doubted whether it would be what the founders intended, or whether it would well serve any of the ends they cherished, to hold the treason offense available to punish only those who make their treacherous intentions more evident than may be done by rendering aid and comfort to an enemy. Treason—insidious and dangerous treason—is the work of the shrewd and crafty more often than of the simple and impulsive.

While of course it must be proved that the accused acted with an intention and purpose to betray or there is no treason, we think that in some circumstances at least the overt act itself will be evidence of the treasonable purpose and intent. But that still leaves us with exceedingly difficult problems. How decisively must treacherous intention be made manifest in the act itself? Will a scintilla of evidence of traitorous intent suffice? Or must it be sufficient to convince beyond reasonable doubt? Or need it show only that treasonable intent was more probable than not? Must the overt act be appraised for legal sufficiency only as supported by the testimony of two witnesses, or may other evidence be thrown into the scales to create inferences not otherwise reasonably to be drawn or to reinforce those which might be drawn from the act itself?

It is only overt acts by the accused which the Constitution explicitly requires to be proved by the testimony of two witnesses. It does not make other common-law evidence inadmissible nor deny its inherent powers of persuasion. It does not forbid judging by the usual process by which the significance of conduct often will be determined by facts which are not acts. Actions of the accused are set

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[42] There are, of course, rare cases where adherence might be proved by an overt act such as subscribing an oath of allegiance or accepting pay from an enemy. These might supplement proof of other acts of aid and comfort, but no such overt acts of adherence are involved in this case.

in time and place in many relationships. Environment illuminates the meaning of acts, as context does that of words. What a man is up to may be clear from considering his bare acts by themselves; often it is made clear when we know the reciprocity and sequence of his acts with those of others, the interchange between him and another, the give and take of the situation.

It would be no contribution to certainty of judgment, which is the object of the provision, to construe it to deprive a trial court of the aid of testimony under the ordinary sanctions of verity, provided, of course, resort is not had to evidence of less than the constitutional standard to supply deficiencies in the constitutional measure of proof of overt acts. For it must be remembered that the constitutional provision establishes a minimum of proof of incriminating acts, without which there can be no conviction, but it is not otherwise a limitation on the evidence with which a jury may be persuaded that it ought to convict. The Constitution does not exclude or set up standards to test evidence which will show the relevant acts of persons other than the accused or their identity or enemy character or other surrounding circumstances. Nor does it preclude any proper evidence of non-incriminating facts about a defendant, such for example as his nationality, naturalization, and residence.

From duly proven overt acts of aid and comfort to the enemy in their setting, it may well be that the natural and reasonable inference of intention to betray will be warranted. The two-witness evidence of the acts accused, together with common-law evidence of acts of others and of facts which are not acts, will help to determine which among possible inferences as to the actor's knowledge, motivation, or intent are the true ones. But the protection of the two-witness rule extends at least to all acts of the defendant which are used to draw incriminating inferences that aid and comfort have been given.

The controversy before us has been waged in terms of intentions, but this, we think, is the reflection of a more fundamental issue as to what is the real function of the overt act in convicting of treason. The prisoner's contention that it alone and on its face must manifest a traitorous intention, apart from an intention to do the act itself, would place on the overt act the whole burden of establishing a complete treason. On the other hand, the Government's contention that it may prove by two witnesses an apparently commonplace and insignificant act and from other circumstances create an inference that the act was a step in treason and was done with treasonable intent really is a contention that the function of the overt act in a treason prosecution is almost zero. It is obvious that the function we ascribe to the overt act is significant chiefly because it measures the two-witness rule protection to the accused and its handicap to the prosecution. If the overt act or acts must go all the way to make out the complete treason, the defendant is protected at all points by the two-witness requirement. If the act may be an insignificant one, then the constitutional safeguards are shrunken so as to be applicable only at a point where they are least needed.

The very minimum function that an overt act[43] must perform in a treason prosecution is that it show sufficient action by the accused, in its setting, to sustain a finding that the accused actually gave[44] aid and comfort to the enemy. Every act, movement, deed, and word of the defendant charged to constitute treason must be supported

[43] Of course, the Constitution does not require a treason to be proved by any single overt act. It may be grounded upon any number, each to be supported by the testimony of two witnesses. We speak in the singular but what we say applies as well to a series of acts or to the sum of many acts.

[44] We are not concerned here with any question as to whether there may be an offense of attempted treason.

by the testimony of two witnesses. The two-witness principle is to interdict imputation of *incriminating acts* to the accused by circumstantial evidence or by the testimony of a single witness. The prosecution cannot rely on evidence which does not meet the constitutional test for overt acts to create any inference that the accused did other acts or did something more than was shown in the overt act, in order to make a giving of aid and comfort to the enemy. The words of the Constitution were chosen, not to make it hard to prove merely routine and everyday acts, but to make the proof of acts that convict of treason as sure as trial processes may. When the prosecution's case is thus established, the Constitution does not prevent presentation of corroborative or cumulative evidence of any admissible character either to strengthen a direct case or to rebut the testimony or inferences on behalf of defendant. The Government is not prevented from making a strong case; it is denied a conviction on a weak one.

It may be that in some cases the overt acts, sufficient to prove giving of aid and comfort, will fall short of showing intent to betray and that questions will then be raised as to permissible methods of proof that we do not reach in this case. But in this and some cases we have cited where the sufficiency of the overt acts has been challenged because they were colorless as to intent, we are persuaded the reason intent was left in question was that the acts were really indecisive as a giving of aid and comfort. When we deal with acts that are trivial and commonplace and hence are doubtful as to whether they gave aid and comfort to the enemy, we are most put to it to find in other evidence a treacherous intent.

We proceed to consider the application of these principles to Cramer's case.

IV

The indictment charged Cramer with adhering to the enemies of the United States, giving them aid and com-

fort, and set forth ten overt acts. The prosecution withdrew seven, and three were submitted to the jury. The overt acts which present the principal issue[45] are alleged in the following language:

"1. Anthony Cramer, the defendant herein, on or about June 23, 1942, at the Southern District of New York and within the jurisdiction of this Court, did meet with Werner Thiel and Edward John Kerling, enemies of the United States, at the Twin Oaks Inn at Lexington Avenue and 44th Street, in the City and State of New York, and did confer, treat, and counsel with said Werner Thiel and Edward John Kerling for a period of time for the purpose of giving and with intent to give aid and comfort to said enemies, Werner Thiel and Edward John Kerling.

"2. Anthony Cramer, the defendant herein, on or about June 23, 1942, at the Southern District of New York and

[45] The verdict in this case was a general one of guilty, without special findings as to the acts on which it rests. Since it is not possible to identify the grounds on which Cramer was convicted, the verdict must be set aside if any of the separable acts submitted was insufficient. *Stromberg* v. *California*, 283 U. S. 359, 368; *Williams* v. *North Carolina*, 317 U. S. 287, 292. The tenth act charged, the third submitted, was based on five falsehoods told by Cramer after his arrest to agents of the Federal Bureau of Investigation, admittedly for the purpose of shielding Werner Thiel. After some time he recanted the falsehoods and told the truth. Thiel had already been taken into custody when the interviews occurred. The prisoner contends that lying to his jailer does not constitute treason, that in the whole history of treason no precedent can be or is cited for holding a false statement while under interrogation after imprisonment is treason, that in any event it amounted to no more than an attempt which was not consummated, that there was no right to interrogate Cramer under the circumstances, and that admissions made out of court are rendered inadmissible as proof of overt acts in view of the requirement that the act be proved by two witnesses or by "confession in open court." The use of this evidence as an overt act of treason is complicated, and we intimate no views upon it in view of reversal on other grounds. Were we to affirm we should have first to resolve these questions against the prisoner.

within the jurisdiction of this Court, did accompany, confer, treat, and counsel with Werner Thiel, an enemy of the United States, for a period of time at the Twin Oaks Inn at Lexington Avenue and 44th Street, and at Thompson's Cafeteria on 42nd Street between Lexington and Vanderbilt Avenues, both in the City and State of New York, for the purpose of giving and with intent to give aid and comfort to said enemy, Werner Thiel."

At the present stage of the case we need not weigh their sufficiency as a matter of pleading. Whatever the averments might have permitted the Government to prove, we now consider their adequacy on the proof as made.

It appeared upon the trial that at all times involved in these acts Kerling and Thiel were under surveillance of the Federal Bureau of Investigation. By direct testimony of two or more agents it was established that Cramer met Thiel and Kerling on the occasions and at the places charged and that they drank together and engaged long and earnestly in conversation. This is the sum of the overt acts as established by the testimony of two witnesses. There is no two-witness proof of what they said nor in what language they conversed. There is no showing that Cramer gave them any information whatever of value to their mission or indeed that he had any to give. No effort at secrecy is shown, for they met in public places. Cramer furnished them no shelter, nothing that can be called sustenance or supplies, and there is no evidence that he gave them encouragement or counsel, or even paid for their drinks.

The Goverment recognizes the weakness of its proof of aid and comfort, but on this score it urges: "Little imagination is required to perceive the advantage such meeting would afford to enemy spies not yet detected. Even apart from the psychological comfort which the meetings furnished Thiel and Kerling by way of social intercourse with

one who they were confident would not report them to the authorities, as a loyal citizen should, the meetings gave them a source of information and an avenue for contact. It enabled them to be seen in public with a citizen above suspicion and thereby to be mingling normally with the citizens of the country with which they were at war." The difficulty with this argument is that the whole purpose of the constitutional provision is to make sure that treason conviction shall rest on direct proof of two witnesses and not on even a little imagination. And without the use of some imagination it is difficult to perceive any advantage which this meeting afforded to Thiel and Kerling as enemies or how it strengthened Germany or weakened the United States in any way whatever. It may be true that the saboteurs were cultivating Cramer as a potential "source of information and an avenue for contact." But there is no proof either by two witnesses or by even one witness or by any circumstance that Cramer gave them information or established any "contact" for them with any person other than an attempt to bring about a rendezvous between Thiel and a girl, or that being "seen in public with a citizen above suspicion" was of any assistance to the enemy. Meeting with Cramer in public drinking places to tipple and trifle was no part of the saboteurs' mission and did not advance it. It may well have been a digression which jeopardized its success.

The shortcomings of the overt act submitted are emphasized by contrast with others which the indictment charged but which the prosecution withdrew for admitted insufficiency of proof. It appears that Cramer took from Thiel for safekeeping a money belt containing about $3,600, some $160 of which he held in his room concealed in books for Thiel's use as needed. An old indebtedness of Thiel to Cramer of $200 was paid from the fund, and the rest Cramer put in his safe-deposit box in a bank for safekeeping. All of this was at Thiel's request. That Thiel

would be aided by having the security of a safe-deposit box for his funds, plus availability of smaller amounts, and by being relieved of the risks of carrying large sums on his person—without disclosing his presence or identity to a bank—seems obvious. The inference of intent from such act is also very different from the intent manifest by drinking and talking together. Taking what must have seemed a large sum of money for safekeeping is not a usual amenity of social intercourse. That such responsibilities are undertaken and such trust bestowed without the scratch of a pen to show it, implies some degree of mutuality and concert from which a jury could say that aid and comfort was given and was intended. If these acts had been submitted as overt acts of treason, and we were now required to decide whether they had been established as required, we would have a quite different case. We would then have to decide whether statements on the witness stand by the defendant are either "confession in open court" or may be counted as the testimony of one of the required two witnesses to make out otherwise insufficiently proved "overt acts." But this transaction was not proven as the Government evidently hoped to do when the indictment was obtained. The overt acts based on it were expressly withdrawn from the jury, and Cramer has not been convicted of treason on account of such acts. We cannot sustain a conviction for the acts submitted on the theory that, even if insufficient, some unsubmitted ones may be resorted to as proof of treason. Evidence of the money transaction serves only to show how much went out of the case when it was withdrawn.

The Government contends that outside of the overt acts, and by lesser degree of proof, it has shown a treasonable intent on Cramer's part in meeting and talking with Thiel and Kerling. But if it showed him disposed to betray, and showed that he had opportunity to do so, it still has not proved in the manner required that he did any acts

submitted to the jury as a basis for conviction which had the effect of betraying by giving aid and comfort. To take the intent for the deed would carry us back to constructive treasons.

It is outside of the commonplace overt acts as proved that we must find all that convicts or convinces either that Cramer gave aid and comfort or that he had a traitorous intention. The prosecution relied chiefly upon the testimony of Norma Kopp, the fiancée of Thiel, as to incriminating statements made by Cramer to her,[46] upon admissions made by Cramer after his arrest to agents of the Federal Bureau of Investigation,[47] upon letters and

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[46] The testimony of Norma Kopp was probably the most damaging to the prisoner. She was a German alien who had been in the United States since 1928, but had never become a citizen. She had long and intimately known both Cramer and Thiel and became engaged to marry Thiel four days before he left for Germany. She knew him to be a Nazi. She received at Westport, Conn., where she was working as a laundry and kitchen maid, a note from Cramer, asking her to come to New York for an undisclosed reason. She came and Cramer then, she says, told her that Thiel was back, that he came with others, that six of them landed from a submarine in a rubber boat in Florida, that they brought much money "from Germany from the German Government," that Cramer was keeping it for Thiel in his safety deposit box, that these men got instructions from a "sitz" in the Bronx as to where to go, but Cramer said he did not know what he meant by "sitz." Cramer said he expected Thiel that evening at his apartment, but Thiel did not come. Cramer failed to bring about her meeting with Thiel, as he had promised her. She was at Kolping House when Cramer was taken into custody. The following day pictures of the saboteurs and the story of their landing and arrest was in the newspapers. She was taken into custody and questioned by the Federal Bureau of Investigation.

[47] Cramer left a note for "William Thomas," the name under which Thiel was going, at the Commodore Hotel, where he was staying, saying that Miss Kopp had come and asking Thiel to meet them at Thompson's Cafeteria at 4:00 that afternoon or call them at 7:00 that evening at Kolping House. Thiel had been arrested and did not keep the

documents found on search of his room by permission after his arrest,[48] and upon testimony that Cramer had

rendezvous nor make the call. About 10:50 p. m. June 27, Cramer was taken into custody at Kolping House and taken to the Bureau's headquarters in New York. He told the agents that the man he had been with at Thompson's Cafeteria was William Thomas, that Thomas had worked in a factory on the West Coast since March of 1941 and had not been out of the United States. When asked if the true name of William Thomas was not Werner Thiel, he replied that it was, and that Thiel was using an assumed name because of difficulties with his draft board. He stated that the money belt which Thiel had given him contained only $200, which Thiel owed him, and that the $3,500 in the safety deposit box belonged to him and had been obtained from the sale of securities. The gravity of the offense with which he might be confronted was intimated to Cramer, and he asked if he might speak with agent Ostholthoff alone. To him he recanted his previous false statements and admitted that he knew Thiel had come from Germany, probably on a mission for the German Government, which he thought was "to stir up unrest among the people and probably spread propaganda." He repeated this in the presence of other agents and stated that he had lied in order to protect Thiel. Cramer authorized the agents to search his room and to open his safe-deposit box at the Corn Exchange Bank and remove the contents thereof.

[48] As summarized in the opinion of the Circuit Court of Appeals, these are: "Writing Thiel in Germany, November 25, 1941, appellant said that 'defiance, boldness, will, and sharp weapons will decide the war, and the Germany Army and the German people are not lacking in these,' that he was 'very discontent' and sat here 'in pitiable comfort,' and that he had refused a job in Detroit at $100 per week because 'I do not want to soil my hands with war work.' To his family in Germany he wrote December 3, 1941, of 'the gigantic sacrifices which the glorious, disciplined German Army is making from day to day for the Homeland,' that 'every day here I hear the shrieks of hatred and the clamor for annihilation from the hostile foreigners,' and that a lost war 'means today a complete extirpation of the German nation.' To a friend in Chicago he wrote April 21, 1942, objecting to conscription 'after one has spent almost half a lifetime here in the States,' and saying 'personally I should not care at all to be misused by the American army as a world conqueror.' All the letters were written in German."

curtly refused to buy Government bonds.[49] After denial of defendant's motion to dismiss at the close of the prosecution's case, defendant became a witness in his own behalf and the Government obtained on cross-examination some admissions of which it had the benefit on submission.[50]

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[49] On the Government's case a witness testified that he went to Cramer's apartment, told him that he was a representative of the United States Government on a pledge drive and asked him if he would like to sign a pledge for a bond. Cramer said he was not interested and, in reply to the question whether he would sign up for a stamp, he said he was not even interested in the purchase of a 10-cent stamp. He then closed the door. The witness rang again and Cramer opened the door again and then closed it.

Norma Kopp testified that Cramer told her that the "Minute Man" called at his door "and he got kind of fresh and he closed the door at him." Miss Kopp's testimony was objected to and was offered as "showing the general motive and disposition, in so far as loyalty to the country is concerned, of this defendant," and as probative on the issue of intent. The court received it on the theory that incidents of that sort might corroborate or the jury might find it corroborated certain other testimony offered by the Government indicating a motive or intent.

[50] The defendant, having testified in his own behalf, was under cross-examination. He was asked: "Q. Now, sir, isn't it the fact that you did write to Germany in the year 1941 several letters in which you discussed the United States in an unfriendly manner? A. I do not know unfriendly. I would say that I have criticized a few persons. I have never criticized the United States as such." He was then asked whether in 1941 he did not receive letters from his nephew Norbert and whether it was not the fact that Cramer's brother, Norbert's father, "through Norbert warned you that your letters discussed the United States in such an unfriendly fashion that Norbert's father feared that you would be put on the blacklist, because according to him the letters went through an American censorship?" Objection was duly made that the letters referred to were from someone else and could not bind the defendant. The objection was overruled, and the witness answered: "Well, I have received a letter from my nephew Norbert which mentions that, I admit that." A motion to

It is not relevant to our issue to appraise weight or credibility of the evidence apart from determining its constitutional sufficiency. Nor is it necessary, in the view we take of the more fundamental issues, to discuss the

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strike the answer was denied, and exceptions to both rulings were duly taken.

The Circuit Court of Appeals observed that, "Of course, these expressions of opinion could not properly bind appellant; and the objection might wisely have been sustained." But it concluded that the ruling was not sufficiently prejudicial to call for reversal.

While defendant was under cross-examination, he was asked, "By the way, Mr. Witness, you have testified at length here about your various studies and your various occupations and interests. Were you ever interested in law? A. No, sir; I was not. Q. Isn't it a fact, sir, that at one time you were particularly interested in the law of treason? A. No, sir; I have never been interested in that." The District Attorney then offered a complete text of the Constitution of the United States as printed in the New York Times in 1937. It had been found in Cramer's room and on it were marks which he admitted making. One of the marks was opposite the paragraph which defines treason. The District Attorney offered it for impeachment and also contended it to be of probative force to show "that this witness had in mind at the time these events which are the subject of the indictment here occurred, what the law of treason was." Against objection the court admitted it as material and relevant and declined to limit the grounds on which it was received.

It appears without dispute that the marks on this copy of the Constitution were made at a time not definitely established but clearly before the United States entered the war and when the policy of the Government was declared to be one of neutrality.

The treason paragraph of the Constitution was one of six provisions which he marked. Another was the provision of Article 1 of § 7, that if any bill passed by the Congress shall not be returned by the President within ten days after having been presented to him, the same shall be a law. Another, the provision of Article 1, § 8, that Congress shall have the power to declare war, grant letters of marque and reprisal and make rules concerning captures on land and water. A third was Article 1, § 9, which provides that no bill of attainder or ex post facto law shall be passed. A fourth was that pro-

reservations which all of us entertain as to the admissibility of some of it or those which some entertain as to other of it. We could conclude in favor of affirmance only if all questions of admissibility were resolved against the prisoner. At all events much of the evidence is of the general character whose infirmities were feared by the framers and sought to be safeguarded against.

Most damaging is the testimony of Norma Kopp, a friend of Cramer's and one with whom, if she is to be believed, he had been most indiscreetly confidential. Her testimony went considerably beyond that of the agents of the Federal Bureau of Investigation as to admissions of guilty knowledge of Thiel's hostile mission and of Cramer's sympathy with it. To the extent that his conviction rests upon such evidence, and it does to an unknown but considerable extent, it rests upon the uncorroborated testimony of one witness not without strong emotional interest in the drama of which Cramer's trial was a part. Other evidence relates statements by Cramer before the United States was at war with Germany. At the time they were uttered, however, they were not treasonable. To use pre-war expressions of opposition to entering a war to convict of treason during the war is a dangerous procedure at best. The same may be said about the inference of disloyal attitude created by showing that he refused to buy bonds and closed the door in the salesman's face. Another class of evidence consists of admissions to agents of the Federal Bureau of Investigation. They are, of course, not "confessions in open court." The Government does not contend and could not well contend

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vision of Article 1, § 9, that no title of nobility shall be granted by the United States. Another was the portion of Article 2, § 1, which sets forth the President's oath.

The petitioner was naturalized in 1936 and, so far as appears, came into possession of the Constitution in 1937.

that admissions made out of court, if otherwise admissible, can supply a deficiency in proof of the overt act itself.

V

The Government has urged that our initial interpretation of the treason clause should be less exacting, lest treason be too hard to prove and the Government disabled from adequately combating the techniques of modern warfare. But the treason offense is not the only nor can it well serve as the principal legal weapon to vindicate our national cohesion and security. In debating this provision, Rufus King observed to the Convention that the "controversy relating to Treason might be of less magnitude than was supposed; as the legislature might punish capitally under other names than Treason." [51] His statement holds good today. Of course we do not intimate that Congress could dispense with the two-witness rule merely by giving the same offense another name. But the power of Congress is in no way limited to enact prohibitions of specified acts thought detrimental to our wartime safety. The loyal and the disloyal alike may be forbidden to do acts which place our security in peril, and the trial thereof may be focussed upon defendant's specific intent to do those particular acts [52] thus eliminating the accusation of treachery and of general intent to betray which have such passion-rousing potentialities. Congress repeatedly has enacted prohibitions of specific acts thought to endanger our security [53] and the practice of foreign nations with de-

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[51] 2 Farrand 347.

[52] E. g., *Hartzel* v. *United States*, 322 U. S. 680.

[53] Congress has prohibited obtaining defense information in certain ways, 50 U. S. C. § 31; certain disclosures of information, 50 U. S. C. § 32; certain seditious and disloyal acts in wartime, 50 U. S. C. § 33; and has enacted such statutes as the Trading with the Enemy Act, 50 U. S. C. App. § 3.

fense problems more acute than our own affords examples of others.[54]

The framers' effort to compress into two sentences the law of one of the most intricate of crimes gives a superficial appearance of clarity and simplicity which proves illusory when it is put to practical application. There are few subjects on which the temptation to utter abstract

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[54] The Government's Appendix includes such examples as the following:

Danish Penal Code.—"Sec. 105. One who commits an act by virtue of which a foreign service of military intelligence is set up, or who assists directly or indirectly in its functioning on the territory of the State of Denmark, shall be punished by imprisonment up to two years and in cases of extenuating circumstances by detention."

Polish Code.—"Art. 100. Sec. 1. Whoever in time of war acts in favor of the enemy or to the damage of the Polish armed forces or allied forces shall be punished by imprisonment not under ten years or for life.

"Art. 100. Sec. 2. If the offender unintentionally acted, he shall be punished by imprisonment not to exceed three years or by detention not to exceed three years."

French Code of 1939.—"Art. 103. Whoever, knowing about the plans of an act of treason or espionage, does not report them to the military, administrative, or judicial authorities as soon as he acquired knowledge shall be punished by penalties provided by Art. 83 for the attack on the exterior safety of the State."

The French Code (Harboring) provides in Article 85 that every Frenchman and every foreigner shall be punished as an accomplice or for harboring:

"(1) Who, knowing the intentions of the perpetrators of major crimes and minor crimes against the exterior safety of the State, furnishes them subsidies, means of existence, lodging, place of asylum or meeting place.

"(2) Who, knowingly carries the correspondence of the perpetrators of a major or minor crime or knowingly facilitates them in any manner whatsoever in finding, harboring, transporting, or transmitting, the objects of a major or minor crime;

"(3) Who harbors knowingly the objects or instruments which served or should serve for the commission of the crime or offense or material objects or documents obtained through a crime or offense."

interpretative generalizations is greater or on which they are more to be distrusted. The little clause is packed with controversy and difficulty. The offense is one of subtlety, and it is easy to demonstrate lack of logic in almost any interpretation by hypothetical cases, to which real treasons rarely will conform. The protection of the two-witness requirement, limited as it is to overt acts, may be wholly unrelated to the real controversial factors in a case. We would be understood as speaking only in the light of the facts and of the issues raised in the case under consideration, although that leaves many undetermined grounds of dispute which, after the method of the common law, we may defer until they are presented by facts which may throw greater light on their significance. Although nothing in the conduct of Cramer's trial evokes it, a repetition of Chief Justice Marshall's warning can never be untimely:

"As there is no crime which can more excite and agitate the passions of men than treason, no charge demands more from the tribunal before which it is made, a deliberate and temperate inquiry. Whether this inquiry be directed to the fact or to the law, none can be more solemn, none more important to the citizen or to the government; none can more affect the safety of both.

". . . It is, therefore, more safe, as well as more consonant to the principles of our constitution, that the crime of treason should not be extended by construction to doubtful cases; and that crimes not clearly within the constitutional definition, should receive such punishment as the legislature in its wisdom may provide." *Ex parte Bollman,* 4 Cranch 75, 125, 127.

It is not difficult to find grounds upon which to quarrel with this constitutional provision. Perhaps the framers placed rather more reliance on direct testimony than modern researches in psychology warrant. Or it may be considered that such a quantitative measure of proof, such

a mechanical calibration of evidence is a crude device at best or that its protection of innocence is too fortuitous to warrant so unselective an obstacle to conviction. Certainly the treason rule, whether wisely or not, is severely restrictive. It must be remembered, however, that the Constitutional Convention was warned by James Wilson that "Treason may sometimes be practiced in such a manner, as to render proof extremely difficult—as in a traitorous correspondence with an Enemy."[55] The provision was adopted not merely in spite of the difficulties it put in the way of prosecution but because of them. And it was not by whim or by accident, but because one of the most venerated of that venerated group considered that "prosecutions for treason were generally virulent." Time has not made the accusation of treachery less poisonous, nor the task of judging one charged with betraying the country, including his triers, less susceptible to the influence of suspicion and rancor. The innovations made by the forefathers in the law of treason were conceived in a faith such as Paine put in the maxim that "He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach himself."[56] We still put trust in it.

We hold that overt acts 1 and 2 are insufficient as proved to support the judgment of conviction, which accordingly is

Reversed.

MR. JUSTICE DOUGLAS, with whom the CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE REED concur, dissenting.

The opinion of the Court is written on a hypothetical state of facts, not on the facts presented by the record.

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[55] 2 Farrand 348.

[56] See Brooks, The World of Washington Irving, 73 n.

It states a rule of law based on an interpretation of the Constitution which is not only untenable but is also unnecessary for the decision. It disregards facts essential to a determination of the question presented for decision. It overlooks the basic issue on which our disposition of the case must turn. In order to reach that issue we must have a more exact appreciation of the facts than can be gleaned from the opinion of the Court.

I

Cramer is a naturalized citizen of the United States, born in Germany. He served in the German army in the last war, coming to this country in 1925. In 1929 he met Thiel who had come to this country in 1927 from a place in Germany not far from petitioner's birthplace. The two became close friends; they were intimate associates during a twelve-year period. In 1933 Cramer found work in Indiana. Thiel joined him there. Both became members of the Friends of New Germany, predecessor of the German-American Bund. Cramer was an officer of the Indiana local. He resigned in 1935 but Thiel remained a member and was known as a zealous Nazi. In 1936 Cramer visited Germany. On his return he received his final citizenship papers. He and Thiel returned to New York in 1937 and lived either together or in close proximity for about four years. Thiel left for Germany in the spring of 1941, feeling that war between the United States and Germany was imminent. According to Cramer, Thiel was "up to his ears" in Nazi ideology. Cramer corresponded with Thiel in Germany. Prior to our declaration of war, he was sympathetic with the German cause and critical of our attitude. Thus in November, 1941, he wrote Thiel saying he had declined a job in Detroit, "as I don't want to dirty my fingers with war material"; that "We sit here in pitiable comfort, when we should be in the

battle—as Nietzsche says—I want the man, I want the woman, the one fit for war, the other fit for bearing." In the spring of 1942 he wrote another friend in reference to the possibility of being drafted: "Personally I should not care at all to be misused by the American army as a world conqueror." Cramer listened to short-wave broadcasts of Lord Haw-Haw and other German propagandists. He knew that the theme of German propaganda was that England and the United States were fighting a war of aggression and seeking to conquer the world.

So much for the background. What followed is a sequel to *Ex parte Quirin,* 317 U.S. 1.

Thiel entered the German army and in 1942 volunteered with seven other German soldiers who had lived in the United States for a special mission to destroy the American aluminum industry. They were brought here by German submarines in two groups. Kerling was the leader and Thiel a member of one group which landed by rubber boat near Jacksonville, Florida on June 17, 1942. They buried their explosives and proceeded to New York City, where on June 21st they registered at the Hotel Commodore under the assumed names of Edward Kelly and William Thomas.

The next morning a strange voice called Cramer's name from the hall of the rooming house where he lived. On his failure to reply an unsigned note was slipped under his door. It read, "Be at the Grand Central station tonight at 8 o'clock, the upper platform near the information booth, Franz from Chicago has come into town and wants to see you; don't fail to be there." Cramer said he knew no Franz from Chicago. But nevertheless he was on hand at the appointed hour and place. Thiel shortly appeared. They went to the Twin Oaks Inn where they talked for two hours. Cramer admitted that he knew Thiel had come from Germany; and of course, he knew that at that time men were not freely entering this country from Ger-

many. He asked Thiel, "Say, how have you come over, have you come by submarine?" Thiel looked startled, smiled, and said, "Some other time I am going to tell you all about this." Thiel told him that he had taken the assumed name of William Thomas and had a forged draft card. Thiel admonished him to remember that he, Thiel, was "anti-Nazi"—a statement Cramer doubted because he knew Thiel was a member of the Nazi party. Thiel indicated he had come from the coast of Florida. Cramer inquired if he had used a rubber boat. When Thiel said that the only time he was "scared to death was when I came over here we got bombed," Cramer replied, "Then you have come over by submarine, haven't you?" Thiel told Cramer that he had "three and a half or four thousand dollars" with him and that "if you have the right kind of connection you can even get dollars in Germany." Cramer offered to keep Thiel's money for him. Thiel agreed but nothing was done about it that evening. Cramer admitted he had a "hunch" that Thiel was here on a mission for the German government. He asked Thiel "whether he had come over here to spread rumors and incite unrest." Cramer after his arrest told agents of the F. B. I. that he had suspected that Thiel had received the money from the German government, that Thiel in fact had told him that he was on a mission for Germany, and that "whatever his mission was, I thought that he was serious in his undertaking." Thiel from the beginning clothed his actions with secrecy; was unwilling to be seen at Cramer's room ("because I have too many acquaintances there and I don't want them to see me"); and cautioned Cramer against conversing loudly with him in the public tavern.

So they agreed to meet at the Twin Oaks Inn at 8 P. M. on the following evening, June 23, 1942. At this meeting Kerling joined them. Cramer had met Kerling in this country and knew he had returned to Germany. Kerling

and Thiel told Cramer that they had come over together. Cramer had a "hunch" that Kerling was here for the same purpose as Thiel. Kerling left Thiel and Cramer after about an hour and a half. Kerling was followed and arrested. Cramer and Thiel stayed on at the tavern for about another hour. After Kerling left, Thiel agreed to entrust his money to Cramer for safekeeping. He told Cramer to take out $200 which Thiel owed him. But he asked Cramer not to put all of the balance in the safe-deposit box—that he should keep some of it out "in the event I need it in a hurry." Thiel went to the washroom to remove the money belt. He handed it to Cramer on the street when they left the tavern. From the Twin Oaks Thiel and Cramer went to Thompson's Cafeteria where they conversed for about fifteen minutes. They agreed to meet there at 8 P. M. on June 25th. They parted. Thiel was followed and arrested.

Cramer returned home. He put Thiel's money belt in a shoe box. He put some of the money between the pages of a book. Later he put the balance in his bank, some in a savings account, most of it in his safe deposit box. He and Thiel had talked of Thiel's fiancée, Norma Kopp. At the first meeting Cramer had offered to write her on Thiel's behalf. He did so. He did not mention Thiel's name but asked her to come to his room, saying he had "sensational" news for her. Cramer appeared at Thompson's Cafeteria at 8 P. M. June 25th to keep his appointment with Thiel. He waited about an hour and a half. He returned the next night, June 26th, and definitely suspected Thiel had been arrested. Though he knew Thiel was registered at the Hotel Commodore, he made no attempt to get in touch with him there. When he returned to his room that night, Norma Kopp was waiting for him. She testified that he told her that Thiel was here; that "they came about six men with a U-boat, in a rubber boat, and landed in Florida"; that they "brought so

much money along from Germany, from the German government" he was keeping it in a safe-deposit box; and that they "get instructions from the sitz (hideout) in the Bronx what to do, and where to go." The next morning Cramer left a note for "William Thomas" at the Commodore saying that Norma Kopp had arrived and suggested a rendezvous. Later in the day Cramer was arrested. He told the agents of the F. B. I. that the name of the man who had been with him at Thompson's Cafeteria on the evening of June 23rd was "William Thomas," that "Thomas" had been working in a factory on the West Coast since March, 1941, and had not been out of the United States since then. He was asked if "Thomas" was not Thiel. He then admitted he was, saying that Thiel had used an assumed name, as he was having difficulties with his draft board. He also stated that the money belt Thiel gave him contained only $200 which Thiel owed him and that the $3,500 in his safe-deposit box belonged to him and were the proceeds from the sale of securities. After about an hour or so of the falsehoods, Cramer asked to speak to one of the agents alone. The request was granted. He then recanted his previous false statements and stated that he felt sure that Thiel had come from Germany by submarine on a mission for the German government and that he thought that mission was "to stir up unrest among the people and probably spread propaganda." He stated he had lied in order to protect Thiel.

The Court holds that this evidence is insufficient to sustain the conviction of Cramer under the requirements of the Constitution. We disagree.

II

Article III, § 3 of the Constitution defines treason as follows: "Treason against the United States, shall consist only in levying War against them, or in adhering to

their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."

The charge against Cramer was that of adhering. The essential elements of the crime are that Cramer (1) with treasonable intent (2) gave aid and comfort to the enemy.[1]

There was ample evidence for the jury that Cramer had a treasonable intent. The trial court charged the jury that "criminal intent and knowledge, being a mental state, are not susceptible of being proved by direct evidence, and therefore you must infer the nature of the defendant's intent and knowledge from all the circumstances." It charged that proof of criminal intent and knowledge is sufficient if proved beyond a reasonable doubt, and that the two witnesses are not necessary for any of the facts other than the overt acts. On that there apparently is no disagreement. It also charged: "Now, gentlemen, motive should not be confused with intent. If the defendant knowingly gives aid and comfort to one who he knows or believes is an enemy, then he must be taken to intend the consequences of his own voluntary act, and the fact that his motive might not have been to aid the enemy is no

[1] It is well established that the overt act and the intent are separate and distinct elements of the crime of treason under the Constitution. See *Ex parte Bollman*, 4 Cranch 75, 126; *United States* v. *Burr*, 25 Fed. Cas. 2, 13–14, No. 14,692a; *United States* v. *Lee*, 26 Fed. Cas. 907, No. 15,584; *United States* v. *Vigol*, 28 Fed. Cas. 376, No. 16,621; *United States* v. *Hanway*, 26 Fed. Cas. 105, 126, No. 15,299; *United States* v. *Greiner*, 26 Fed. Cas. 36, 39, No. 15,262; *United States* v. *Greathouse*, 26 Fed. Cas. 18, 22, No. 15,254; *United States* v. *Werner*, 247 F. 708, 709–710; *United States* v. *Fricke*, 259 F. 673, 677; *United States* v. *Robinson*, 259 F. 685, 690; *United States* v. *Stephan*, 50 F. Supp. 738, 742–743, aff'd 133 F. 2d 87, 99. Chief Justice Marshall ruled in *United States* v. *Burr*, 25 Fed. Cas. 52, 54, No. 14,692h, that it was in the discretion of the prosecutor to present evidence of the intent before proof of an overt act. And see *United States* v. *Lee*, *supra*.

defense. In other words, one cannot do an act which he knows will give aid and comfort to a person he knows to be an enemy of the United States, and then seek to disclaim criminal intent and knowledge by saying that one's motive was not to aid the enemy. So if you believe that the defendant performed acts which by their nature gave aid and comfort to the enemy, knowing or believing him to be an enemy, then you must find that he had criminal intent, since he intended to do the act forbidden by the law. The fact that you may believe that his motive in so doing was, for example, merely to help a friend, or possibly for financial gain, would not change the fact that he had a criminal intent." On that there apparently is no disagreement. A man who voluntarily assists one known or believed to be an enemy agent may not defend on the ground that he betrayed his country for only thirty pieces of silver. See *Hanauer* v. *Doane,* 12 Wall. 342, 347; *Sprott* v. *United States,* 20 Wall. 459, 463. "The consequences of his acts are too serious and enormous to admit of such a plea. He must be taken to intend the consequences of his own voluntary act." *Hanauer* v. *Doane, supra.* For the same reasons a man cannot slip through our treason law because his aid to those who would destroy his country was prompted by a desire to "accommodate a friend." [2] Loyalty to country cannot be subordinated to the amenities of personal friendship.

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[2] *Carlisle* v. *United States,* 16 Wall. 147, 150–151; *Sprott* v. *United States,* 20 Wall. 459, 463–464; *United States* v. *Hodges,* 26 Fed. Cas. 332, 334, No. 15,374; Charge to Grand Jury—Treason, 30 Fed. Cas. 1032, 1034, No. 18,270; see also 1 East, Pleas of the Crown (1806) pp. 77–81; Warren, What is Giving Aid and Comfort to the Enemy (1918), 27 Yale L. J. 331, 343–345; Hazard and Stern, "Exterior Treason" (1938), 6 U. of Chi. L. Rev. 77, 84–85. But a mere showing of aid and assistance to an alien enemy permanently residing in the United States without any showing that the enemy alien has designs against the interests of the United States, does not without more establish an act of treason. See *United States* v. *Fricke,* 259 F. 673, 682.

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Cramer had a traitorous intent if he knew or believed that Thiel and Kerling were enemies and were working here in the interests of the German Reich. The trial court charged that mere suspicion was not enough; but that it was not necessary for Cramer to have known all their plans. There apparently is no disagreement on that. By that test the evidence against Cramer was overwhelming. The conclusion is irresistible that Cramer believed, if he did not actually know, that Thiel and Kerling were here on a secret mission for the German Reich with the object of injuring the United States and that the money which Thiel gave him for safekeeping had been supplied by Germany to facilitate the project of the enemy. The trial court charged that if the jury found that Cramer had no purpose or intention of assisting the German Reich in its prosecution of the war or in hampering the United States in its prosecution of the war but acted solely for the purpose of assisting Kerling and Thiel as individuals, Cramer should be acquitted. There was ample evidence for the jury's conclusion that the assistance Cramer rendered was assistance to the German Reich, not merely assistance to Kerling and Thiel as individuals.

The trial judge stated when he sentenced Cramer that it did not appear that Cramer knew that Thiel and Kerling were in possession of explosives or other means for destroying factories in this country or that they planned to do that. He stated that if there had been direct proof of such knowledge he would have sentenced Cramer to death rather than to forty-five years in prison. But however relevant such particular knowledge may have been to fixing the punishment for Cramer's acts of treason, it surely was not essential to proof of his traitorous intent. A defendant who has aided an enemy agent in this country may not escape conviction for treason on the ground that he was not aware of the enemy's precise objectives. Knowing or believing that the agent was here on a mis-

sion on behalf of a hostile government, he could not, by simple failure to ask too many questions, assume that this mission was one of charity and benevolence toward the United States. But the present case is much stronger. For Cramer claims he believed the enemy agent's objective was to destroy national morale by propaganda and not to blow up war factories. Propaganda designed to cause disunity among adversaries is one of the older weapons known to warfare, and upon occasion one of the most effective. No one can read this record without concluding that the defendant Cramer knew this. He is an intelligent, if misguided, man. He has a quick wit sharpened by considerable learning of its kind. He is widely read and a student of history and philosophy, particularly Ranke and Nietzsche. He had been an officer of a pro-German organization, and his closest associate had been a zealous Nazi. He also had listened to German propagandists over the short wave. But, in any event, it is immaterial whether Cramer was acquainted with the efficacy of propaganda in modern warfare. Undoubtedly he knew that the German government thought it efficacious. When he was shown consciously and voluntarily to have assisted this enemy program his traitorous intent was then and there sufficiently proved.

The Court does not purport to set aside the conviction for lack of sufficient evidence of traitorous intent. It frees Cramer from this treason charge solely on the ground that the overt acts charged are insufficient under the constitutional requirement.

III

The overt acts alleged were (1) that Cramer met with Thiel and Kerling on June 23rd, 1942, at the Twin Oaks Inn and "did confer, treat, and counsel" with them "for the purpose of giving and with the intent to give aid and comfort" to the enemy; (2) that Cramer "did accompany,

confer, treat, and counsel with" Thiel at the Twin Oaks Inn and at Thompson's Cafeteria on June 23rd, 1942, "for the purpose of giving and with intent to give aid and comfort" to the enemy; and (3) that Cramer gave false information of the character which has been enumerated to agents of the F. B. I. "for the purpose of concealing the identity and mission" of Thiel and "for the purpose of giving and with intent to give aid and comfort" to the enemy.

The Court concedes that an overt act need not manifest on its face a traitorous intention. By that concession it rejects the defense based on the treason clause which Cramer has made here. The Court says an overt act must "show sufficient action by the accused, in its setting, to sustain a finding that the accused actually gave aid and comfort to the enemy." It says, however, that the "protection of the two-witness rule extends at least to all acts of the defendant which are used to draw incriminating inferences that aid and comfort have been given." It adds, "Every act, movement, deed, and word of the defendant charged to constitute treason must be supported by the testimony of two witnesses. The two-witness principle is to interdict imputation of *incriminating acts* to the accused by circumstantial evidence or by the testimony of a single witness. The prosecution cannot rely on evidence which does not meet the constitutional test for overt acts to create any inference that the accused did other acts or did something more than was shown in the overt act, in order to make a giving of aid and comfort to the enemy." And when it comes to the overt acts of meeting and conferring with Thiel and Kerling the Court holds that they are inadequate since there was "no two-witness proof of what they said nor in what language they conversed." That is to say, reversible error is found because the two witnesses who testified to the fact that Cramer met twice with the saboteurs did not testify that Cramer

gave them information of "value to their mission" such as shelter, sustenance, supplies, encouragement or counsel.

That conclusion, we submit, leads to ludicrous results. The present case is an excellent example.

It is conceded that if the two witnesses had testified not only that they saw Cramer conferring with Thiel and Kerling but also heard him agree to keep Thiel's money and saw him take it, the result would be different. But the assumption is that since the two witnesses could not testify as to what happened at the meetings, we must appraise the meetings in isolation from the other facts of the record. Therein lies the fallacy of the argument.

In the first place, we fully agree that under the constitutional provision there can be no conviction of treason without proof of two witnesses of an overt act of treason. We also agree that the act so proved need not itself manifest on its face the treasonable intent. And as the Court states, such intent need not be proved by two witnesses. It may even be established by circumstantial evidence. For it is well established that the overt act and the intent are separate and distinct elements of the crime.[3] The "intent may be proved by one witness, collected from circumstances, or even by a single fact." *Case of Fries,* 9 Fed. Cas. 826, 909, No. 5126; *Respublica* v. *Roberts,* 1 Dallas 39; *United States* v. *Lee,* 26 Fed. Cas. 907, No. 15,584; *Trial of David Maclane,* 26 How. St. Tr. 721, 795–798. Acts innocent on their face, when judged in the light of their purpose and of related events, may turn out to be acts of aid and comfort committed with treasonable purpose. It is the overt act charged as such in the indictment which must be proved by two witnesses and not the related events which make manifest its treasonable quality and purpose. This, we think, is the correct and necessary conclusion to be drawn from the concession that the overt act need not on its face manifest the guilty purpose. The

[3] See note 1, *supra.*

grossest and most dangerous act of treason may be, as in this case, and often is, innocent on its face. But the ruling of the Court that the related acts and events which show the true character of the overt act charged must be proved by two witnesses is without warrant under the constitutional provisions, and is so remote from the practical realities of proving the offense, as to render the constitutional command unworkable. The treasonable intent or purpose which it is said may be proved by a single witness or circumstantial evidence, must, in the absence of a confession of guilt in open court, be inferred from all the facts and circumstances which surround and relate to the overt act. Inference of the treasonable purpose from events and acts related to or surrounding the overt act necessarily includes the inference that the accused committed the overt act with the knowledge or understanding of its treasonable character. To say that the treasonable purpose with which the accused committed the overt act may be inferred from related events proved by a single witness, and at the same time to say that so far as they show the treasonable character of the overt act, they must be proved by two witnesses, is a contradiction in terms. The practical effect of such a doctrine is to require proof by two witnesses, not only of the overt act charged which the Constitution requires but of every other fact and circumstance relied upon to show the treasonable character of the overt act and the treasonable purpose with which it was committed which the Constitution plainly does not require. Here, as in practically all cases where there is no confession in open court, the two are inseparable, save only in the single instance where the overt act manifests its treasonable character on its face. The Court thus in substance adopts the contention of the respondent, which it has rejected in words, and for all practical purposes requires proof by two witnesses, not only of the overt act but of all other elements of the crime save only in the

case where the accused confesses in open court. It thus confuses proof of the overt act with proof of the purpose or intent with which the overt act was committed and, without historical support, expands the constitutional requirement so as to include an element of proof not embraced by its words.

We have developed in the Appendix to this opinion the historic function of the overt act in treason cases. It is plain from those materials that the requirement of an overt act is designed to preclude punishment for treasonable plans or schemes or hopes which have never moved out of the realm of thought or speech. It is made a necessary ingredient of the crime to foreclose prosecutions for constructive treason. The treasonable project is complete as a crime only when the traitorous intent has ripened into a physical and observable act. The act standing alone may appear to be innocent or indifferent, such as joining a person at a table, stepping into a boat, or carrying a parcel of food. That alone is insufficient. It must be established beyond a reasonable doubt that the act was part of the treasonable project and done in furtherance of it. Its character and significance are to be judged by its place in the effectuation of the project. That does not mean that where the treasonable scheme involves several treasonable acts, and the overt act which is charged has been proved by two witnesses, that all the other acts which tend to show the treasonable character of the overt act and the treasonable purpose with which it was committed must be proved by two witnesses. The Constitution does not so declare. There is no historical support for saying that the phrase "two witnesses to the same overt act" may be or can be read as meaning two witnesses to all the acts involved in the treasonable scheme of the accused. Obviously one overt act proved by two witnesses is enough to sustain a conviction even though the accused has committed many other acts which can be proved by only one

witness or by his own admission in open court. Hence, it is enough that the overt act which is charged be proved by two witnesses. As the Court concedes, its treasonable character need not be manifest upon its face. We say that its true character may be proved by any competent evidence sufficient to sustain the verdict of a jury. Any other conclusion leads to such absurd results as to preclude the supposition that the two-witness rule was intended to have the meaning attributed to it.

When we apply that test to the facts of this case it is clear to us that the judgment of conviction against Cramer should not be set aside. The historical materials which we have set forth in the Appendix to this opinion establish that a meeting with the enemy may be adequate as an overt act of treason. Hale, Kelyng and Foster establish that beyond peradventure of doubt. Such a meeting might be innocent on its face. It might also be innocent in its setting, as Hale, Kelyng and Foster point out, where, for example, it was accidental. We would have such a case here if Cramer's first meeting with Thiel was charged as an overt act. For, as we have seen, Cramer went to the meeting without knowledge that he would meet and confer with Thiel. But the subsequent meetings were arranged between them. They were arranged in furtherance of Thiel's designs. Cramer was not only on notice that Thiel was here on a mission inimical to the interests of this nation. He had agreed at the first meeting to hide Thiel's money. He had agreed to contact Norma Kopp. He knew that Thiel wanted his identity and presence in New York concealed. This was the setting in which the later meetings were held. The meetings take on their true character and significance from that setting. They constitute acts. They demonstrate that Cramer had a liking for Thiel's design to the extent of aiding him in it. They show beyond doubt that Cramer had more than a treasonable intent; that that intent had moved from the realm of

thought into the realm of action. Since two witnesses proved that the meetings took place, their character and significance might be proved by any competent evidence.

In the second place, this judgment of conviction should be sustained even though we assume, *arguendo,* that Cramer's motion to dismiss at the end of the government's case should have been granted. The concern of the Court is that acts innocent on their face may be transformed into sinister or guilty acts by circumstantial evidence, by inference, by speculation. The rule announced by the Court is based on a desire for trustworthy evidence in determining the character and significance of the overt acts. But this is not a case where an act innocent on its face is given a sinister aspect and made a part of a treasonous design by circumstantial evidence, by inference, or by the testimony of a single witness for the prosecution. We know from Cramer's own testimony—from his admissions at the trial—exactly what happened.

We know the character of the meetings from Cramer's own admissions. We know from his own lips that they were not accidental or casual conferences, or innocent, social meetings. He arranged them with Thiel. When he did so he believed that Thiel was here on a secret mission for the German Reich with the object of injuring this nation. He also knew that Thiel was looking for a place to hide his money. Cramer had offered to keep it for Thiel and Thiel had accepted the offer. Cramer had also offered to write Norma Kopp, Thiel's fiancée, without mentioning Thiel's name. Cramer also knew that Thiel wanted his identity and his presence in New York concealed. Cramer's admissions at the trial gave character and significance to those meetings. Those admissions plus the finding of treasonable intent place beyond a reasonable doubt the conclusion that those meetings were steps in and part and parcel of the treasonable project.

Nor need we guess or speculate for knowledge of what happened at the meetings. We need not rely on circum-

stantial evidence, draw inferences from other facts, or resort to secondary sources. Again we know from Cramer's testimony at the trial—from his own admissions—precisely what transpired.

Cramer told the whole story in open court. He admitted he agreed to act and did act as custodian of the saboteur Thiel's money. He agreed to hold it available for Thiel's use whenever Thiel might need it. It is difficult to imagine what greater aid one could give a saboteur unless he participated in the sabotage himself. Funds were as essential to Thiel's plans as the explosives he buried in the sands of Florida. Without funds the mission of all the saboteurs would have soon ended or been seriously crippled. Cramer did not stop here. Preservation of secrecy was essential to this invasion of the enemy. It was vital if the project was to be successful. In this respect Cramer also assisted Thiel. He cooperated with Thiel in the concealment of Thiel's identity and presence in New York City. He did his best to throw federal officers off the trail and to mislead them. He made false statements to them, saying that Thiel's true name was "Thomas" and that Thiel had not been out of the country since the war began.

If Cramer had not testified, we would then be confronted with the questions discussed in the opinion of the Court. But he took the stand and told the whole story. It is true that at the end of the government's case Cramer moved to dismiss on the ground that the crime charged had not been made out. That motion was denied and an exception taken. If Cramer had rested there, the case submitted to the jury and a judgment of conviction rendered, we would have before us the problem presented in the opinion of the Court. But Cramer did not rest on that motion. He took the stand and told the whole story. Any defect in the proof was cured by that procedure. As stated in *Bogk* v. *Gassert*, 149 U. S. 17, 23, "A defend-

ant has an undoubted right to stand upon his motion for a nonsuit, and have his writ of error if it be refused; but he has no right to insist upon his exception, after having subsequently put in his testimony and made his case upon the merits, since the court and jury have the right to consider the whole case as made by the testimony. It not infrequently happens that the defendant himself, by his own evidence, supplies the missing link." And see *Sigafus* v. *Porter,* 179 U. S. 116, 121; *McCabe & Steen Co.* v. *Wilson,* 209 U. S. 275, 276; *Bates* v. *Miller,* 133 F. 2d 645, 647–648; 9 Wigmore on Evidence (3d ed. 1940) § 2496. And the rule obtains in criminal as well as in civil cases. *Sheridan* v. *United States,* 112 F. 2d 503, 504, rev'd on other grounds 312 U. S. 654; *Edwards* v. *United States,* 7 F. 2d 357, 359; *Baldwin* v. *United States,* 72 F. 2d 810, 812.

Why then must we disregard Cramer's admissions at the trial? Why must we assume, as does this Court, that those admissions are out of the case and that our decision must depend solely on the evidence presented by the government?

The Constitution says that a "confession in open court" is sufficient to sustain a conviction of treason. It was held in *United States* v. *Magtibay,* 2 Philippine Rep. 703, that a confession in open court to the overt acts charged in the indictment was not an adequate substitute for the testimony of two witnesses where the accused denied treasonable purpose. We need not go so far as to say that if the whole crime may be proved by an admission by the accused in open court, one of the ingredients of the offense may be established in like manner. See *Respublica* v. *Roberts, supra.* We do not say that if the government completely fails to prove an overt act or proves it by one witness only, the defect can be cured by the testimony of other witnesses or by the admissions of the accused. We do say that a meeting with the enemy is an act and

may in its setting be an overt act of treason. We agree that overt acts innocent on their face should not be lightly transformed into incriminating acts. But so long as overt acts of treason need not manifest treason on their face, as the Court concedes, the sufficiency of the evidence to establish the treasonable character of the act, like the evidence of treasonable intent, depends on the quality of that evidence whatever the number of witnesses who supplied it. There can be no doubt in this case on that score. Certainly a person who takes the stand in defense of a treason charge against him will not be presumed to commit perjury when he makes admissions against self-interest. Admissions against self-interest have indeed always been considered as the highest character of evidence. When two witnesses testify to the overt acts, why then are not admissions of the accused in open court adequate to establish their true character? Could the testimony of any number of witnesses more certainly or conclusively establish the significance of what was done? Take the case where two witnesses testify that the accused delivered a package to the enemy, the accused admitting in open court that the package contained guns or ammunition. Or two witnesses testify that the accused sent the enemy a message, innocuous on its face, the accused admitting in open court that the message was a code containing military information. Must a conviction be set aside because the two witnesses did not testify to what the accused admitted in open court? We say no. In such circumstances we have no examples of constructive treason. The intent is not taken for the deed. Proof of the overt act plus proof of a treasonable intent make clear that the treasonable design has moved out of the realm of thought into the field of action. And any possibility that an act innocent on its face has been transformed into a sinister or guilty act is foreclosed. For the significance and character of the act are supplied by the admissions from the lips of

the accused in open court. The contrary result could be reached only if it were necessary that the overt act manifest treason on its face. That theory is rejected by the Court. But once rejected it is fatal to the defense.

Cramer's counsel could not defend on the grounds advanced by the Court for the simple reason that the government having proved by two witnesses that Cramer met and conferred with the saboteurs, any possible insufficiency in the evidence which it adduced to show the character and significance of the meetings was cured by Cramer's own testimony. Cramer can defend only on the ground that the overt act must manifest treason, which the Court rejects, or on the ground that he had no treasonable intent, which the jury found against him on an abundance of evidence. Those are the only alternatives because concededly conferences with saboteurs here on a mission for the enemy may be wholly adequate as overt acts under the treason clause. They were proved by two witnesses as required by the Constitution. Any possible doubt as to their character and significance as parts of a treasonable project were removed by the defendant's own admissions in open court. To say that we are precluded from considering those admissions in weighing the sufficiency of the evidence of the true character and significance of the overt acts is neither good sense nor good law. Such a result makes the way easy for the traitor, does violence to the Constitution and makes justice truly blind.

APPENDIX

The most relevant source of materials for interpretation of the treason clause of the Constitution is the statute of 25 Edw. III, Stat. 5, ch. 2 (1351) and the construction which was given it. It was with that body of law and the English and colonial experience under it that the Framers were acquainted. That statute specified seven offenses as

constituting treason. As respects the three offenses relevant to our present discussion, it provided as follows: if a man "doth compass or imagine the death" of the king, or "if a man do levy war" against the king in his realm, or if he "be adherent to the king's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere, and thereof be probably attainted of open deed," he shall be guilty of treason.

Coke makes clear that the requirement of an overt act under the statute applies to all of the offenses included in the category of treason. See Coke, Institutes of the Laws of England, Third Part (5th ed., London, 1671), p. 5. There are indications by Coke that the overt act was a separate element of the offense and that its function was to show that the treasonable design had moved from thought to action. *Id.*, pp. 5, 12, 14, 38. Hale is somewhat more explicit. In discussing the offense of compassing the king's death he indicates that the overt act may be "indifferent" in character. He says, "That words may expound an overt-act to make good an indictment of treason of compassing the king's death, which overt-act possibly of itself may be indifferent and unapplicable to such an intent." 1 Hale, History of the Pleas of the Crown (Emlyn ed., London, 1736), p. 115. And he noted that "If there be an assembling together to consider how they may kill the king, this assembling is an overt-act to make good an indictment of compassing the king's death." *Id.*, p. 119. Kelyng states the same view. He cites *Sir Everard Digby's Case*, 1 St. Tr. 234, for the proposition that the meeting of persons and their consulting to destroy the king was itself an overt act. "It was resolved that where a Person knowing of the Design does meet with them, and hear them discourse of their traitorous Designs, and say or act nothing; This is High-Treason in that Party, for it is more than a bare Concealment, which is Misprision, because it sheweth his liking and approving of their De-

sign." He says that if a person not knowing their intent met with them, heard their plans, but said nothing and never met again, that would be only misprision of treason. "But if he after meet with them again, and hear their Consultations, and then conceal it, this is High-Treason. For it sheweth a liking, and an approving of their Design." Kelyng, A Report of Divers Cases in Pleas of the Crown (3d ed., London, 1873), p. *17. And see p. *21.

Foster is even more explicit. Like Coke he asserts that an overt act is required for each branch of treason covered by the Statute of Edward III. Foster, A Report of Some Proceedings on the Commission for the Trial of the Rebels in the Year 1746 in the County of Surry, and of other Crown Cases (2d ed., London, 1791), pp. 207, 237. He makes clear that an overt act is required not to corroborate the proof of a traitorous intent but to show that the treasonable project has left the realm of thought and moved into the realm of action. As respects the offense of compassing the death of the king, he says that the indictment "must charge, that the defendant did traitorously compass and imagine &c, and then go on and charge the several overt-acts as the means employed by the defendant for executing his traitorous purposes. For the compassing is considered as the treason, the overt-acts as the means made use of to effectuate the intentions and imaginations of the heart." *Id.*, p. 194. He refers to *Crohagan's Case* (Cro. Car. 332) where the defendant said "I will kill the King of England, if I can come at him" and the indictment added that he came to England for that purpose. "The traitorous intention, proved by his words, converted an action, innocent in itself, into an overt-act of treason." *Id.*, p. 202. And he also points out that "Overt-acts undoubtedly do discover the man's intentions; but, I conceive, they are not to be considered merely as evidence, but as the means made use of to effectuate the purposes of the heart." *Id.*, p. 203. And he adds, "Upon this

principle words of advice or encouragement, and, above all, consultations for destroying the King, very properly come under the notion of means made use of for that purpose. But loose words not relative to facts are, at the worst, no more than bare indications of the malignity of the heart." *Id.*, p. 204. He follows Kelyng in saying that attendance at a meeting with previous notice of the design to plot the death of the king or a return to a meeting after knowledge is gained of its treasonable purpose is treason, though bare concealment would not be if the defendant met the conspirators "accidentally or upon some indifferent occasion." *Id.*, p. 195.

It is true that these observations related to the offense of compassing or imagining the death of the king. But Foster indicates that the same test applies to make out the offense of adherence to the king's enemies. He says, "The offence of inciting foreigners to invade the kingdom is a treason of signal enormity. In the lowest estimation of things and in all possible events, it is an attempt, on the part of the offender, to render his country the seat of blood and desolation." *Id.*, pp. 196–197. This was said in connection with his discussion of *Lord Preston's* case, 12 How. St. Tr. 645, a landmark in the law of treason. Lord Preston was indicted both for compassing the death of the king and for adherence to his enemies. England was at war with France. The indictment alleged as an overt act of treason that on December 30, 1690, Lord Preston and others hired a small boat in the County of Middlesex to take them to another vessel which would carry them to France. The indictment alleged that the defendants were en route to France to communicate military information to the enemy. After the vessel set sail for France and when the vessel was in the County of Kent, the defendants were arrested. Papers containing information of value to the enemy were found on the person of Lord Preston's servant. Lord Preston contended that since the indictment laid the

treason in Middlesex there was no showing that a legally sufficient overt act of treason had been committed in that county. The court held, however, that the act of boarding the boat in Middlesex was a sufficient overt act of treason. Lord Chief Justice Holt ruled, "Now the question is, whether your lordship had a design to go to France with these papers? If you had, and if your lordship did go on ship-board in order to it, your taking boat in Middlesex in order to go on ship-board, is a fact done in the county of Middlesex." 12 How. St. Tr., p. 728.

Foster in his analysis of that case makes clear that taking the boat was an overt act sufficient not only to the crime of compassing the death of the king but also adherence to the enemies of the king. Foster, *op. cit.*, pp. 197–198. Yet on its face and standing alone the overt act of taking the boat was completely innocent and harmless. Only when it was related to other activities and events did it acquire a treasonable significance. Foster gives other indications that in case of adherence to the enemy the function of the overt act is no different than when the offense of compassing is charged. The crime of adherence is made out where the defendant attempts to send money, provisions, or information to the enemy "though the money or intelligence should happen to be intercepted. For the party in sending did all he could: the treason was complete on his part, though it had not the effect he intended." *Id.*, p. 217.

Blackstone emphasizes the desirability of a restrictive interpretation of the offense of treason, condemning "constructive" treason and "newfangled treasons" which imperil the liberty of the people. 4 Blackstone, Commentaries (6th ed. Dublin 1775), pp. 75, 83, 85, 86. Blackstone recognizes the distinction between evidence of intent and the overt act: "But, as this compassing or imagination is an act of the mind, it cannot possibly fall under any judicial cognizance, unless it be demonstrated by

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some open, or *overt*, act. And yet the tyrant Dionysius is recorded to have executed a subject, barely for dreaming that he had killed him; which was held for a sufficient proof, that he had thought thereof in his waking hours. But such is not the temper of the English law; and therefore, in this, and the three next species of treason, it is necessary that there appear an open or *overt* act of a more full and explicit nature, to convict the traitor upon." *Id.*, p. 79. When it comes to the offense of adherence to the enemy he gives examples of adequate overt acts, some of which may be innocent standing by themselves. "This must likewise be proved by some overt act, as by giving them intelligence, by sending them provisions, by selling them arms, by treacherously surrendering a fortress, or the like." *Id.*, pp. 82–83. His analysis supports the views of Foster that the function of the overt act is to show that the traitorous project has moved out of the realm of thought into the realm of action.

The English cases prior to 1790 support this thesis. We have mentioned *Lord Preston's* case. In the case of *Captain Vaughan*, 13 How. St. Tr. 485, the principal charge against the defendant was adhering to the enemy, though levying war was also alleged. The substance of the overt act of adherence was that when France and England were at war the defendant cruised in a small ship of war, in English waters, in the service of France with intent to take the king's ships. It was objected that the overt act alleged was insufficient "for it is said only he went a-cruising; whereas they ought to have alledged that he did commit some acts of hostility, and attempted to take some of the king's ships; for cruising alone cannot be an overt-act; for he might be cruising to secure the French merchant-ships from being taken, or for many other purposes, which will not be an overt-act of treason." p. 531. But Lord Chief Justice Holt ruled: "I beg your pardon. Suppose the French king, with forces, should

come to Dunkirk with a design to invade England; if any one should send him victuals, or give him intelligence, or by any other way contribute to their assistance, it would be high-treason in adhering to the king's enemies." p. 531. And Lord Chief Justice Treby added: "The indictment is laid for adhering to, and comforting and aiding the king's enemies. You would take that to be capable to be construed adhering to the king's enemies in other respects; but I take it to be a reasonable construction of the indictment, to be adhering to the king's enemies in their enmity. What is the duty of every subject? It is to fight with, subdue, and weaken the king's enemies: and contrary to this, if he confederate with, and strengthen the king's enemies, he expressly contradicts this duty of his allegiance, and is guilty of this treason of adhering to them. But then you say here is no aiding unless there were something done, some act of hostility. Now here is going aboard with an intention to do such acts; and is not that comforting and aiding? Certainly it is. Is not the French king comforted and aided, when he has got so many English subjects to go a cruising upon our ships?" pp. 532–533. And he went on to say that acts which "give the enemy heart and courage to go on with the war" are acts of adherence even though the whole project was "an unprosperous attempt." p. 533. He emphasized that the lack of success was immaterial, for "if they have success enough, it will be too late to question them." p. 533. This is plain recognition not only that the aid and comfort may be given though the project is thwarted,[1] but also that aid and comfort is given when the enemy is encouraged and his morale bolstered as well as when materials are furnished.

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[1] Accord: *William Gregg*, 14 How. St. Tr. 1371; *Trial of Dr. Hensey*, 19 How. St. Tr. 1341. Both of these involved indictments for compassing and adhering, the overt acts being letters of intelligence intercepted before they reached the enemy.

The case of *Francis De la Motte,* 21 How. St. Tr. 687, is also somewhat illuminating. The indictment charged compassing and adhering. The overt acts included writing and causing to be written documents conveying intelligence to the enemy, procuring a messenger to carry the documents, and hiring a person to gather and to send the intelligence. Mr. Justice Buller in his charge to the jury said: "The sending intelligence, or collecting intelligence, for the purpose of sending it to an enemy, to enable them to annoy us or to defend themselves, though it be never delivered to the enemy; or the hiring a person for that purpose, is an overt act of both the species of treason which I am stating to you from this indictment." p. 808.

These materials indicate that the function of the overt act was to make certain that before a conviction for the high crime of treason may be had more than a treasonable design must be established; it must be shown that action pursuant to that design has been taken. The treason of adherence was defined essentially in terms of conduct for it involved giving aid and comfort. Yet the attempt alone was sufficient; the aid and comfort need not have been received by the enemy. Conduct amounting to aid and comfort might be innocent by itself—such as collecting information or stepping into a boat. It was sufficient if in its setting it reflected a treasonable project. It need not entail material aid; comfort or encouragement was sufficient. The only requirement was that it definitely translate treasonable thought into action which plainly tended to give aid and comfort to the enemy.

These materials likewise support the contention of the government that the overt act need not manifest treason on its face.

The history of treason in this country down to the Constitution has been recently developed in Hurst, Treason in the United States, (1944) 58 Harv. L. Rev. 226. We

do not stop to explore that field. But Professor Hurst's researches make plain that prior to the revolution the influence of 25 Edw. III was strong in the colonies and that, if anything, the scope of the offense was somewhat broadened. The Revolution changed matters. The Continental Congress recommended more restrictive legislation to the colonies which limited treason to levying war and adhering to the enemy, giving him aid and comfort. *Id.*, p. 247. No form of treason by compassing was retained. *Id.*, p. 252. Distrust of constructive treason was beginning to be voiced (*id.*, pp. 253, 254) though in some colonies treason was so broadly defined as to include mere utterances of opinions. *Id.*, pp. 266 *et seq.*

The proceedings of the Constitutional Convention of 1787 have been related in the opinion of the Court. And see Hurst, Treason in the United States, 58 Harv. L. Rev. 395. As the Court points out the Framers were anxious to guard against convictions of the innocent by perjury and to remove treason from the realm of domestic, political disputes. Franklin expressed concern on the first in his statement that "prosecutions for treason were generally virulent; and perjury too easily made use of against innocence." 2 Farrand, Records of the Federal Convention, p. 348. Madison and Jefferson [2] both expressed distrust of treason for its long history of abuse in the political field. Madison said in language somewhat reminiscent of Blackstone: "As treason may be committed

[2] In a letter of April 24, 1792, Jefferson, then Secretary of State, wrote: "Treason, . . . when real, merits the highest punishment. But most codes extend their definitions of treason to acts not really against one's country. They do not distinguish between acts against the *government* and acts against the *oppressions of the government*; the latter are virtues; yet they have furnished more victims to the executioner than the former; because real treasons are rare; oppressions frequent. The unsuccessful strugglers against tyranny, have been the chief martyrs of treason laws in all countries." See 8 Writings of Thomas Jefferson (Library ed. Wash. 1903) p. 332.

against the United States, the authority of the United States ought to be enabled to punish it. But as new-fangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free government, have usually wreaked their alternate malignity on each other, the convention have, with great judgment, opposed a barrier to this peculiar danger, by inserting a constitutional definition of the crime, fixing the proof necessary for conviction of it, and restraining the Congress, even in punishing it, from extending the consequences of guilt beyond the person of its author." The Federalist, No. XLIII.

The requirement of two witnesses was not novel. England had long had that rule. 9 Holdsworth, A History of English Law (2d ed. 1938) p. 207. The novelty was in the requirement that there be two witnesses to the "same" overt act. Moreover, there was no novelty in the offenses which were included in the definition of treason. Adhering to the enemy, giving him aid and comfort, like levying war, had long been embraced in the English crime of treason, as we have seen. But there was novelty in the narrow definition of treason which was adopted—a restrictive definition born of the fear of constructive treason and distrust of treason as a political instrument.

There is, however, no evidence whatever that the offense of adhering to the enemy giving him aid and comfort was designed to encompass a narrower field than that indicated by its accepted and settled meaning. Nor is there the slightest indication that the kind or character of overt acts required were any different than those which had long been recognized or accepted as adequate. The overt act was of course "intended as a distinct element of proof of the offense in addition to intent." Hurst, *op. cit.*, pp. 415–416. But any suggested difference from the body of law which preceded vanishes when two witnesses to the same overt act are produced. As respects the point vital

for our decision it is therefore quite inaccurate for the Court to conclude that our treason clause "taught a concept that differed from all historical models." That would be true only if there was a purpose to depart from the concept of adhering to the enemy or the concept of overt acts which had become ingrained in the antecedent English law. We find no such purpose.

HERB *v.* PITCAIRN ET AL., RECEIVERS FOR WABASH RAILWAY CO.

NO. 24. CERTIORARI TO THE SUPREME COURT OF ILLINOIS.*

Decided April 23, 1945.

For purposes of the Federal Employers' Liability Act, which provides that "No action shall be maintained under this chapter unless commenced within two years from the day the cause of action accrued," an action is "commenced" when instituted by service of process issued out of a state court which is itself unable to proceed to judgment but which by the state law or practice is directed or permitted to transfer the proceeding, by change of venue or otherwise, to a court which does have jurisdiction to hear and determine the cause. P. 78.

384 Ill. 237, 281; 51 N. E. 2d 277, 282, reversed.

CERTIORARI, 321 U. S. 759, to review judgments affirming dismissals of two suits under the Federal Employers' Liability Act. An earlier opinion of this Court in this case is reported in 324 U. S. 117.

Messrs. Roberts P. Elam and *Mark D. Eagleton* for petitioner.

Messrs. Carleton S. Hadley, Geo. D. Burroughs, Bruce A. Campbell, James A. Farmer and *Walton Whitwell* for respondents.

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*Together with No. 25, *Belcher* v. *Louisville & Nashville Railroad Co.*, also on certiorari to the Supreme Court of Illinois.

Mr. Justice Jackson delivered the opinion of the Court.

These cases were heretofore considered and disposition was deferred to enable petitioners to apply for clarification of the grounds upon which the Supreme Court of Illinois intended to rest its judgments. *Herb* v. *Pitcairn,* 324 U.S. 117.

That court, responding to petitioners' request, has made clear that its judgment resulted solely from its interpretation of a federal statute of limitations applicable to actions under the Federal Employers' Liability Act which provided: "No action shall be maintained under this chapter unless commenced within two years from the day the cause of action accrued." 35 Stat. 66, 45 U. S. C. 56; amended to three years, August 11, 1939, 53 Stat. 1404. That court said (March 21, 1945) that it "did not pass upon any of the questions certified except to apply the limitation of two years fixed in the last-mentioned statute after deciding whether said cause had been commenced when it was filed in the city court of Granite City, Illinois." And it added: "We observed that section 6 of the Federal Employers' Liability Act required the plaintiff to commence an action within two years from the date of the injury; that the city court of Granite City had no jurisdiction of the cause for the reasons set forth in the opinion, and that, under Illinois law, commencing an action means starting it in a court that has the power to decide the matter involved, to issue process, to bring the parties to the particular cause before it and to render and enforce a judgment on the merits of said cause."

We are unable to agree to an interpretation of the federal statute by which a case is not "commenced" for its purposes unless instituted in a court with power to proceed to final judgment. An action is "commenced" for these purposes as a matter of federal law when instituted by

service of process issued out of a state court, even if one which itself is unable to proceed to judgment, if the state law or practice directs or permits the transfer through change of venue or otherwise to a court which does have jurisdiction to hear, try, and otherwise determine that cause. Whether the action would be barred if state law made new or supplemental process necessary is a question not involved here and not decided. Clearly, however, when process has been adequate to bring in the parties and to start the case on a course of judicial handling which may lead to final judgment without issuance of new initial process, it is enough to commence the action within the federal statute. As these cases were dismissed solely because of a contrary view, the judgments are reversed and the causes remanded to the Supreme Court of Illinois for further proceedings not inconsistent with our opinions herein.

HOOVER COMPANY *v.* COE, COMMISSIONER OF PATENTS.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

No. 486. Argued March 5, 1945.—Decided April 30, 1945.

1. A federal district court has jurisdiction of a suit under R. S. § 4915 to review a decision of the Board of Appeals of the Patent Office rejecting a claim as not reading on the disclosure in the application for a patent. Pp. 80, 83.

   Jurisdiction is not defeated by the fact that an adjudication favorable to the applicant might not conclude all possible questions as to the applicant's right to a patent.

2. The right of the applicant in such case to sue under R. S. § 4915 is supported by the language of the statute, its legislative history, administrative practice, and judicial construction. Pp. 80, 84.

3. *Hill* v. *Wooster*, 132 U. S. 693, distinguished. P. 89.

144 F. 2d 514, reversed.

CERTIORARI, 323 U. S. 697, to review the affirmance of a judgment dismissing a suit against the Commissioner of Patents under R. S. § 4915.

Messrs. William D. Sellers and *Richard R. Fitzsimmons,* with whom *Mr. William S. Hodges* was on the brief, for petitioner.

Mr. T. Hayward Brown argued the cause, and *Solicitor General Fahy, Assistant Attorney General Shea, Messrs. Robert L. Stern, Joseph B. Goldman* and *Joseph Houghton* were on the brief, for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The question presented is whether a District Court has jurisdiction of a suit under R. S. 4915[1] to review the refusal of a claim for patent as not reading on the application. The court below answered in the negative.

The respondent confesses error. The language of the Act, its legislative history, administrative practice, and judicial construction, constrain us to hold that the District Court had jurisdiction of the suit and that the Court of Appeals should have reviewed its decision upon the merits.

January 10, 1941, the petitioner's assignor filed application for a reissue of a patent granted November 7, 1939, on an original application of August 8, 1936. The alleged invention is for improvements in a refrigerating system. A number of claims included in the application for reissue were copied, or substantially copied, from several later patents, in order to provoke interferences therewith and a contest as to priority of invention.

The Primary Examiner finally rejected four of the claims, stating that they were rejected "as not reading on applicant's disclosure." The Board of Appeals of the Pat-

[1] 35 U. S. C. § 63.

ent Office affirmed the Examiner's decision. The petitioner then brought suit against the Commissioner of Patents under R. S. 4915 in the United States District Court for the District of Columbia, to compel him to allow the four claims, to the end that interference proceedings might be instituted. The case was heard on the Patent Office record and additional evidence. The court entered findings of fact and conclusions of law and dismissed the complaint on the ground that the claims did not read on, that is, did not accurately describe, the disclosure in the application.

On appeal the court below on its own motion raised the question "whether [R. S. 4915] confers jurisdiction on the District Court to enter a decree which does not determine the right of the applicant to receive a patent but which instead directs the examiner to allow claims for the purpose of provoking subsequent interference proceedings." The parties were heard upon this question and the court decided that the District Court lacked jurisdiction of the suit, and on that ground affirmed its judgment of dismissal.[2]

R. S. 4915 is in part:

"Whenever a patent on application is refused by the Board of Appeals or whenever any applicant is dissatisfied with the decision of the board of interference examiners, the applicant, unless appeal has been taken to the United States Court of Customs and Patent Appeals, and such appeal is pending or has been decided, in which case no action may be brought under this section, may have remedy by bill in equity, if filed within six months after such refusal or decision; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim or for any part thereof, as the facts

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[2] 144 F. 2d 514.

in the case may appear. And such adjudication, if it be in favor of the right of the applicant, shall authorize the commissioner to issue such patent on the applicant filing in the Patent Office a copy of the adjudication and otherwise complying with the requirements of law. In all cases where there is no opposing party a copy of the bill shall be served on the commissioner; and all the expenses of the proceedings shall be paid by the applicant, whether the final decision is in his favor or not."

The court below held that in conformity to the general rule, a court of equity ought not to afford piecemeal relief pending completion of the administrative process, and consequently ought not to entertain a suit under the statute unless its adjudication would conclude all possible questions as to the right to a patent.

1. On its face the statute confers the right to sue "Whenever a patent on application is refused by the Board of Appeals." The patent applied for (that is, the claims in question) was finally refused by the Board of Appeals. No appeal was taken to the United States Court of Customs and Patent Appeals, and petitioner filed its bill within the time limited in the section.

Two matters may be noted respecting R. S. 4915. These are the denial of jurisdiction if appeal has been taken to the United States Court of Customs and Patent Appeals and the statement that adjudication in favor of the applicant shall authorize the Commissioner to issue a patent. These provisions require reference to R. S. 4911, as amended. That section provides:

"If any applicant is dissatisfied with the decision of the board of appeals, he may appeal to the United States Court of Customs and Patent Appeals, in which case he waives his right to proceed under section 63 [R. S. 4915] of this title. If any party to an interference is dissatisfied with the decision of the board of interference examiners, he may appeal to the United States Court of Customs and

Patent Appeals: *Provided,* That such appeal shall be dismissed if any adverse party to such interference shall, within twenty days after the appellant shall have filed notice of appeal according to section 60 of this title, file notice with the Commissioner of Patents that he elects to have all further proceedings conducted as provided in Section 63 [R. S. 4915]. Thereupon the appellant shall have thirty days thereafter within which to file a bill in equity under said section 63 [R. S. 4915], in default of which the decisions appealed from shall govern the further proceedings in the case."

It is evident that alternative rights of review are accorded an applicant,—one by appeal to the United States Court of Customs and Patent Appeals, the other by bill in equity filed in one of the federal district courts. In the first the hearing is summary and solely on the record made in the Patent Office; [3] in the other a formal trial is afforded on proof which may include evidence not presented in the Patent Office.[4] Every party adversely affected by a ruling on the merits may, if he so elect, proceed by bill rather than by appeal. In the one case the adjudication in equity authorizes issue of a patent on the applicant's "otherwise complying with the requirements of law." In the other the decision "shall govern the further proceedings in the case" in the Patent Office.[5]

The question is whether the differences in the character of the proceedings and the statutory effect of decision or adjudication require a holding that as to all decisions on the merits adverse to the applicant, other than the final action as to the issue of a patent, the applicant must obtain review by appeal to the Court of Customs and Patent Appeals, and can proceed by bill under R. S. 4915 only when every step requisite to issue has been taken. If so,

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[3] See R. S. 4914, 35 U. S. C. § 62.

[4] *Butterworth* v. *Hoe,* 112 U. S. 50, 61.

[5] R. S. 4911, *supra.*

the language of R. S. 4915 is ill chosen. "Whenever a patent on application is refused" states precisely this case. The petitioner's application was refused. "Whenever any applicant is dissatisfied with the decision of the board of interference examiners" states a case where the examiner's decision may be only one of a series of rulings in the Patent Office prior to issue of a patent. It can hardly be that these phrases have no effect and are to be read as "Whenever, after all administrative steps are complete and a patent is about to issue, any person aggrieved may have remedy by bill in equity." If that be the correct construction, one finally denied a patent could not resort to the specified remedy, since, even if his contention were sustained, he might thereafter have to leap the hurdles in the Patent Office of interferences, later references, and other obstacles to patentability.

On the face of the statutes the applicant is given alternative remedies resulting in the same sort of relief so far as concerns the further prosecution of the application in the Patent Office.

2. The legislative history confirms the view that Congress so intended.

That history cannot be stated briefly. It has its origin in the Patent Act of 1836 [6] which afforded an applicant aggrieved by a ruling of the Commissioner an appeal to a board of examiners.[7] By a later section it was provided that "whenever a patent on application shall have been refused on an adverse decision of a board of examiners, on the ground that the patent applied for would interfere with an unexpired patent," the applicant might have remedy by bill in equity; and the court might adjudge the applicant entitled to a patent, according to his claim or any part of it. Adjudication favorable to the applicant was to "authorize the Commissioner to issue such patent" on the applicant's filing a copy of the adjudication "and

[6] 5 Stat. 117.

[7] § 7, 5 Stat. 119–120.

otherwise complying with the requisitions of this act."[8] It will be noted that a bill might be filed under this statute only where the rejection of a claim was for interference with an outstanding patent. By the Act of March 3, 1837,[9] the same remedy was afforded an applicant for patent for an improvement or for "correction and re-issue."

By the Act of March 3, 1839,[10] the same remedy was extended "to all cases where patents are refused for any reason whatever, either by the Commissioner of Patents or by the chief justice of the District of Columbia, upon appeals from the decision of said Commissioner," as well as where the refusal was based on asserted interference. The reason for adding the phrase concerning the decision of the Chief Justice was that, by § 11[11] of the same Act, a summary appeal on the Patent Office record to this judicial officer was substituted for the former appeal to a board of examiners given by the Act of 1836.[12]

Thus a District Court might set aside, on bill filed, any ruling refusing a patent, either on interference or otherwise, whether the ruling were that of the Patent Office or of a judge of the Circuit Court of the District of Columbia on appeal from the Patent Office decision.

The Act of July 8, 1870,[13] amended, revised, and consolidated existing law. In § 48[14] it enacted that in *ex parte* cases an applicant for patent or reissue whose claims had been twice rejected might appeal to the Supreme Court of the District of Columbia. The hearing was to be summary, to be on the office record, and the decision

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[8] § 16, 5 Stat. 123.

[9] 5 Stat. 191.

[10] § 10, 5 Stat. 354.

[11] 5 Stat. 354.

[12] By the Act of August 30, 1852, 10 Stat. 75, such summary appeal might be heard by any judge of the Circuit Court of the District of Columbia.

[13] 16 Stat. 198.

[14] 16 Stat. 205.

was "to govern the further proceedings in the case."[15] In § 52 it provided that whenever a patent on application "is refused, for any reason whatever," either by the Commissioner or by the Supreme Court of the District upon appeal, the remedy by bill in equity should be available. The adjudication was to authorize the issue of a patent on the applicant's filing a copy in the Patent Office "and otherwise complying with the requisitions of law." This statute was construed to require an appeal to the District Supreme Court as a condition precedent to the maintenance of a bill in equity.[16]

The provisions of the Act of 1870 were codified in the Revised Statutes of 1873.[17] In the process the words "for any reason whatever" were deleted from § 52, which became R. S. 4915. The omission was evidently because the words were surplusage, since the purpose of the revisers was not "to attempt any change whatever in the existing law" except "mere changes of phraseology not affecting the meaning of the law."[18]

By the Act of February 9, 1893[19] the Court of Appeals for the District of Columbia was created and jurisdiction of summary appeals from Patent Office rulings was transferred to that court. Thus the remedy by bill in equity was now to be pursued in a District Court only after an appeal to the Court of Appeals of the District had resulted adversely to the applicant; and an adjudication in the equity suit was subjected to review on appeal.

So matters stood until the passage of the Act of March 2, 1927.[20] In the hearings on the bill which became the statute, it was proposed that Congress eliminate either the

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[15] § 50, 16 Stat. 205.

[16] *Kirk* v. *Commissioner of Patents* (1886), C. D. 440; *Fekete* v. *Robertson,* 17 F. 2d 335; *Cooper* v. *Robertson,* 38 F. 2d 852.

[17] The relevant sections are 4911–15 inclusive.

[18] 2 Cong. Rec. 646.

[19] 27 Stat. 434, 436.

[20] 44 Stat. 1335.

appeal or the bill in equity, some interested parties suggesting abolition of the one remedy, others advocating dropping the other. Congress decided not to do away with either, but to allow an applicant "to have the decision of the Patent Office reviewed either by the court of appeals or by filing a bill in equity, but not both." [21] It is evident that no alteration in respect of the rulings which could be reviewed was intended; but the number of possible appeals was to be reduced, while saving to litigants the option of producing new evidence in a court, by retaining the equity procedure.[22]

Finally, the Act of March 2, 1929 [23] transferred from the Court of Appeals of the District to the Court of Customs and Patent Appeals jurisdiction of appeals from the Patent Office, but *ex industria* provided "Nothing contained in this Act shall be construed as affecting in any way the jurisdiction of the Court of Appeals of the District of Columbia in equity cases." This was of course to make it plain that suits in the District Court of the District of Columbia should be appealable as are suits under R. S. 4915 instituted in district courts in circuits outside the District.

Thus it is clear that throughout more than a century Congress has for correction of erroneous adverse rulings, which if unreversed would end the proceedings in the Patent Office, preserved the remedy by bill in a District Court

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[21] H. R. No. 1889, pp. 2–3; S. R. No. 1313, p. 4, 69th Cong., 2d Sess.

[22] See H. R. 1889, *supra,* p. 3; Hearings, House Committee on Patents, on H. R. 6552 and H. R. 7087, 69th Cong., 1st Sess., pp. 21–22; Hearings, House Committee on Patents, on H. R. 7563 and H. R. 13487, 69th Cong., 2d Sess., p. 11; Hearings, Senate Committee on Patents, on S. 4812, 69th Cong., 2d Sess., p. 15; Hearings, House Committee on the Judiciary, on H. R. 6687, 70th Cong., 1st Sess., *passim;* cf. Hearings, House Committee on Patents, on H. R. 7563 and H. R. 13487, 69th Cong., 2d Sess., p. 31; Hearings, House Committee on Patents, on H. R. 6252 and H. R. 7087, 69th Cong., 1st Sess., p. 79.

[23] 45 Stat. 1475.

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either as additional to or alternative to that by summary appeal and has made the effect of adjudication in equity the same as that of decision on appeal.

3. The Commissioner of Patents states that "when claims are finally rejected by the examiner and his action is affirmed by the Board of Appeals, the grounds then stated for such rejection, as well as any other grounds in support thereof, may be set up by this Office in answer to a subsequent suit by the applicant under Rev. Stat. 4915. If the adjudication by the court is favorable to the applicant, it is the practice of this Office to treat that judgment as conclusive with respect to any ground of rejection urged before the court in defense of the refusal to allow the claims in issue. In the usual case, following such adjudication, the application is allowed and, upon payment of the prescribed fee, the patent is issued. However, in rare instances where, after termination of the suit, a new reference is discovered which shows lack of patentability of the claims for a reason not considered by the court, this Office considers itself under a duty to reject the claims on the newly discovered ground, and to refuse a patent on those claims unless the applicant can overcome the new ground of rejection. Similarly, if another applicant or a patentee is claiming substantially the same subject matter as that held patentable in the Rev. Stat. 4915 suit and a question of priority arises, interference proceedings may be necessary under Rev. Stat. 4904 to determine which of the adverse claimants is the first inventor. . . . The foregoing is believed to have been the consistent practice of this Office for many years."

4. This court has repeatedly indicated a view of the meaning of R. S. 4915 which is inconsistent with the decision below,[24] although the exact question here presented

[24] *Gandy* v. *Marble*, 122 U. S. 432, 439; *In re Hien*, 166 U. S. 432, 439; *Frasch* v. *Moore*, 211 U. S. 1, 8–9; *American Steel Foundries* v. *Robertson*, 262 U. S. 209, 212–213; *United States ex rel. Baldwin Co.* v. *Robertson*, 265 U. S. 168, 180–181.

was not involved in the cases under adjudication. The lower federal courts have consistently construed the section as conferring jurisdiction in cases which are indistinguishable from that at bar.[25] They have so held in cases where it affirmatively appeared that further proceedings in the Patent Office would be necessary following adjudication in favor of the applicant,[26] and where though it did not appear of record that further proceedings would be required in the Patent Office, it was evident that they might ensue adjudication, as where a patent was denied for want of invention.[27] And, where an applicant has succeeded in a bill filed under R. S. 4915, the courts have not questioned the power of the Patent Office subsequently to disallow the claims for want of invention over a newly discovered reference to the prior art.[28]

The court below relied upon *Hill* v. *Wooster,* 132 U. S. 693, for its holding that a suit under R. S. 4915 cannot select a single issue which affects the applicant's right to a patent, without determining all the other issues on which that right depends. That case was one in which the Commissioner had decided an interference between the claims of two applicants in favor of one of them, and ordered that a patent issue. In an *inter partes* suit by the unsuccessful applicant against the successful one, this

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[25] *Dilg* v. *Moore,* 34 App. D. C. 106; *E. I. du Pont de Nemours & Co.* v. *Coe,* 89 F. 2d 679; *Pitman* v. *Coe,* 68 F. 2d 412; *Power Patents Co.* v. *Coe,* 110 F. 2d 550; *Tully* v. *Robertson,* 19 F. 2d 954; *Monopower Corp.* v. *Coe,* 33 F. Supp. 934; *Booth Fisheries Corp.* v. *Coe,* 114 F. 2d 462; *Forward Process Co.* v. *Coe,* 116 F. 2d 946.

[26] *Pitman* v. *Coe, supra; International Cellucotton Co.* v. *Coe,* 85 F. 2d 869; *American Cyanamid Co.* v. *Coe,* 106 F. 2d 851.

[27] *American Steel & Wire Co.* v. *Coe,* 105 F. 2d 17; *Abercrombie* v. *Coe,* 119 F. 2d 458; *General Motors Corp.* v. *Coe,* 120 F. 2d 736; *Radtke Patents Corp.* v. *Coe,* 122 F. 2d 937; *Hydraulic Press Corp.* v. *Coe,* 124 F. 2d 521; *Minnesota Mining & Mfg. Co.* v. *Coe,* 125 F. 2d 198; *Poulsen* v. *McDowell,* 142 F. 2d 267.

[28] *Gold* v. *Newton,* 254 F. 824.

court held that if it appeared that neither application disclosed invention (a matter which should have moved the Commissioner not to declare an interference) the bill should be dismissed.[29] The court did not purport to decide what Patent Office rulings are reviewable under R. S. 4915.[30]

The ruling of the Board of Appeals in the instant case was neither a procedural ruling[31] nor an interlocutory one[32] as to which the District Court should not entertain a suit under R. S. 4915. On the contrary, it finally denied a patent on the claims presented. In this respect it was like a dismissal of a suit in a court. Unless the applicant could sue to correct error in that dismissal, he could never sue under R. S. 4915. That he was accorded a right of suit in this case the language of the statute, its history, the administrative construction and judicial decision unite in affirming.

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

Reversed.

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[29] Section 16 of the Act of 1836, 5 Stat. 123, *supra,* expressly provided that upon a bill filed as a result of Patent Office decision on an interference the court might adjudge either of the patents void in whole or in part. This language was evidently omitted in later acts as surplusage, for obviously if either patent was void for lack of invention or other cause, the question of interference disappeared.

[30] This is equally true of *Radtke Patents Corp.* v. *Coe,* 122 F. 2d 937, on which the court below relied.

[31] *Butterworth* v. *Hoe,* 112 U. S. 50; *Shoemaker* v. *Robertson,* 54 F. 2d 456; *Chessin* v. *Robertson,* 63 F. 2d 267; *Cherry-Burrell Corp.* v. *Coe,* 143 F. 2d 372.

[32] *American Cable Co.* v. *John A. Roebling's Sons Co.,* 65 F. 2d 801; *Synthetic Plastics Co.* v. *Ellis-Foster Co.,* 78 F. 2d 847.

SCREWS ET AL. v. UNITED STATES.

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

No. 42. Argued October 20, 1944.—Decided May 7, 1945.

1. Upon review of a judgment affirming the conviction, for violation of § 20 of the Criminal Code and conspiracy thereunto, of local law-enforcement officers who arrested a negro citizen for a state offense and wrongfully beat him to death, the judgment is reversed with directions for a new trial. Pp. 92–94, 113.

Opinion of DOUGLAS, J., in which the CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE REED concur:

2. Section 20 of the Criminal Code, so far as it penalizes acts which "willfully" deprive a person of any right secured to him by the due process clause of the Fourteenth Amendment, is to be construed as requiring a specific intent to deprive of a right which has been made specific by the express terms of the Constitution or laws of the United States or by decisions interpreting them; and, as so construed, the section is not unconstitutional as lacking an ascertainable standard of guilt. P. 101.
3. The trial court erred in not instructing the jury that, in order to convict, they must find that the defendants had the purpose to deprive the prisoner of a constitutional right. In determining whether that requisite bad purpose was present the jury would be entitled to consider all the attendant circumstances—the malice of the defendants, the weapons used in the assault, the character and duration of the assault, the provocation, if any, and the like. P. 106.
4. Although no exception was taken to the trial court's charge, the error was so fundamental—failure to submit to the jury the essential elements of the only offense on which the conviction could rest—that this Court takes note of it *sua sponte*. P. 107.
5. In making the arrest and in assaulting the prisoner, the defendants acted "under color of law," within the meaning of § 20 of the Criminal Code. P. 107.

Defendants were officers of the law who had made an arrest, and it was their duty under the law of the State to make the arrest

effective. By their own admissions, they made the assault in order to protect themselves and to keep the prisoner from escaping. 140 F. 2d 662, reversed.

CERTIORARI, 322 U. S. 718, to review a judgment affirming convictions for violation of § 20 of the Criminal Code and conspiracy.

Mr. James F. Kemp, with whom *Messrs. Clint W. Hager* and *Robert B. Short* were on the brief, for petitioners.

Solicitor General Fahy, with whom *Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl* and *Irving S. Shapiro* were on the brief, for the United States.

Messrs. William H. Hastie, Thurgood Marshall and *Leon A. Ransom* filed a brief on behalf of the National Association for the Advancement of Colored People, as *amicus curiae,* urging affirmance.

MR. JUSTICE DOUGLAS announced the judgment of the Court and delivered the following opinion, in which the CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE REED concur.

This case involves a shocking and revolting episode in law enforcement. Petitioner Screws was sheriff of Baker County, Georgia. He enlisted the assistance of petitioner Jones, a policeman, and petitioner Kelley, a special deputy, in arresting Robert Hall, a citizen of the United States and of Georgia. The arrest was made late at night at Hall's home on a warrant charging Hall with theft of a tire. Hall, a young negro about thirty years of age, was handcuffed and taken by car to the court house. As Hall alighted from the car at the court-house square, the three petitioners began beating him with their fists and with a solid-bar blackjack about eight inches long and weighing two pounds. They claimed Hall had reached for a gun and had used insulting language as he alighted from the

car. But after Hall, still handcuffed, had been knocked to the ground they continued to beat him from fifteen to thirty minutes until he was unconscious. Hall was then dragged feet first through the court-house yard into the jail and thrown upon the floor dying. An ambulance was called and Hall was removed to a hospital where he died within the hour and without regaining consciousness. There was evidence that Screws held a grudge against Hall and had threatened to "get" him.

An indictment was returned against petitioners—one count charging a violation of § 20 of the Criminal Code, 18 U. S. C. § 52 and another charging a conspiracy to violate § 20 contrary to § 37 of the Criminal Code, 18 U. S. C. § 88. Sec. 20 provides:

"Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000, or imprisoned not more than one year, or both."

The indictment charged that petitioners, acting under color of the laws of Georgia, "willfully" caused Hall to be deprived of "rights, privileges, or immunities secured or protected" to him by the Fourteenth Amendment—the right not to be deprived of life without due process of law; the right to be tried, upon the charge on which he was arrested, by due process of law and if found guilty to be punished in accordance with the laws of Georgia; that is to say that petitioners "unlawfully and wrongfully did assault, strike and beat the said Robert Hall about the head with human fists and a blackjack causing injuries" to Hall "which were the proximate and immediate cause

of his death." A like charge was made in the conspiracy count.

The case was tried to a jury.[1] The court charged the jury that due process of law gave one charged with a crime the right to be tried by a jury and sentenced by a court. On the question of intent it charged that

". . . if these defendants, without its being necessary to make the arrest effectual or necessary to their own personal protection, beat this man, assaulted him or killed him while he was under arrest, then they would be acting illegally under color of law, as stated by this statute, and would be depriving the prisoner of certain constitutional rights guaranteed to him by the Constitution of the United States and consented to by the State of Georgia."

The jury returned a verdict of guilty and a fine and imprisonment on each count was imposed. The Circuit Court of Appeals affirmed the judgment of conviction, one judge dissenting. 140 F. 2d 662. The case is here on a petition for a writ of certiorari which we granted because of the importance in the administration of the criminal laws of the questions presented.

I

We are met at the outset with the claim that § 20 is unconstitutional, insofar as it makes criminal acts in violation of the due process clause of the Fourteenth Amendment. The argument runs as follows: It is true that this Act as construed in *United States* v. *Classic,* 313 U. S. 299, 328, was upheld in its application to certain ballot box frauds committed by state officials. But in that case the constitutional rights protected were the rights to vote

[1] A demurrer to the indictment alleging among other things that the matters charged did not constitute an offense against the United States and did not come within the purview of § 20 was overruled. At the end of the government's case petitioners' motion for a directed verdict on the grounds of the insufficiency of the evidence was denied.

specifically guaranteed by Art. I, § 2 and § 4 of the Constitution. Here there is no ascertainable standard of guilt. There have been conflicting views in the Court as to the proper construction of the due process clause. The majority have quite consistently construed it in broad general terms. Thus it was stated in *Twining* v. *New Jersey,* 211 U. S. 78, 101, that due process requires that "no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law and protect the citizen in his private right, and guard him against the arbitrary action of government." In *Snyder* v. *Massachusetts,* 291 U. S. 97, 105, it was said that due process prevents state action which "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." The same standard was expressed in *Palko* v. *Connecticut,* 302 U. S. 319, 325, in terms of a "scheme of ordered liberty." And the same idea was recently phrased as follows: "The phrase formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial." *Betts* v. *Brady,* 316 U. S. 455, 462.

It is said that the Act must be read as if it contained those broad and fluid definitions of due process and that if it is so read it provides no ascertainable standard of guilt. It is pointed out that in *United States* v. *Cohen Grocery Co.,* 255 U. S. 81, 89, an Act of Congress was struck down, the enforcement of which would have been "the exact equivalent of an effort to carry out a statute

which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury." In that case the act declared criminal was the making of "any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries." 255 U. S. p. 86. The Act contained no definition of an "unjust or unreasonable rate" nor did it refer to any source where the measure of "unjust or unreasonable" could be ascertained. In the instant case the decisions of the courts are, to be sure, a source of reference for ascertaining the specific content of the concept of due process. But even so the Act would incorporate by reference a large body of changing and uncertain law. That law is not always reducible to specific rules, is expressible only in general terms, and turns many times on the facts of a particular case. Accordingly, it is argued that such a body of legal principles lacks the basic specificity necessary for criminal statutes under our system of government. Congress did not define what it desired to punish but referred the citizen to a comprehensive law library in order to ascertain what acts were prohibited. To enforce such a statute would be like sanctioning the practice of Caligula who "published the law, but it was written in a very small hand, and posted up in a corner, so that no one could make a copy of it." Suetonius, Lives of the Twelve Caesars, p. 278.

The serious character of that challenge to the constitutionality of the Act is emphasized if the customary standard of guilt for statutory crimes is taken. As we shall see, specific intent is at times required. Holmes, The Common Law, pp. 66 *et seq.* But the general rule was stated in *Ellis* v. *United States,* 206 U. S. 246, 257, as follows: "If a man intentionally adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by the law under those circumstances, he intentionally breaks the law in the only sense in which the law ever considers intent." And see *Horning* v. *District of*

Columbia, 254 U. S. 135, 137; *Nash* v. *United States,* 229 U. S. 373, 377. Under that test a local law enforcement officer violates § 20 and commits a federal offense for which he can be sent to the penitentiary if he does an act which some court later holds deprives a person of due process of law. And he is a criminal though his motive was pure and though his purpose was unrelated to the disregard of any constitutional guarantee. The treacherous ground on which state officials—police, prosecutors, legislators, and judges—would walk is indicated by the character and closeness of decisions of this Court interpreting the due process clause of the Fourteenth Amendment. A confession obtained by too long questioning (*Ashcraft* v. *Tennessee,* 322 U. S. 143); the enforcement of an ordinance requiring a license for the distribution of religious literature (*Murdock* v. *Pennsylvania,* 319 U. S. 105); the denial of the assistance of counsel in certain types of cases (Cf. *Powell* v. *Alabama,* 287 U. S. 45 with *Betts* v. *Brady, supra*); the enforcement of certain types of anti-picketing statutes (*Thornhill* v. *Alabama,* 310 U. S. 88); the enforcement of state price control laws (*Olsen* v. *Nebraska,* 313 U. S. 236); the requirement that public school children salute the flag (*Board of Education* v. *Barnette,* 319 U. S. 624)—these are illustrative of the kind of state action [2] which might or might not be caught in the broad reaches of § 20 dependent on the prevailing view of the Court as constituted when the case arose. Those who enforced local law today might not know for many months (and meanwhile could not find out) whether what they did deprived some one of due process of law. The enforcement of a criminal statute so construed would indeed cast

[2] Moreover, federal as well as state officials would run afoul of the Act since it speaks of "any law, statute, ordinance, regulation, or custom." Comparable uncertainties will exist in the application of the due process clause of the Fifth Amendment.

law enforcement agencies loose at their own risk on a vast uncharted sea.

If such a construction is not necessary, it should be avoided. This Court has consistently favored that interpretation of legislation which supports its constitutionality. *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 348; *Labor Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 30; *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337, 351–352. That reason is impelling here so that if at all possible § 20 may be allowed to serve its great purpose—the protection of the individual in his civil liberties.

Sec. 20 was enacted to enforce the Fourteenth Amendment.[3] It derives[4] from § 2 of the Civil Rights Act of April 9, 1866. 14 Stat. 27.[5] Senator Trumbull, chairman of the Senate Judiciary Committee which reported the bill, stated that its purpose was "to protect all persons in the United States in their civil rights, and furnish the means of their vindication." Cong. Globe, 39th Cong., 1st Sess., p. 211. In origin it was an antidiscrimination measure (as its language indicated), framed to protect Negroes in their newly won rights. See Flack, The Adoption of the Fourteenth Amendment (1908), p. 21. It was

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[3] See Cong. Globe, 41st Cong., 2d Sess., pp. 3807–3808, 3881. Flack, The Adoption of the Fourteenth Amendment (1908), pp. 19–54, 219, 223, 227; *Hague* v. *C. I. O.,* 307 U. S. 496, 510.

[4] See *United States* v. *Classic,* 313 U. S. 299, 327, note 10.

[5] "That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court."

amended by § 17 of the Act of May 31, 1870, 16 Stat. 144,[6] and made applicable to "any inhabitant of any State or Territory."[7] The prohibition against the "deprivation of any rights, privileges, or immunities, secured or protected by the Constitution and laws of the United States" was introduced by the revisers in 1874. R. S. § 5510. Those words were taken over from § 1 of the Act of April 20, 1871, 17 Stat. 13 (the so-called Ku-Klux Act) which provided civil suits for redress of such wrongs.[8] See Cong. Rec.,

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[6] "That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by the last preceding section of this act, or to different punishment, pains, or penalties on account of such person being an alien, or by reason of his color or race, than is prescribed for the punishment of citizens, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court."

The preceding section referred to read as follows:

"That all persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding. No tax or charge shall be imposed or enforced by any State upon any person immigrating thereto from a foreign country which is not equally imposed and enforced upon every person immigrating to such State from any other foreign country; and any law of any State in conflict with this provision is hereby declared null and void."

[7] Its sponsor, Senator Stewart, stated that "It extends the operation of the civil rights bill, which is well known in the Senate and to the country, to all persons within the jurisdiction of the United States." Cong. Globe, 41st Cong., 2d Sess., p. 1536.

[8] That section provided in part:

"That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be

43d Cong., 1st Sess., p. 828. The 1874 revision was applicable to any person who under color of law, etc., "subjects, or causes to be subjected" any inhabitant to the deprivation of any rights, etc. The requirement for a "willful" violation was introduced by the draftsmen of the Criminal Code of 1909. Act of March 4, 1909, 35 Stat. 1092. And we are told "willfully" was added to § 20 in order to make the section "less severe." 43 Cong. Rec., 60th Cong., 2d Sess., p. 3599.

We hesitate to say that when Congress sought to enforce the Fourteenth Amendment [9] in this fashion it did a vain thing. We hesitate to conclude that for 80 years this effort of Congress, renewed several times, to protect the important rights of the individual guaranteed by the Fourteenth Amendment has been an idle gesture. Yet if the Act falls by reason of vagueness so far as due process of law is concerned, there would seem to be a similar lack of specificity when the privileges and immunities clause (*Madden* v. *Kentucky,* 309 U. S. 83) and the equal protection clause (*Smith* v. *Texas,* 311 U. S. 128; *Hill* v. *Texas,* 316 U. S. 400) of the Fourteenth Amendment are involved. Only if no construction can save the Act from this claim of unconstitutionality are we willing to reach that result. We do not reach it, for we are of the view that if § 20 is confined more narrowly than the lower courts confined it, it can be preserved as one of the sanctions to the great rights which the Fourteenth Amendment was designed to secure.

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subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress . . ."

This section became § 1979 of the Revised Statutes and is now found in 8 U. S. C. § 43. See *Hague* v. *C. I. O., supra,* note 3, p. 510.

[9] Sec. 5 thereof provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article."

II

We recently pointed out that "willful" is a word "of many meanings, its construction often being influenced by its context." *Spies* v. *United States,* 317 U. S. 492, 497. At times, as the Court held in *United States* v. *Murdock,* 290 U. S. 389, 394, the word denotes an act which is intentional rather than accidental. And see *United States* v. *Illinois Central R. Co.,* 303 U. S. 239. But "when used in a criminal statute it generally means an act done with a bad purpose." *Id.,* p. 394. And see *Felton* v. *United States,* 96 U. S. 699; *Potter* v. *United States,* 155 U. S. 438; *Spurr* v. *United States,* 174 U. S. 728; *Hargrove* v. *United States,* 67 F. 2d 820. In that event something more is required than the doing of the act proscribed by the statute. Cf. *United States* v. *Balint,* 258 U. S. 250. An evil motive to accomplish that which the statute condemns becomes a constituent element of the crime. *Spurr* v. *United States, supra,* p. 734; *United States* v. *Murdock, supra,* p. 395. And that issue must be submitted to the jury under appropriate instructions. *United States* v. *Ragen,* 314 U. S. 513, 524.

An analysis of the cases in which "willfully" has been held to connote more than an act which is voluntary or intentional would not prove helpful as each turns on its own peculiar facts. Those cases, however, make clear that if we construe "willfully" in § 20 as connoting a purpose to deprive a person of a specific constitutional right, we would introduce no innovation. The Court, indeed, has recognized that the requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid. The constitutional vice in such a statute is the essential injustice to the accused of placing him on trial for an offense, the nature of which the statute does not define and hence of which it gives no warning.

See *United States* v. *Cohen Grocery Co., supra.* But where the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law. The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware. That was pointed out by Mr. Justice Brandeis speaking for the Court in *Omaechevarria* v. *Idaho,* 246 U. S. 343. An Idaho statute made it a misdemeanor to graze sheep "upon any range usually occupied by any cattle grower." The argument was that the statute was void for indefiniteness because it failed to provide for the ascertainment of boundaries of a "range" or for determining what length of time was necessary to make a prior occupation a "usual" one. The Court ruled that "any danger to sheepmen which might otherwise arise from indefiniteness, is removed by § 6314 of Revised Codes, which provides that: 'In every crime or public offense there must exist a union, or joint operation, of act and intent, or criminal negligence.'" *Id.,* p. 348. A similar ruling was made in *Hygrade Provision Co.* v. *Sherman,* 266 U. S. 497. The charge was that a criminal statute which regulated the sale of "kosher" meat or products "sanctioned by the orthodox Hebrew religious requirements" was unconstitutional for want of any ascertainable standard of guilt. The Court speaking through Mr. Justice Sutherland stated, ". . . since the statutes require a specific intent to defraud in order to encounter their prohibitions, the hazard of prosecution which appellants fear loses whatever substantial foundation it might have in the absence of such a requirement." 266 U. S. pp. 502–503. In *United States* v. *Ragen, supra,* we took

that course in a prosecution for willful evasion of a federal income tax where it was alleged that the defendant had deducted more than "reasonable" allowances for salaries. By construing the statute to require proof of bad faith we avoided the serious question which the rule of *United States* v. *Cohen Grocery Co., supra,* might have presented. We think a like course is appropriate here.

Moreover, the history of § 20 affords some support for that narrower construction. As we have seen, the word "willfully" was not added to the Act until 1909. Prior to that time it may be that Congress intended that he who deprived a person of any right protected by the Constitution should be liable without more. That was the pattern of criminal legislation which has been sustained without any charge or proof of *scienter*. *Shevlin-Carpenter Co.* v. *Minnesota,* 218 U. S. 57; *United States* v. *Balint, supra.* And the present Act in its original form would have been susceptible of the same interpretation apart from the equal protection clause of the Fourteenth Amendment, where "purposeful discriminatory" action must be shown. *Snowden* v. *Hughes,* 321 U. S. 1, 8–9. But as we have seen, the word "willfully" was added to make the section "less severe." We think the inference is permissible that its severity was to be lessened by making it applicable only where the requisite bad purpose was present, thus requiring specific intent not only where discrimination is claimed but in other situations as well. We repeat that the presence of a bad purpose or evil intent alone may not be sufficient. We do say that a requirement of a specific intent to deprive a person of a federal right made definite by decision or other rule of law saves the Act from any charge of unconstitutionality on the grounds of vagueness.

Once the section is given that construction, we think that the claim that the section lacks an ascertainable standard of guilt must fail. The constitutional requirement that a criminal statute be definite serves a high func-

tion. It gives a person acting with reference to the statute fair warning that his conduct is within its prohibition. This requirement is met when a statute prohibits only "willful" acts in the sense we have explained. One who does act with such specific intent is aware that what he does is precisely that which the statute forbids. He is under no necessity of guessing whether the statute applies to him (see *Connally* v. *General Construction Co.*, 269 U. S. 385) for he either knows or acts in reckless disregard of its prohibition of the deprivation of a defined constitutional or other federal right. See *Gorin* v. *United States*, 312 U. S. 19, 27–28. Nor is such an act beyond the understanding and comprehension of juries summoned to pass on them. The Act would then not become a trap for law enforcement agencies acting in good faith. "A mind intent upon willful evasion is inconsistent with surprised innocence." *United States* v. *Ragen, supra*, p. 524.

It is said, however, that this construction of the Act will not save it from the infirmity of vagueness since neither a law enforcement official nor a trial judge can know with sufficient definiteness the range of rights that are constitutional. But that criticism is wide of the mark. For the specific intent required by the Act is an intent to deprive a person of a right which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them. Take the case of a local officer who persists in enforcing a type of ordinance which the Court has held invalid as violative of the guarantees of free speech or freedom of worship. Or a local official continues to select juries in a manner which flies in the teeth of decisions of the Court. If those acts are done willfully, how can the officer possibly claim that he had no fair warning that his acts were prohibited by the statute? He violates the statute not merely because he has a bad purpose but because he acts in defiance of announced rules of law. He who defies a

decision interpreting the Constitution knows precisely what he is doing. If sane, he hardly may be heard to say that he knew not what he did. Of course, willful conduct cannot make definite that which is undefined. But willful violators of constitutional requirements, which have been defined, certainly are in no position to say that they had no adequate advance notice that they would be visited with punishment. When they act willfully in the sense in which we use the word, they act in open defiance or in reckless disregard of a constitutional requirement which has been made specific and definite. When they are convicted for so acting, they are not punished for violating an unknowable something.

The Act so construed has a narrower range in all its applications than if it were interpreted in the manner urged by the government. But the only other alternative, if we are to avoid grave constitutional questions, is to construe it as applicable only to those acts which are clearly marked by the specific provisions of the Constitution as deprivations of constitutional rights, privileges, or immunities, and which are knowingly done within the rule of *Ellis* v. *United States, supra.* But as we have said, that course would mean that all protection for violations of due process of law would drop out of the Act. We take the course which makes it possible to preserve the entire Act and save all parts of it from constitutional challenge. If Congress desires to give the Act wider scope, it may find ways of doing so. Moreover, here as in *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, we are dealing with a situation where the interpretation of the Act which we adopt does not preclude any state from punishing any act made criminal by its own laws. Indeed, the narrow construction which we have adopted more nearly preserves the traditional balance between the States and the national government in law enforcement than that which is urged upon us.

United States v. *Classic, supra,* met the test we suggest. In that case we were dealing merely with the validity of an indictment, not with instructions to the jury. The indictment was sufficient since it charged a willful failure and refusal of the defendant election officials to count the votes cast, by their alteration of the ballots and by their false certification of the number of votes cast for the respective candidates. 313 U. S. pp. 308–309. The right so to vote is guaranteed by Art. I, § 2 and § 4 of the Constitution. Such a charge is adequate since he who alters ballots or without legal justification destroys them would be acting willfully in the sense in which § 20 uses the term. The fact that the defendants may not have been thinking in constitutional terms is not material where their aim was not to enforce local law but to deprive a citizen of a right and that right was protected by the Constitution. When they so act they at least act in reckless disregard of constitutional prohibitions or guarantees. Likewise, it is plain that basic to the concept of due process of law in a criminal case is a trial—a trial in a court of law, not a "trial by ordeal." *Brown* v. *Mississippi,* 297 U. S. 278, 285. It could hardly be doubted that they who "under color of any law, statute, ordinance, regulation, or custom" act with that evil motive violate § 20. Those who decide to take the law into their own hands and act as prosecutor, jury, judge, and executioner plainly act to deprive a prisoner of the trial which due process of law guarantees him. And such a purpose need not be expressed; it may at times be reasonably inferred from all the circumstances attendant on the act. See *Tot* v. *United States,* 319 U. S. 463.

The difficulty here is that this question of intent was not submitted to the jury with the proper instructions. The court charged that petitioners acted illegally if they applied more force than was necessary to make the arrest effectual or to protect themselves from the prisoner's al-

leged assault. But in view of our construction of the word "willfully" the jury should have been further instructed that it was not sufficient that petitioners had a generally bad purpose. To convict it was necessary for them to find that petitioners had the purpose to deprive the prisoner of a constitutional right, e. g. the right to be tried by a court rather than by ordeal. And in determining whether that requisite bad purpose was present the jury would be entitled to consider all the attendant circumstances—the malice of petitioners, the weapons used in the assault, its character and duration, the provocation, if any, and the like.

It is true that no exception was taken to the trial court's charge. Normally we would under those circumstances not take note of the error. See *Johnson* v. *United States,* 318 U. S. 189, 200. But there are exceptions to that rule. *United States* v. *Atkinson,* 297 U. S. 157, 160; *Clyatt* v. *United States,* 197 U. S. 207, 221–222. And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion. Even those guilty of the most heinous offenses are entitled to a fair trial. Whatever the degree of guilt, those charged with a federal crime are entitled to be tried by the standards of guilt which Congress has prescribed.

III

It is said, however, that petitioners did not act "under color of any law" within the meaning of § 20 of the Criminal Code. We disagree. We are of the view that petitioners acted under "color" of law in making the arrest of Robert Hall and in assaulting him. They were officers of the law who made the arrest. By their own admissions they assaulted Hall in order to protect themselves and to keep their prisoner from escaping. It was their duty

under Georgia law to make the arrest effective. Hence, their conduct comes within the statute.

Some of the arguments which have been advanced in support of the contrary conclusion suggest that the question under § 20 is whether Congress has made it a federal offense for a state officer to violate the law of his State. But there is no warrant for treating the question in state law terms. The problem is not whether state law has been violated but whether an inhabitant of a State has been deprived of a federal right by one who acts under "color of any law." He who acts under "color" of law may be a federal officer or a state officer. He may act under "color" of federal law or of state law. The statute does not come into play merely because the federal law or the state law under which the officer purports to act is violated. It is applicable when and only when someone is deprived of a federal right by that action. The fact that it is also a violation of state law does not make it any the less a federal offense punishable as such. Nor does its punishment by federal authority encroach on state authority or relieve the state from its responsibility for punishing state offenses.[10]

We agree that when this statute is applied to the action of state officials, it should be construed so as to respect the proper balance between the States and the federal government in law enforcement. Violation of local law does not necessarily mean that federal rights have been invaded. The fact that a prisoner is assaulted, injured, or even murdered by state officials does not necessarily mean that he is deprived of any right protected or secured by the

[10] The petitioners may be guilty of manslaughter or murder under Georgia law and at the same time liable for the federal offense proscribed by § 20. The instances where "an act denounced as a crime by both national and state sovereignties" may be punished by each without violation of the double jeopardy provision of the Fifth Amendment are common. *United States* v. *Lanza,* 260 U. S. 377, 382; *Hebert* v. *Louisiana,* 272 U. S. 312.

Constitution or laws of the United States. Cf. *Logan* v. *United States,* 144 U. S. 263, dealing with assaults by federal officials. The Fourteenth Amendment did not alter the basic relations between the States and the national government. *United States* v. *Harris,* 106 U. S. 629; *In re Kemmler,* 136 U. S. 436, 448. Our national government is one of delegated powers alone. Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States. *Jerome* v. *United States,* 318 U. S. 101, 105. As stated in *United States* v. *Cruikshank,* 92 U. S. 542, 553–554, "It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a State, than it would be to punish for false imprisonment or murder itself." And see *United States* v. *Fox,* 95 U. S. 670, 672. It is only state action of a "particular character" that is prohibited by the Fourteenth Amendment and against which the Amendment authorizes Congress to afford relief. *Civil Rights Cases,* 109 U. S. 3, 11, 13. Thus Congress in § 20 of the Criminal Code did not undertake to make all torts of state officials federal crimes. It brought within § 20 only specified acts done "under color" of law and then only those acts which deprived a person of some right secured by the Constitution or laws of the United States.

This section was before us in *United States* v. *Classic,* 313 U. S. 299, 326, where we said: "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." In that case state election officials were charged with failure to count the votes as cast, alteration of the ballots, and false certification of the number of votes cast for the respective candidates. 313 U. S. pp. 308–309. We stated that those acts of the defendants "were committed in the course of

their performance of duties under the Louisiana statute requiring them to count the ballots, to record the result of the count, and to certify the result of the election." *Id.*, pp. 325–326. In the present case, as we have said, the defendants were officers of the law who had made an arrest and who by their own admissions made the assault in order to protect themselves and to keep the prisoner from escaping, i. e., to make the arrest effective. That was a duty they had under Georgia law. *United States* v. *Classic* is, therefore, indistinguishable from this case so far as "under color of" state law is concerned. In each officers of the State were performing official duties; in each the power which they were authorized to exercise was misused. We cannot draw a distinction between them unless we are to say that § 20 is not applicable to police officers. But the broad sweep of its language leaves no room for such an exception.

It is said that we should abandon the holding of the *Classic* case. It is suggested that the present problem was not clearly in focus in that case and that its holding was ill-advised. A reading of the opinion makes plain that the question was squarely involved and squarely met. It followed the rule announced in *Ex parte Virginia,* 100 U. S. 339, 346, that a state judge who in violation of state law discriminated against negroes in the selection of juries violated the Act of March 1, 1875, 18 Stat. 336. It is true that that statute did not contain the words under "color" of law. But the Court in deciding what was state action within the meaning of the Fourteenth Amendment held that it was immaterial that the state officer exceeded the limits of his authority. ". . . as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it." 100 U. S. at p. 347. And see *Virginia* v. *Rives,*

100 U. S. 313, 321. The *Classic* case recognized, without dissent, that the contrary view would defeat the great purpose which § 20 was designed to serve. Reference is made to statements [11] of Senator Trumbull in his discussion of § 2 of the Civil Rights Act of 1866, 14 Stat. 27, and to statements of Senator Sherman concerning the 1870 Act [12] as supporting the conclusion that "under color of any law" was designed to include only action taken by officials pursuant to state law. But those statements in their context are inconclusive on the precise problem involved in the *Classic* case and in the present case. We are not dealing here with a case where an officer not authorized to act nevertheless takes action. Here the state officers were authorized to make an arrest and to take such steps as were necessary to make the arrest effective. They acted without authority only in the sense that they used excessive force in making the arrest effective. It is clear that under "color" of law means under "pretense" of law. Thus acts of officers in the ambit of their personal pursuits are plainly excluded. Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it. If, as suggested, the statute was designed to embrace only action which the State in fact authorized, the words "under color of any law" were hardly apt words to express the idea.

Nor are the decisions under § 33 of the Judicial Code, 28 U. S. C. § 76, in point. That section gives the right of removal to a federal court of any criminal prosecution begun in a state court against a revenue officer of the United States "on account of any act done under color of his office or of any such (revenue) law." The cases under it recognize that it is an "exceptional" procedure which wrests from state courts the power to try offenses against

[11] Cong. Globe, 39th Cong., 1st Sess., p. 1759.

[12] Cong. Globe, 41st Cong., 2d Sess., p. 3663.

their own laws. *Maryland* v. *Soper (No. 1)*, 270 U. S. 9, 29, 35; *Colorado* v. *Symes*, 286 U. S. 510, 518. Thus the requirements of the showing necessary for removal are strict. See *Maryland* v. *Soper (No. 2)*, 270 U. S. 36, 42, saying that acts "necessary to make the enforcement effective" are done under "color" of law. Hence those cases do not supply an authoritative guide to the problems under § 20 which seeks to afford protection against officers who possess authority to act and who exercise their powers in such a way as to deprive a person of rights secured to him by the Constitution or laws of the United States. It is one thing to deprive state courts of their authority to enforce their own laws. It is quite another to emasculate an Act of Congress designed to secure individuals their constitutional rights by finely spun distinctions concerning the precise scope of the authority of officers of the law. Cf. *Yick Wo* v. *Hopkins*, 118 U. S. 356.

But beyond that is the problem of *stare decisis*. The construction given § 20 in the *Classic* case formulated a rule of law which has become the basis of federal enforcement in this important field. The rule adopted in that case was formulated after mature consideration. It should be good for more than one day only. We do not have here a situation comparable to *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96, where we overruled a decision demonstrated to be a sport in the law and inconsistent with what preceded and what followed. The *Classic* case was not the product of hasty action or inadvertence. It was not out of line with the cases which preceded. It was designed to fashion the governing rule of law in this important field. We are not dealing with constitutional interpretations which throughout the history of the Court have wisely remained flexible and subject to frequent re-examination. The meaning which the *Classic* case gave to the phrase "under color of any law" involved only a construction of the statute. Hence if it states a rule un-

desirable in its consequences, Congress can change it. We add only to the instability and uncertainty of the law if we revise the meaning of § 20 to meet the exigencies of each case coming before us.

Since there must be a new trial, the judgment below is

Reversed.

MR. JUSTICE RUTLEDGE, concurring in the result.

For the compelling reason stated at the end of this opinion I concur in reversing the judgment and remanding the cause for further proceedings. But for that reason, my views would require that my vote be cast to affirm the judgment, for the reasons stated by MR. JUSTICE MURPHY and others I feel forced, in the peculiar situation, to state.

The case comes here established in fact as a gross abuse of authority by state officers. Entrusted with the state's power and using it, without a warrant or with one of only doubtful legality [1] they invaded a citizen's home, arrested him for alleged theft of a tire, forcibly took him in handcuffs to the courthouse yard, and there beat him to death. Previously they had threatened to kill him, fortified themselves at a near-by bar, and resisted the bartender's importunities not to carry out the arrest. Upon this and other evidence which overwhelmingly supports (140 F. 2d at 665) the verdict, together with instructions adequately

[1] The evidence was conflicting whether the warrant was made out and issued before, or after, the arrest and killing, and if issued beforehand, whether it was valid. The Court of Appeals noted there was evidence "that the alleged warrant of arrest was prepared by the sheriff and was a spurious afterthought" (140 F. 2d at 665), but assumed in the petitioner's favor that a valid warrant had been issued. The dissenting opinion said the victim's shotgun was taken from his home "not in a search of his person but apparently without lawful warrant." 140 F. 2d at 667.

covering an officer's right to use force, the jury found the petitioners guilty.

I

The verdict has shaped their position here. Their contention hardly disputes the facts on which it rests.[2] They do not come therefore as faithful state officers, innocent of crime. Justification has been foreclosed. Accordingly, their argument now admits the offense, but insists it was against the state alone, not the nation. So they have made their case in this Court.[3]

In effect, the position urges it is murder they have done,[4] not deprivation of constitutional right. Strange as the argument is the reason. It comes to this, that abuse of state power creates immunity to federal power. Because what they did violated the state's laws, the nation cannot reach their conduct.[5] It may deprive the citizen of his liberty and his life. But whatever state officers may do in abuse of their official capacity can give this Government and its courts no concern. This, though the prime object of the Fourteenth Amendment and § 20 was to secure these fundamental rights against wrongful denial by exercise of the power of the states.

The defense is not pretty. Nor is it valid. By a long course of decision from *Ex parte Virginia,* 100 U. S. 339, to *United States* v. *Classic,* 313 U. S. 299, it has been re-

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[2] The crucial dispute of fact was over whether the defendants had used more force than was necessary to restrain the prisoner. The "overwhelming weight of the testimony" (140 F. 2d at 665) was that they used not only all force required to subdue him (if it is assumed he resisted), but continued to beat him for fifteen to thirty minutes after he was knocked to the ground.

[3] Cf. Part II *infra.*

[4] The dissenting judge in the Court of Appeals thought the local offense was not "wilful murder, but rather that it was involuntary manslaughter in the commission of an unlawful act." 140 F. 2d at 666.

[5] It does not appear that the state has taken any steps toward prosecution for violation of its law.

jected.[6] The ground should not need ploughing again. It was cleared long ago and thoroughly. It has been kept clear, until the ancient doubt, laid in the beginning, was resurrected in the last stage of this case. The evidence has nullified any pretense that petitioners acted as individuals, about their personal though nefarious business. They used the power of official place in all that was done. The verdict has foreclosed semblance of any claim that only private matters, not touching official functions, were involved. Yet neither was the state's power, they say.

There is no third category. The Amendment and the legislation were not aimed at rightful state action. Abuse of state power was the target. Limits were put to state authority, and states were forbidden to pass them, by whatever agency.[7] It is too late now, if there were better reason than exists for doing so, to question that in these matters abuse binds the state and is its act, when done by

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[6] Cf. notes 7 and 10. And see *Neal* v. *Delaware,* 103 U. S. 370, 397; *Civil Rights Cases,* 109 U. S. 3, 15–18; *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226, 233–234; *Raymond* v. *Chicago Traction Co.,* 207 U. S. 20, 35–37; *Ex parte Young,* 209 U. S. 123; *Home Tel. & Tel. Co.* v. *Los Angeles,* 227 U. S. 278, 288–289; *Cuyahoga Power Co.* v. *Akron,* 240 U. S. 462; *Fidelity & Deposit Co.* v. *Tafoya,* 270 U. S. 426, 434; *Hopkins* v. *Southern California Telephone Co.,* 275 U. S. 393, 398; *Iowa-Des Moines Bank* v. *Bennett,* 284 U. S. 239, 245–246; *Nixon* v. *Condon,* 286 U. S. 73, 89; *Mosher* v. *City of Phoenix,* 287 U. S. 29; *Sterling* v. *Constantin,* 287 U. S. 378, 393; *Mooney* v. *Holohan,* 294 U. S. 103; *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337, 343; *Hague* v. *C. I. O.,* 307 U. S. 496, 512; *Cochran* v. *Kansas,* 316 U. S. 255; *Pyle* v. *Kansas,* 317 U. S. 213.

[7] "The prohibitions of the Fourteenth Amendment are directed to the States, . . . It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial. . . . Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so,

one to whom it has given power to make the abuse effective to achieve the forbidden ends. Vague ideas of dual federalism,[8] of ultra vires doctrine imported from private agency,[9] and of want of finality in official action,[10] do not nullify what four years of civil strife secured and eighty years have verified. For it was abuse of basic civil and political rights, by states and their officials, that the Amendment and the enforcing legislation were adopted to uproot.

The danger was not merely legislative or judicial. Nor was it threatened only from the state's highest officials. It was abuse by whatever agency the state might invest with its power capable of inflicting the deprivation. In all its flux, time makes some things axiomatic. One has been that state officials who violate their oaths of office and flout

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or the constitutional prohibition has no meaning." *Ex parte Virginia*, 100 U. S. 339, 346–347.

"Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." *United States* v. *Classic*, 313 U. S. 299, 326, citing *Ex parte Virginia, supra,* and other authorities.

[8] Cf. Part III *infra.* "Such enforcement [of the Fourteenth Amendment by Congress] is no invasion of State sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact. This extent of the powers of the general government is overlooked, when it is said, as it has been in this case, that the act of March 1, 1875, [18 Stat., part 3, 336] interferes with State rights." *Ex parte Virginia*, 100 U. S. at 346.

[9] Cf. *Home Tel. & Tel. Co.* v. *Los Angeles*, 227 U. S. 278, 287.

[10] Compare *Barney* v. *City of New York*, 193 U. S. 430, with *Home Tel. & Tel. Co.* v. *Los Angeles*, 227 U. S. 278, the latter suggesting that the former, "if it conflicted with the doctrine" of *Raymond* v. *Chicago Traction Co.*, 207 U. S. 20, and *Ex parte Young*, 209 U. S. 123, "is now so distinguished or qualified as not to be here authoritative or even persuasive." 227 U. S. at 294. See also *Snowden* v. *Hughes*, 321 U. S. 1, 13; Isseks, Jurisdiction of the Lower Federal Courts to Enjoin Unauthorized Action of State Officials, 40 Harv. L. Rev. 969, 972.

the fundamental law are answerable to it when their misconduct brings upon them the penalty it authorizes and Congress has provided.

There could be no clearer violation of the Amendment or the statute. No act could be more final or complete, to denude the victim of rights secured by the Amendment's very terms. Those rights so destroyed cannot be restored. Nor could the part played by the state's power in causing their destruction be lessened, though other organs were now to repudiate what was done. The state's law might thus be vindicated. If so, the vindication could only sustain, it could not detract from the federal power. Nor could it restore what the federal power shielded. Neither acquittal nor conviction, though affirmed by the state's highest court, could resurrect what the wrongful use of state power has annihilated. There was in this case abuse of state power, which for the Amendment's great purposes was state action, final in the last degree, depriving the victim of his liberty and his life without due process of law.

If the issues made by the parties themselves were allowed to govern, there would be no need to say more. At various stages petitioners have sought to show that they used no more force than was necessary, that there was no state action, and that the evidence was not sufficient to sustain the verdict and the judgment. These issues, in various formulations,[11] have comprehended their case. All have been resolved against them without error. This should end the matter.

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[11] Petitioners' objections in law were stated most specifically in the demurrer to the indictment. These grounds also were incorporated in their motion for a directed verdict and their statement of grounds for appeal. The grounds for demurrer maintained that the facts alleged were not sufficient to constitute a federal offense, to fall within or violate the terms of any federal law or statute, or to confer jurisdiction upon the District or other federal court. One ground attacked the indictment for vagueness.

II

But other and most important issues have been injected and made decisive to reverse the judgment. Petitioners have not denied that they acted "willfully" within the meaning of § 20 or that they intended to do the acts which took their victim's liberty and life. In the trial court they claimed justification. But they were unable to prove it. The verdict, on overwhelming evidence, has concluded against them their denial of bad purpose and reckless disregard of rights. This is necessarily implied in the finding that excessive force was used. No complaint was made of the charge in any of these respects and no request for additional charges concerning them was offered. Nor, in the application for certiorari or the briefs, have they raised questions of the requisite criminal intent or of unconstitutional vagueness in the statute's definition of the crime. However, these issues have been brought forward, so far as the record discloses, first by the dissenting opinion in the Court of Appeals, then by inquiry at the argument and in the disposition here.

The story would be too long, to trace in more than outline the history of § 20 and companion provisions, in particular § 19,[12] with which it must be considered on any suggestion of fatal ambiguity. But this history cannot be ignored, unless we would risk throwing overboard what the nation's greatest internal conflict created and eight

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[12] Section 19 of the Criminal Code (18 U. S. C. § 51):

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen *in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States*, or because of his having so exercised the same, or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than $5,000 and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust

decades have confirmed, in protection of individual rights against impairment by the states.

Sections 19 and 20 are twin sections in all respects that concern any question of vagueness in defining the crimes. There are important differences. Section 19 strikes at conspiracies, § 20 at substantive offenses. The former protects "citizens," the latter "inhabitants." There are, however, no differences in the basic rights guarded. Each protects in a different way the rights and privileges secured to individuals by the Constitution. If one falls for vagueness in pointing to these, the other also must fall for the same reason. If one stands, so must both. It is not one statute therefore which we sustain or nullify. It is two.

The sections have stood for nearly eighty years. Nor has this been without attack for ambiguity. Together the two sections have repelled it. In 1915, one of this Court's greatest judges, speaking for it, summarily disposed of the suggestion that § 19 is invalid: "It is not open to question that this statute is constitutional . . . [It] dealt with Federal rights and with all Federal rights, and protected them in the lump . . ." *United States* v. *Mosley,* 238 U. S. 383, 386, 387. And in *United States* v. *Classic,* 313 U. S. 299, the Court with equal vigor reaffirmed the validity of both sections, against dissenting assault for fatal

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created by the Constitution or laws of the United States." (Emphasis added.)

Section 20 (18 U. S. C. § 52) is as follows:

"Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to *the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States,* or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000, or imprisoned not more than one year, or both." (Emphasis added.)

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ambiguity in relation to the constitutional rights then in question. These more recent pronouncements but reaffirmed earlier and repeated ones. The history should not require retelling. But old and established freedoms vanish when history is forgotten.

Section 20 originated in the Civil Rights Act of 1866 (14 Stat. 27), § 19 in the Enforcement Act of 1870 (16 Stat. 141, § 6). Their great original purpose was to strike at discrimination, particularly against Negroes, the one securing civil, the other political rights. But they were not drawn so narrowly. From the beginning § 19 protected all "citizens," § 20 "inhabitants."

At first § 20 secured only rights enumerated in the Civil Rights Act. The first ten years brought it, through broadening changes, to substantially its present form. Only the word "willfully" has been added since then, a change of no materiality, for the statute implied it beforehand.[13] 35 Stat. 1092. The most important change of the first decade replaced the specific enumeration of the Civil Rights Act with the present broad language covering "the deprivation of any rights, privileges, or immunities, secured or protected by the Constitution and laws of the United States." R. S. § 5510. This inclusive designation brought § 20 into conformity with § 19's original coverage of "any right or privilege secured to him by the Constitution or laws of the United States." Since then, under these generic designations, the two have been literally identical in the scope of the rights they secure. The slight difference in wording cannot be one of substance.[14]

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[13] Cf. note 32. President Johnson, vetoing another bill on July 16, 1866, stated that the penalties of the Civil Rights Act "are denounced against the person who willfully violates the law." Cong. Globe, 39th Cong., 1st Sess., 3839.

[14] For the history of these changes, see the authorities cited in the opinion of MR. JUSTICE DOUGLAS, particularly Flack, Adoption of the Fourteenth Amendment (1908).

Throughout a long and varied course of application the sections have remained unimpaired on the score of vagueness in the crimes they denounce. From 1874 to today they have repelled all attacks proposed to invalidate them. None has succeeded. If time and uniform decision can give stability to statutes, these have acquired it.

Section 20 has not been much used, in direct application, until recently. There were however a number of early decisions.[15] Of late the section has been applied more frequently, in considerable variety of situation, against varied and vigorous attack.[16] In *United States* v. *Classic,* 313 U. S. at 321, as has been stated, this Court gave it clear-cut sanction. The opinion expressly repudiated any idea that the section, or § 19, is vitiated by ambiguity. Moreover, this was done in terms which leave no room to say that the decision was not focused upon that question.[17] True, application to Fourteenth Amendment

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[15] *United States* v. *Rhodes,* 27 Fed. Cas. 785, No. 16,151; *United States* v. *Jackson,* 26 Fed. Cas. 563, No. 15,459; *United States* v. *Buntin,* 10 F. 730; cf. *United States* v. *Stone,* 188 F. 836, a prosecution under § 37 of the Criminal Code for conspiracy to violate § 20; cf., also 197 F. 483; *United States* v. *Horton,* 26 Fed. Cas. 375, No. 15,392. The constitutionality of the statute was sustained in the Rhodes case in 1866, and in the Jackson case in 1874. It was likewise sustained in *In re Turner,* 24 Fed. Cas. 337, No. 14,247 (1867); *Smith* v. *Moody,* 26 Ind. 299 (1866).

[16] Cf. the authorities cited *infra* at note 25.

[17] Referring to § 20, the Court said: "The generality of the section, made applicable as it is to deprivations of any constitutional right, does not obscure its meaning or impair its force within the scope of its application, which is restricted by its terms to deprivations which are willfully inflicted by those acting under color of any law, statute and the like." 313 U. S. at 328.

Concerning § 19, also involved, the Court pointed to the decisions in *Ex parte Yarbrough,* 110 U. S. 651, and *United States* v. *Mosley,* 238 U. S. 383, cf. note 22, and commented: ". . . the Court found no uncertainty or ambiguity in the statutory language, obviously devised to protect the citizen 'in the free exercise or enjoyment of any

rights was reserved because the question was raised for the first time in the Government's brief filed here. 313 U. S. at 329. But the statute was sustained in application to a vast range of rights secured by the Constitution, apart from the reserved segment, as the opinion's language and the single reservation itself attest. The ruling, thus broad, could not have been inadvertent. For it was repeated concerning both sections, broadly, forcefully, and upon citation of long-established authority. And this was done in response to a vigorous dissent which made the most of the point of vagueness.[18] The point was flatly, and deliberately, rejected. The Court could not have been blinded by other issues to the import of this one.

The *Classic* decision thus cannot be put aside in this case. Nor can it be demonstrated that the rights secured by the Fourteenth Amendment are more numerous or more dubious than the aggregate encompassed by other

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right or privilege secured to him by the Constitution,' and concerned itself with the question whether the right to participate in choosing a representative is so secured. Such is our function here." 313 U. S. at 321. The opinion stated further: "The suggestion that § 19 . . . is not sufficiently specific to be deemed applicable to primary elections, will hardly bear examination. Section 19 speaks neither of elections nor of primaries. In unambiguous language it protects 'any right or privilege secured by the Constitution,' a phrase which . . . extends to the right of the voter to have his vote counted . . . as well as to numerous other constitutional rights which are wholly unrelated to the choice of a representative in Congress," citing *United States* v. *Waddell,* 112 U. S. 76; *Logan* v. *United States,* 144 U. S. 263; *In re Quarles,* 158 U. S. 532; *Motes* v. *United States,* 178 U. S. 458; *Guinn* v. *United States,* 238 U. S. 347. Cf. note 18.

[18] The dissenting opinion did not urge that §§ 19 and 20 are wholly void for ambiguity, since it put to one side cases involving discrimination for race or color as "plainly outlawed by the Fourteenth Amendment," as to which it was said, "Since the constitutional mandate is plain, there is no reason why § 19 or § 20 should not be applicable." However it was thought "no such unambiguous mandate" had been given by the constitutional provisions relevant in the *Classic* case. 313 U. S. at 332.

constitutional provisions. Certainly "the equal protection of the laws," guaranteed by the Amendment, is not more vague and indefinite than many rights protected by other commands.[19] The same thing is true of "the privileges or immunities of citizens of the United States." The Fifth Amendment contains a due process clause as broad in its terms restricting national power as the Fourteenth is of state power.[20] If § 20 (with § 19) is valid in general coverage of other constitutional rights, it cannot be void in the less sweeping application to Fourteenth Amendment rights. If it is valid to assure the rights "plainly and directly" secured by other provisions, it is equally valid to protect those "plainly and directly" secured by the Fourteenth Amendment, including the expressly guaranteed rights not to be deprived of life, liberty or property without due process of law. If in fact there could be any difference among the various rights protected, in view of the history it would be that the section applies more clearly to Fourteenth Amendment rights than to others. Its phrases "are all phrases of large generalities. But they are not generalities of unillumined vagueness; they are generalities circumscribed by history and appropriate to the largeness of the problems of government with which they were concerned." *Malinski* v. *New York,* 324 U. S. 401, concurring opinion, p. 413.

Historically, the section's function and purpose have been to secure rights given by the Amendment. From the Amendment's adoption until 1874, it was Fourteenth Amendment legislation. Surely when in that year the section was expanded to include other rights these were

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[19] Cf. note 18.

[20] Whether or not the two are coextensive in limitation of federal and state power, respectively, there is certainly a very broad correlation in coverage, and it hardly could be maintained that one is confined by more clear-cut boundaries than the other, although differences in meandering of the boundaries may exist.

not dropped out. By giving the citizen additional security in the exercise of his voting and other political rights, which was the section's effect, unless the *Classic* case falls, Congress did not take from him the protection it previously afforded (wholly apart from the prohibition of different penalties)[21] against deprivation of such rights on account of race, color or previous condition of servitude, or repeal the prior safeguard of civil rights.

To strike from the statute the rights secured by the Fourteenth Amendment, but at the same time to leave within its coverage the vast area bounded by other constitutional provisions, would contradict both reason and history. No logic but one which nullifies the historic foundations of the Amendment and the section could support such an emasculation. There should be no judicial hack work cutting out some of the great rights the Amendment secures but leaving in others. There can be none excising all protected by the Amendment, but leaving

[21] The Court's opinion in the *Classic* case treated this clause of § 20, cf. note 12, as entirely distinct from the preceding clauses, stating that "the qualification with respect to alienage, color and race, refers only to differences in punishment *and not to* deprivations of any rights or privileges secured by the Constitution," (emphasis added) as was thought to be evidenced by the grammatical structure of the section and "the necessities of the practical application of its provisions." 313 U. S. 326.

The "pains and penalties" provision is clearly one against discrimination. It does not follow that the qualification as to alienage, color and race does not also refer to the "deprivation of any rights or privileges" clause, though not in an exclusive sense. No authority for the contrary dictum was cited. History here would seem to outweigh doubtful grammar, since, as § 20 originally appeared in the Civil Rights Act, the qualification as to "color or race" (alienage was added later) seems clearly applicable to its entire prohibition. Although the section is not exclusively a discrimination statute, it would seem clearly, in the light of its history, to include discrimination for alienage, color or race among the prohibited modes of depriving persons of rights or privileges.

every other given by the Constitution intact under the statute's aegis.

All that has been said of § 20 applies with equal force to § 19. It had an earlier more litigious history, firmly establishing its validity.[22] It also has received recent ap-

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[22] *Ex parte Yarbrough,* 110 U. S. 651 (1884); *United States* v. *Waddell,* 112 U. S. 76 (1884); *Logan* v. *United States,* 144 U. S. 263 (1892); *In re Quarles and Butler,* 158 U. S. 532 (1895); *Motes* v. *United States,* 178 U. S. 458 (1900); *United States* v. *Mosley,* 238 U. S. 383 (1915); *United States* v. *Morris,* 125 F. 322 (1903); *United States* v. *Lackey,* 99 F. 952 (1900), reversed on other grounds, 107 F. 114, cert. denied, 181 U. S. 621.

In *United States* v. *Mosley, supra,* as is noted in the text, the Court summarily disposed of the question of validity, stating that the section's constitutionality "is not open to question." 238 U. S. at 386. Cf. note 17. The Court was concerned with implied repeal, but stated: "But § 6 [the antecedent of § 19 in the Enforcement Act] being devoted, as we have said, to the protection *of all Federal rights* from conspiracies against them . . . Just as the Fourteenth Amendment . . . was adopted with a view to the protection of the colored race but has been found to be equally important in its application to the rights of all, § *6 had a general scope and used general words that have become the most important* . . . The section now begins with sweeping general words. Those words always were in the act, and the present form gives them a congressional interpretation. Even if that interpretation would not have been held correct in an indictment under § 6, which we are far from intimating, and if we cannot interpret the past by the present, we cannot allow the past so far to affect the present as to deprive citizens of the United States of the general protection which on its face § 19 most reasonably affords." 238 U. S. at 387–388. (Emphasis added.) The dissenting opinion of Mr. Justice Lamar raised no question of the section's validity. It maintained that Congress had not included or had removed protection of voting rights from the section, leaving only civil rights within its coverage. 238 U. S. at 390.

The cases holding that the Fourteenth Amendment and § 19 do not apply to infractions of constitutional rights involving no state action recognize and often affirm the section's applicability to wrongful action by state officials which infringes them: *United States* v. *Cruikshank,* 92 U. S. 542 (1876); *Hodges* v. *United States,* 203 U. S. 1 (1906); *United States* v. *Powell,* 212 U. S. 564 (1909), see also 151 F.

plication,[23] without question for ambiguity except in the *Classic* case, which nevertheless gave it equal sanction with its substantive counterpart.

Separately, and often together in application, §§ 19 and 20 have been woven into our fundamental and statutory law. They have place among our more permanent legal achievements. They have safeguarded many rights and privileges apart from political ones. Among those buttressed, either by direct application or through the general conspiracy statute, § 37 (18 U. S. C. § 88),[24] are the rights to a fair trial, including freedom from sham trials; to be free from arrest and detention by methods constitutionally forbidden and from extortion of property by such methods; from extortion of confessions; from mob action incited or shared by state officers; from failure to furnish police protection on proper occasion and demand; from interference with the free exercise of religion, freedom of the press, freedom of speech and assembly;[25] and

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648; *Ex parte Riggins,* 134 F. 404 (1904), dismissed, 199 U. S. 547; *United States* v. *Sanges,* 48 F. 78 (1891), writ of error dismissed, 144 U. S. 310; *Powe* v. *United States,* 109 F. 2d 147 (1940), cert. denied, 309 U. S. 679. See also *United States* v. *Hall,* 26 Fed. Cas. 79, No. 15,282 (1871); *United States* v. *Mall,* 26 Fed. Cas. 1147, No. 15,712 (1871).

[23] Cf. the authorities cited in notes 22 and 25; *United States* v. *Saylor,* 322 U. S. 385.

[24] Sections 19 and 37 clearly overlap in condemning conspiracies to violate constitutional rights. The latter, apparently, has been more frequently used, at any rate recently, when civil rather than political rights are involved. It goes without saying that in these cases validity of the application of § 37, charging conspiracy to violate § 20, depends upon the latter's validity in application to infraction of the rights charged to have been infringed.

[25] Recent examples involving these and other rights are: *Culp* v. *United States,* 131 F. 2d 93; *Catlette* v. *United States,* 132 F. 2d 902; *United States* v. *Sutherland,* 37 F. Supp. 344; *United States* v. *Trierweiler,* 52 F. Supp. 4.

In the *Culp* case the court said: "That this section [§ 20] has not lost any of its vitality since it was originally enacted, is indicated

the necessary import of the decisions is that the right to be free from deprivation of life itself, without due process of law, that is, through abuse of state power by state officials, is as fully protected as other rights so secured.

So much experience cannot be swept aside, or its teaching annulled, without overthrowing a great, and a firmly established, constitutional tradition. Nor has the feared welter of uncertainty arisen. Defendants have attacked the sections, or their application, often and strenuously. Seldom has complaint been made that they are too vague and uncertain. Objections have centered principally about "state action," including "color of law" and failure by inaction to discharge official duty, cf. *Catlette* v. *United States,* 132 F. 2d 902, and about the strength of federal power to reach particular abuses.[26] More rarely they have touched other matters, such as the limiting effect of official privilege[27] and, in occasional instances, *mens rea.*[28]

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by . . . *United States* v. *Classic* . . . It is our opinion that a state law enforcement officer who, under color of state law, willfully and without cause, arrests and imprisons an inhabitant of the United States for the purpose of extortion, deprives him of a right, privilege, and immunity secured and protected by the Constitution of the United States, and commits one of the offenses defined in § 52." 131 F. 2d at 98. Fourteenth Amendment rights were involved also in the *Catlette* case; and in *United States* v. *Trierweiler, supra,* the court said: "The congressional purpose, obviously, is to assure enjoyment of the rights of citizens defined by the Fourteenth Amendment, including the mandate that no state shall deprive any person of life, liberty, or property without due process of law . . ." 52 F. Supp. at 5.

United States v. *Buntin,* 10 F. 730, involved alleged discrimination for race in denying the right to attend public school. In *United States* v. *Chaplin,* 54 F. Supp. 926, the court ruled that a state judge, acting in his judicial capacity, is immune to prosecution under § 37 for violating § 20. But cf. *Ex parte Virginia,* 100 U. S. 339.

[26] These have been the perennial objections, notwithstanding uniform rejection in cases involving interference with both political and civil rights. Cf. the authorities cited in notes 7, 10, 22 and 25.

[27] Compare *United States* v. *Chaplin,* 54 F. Supp. 926 (see note 25 *supra*), with *Ex parte Virginia,* 100 U. S. 339.

[28] Cf. *United States* v. *Buntin,* 10 F. 730.

In all this wealth of attack accused officials have little used the shield of ambiguity. The omission, like the Court's rejection in the *Classic* case, cannot have been inadvertent. There are valid reasons for it, apart from the old teaching that the matter has been foreclosed.

One is that the generality of the section's terms simply has not worked out to be a hazard of unconstitutional, or even serious, proportions. It has not proved a source of practical difficulty. In no other way can be explained the paucity of the objection's appearance in the wealth of others made. If experience is the life of the law, as has been said, this has been true preeminently in the application of §§ 19 and 20.

Moreover, statutory specificity has two purposes, to give due notice that an act has been made criminal before it is done and to inform one accused of the nature of the offense charged, so that he may adequately prepare and make his defense. More than this certainly the Constitution does not require. Cf. Amend. VI. All difficulty on the latter score vanishes, under § 20, with the indictment's particularization of the rights infringed and the acts infringing them. If it is not sufficient in either respect, in these as in other cases the motion to quash or one for a bill of particulars is at the defendant's disposal. The decided cases demonstrate that accused persons have had little or no difficulty to ascertain the rights they have been charged with transgressing or the acts of transgression.[29] So it was with the defendants in this case. They were not puzzled to know for what they were indicted, as their proof and their defense upon the law conclusively show. They simply misconceived that the victim had no federal rights and that what they had done was not a crime within the federal power to penalize.[30] That kind of error relieves no one from penalty.

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[29] Cf. authorities cited in notes 7, 10, 22 and 25.

[30] Cf. Part III.

In the other aspect of specificity, two answers, apart from experience, suffice. One is that § 20, and § 19, are no more general and vague, Fourteenth Amendment rights included, than other criminal statutes commonly enforced against this objection. The Sherman Act is the most obvious illustration.[31]

Furthermore, the argument of vagueness, to warn men of their conduct, ignores the nature of the criminal act itself and the notice necessarily given from this. Section 20 strikes only at abuse of official functions by state officers. It does not reach out for crimes done by men in general. Not murder per se, but murder by state officers in the course of official conduct and done with the aid of state power, is outlawed. These facts, inherent in the crime, give all the warning constitutionally required. For one, so situated, who goes so far in misconduct can have no excuse of innocence or ignorance.

Generally state officials know something of the individual's basic legal rights. If they do not, they should, for they assume that duty when they assume their office. Ignorance of the law is no excuse for men in general. It is less an excuse for men whose special duty is to apply it, and therefore to know and observe it. If their knowledge is not comprehensive, state officials know or should know when they pass the limits of their authority, so far at any rate that their action exceeds honest error of judgment and amounts to abuse of their office and its function. When they enter such a domain in dealing with the citizen's rights, they should do so at their peril, whether that

[31] Compare the statutes upheld in *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 573–574; *Gorin* v. *United States*, 312 U. S. 19, 23–28; *Minnesota* v. *Probate Court*, 309 U. S. 270, 274; *Old Dearborn Co.* v. *Seagram Corp.*, 299 U. S. 183, 196; *Bandini Petroleum Co.* v. *Superior Court*, 284 U. S. 8, 18; *Whitney* v. *California*, 274 U. S. 357, 360, 368–369; *Fox* v. *Washington*, 236 U. S. 273, 277–278; *United States* v. *Keitel*, 211 U. S. 370, 393–395.

be created by state or federal law. For their sworn oath and their first duty are to uphold the Constitution, then only the law of the state which too is bound by the charter. Since the statute, as I think, condemns only something more than error of judgment, made in honest effort at once to apply and to follow the law, cf. *United States* v. *Murdock,* 290 U. S. 389, officials who violate it must act in intentional or reckless disregard of individual rights and cannot be ignorant that they do great wrong.[32] This being true, they must be taken to act at peril of incurring the penalty placed upon such conduct by the federal law, as they do of that the state imposes.

What has been said supplies all the case requires to be decided on the question of criminal intent. If the criminal act is limited, as I think it must be and the statute intends, to infraction of constitutional rights, including rights secured by the Fourteenth Amendment, by conduct which amounts to abuse of one's official place or reckless disregard of duty, no undue hazard or burden can be placed on state officials honestly seeking to perform the rightful functions of their office. Others are not entitled to greater protection.

But, it is said, a penumbra of rights may be involved, which none can know until decision has been made and infraction may occur before it is had. It seems doubtful this could be true in any case involving the abuse of official function which the statute requires and, if it could, that one guilty of such an abuse should have immunity for that reason. Furthermore, the doubtful character of the

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[32] I think all this would be implied if "willfully" had not been added to § 20 by amendment. The addition but reinforces the original purpose. Cf. note 13 *supra.* Congress, in this legislation, hardly can be taken to have sought to punish merely negligent conduct or honest error of judgment by state officials. The aim was at grosser violations of basic rights and the supreme law. Sensible construction of the language, with other considerations, requires this view. The consistent course of the section's application supports it.

right infringed could give reason at the most to invalidate the particular charge, not for outlawing the statute or narrowly restricting its application in advance of compelling occasion.

For there is a body of well-established, clear-cut fundamental rights, including many secured by the Fourteenth Amendment, to all of which the sections may and do apply, without specific enumeration and without creating hazards of uncertainty for conduct or defense. Others will enter that category. So far, at the least when they have done so, the sections should stand without question of their validity. Beyond this, the character of the act proscribed and the intent it necessarily implies would seem to afford would-be violators all of notice the law requires, that they act at peril of the penalty it places on their misconduct.

We have in this case no instance of mere error in judgment, made in good faith. It would be time enough to reverse and remand a conviction, obtained without instructions along these lines, if such a case should arise. Actually the substance of such instruction was given in the wholly adequate charge concerning the officer's right to use force, though not to excess. When, as here, a state official abuses his place consciously or grossly in abnegation of its rightful obligation, and thereby tramples underfoot the established constitutional rights of men or citizens, his conviction should stand when he has had the fair trial and full defense the petitioners have been given in this case.

III

Two implicit but highly important considerations must be noticed more definitely. One is the fear grounded in concern for possible maladjustment of federal-state relations if this and like convictions are sustained. Enough has been said to show that the fear is not well grounded. The same fear was expressed, by some in exaggerated and

highly emotional terms, when § 2 of the Civil Rights Act, the antecedent of § 20, was under debate in Congress.[33] The history of the legislation's enforcement gives it no support. The fear was not realized in later experience. Eighty years should be enough to remove any remaining vestige. The volume of prosecutions and convictions has been small, in view of the importance of the subject matter and the length of time the statutes have been in force. There are reasons for this, apart from self-restraint of federal prosecuting officials.

One lies in the character of the criminal act and the intent which must be proved. A strong case must be made to show abuse of official function, and therefore to secure indictment or conviction. Trial must be "by an impartial jury of the State and the district wherein the crime shall have been committed." Const., Amend. VI; cf. Art. III, § 2. For all practical purposes this means within the state of which the accused is an officer. Citizens of the state have not been, and will not be, ready to indict or convict their local officers on groundless charges or in doubtful cases. The sections can be applied effectively only when twelve of them concur in a verdict which accords with the prosecuting official's belief that the accused has violated another's fundamental rights. A federal official therefore faces both a delicate and a difficult task when he undertakes to charge and try a state officer under the terms of §§ 19 and 20. The restraint which has been shown is as much enforced by these limitations as it has been voluntary.

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[33] See Flack, Adoption of the Fourteenth Amendment (1908) 22-38; Cong. Globe, 39th Cong., 1st Sess., 474-607, 1151 ff.

Senator Davis of Kentucky said that "this short bill repeals all the penal laws of the States. . . . The cases . . . the . . . bill would bring up every day in the United States would be as numerous as the passing minutes. The result would be to utterly subvert our Government . . ." Cong. Globe, 39th Cong., 1st Sess., 598.

These are the reasons why prosecution has not been frequent, has been brought only in cases of gross abuse, and therefore has produced no grave or substantial problem of interference by federal authority in state affairs. But if the problem in this phase of the case were more serious than it has been or is likely to be, the result legally could not be to give state officials immunity from the obligations and liabilities the Amendment and its supporting legislation have imposed. For the verdict of the struggle which brought about adoption of the Amendment was to the contrary.

Lying beneath all the surface arguments is a deeper implication, which comprehends them. It goes to federal power. It is that Congress could not in so many words denounce as a federal crime the intentional and wrongful taking of an individual's life or liberty by a state official acting in abuse of his official function and applying to the deed all the power of his office. This is the ultimate purport of the notions that state action is not involved and that the crime is against the state alone, not the nation. It is reflected also in the idea that the statute can protect the victim in his many procedural rights encompassed in the right to a fair trial before condemnation, but cannot protect him in the right which comprehends all others, the right to life itself.

Suffice it to say that if these ideas did not pass from the American scene once and for all, as I think they did, upon adoption of the Amendment without more, they have long since done so. Violation of state law there may be. But from this no immunity to federal authority can arise where any part of the Constitution has made it supreme. To the Constitution state officials and the states themselves owe first obligation. The federal power lacks no strength to reach their malfeasance in office when it infringes constitutional rights. If that is a great power, it is one generated by the Constitution and the Amend-

ments, to which the states have assented and their officials owe prime allegiance.[34]

The right not to be deprived of life or liberty by a state officer who takes it by abuse of his office and its power is such a right. To secure these rights is not beyond federal power. This §§ 19 and 20 have done, in a manner history long since has validated.

Accordingly, I would affirm the judgment.

My convictions are as I have stated them. Were it possible for me to adhere to them in my vote, and for the Court at the same time to dispose of the cause, I would act accordingly. The Court, however, is divided in opinion. If each member accords his vote to his belief, the case cannot have disposition. Stalemate should not prevail for any reason, however compelling, in a criminal cause or, if avoidable, in any other. My views concerning appropriate disposition are more nearly in accord with those stated by MR. JUSTICE DOUGLAS, in which three other members of the Court concur, than they are with the views of my dissenting brethren who favor outright reversal. Accordingly, in order that disposition may be made of this case, my vote has been cast to reverse the decision of the Court of Appeals and remand the cause to the District Court for further proceedings in accordance with the disposition required by the opinion of MR. JUSTICE DOUGLAS.

MR. JUSTICE MURPHY, dissenting.

I dissent. Robert Hall, a Negro citizen, has been deprived not only of the right to be tried by a court rather than by ordeal. He has been deprived of the right to life itself. That right belonged to him not because he was a Negro or a member of any particular race or creed. That right was his because he was an American citizen, because

[34] Cf. note 8.

he was a human being. As such, he was entitled to all the respect and fair treatment that befits the dignity of man, a dignity that is recognized and guaranteed by the Constitution. Yet not even the semblance of due process has been accorded him. He has been cruelly and unjustifiably beaten to death by local police officers acting under color of authority derived from the state. It is difficult to believe that such an obvious and necessary right is indefinitely guaranteed by the Constitution or is foreign to the knowledge of local police officers so as to cast any reasonable doubt on the conviction under § 20 of the Criminal Code of the perpetrators of this "shocking and revolting episode in law enforcement."

The Constitution and § 20 must be read together inasmuch as § 20 refers in part to certain provisions of the Constitution. Section 20 punishes anyone, acting under color of any law, who willfully deprives any person of any right, privilege or immunity secured or protected by the Constitution or laws of the United States. The pertinent part of the Constitution in this instance is § 1 of the Fourteenth Amendment, which firmly and unmistakably provides that no state shall deprive any person of life without due process of law. Translated in light of this specific provision of the Fourteenth Amendment, § 20 thus punishes anyone, acting under color of state law, who willfully deprives any person of life without due process of law. Such is the clear statutory provision upon which this conviction must stand or fall.

A grave constitutional issue, however, is said to lurk in the alleged indefiniteness of the crime outlawed by § 20. The rights, privileges and immunities secured or protected by the Constitution or laws of the United States are claimed to be so uncertain and flexible, dependent upon changeable legal concepts, as to leave a state official confused and ignorant as to what actions of his might run afoul of the law. The statute, it is concluded, must be set aside for vagueness.

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It is axiomatic, of course, that a criminal statute must give a clear and unmistakable warning as to the acts which will subject one to criminal punishment. And courts are without power to supply that which Congress has left vague. But this salutary principle does not mean that if a statute is vague as to certain criminal acts but definite as to others the entire statute must fall. Nor does it mean that in the first case involving the statute to come before us we must delineate all the prohibited acts that are obscure and all those that are explicit.

Thus it is idle to speculate on other situations that might involve § 20 which are not now before us. We are unconcerned here with state officials who have coerced a confession from a prisoner, denied counsel to a defendant or made a faulty tax assessment. Whatever doubt may exist in those or in other situations as to whether the state officials could reasonably anticipate and recognize the relevant constitutional rights is immaterial in this case. Our attention here is directed solely to three state officials who, in the course of their official duties, have unjustifiably beaten and crushed the body of a human being, thereby depriving him of trial by jury and of life itself. The only pertinent inquiry is whether § 20, by its reference to the Fourteenth Amendment guarantee that no state shall deprive any person of life without due process of law, gives fair warning to state officials that they are criminally liable for violating this right to life.

Common sense gives an affirmative answer to that problem. The reference in § 20 to rights protected by the Constitution is manifest and simple. At the same time, the right not to be deprived of life without due process of law is distinctly and lucidly protected by the Fourteenth Amendment. There is nothing vague or indefinite in these references to this most basic of all human rights. Knowledge of a comprehensive law library is unnecessary for officers of the law to know that the right to murder

individuals in the course of their duties is unrecognized in this nation. No appreciable amount of intelligence or conjecture on the part of the lowliest state official is needed for him to realize that fact; nor should it surprise him to find out that the Constitution protects persons from his reckless disregard of human life and that statutes punish him therefor. To subject a state official to punishment under § 20 for such acts is not to penalize him without fair and definite warning. Rather it is to uphold elementary standards of decency and to make American principles of law and our constitutional guarantees mean something more than pious rhetoric.

Under these circumstances it is unnecessary to send this case back for a further trial on the assumption that the jury was not charged on the matter of the willfulness of the state officials, an issue that was not raised below or before us. The evidence is more than convincing that the officials willfully, or at least with wanton disregard of the consequences, deprived Robert Hall of his life without due process of law. A new trial could hardly make that fact more evident; the failure to charge the jury on willfulness was at most an inconsequential error. Moreover, the presence or absence of willfulness fails to decide the constitutional issue raised before us. Section 20 is very definite and certain in its reference to the right to life as spelled out in the Fourteenth Amendment quite apart from the state of mind of the state officials. A finding of willfulness can add nothing to the clarity of that reference.

It is an illusion to say that the real issue in this case is the alleged failure of § 20 fully to warn the state officials that their actions were illegal. The Constitution, § 20 and their own consciences told them that. They knew that they lacked any mandate or authority to take human life unnecessarily or without due process of law in the course of their duties. They knew that their excessive and abusive

use of authority would only subvert the ends of justice. The significant question, rather, is whether law enforcement officers and those entrusted with authority shall be allowed to violate with impunity the clear constitutional rights of the inarticulate and the friendless. Too often unpopular minorities, such as Negroes, are unable to find effective refuge from the cruelties of bigoted and ruthless authority. States are undoubtedly capable of punishing their officers who commit such outrages. But where, as here, the states are unwilling for some reason to prosecute such crimes the federal government must step in unless constitutional guarantees are to become atrophied.

This necessary intervention, however, will be futile if courts disregard reality and misuse the principle that criminal statutes must be clear and definite. Here state officers have violated with reckless abandon a plain constitutional right of an American citizen. The two courts below have found and the record demonstrates that the trial was fair and the evidence of guilt clear. And § 20 unmistakably outlaws such actions by state officers. We should therefore affirm the judgment.

MR. JUSTICE ROBERTS, MR. JUSTICE FRANKFURTER and MR. JUSTICE JACKSON, dissenting.

Three law enforcement officers of Georgia, a county sheriff, a special deputy and a city policeman, arrested a young Negro charged with a local crime, that of stealing a tire. While he was in their custody and handcuffed, they so severely beat the lad that he died. This brutal misconduct rendered these lawless law officers guilty of manslaughter, if not of murder, under Georgia law. Instead of leaving this misdeed to vindication by Georgia law, the United States deflected Georgia's responsibility by instituting a federal prosecution. But this was a criminal homicide only under Georgia law. The United States could not prosecute the petitioners for taking life. In-

stead a prosecution was brought, and the conviction now under review was obtained, under § 20 of the Criminal Code, 18 U. S. C. § 52. Section 20, originating in § 2 of the Civil Rights Act of April 9, 1866, 14 Stat. 27, was put on the statute books on May 31, 1870, but for all practical purposes it has remained a dead letter all these years. This section provides that "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects . . . any inhabitant of any State . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States . . . shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both." Under § 37 of the Criminal Code, 18 U. S. C. § 88, a conspiracy to commit any federal offense is punishable by imprisonment for two years. The theory of this prosecution is that one charged with crime is entitled to due process of law and that that includes the right to an orderly trial of which the petitioners deprived the Negro.

Of course the petitioners are punishable. The only issue is whether Georgia alone has the power and duty to punish, or whether this patently local crime can be made the basis of a federal prosecution. The practical question is whether the States should be relieved from responsibility to bring their law officers to book for homicide, by allowing prosecutions in the federal courts for a relatively minor offense carrying a short sentence. The legal question is whether, for the purpose of accomplishing this relaxation of State responsibility, hitherto settled principles for the protection of civil liberties shall be bent and tortured.

I

By the Thirteenth Amendment slavery was abolished. In order to secure equality of treatment for the emancipated, the Fourteenth Amendment was adopted at the

same time. To be sure, the latter Amendment has not been confined to instances of discrimination because of race or color. Undoubtedly, however, the necessary protection of the new freedmen was the most powerful impulse behind the Fourteenth Amendment. The vital part of that Amendment, § 1, reads as follows:

"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."

By itself, this Amendment is merely an instrument for striking down action by the States in defiance of it. It does not create rights and obligations actively enforceable by federal law. However, like all rights secured by the Constitution of the United States, those created by the Fourteenth Amendment could be enforced by appropriate federal legislation. The general power of Congress to pass measures effectuating the Constitution is given by Art. I, § 8, cl. 18—the Necessary-and-Proper Clause. In order to indicate the importance of enforcing the guarantees of Amendment XIV, its fifth section specifically provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

Accordingly, Congress passed various measures for its enforcement. It is familiar history that much of this legislation was born of that vengeful spirit which to no small degree envenomed the Reconstruction era. Legislative respect for constitutional limitations was not at its height and Congress passed laws clearly unconstitutional. See *Civil Rights Cases,* 109 U. S. 3. One of the laws of this period was the Act of May 31, 1870, 16 Stat. 140. In its

present form, as § 20, it is now here for the first time on full consideration as to its meaning and its constitutionality, unembarrassed by preoccupation both on the part of counsel and Court with the more compelling issue of the power of Congress to control State procedure for the election of federal officers. If § 20 were read as other legislation is read, by giving it the meaning which its language in its proper setting naturally and spontaneously yields, it is difficult to believe that there would be real doubt about the proper construction. The unstrained significance of the words chosen by Congress, the disclosed purpose for which they were chosen and to which they were limited, the always relevant implications of our federal system especially in the distribution of power and responsibility for the enforcement of the criminal law as between the States and the National Government, all converge to make plain what conduct Congress outlawed by the Act of 1870 and what impliedly it did not.

The Fourteenth Amendment prohibited a State from so acting as to deprive persons of new federal rights defined by it. Section 5 of the Amendment specifically authorized enabling legislation to enforce that prohibition. Since a State can act only through its officers, Congress provided for the prosecution of any officer who deprives others of their guaranteed rights and denied such an officer the right to defend by claiming the authority of the State for his action. In short, Congress said that no State can empower an officer to commit acts which the Constitution forbade the State from authorizing, whether such unauthorized command be given for the State by its legislative or judicial voice, or by a custom contradicting the written law. See *Nashville, C. & St. L. R. Co.* v. *Browning*, 310 U. S. 362, 369. The present prosecution is not based on an officer's claim that that for which the United States seeks his punishment was commanded or authorized by the law of his State. On the contrary,

the present prosecution is based on the theory that Congress made it a federal offense for a State officer to violate the explicit law of his State. We are asked to construe legislation which was intended to effectuate prohibitions against States for defiance of the Constitution, to be equally applicable where a State duly obeys the Constitution, but an officer flouts State law and is unquestionably subject to punishment by the State for his disobedience.

So to read § 20 disregards not merely the normal function of language to express ideas appropriately. It fails not merely to leave to the States the province of local crime enforcement, that the proper balance of political forces in our federalism requires. It does both, heedless of the Congressional purpose, clearly evinced even during the feverish Reconstruction days, to leave undisturbed the power and the duty of the States to enforce their criminal law by restricting federal authority to the punishment only of those persons who violate federal rights under claim of State authority and not by exerting federal authority against offenders of State authority. Such a distortion of federal power devised against recalcitrant State authority never entered the minds of the proponents of the legislation.

Indeed, we have the weightiest evidence to indicate that they rejected that which now, after seventy-five years, the Government urges. Section 20 of the Criminal Code derived from § 2 of the Civil Rights Act of 1866, 14 Stat. 27. During the debate on that section, Senator Trumbull, the Chairman of the Senate Judiciary Committee, answered fears concerning the loose inclusiveness of the phrase "color of law." In particular, opponents of the Act were troubled lest it would make criminals of State judges and officials for carrying out their legal duties. Senator Trumbull agreed that they would be guilty if they consciously helped to enforce discriminatory State

legislation. Federal law, replied Senator Trumbull, was directed against those, and only against those, who were not punishable by State law precisely because they acted in obedience to unconstitutional State law and by State law justified their action. Said Senator Trumbull, "If an offense is committed against a colored person simply because he is colored, in a State where the law affords him the same protection as if he were white, this act neither has nor was intended to have anything to do with his case, because he has adequate remedies in the State courts; but if he is discriminated against under color of State laws because he is colored, then it becomes necessary to interfere for his protection." Cong. Globe, 39th Cong., 1st Sess., p. 1758. And this language applies equally to § 17 of the Act of May 31, 1870, 16 Stat. 140, 144 (now § 20 of the Criminal Code), which reenacted the Civil Rights Act.

That this legislation was confined to attempted deprivations of federal rights by State law and was not extended to breaches of State law by its officials, is likewise confirmed by observations of Senator Sherman, another leading Reconstruction statesman. When asked about the applicability of the 1870 Act to a Negro's right to vote when State law provided for that right, Senator Sherman replied, "That is not the case with which we are dealing. I intend to propose an amendment to present a question of that kind. This bill only proposes to deal with offenses committed by officers or persons under color of existing State law, under color of existing State constitutions. No man could be convicted under this bill reported by the Judiciary Committee unless the denial of the right to vote was done under color or pretense of State regulation. The whole bill shows that. My honorable friend from California has not read this bill with his usual care if he does not see that that runs through the whole of the provisions of the first and second sections of the bill, which

simply punish officers as well as persons for discrimination under color of State laws or constitutions; and so it provides all the way through." Cong. Globe, 41st Cong., 2d Sess., p. 3663. The debates in Congress are barren of any indication that the supporters of the legislation now before us had the remotest notion of authorizing the National Government to prosecute State officers for conduct which their State had made a State offense where the settled custom of the State did not run counter to formulated law.

Were it otherwise it would indeed be surprising. It was natural to give the shelter of the Constitution to those basic human rights for the vindication of which the successful conduct of the Civil War was the end of a long process. And the extension of federal authority so as to guard against evasion by any State of these newly created federal rights was an obvious corollary. But to attribute to Congress the making overnight of a revolutionary change in the balance of the political relations between the National Government and the States without reason, is a very different thing. And to have provided for the National Government to take over the administration of criminal justice from the States to the extent of making every lawless act of the policeman on the beat or in the station house, whether by way of third degree or the illegal ransacking for evidence in a man's house (see *Gouled* v. *United States,* 255 U. S. 298; *Byars* v. *United States,* 273 U. S. 28; *Brown* v. *Mississippi,* 297 U. S. 278; *Chambers* v. *Florida,* 309 U. S. 227), a federal offense, would have constituted a revolutionary break with the past overnight. The desire for such a dislocation in our federal system plainly was not contemplated by the Lyman Trumbulls and the John Shermans, and not even by the Thaddeus Stevenses.

Regard for maintaining the delicate balance "between the judicial tribunals of the Union and of the States" in

the enforcement of the criminal law has informed this Court, as it has influenced Congress, "in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution." *Ex parte Royall,* 117 U. S. 241, 251. Observance of this basic principle under our system of Government has led this Court to abstain, even under more tempting circumstances than those now here, from needless extension of federal criminal authority into matters that normally are of State concern and for which the States had best be charged with responsibility.

We have reference to § 33 of the Judicial Code, as amended, 28 U. S. C. § 76. That provision gives the right of removal to a federal court of any criminal prosecution begun in a State court against a revenue officer of the United States "on account of any act done under color of his office or of any such [revenue] law." Where a State prosecution for manslaughter is resisted by the claim that what was done was justifiably done by a United States officer one would suppose that this Court would be alert to construe very broadly "under color of his office or of any such law" in order to avoid the hazards of trial, whether through conscious or unconscious discrimination or hostility, of a United States officer accused of homicide and to assure him a trial in a presumably more impartial federal court. But this Court long ago indicated that misuse of federal authority does not come within the statute's protection. *Tennessee* v. *Davis,* 100 U. S. 257, 261–262. More recently, this Court in a series of cases unanimously insisted that a petition for removal must show with particularity that the offense for which the State is prosecuting resulted from a discharge of federal duty. "It must appear that the prosecution of him, for whatever offense, has arisen out of the acts done by him under color of federal authority and in enforcement of federal law, and

he must by direct averment exclude the possibility that it was based on acts or conduct of his not justified by his federal duty. . . . The defense he is to make is that of his immunity from punishment by the State, because what he did was justified by his duty under the federal law, and because he did nothing else on which the prosecution could be based." *Maryland* v. *Soper* (No. 1), 270 U. S. 9, 33. And see *Maryland* v. *Soper* (No. 2), 270 U. S. 36; *Maryland* v. *Soper* (No. 3), 270 U. S. 44; *Colorado* v. *Symes,* 286 U. S. 510. To the suggestion that such a limited construction of the removal statute enacted for the protection of the United States officers would restrict its effectiveness, the answer was that if Congress chose to afford even greater protection and to withdraw from the States the right and duty to enforce their criminal law in their own courts, it should express its desire more specifically. *Maryland* v. *Soper* (No. 2), 270 U. S. 36, 42, 44. That answer should be binding in the situation now before us.

The reasons which led this Court to give such a restricted scope to the removal statute are even more compelling as to § 20. The matter concerns policies inherent in our federal system and the undesirable consequences of federal prosecution for crimes which are obviously and predominantly State crimes no matter how much sophisticated argumentation may give them the appearance of federal crimes. Congress has not expressed a contrary purpose, either by the language of its legislation or by anything appearing in the environment out of which its language came. The practice of government for seventy-five years likewise speaks against it. Nor is there a body of judicial opinion which bids us find in the unbridled excess of a State officer, constituting a crime under his State law, action taken "under color of law" which federal law forbids.

Only two reported cases considered § 20 before *United States* v. *Classic,* 313 U. S. 299. In *United States* v. *Bun-*

tin, 10 F. 730, a teacher, in reliance on a State statute, refused admittance to a colored child, while in *United States* v. *Stone,* 188 F. 836, election supervisors who acted under a Maryland election law were held to act "under color of law." In neither case was there a patent violation of State law but rather an attempt at justification under State law. *United States* v. *Classic, supra,* is the only decision that looks the other way. In that case primary election officials were held to have acted "under color of law" even though the acts complained of as a federal offense were likewise condemned by Louisiana law. The truth of the matter is that the focus of attention in the *Classic* case was not our present problem, but was the relation of primaries to the protection of the electoral process under the United States Constitution. The views in the *Classic* case thus reached ought not to stand in the way of a decision on the merits of a question which has now for the first time been fully explored and its implications for the workings of our federal system have been adequately revealed.

It was assumed quite needlessly in the *Classic* case that the scope of § 20 was coextensive with the Fourteenth Amendment. Because the weight of the case was elsewhere, we did not pursue the difference between the power granted to Congress by that Amendment to bar "any State" from depriving persons of the newly created constitutional rights and the limited extent to which Congress exercised that power, in what is now § 20, by making it an offense for one acting "under color of any law" to deprive another of such constitutional rights. It may well be that Congress could, within the bounds of the Fourteenth Amendment, treat action taken by a State official even though in defiance of State law and not condoned by ultimate State authority as the action of "a State." It has never been satisfactorily explained how a State can be said to deprive a person of liberty or property without

due process of law when the foundation of the claim is that a minor official has disobeyed the authentic command of his State. See *Raymond* v. *Chicago Traction Co.,* 207 U. S. 20, 40, 41. Although action taken under such circumstances has been deemed to be deprivation by a "State" of rights guaranteed by the Fourteenth Amendment for purposes of federal jurisdiction, the doctrine has had a fluctuating and dubious history. Compare *Barney* v. *City of New York,* 193 U. S. 430, with *Raymond* v. *Chicago Traction Co., supra; Memphis* v. *Cumberland Telephone Co.,* 218 U. S. 624, with *Home Tel. & Tel. Co.* v. *Los Angeles,* 227 U. S. 278. *Barney* v. *City of New York, supra,* which ruled otherwise, although questioned, has never been overruled. See, for instance, *Iowa-Des Moines Bank* v. *Bennett,* 284 U. S. 239, 246–247, and *Snowden* v. *Hughes,* 321 U. S. 1, 13.[1]

But assuming unreservedly that conduct such as that now before us, perpetrated by State officers in flagrant defiance of State law, may be attributed to the State under the Fourteenth Amendment, this does not make it action under "color of any law." Section 20 is much narrower than the power of Congress. Even though Congress might have swept within the federal criminal law any action that could be deemed within the vast reach of the Fourteenth Amendment, Congress did not do so. The presuppositions of our federal system, the pronouncements of the statesmen who shaped this legislation, and the normal meaning of language powerfully counsel against attributing to Congress intrusion into the sphere of criminal law tradition-

[1] *Iowa-Des Moines Bank* v. *Bennett, supra,* illustrates the situation where there can be no doubt that the action complained of was the action of a State. That case came here from a State court as the ultimate voice of State law authenticating the alleged illegal action as the law of the State. Cases of which *Lane* v. *Wilson,* 307 U. S. 268, is an illustration are also to be differentiated. In that case election officials discriminated illegally against Negroes not in defiance of a State statute but under its authority.

ally and naturally reserved for the States alone. When due account is taken of the considerations that have heretofore controlled the political and legal relations between the States and the National Government, there is not the slightest warrant in the reason of things for torturing language plainly designed for nullifying a claim of acting under a State law that conflicts with the Constitution so as to apply to situations where State law is in conformity with the Constitution and local misconduct is in undisputed violation of that State law. In the absence of clear direction by Congress we should leave to the States the enforcement of their criminal law, and not relieve States of the responsibility for vindicating wrongdoing that is essentially local or weaken the habits of local law enforcement by tempting reliance on federal authority for an occasional unpleasant task of local enforcement.

II

In our view then, the Government's attempt to bring an unjustifiable homicide by local Georgia peace officers within the defined limits of the federal Criminal Code cannot clear the first hurdle of the legal requirement that that which these officers are charged with doing must be done under color of Georgia law.

Since the majority of the Court do not share this conviction that the action of the Georgia peace officers was not perpetrated under color of law, we, too, must consider the constitutionality of § 20. All but two members of the Court apparently agree that insofar as § 20 purports to subject men to punishment for crime it fails to define what conduct is made criminal. As misuse of the criminal machinery is one of the most potent and familiar instruments of arbitrary government, proper regard for the rational requirement of definiteness in criminal statutes is basic to civil liberties. As such it is included in the constitutional guaranty of due process of law. But four

members of the Court are of the opinion that this plain constitutional principle of definiteness in criminal statutes may be replaced by an elaborate scheme of constitutional exegesis whereby that which Congress has not defined the courts can define from time to time, with varying and conflicting definiteness in the decisions, and that, in any event, an undefined range of conduct may become sufficiently definite if only such undefined conduct is committed "willfully."

In subjecting to punishment "deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States," § 20 on its face makes criminal deprivation of the whole range of undefined appeals to the Constitution. Such is the true scope of the forbidden conduct. Its domain is unbounded and therefore too indefinite. Criminal statutes must have more or less specific contours. This has none.

To suggest that the "right" deprivation of which is made criminal by § 20 "has been made specific either by the express terms of the Constitution or by decisions interpreting it" hardly adds definiteness beyond that of the statute's own terms. What provision is to be deemed "specific" "by the express terms of the Constitution" and what not "specific"? If the First Amendment safeguarding free speech be a "specific" provision, what about the Fourth? "All unreasonable searches and seizures are absolutely forbidden by the Fourth Amendment." *Nathanson* v. *United States,* 290 U. S. 41, 46. Surely each is among the "rights, privileges, or immunities secured or protected by the Constitution," deprivation of which is a crime under § 20. In any event, what are the criteria by which to determine what express provisions of the Constitution are "specific" and what provisions are not "specific"? And if the terms of § 20 in and of themselves are lacking in sufficient definiteness for a criminal statute, restriction within the framework of "decisions interpret-

ing" the Constitution cannot show the necessary definiteness. The illustrations given in the Court's opinion underline the inescapable vagueness due to the doubts and fluctuating character of decisions interpreting the Constitution.

This intrinsic vagueness of the terms of § 20 surely cannot be removed by making the statute applicable only where the defendant has the "requisite bad purpose." Does that not amount to saying that the black heart of the defendant enables him to know what are the constitutional rights deprivation of which the statute forbids, although we as judges are not able to define their classes or their limits, or, at least, are not prepared to state what they are unless it be to say that § 20 protects whatever rights the Constitution protects?

Under the construction proposed for § 20, in order for a jury to convict, it would be necessary "to find that petitioners had the purpose to deprive the prisoner of a constitutional right, e. g. the right to be tried by a court rather than by ordeal." There is no question that Congress could provide for a penalty against deprivation by State officials "acting under color of any law" of "the right to be tried by a court rather than by ordeal." But we cannot restrict the problem raised by § 20 to the validity of penalizing a deprivation of this specific constitutional right. We are dealing with the reach of the statute, for Congress has not particularized as the Court now particularizes. Such transforming interpolation is not interpretation. And that is recognized by the sentence just quoted, namely, that the jury in order to convict under § 20 must find that an accused "had the purpose to deprive" another "of a constitutional right," giving *this* specific constitutional right as "e. g.," by way of illustration. Hence a judge would have to define to the jury what the constitutional rights are deprivation of which is prohibited by § 20. If that is a legal question as to which

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the jury must take instruction from the court, at least the trial court must be possessed of the means of knowing with sufficient definiteness the range of "rights" that are "constitutional." The court can hardly be helped out in determining that legal question by leaving it to the jury to decide whether the act was "willfully" committed.

It is not conceivable that this Court would find that a statute cast in the following terms would satisfy the constitutional requirement for definiteness:

"Whoever WILLFULLY commits any act which the Supreme Court of the United States shall find to be a deprivation of any right, privilege, or immunity secured or protected by the Constitution shall be imprisoned not more than, etc."

If such a statute would fall for uncertainty, wherein does § 20 as construed by the Court differ and how can it survive?

It was settled early in our history that prosecutions in the federal courts could not be founded on any undefined body of so-called common law. *United States* v. *Hudson,* 7 Cranch 32; *United States* v. *Gooding,* 12 Wheat. 460. Federal prosecutions must be founded on delineation by Congress of what is made criminal. To base federal prosecutions on the shifting and indeterminate decisions of courts is to sanction prosecutions for crimes based on definitions made by courts. This is tantamount to creating a new body of federal criminal common law.

It cannot be too often emphasized that as basic a difference as any between our notions of law and those of legal systems not founded on Anglo-American conceptions of liberty is that crimes must be defined by the legislature. The legislature does not meet this requirement by issuing a blank check to courts for their retrospective finding that some act done in the past comes within the contingencies and conflicts that inhere in ascertaining the content of the Fourteenth Amendment by "the gradual process of

judicial inclusion and exclusion." *Davidson* v. *New Orleans,* 96 U. S. 97, 104. Therefore, to subject to criminal punishment conduct that the court may eventually find to have been within the scope or the limitations of a legal doctrine underlying a decision is to satisfy the vital requirement for definiteness through an appearance of definiteness in the process of constitutional adjudication which every student of law knows not to comport with actuality. What the Constitution requires is a definiteness defined by the legislature, not one argumentatively spelled out through the judicial process which, precisely because it is a process, can not avoid incompleteness. A definiteness which requires so much subtlety to expound is hardly definite.

It is as novel as it is an inadmissible principle that a criminal statute of indefinite scope can be rendered definite by requiring that a person "willfully" commit what Congress has not defined but which, if Congress had defined, could constitutionally be outlawed. Of course Congress can prohibit the deprivation of enumerated constitutional rights. But if Congress makes it a crime to deprive another of any right protected by the Constitution—and that is what § 20 does—this Court cannot escape facing decisions as to what constitutional rights are covered by § 20 by saying that in any event, whatever they are, they must be taken away "willfully." It has not been explained how all the considerations of unconstitutional vagueness which are laid bare in the early part of the Court's opinion evaporate by suggesting that what is otherwise too vaguely defined must be "willfully" committed.

In the early law an undesired event attributable to a particular person was punished regardless of the state of mind of the actor. The rational development of criminal liability added a mental requirement for criminal culpability, except in a limited class of cases not here relevant. (See *United States* v. *Balint,* 258 U. S. 250.) That req-

uisite mental ingredient is expressed in various forms in criminal statutes, of which the word "willfully" is one of the most common. When a criminal statute prohibits something from being "willfully" done, "willfully" never defines the physical conduct or the result the bringing of which to pass is proscribed. "Willfully" merely adds a certain state of mind as a prerequisite to criminal responsibility for the otherwise proscribed act. If a statute does not satisfy the due-process requirement of giving decent advance notice of what it is which, if happening, will be visited with punishment, so that men may presumably have an opportunity to avoid the happening (see *International Harvester Co.* v. *Kentucky,* 234 U. S. 216; *Collins* v. *Kentucky,* 234 U. S. 634; *United States* v. *Cohen Grocery Co.,* 255 U. S. 81; *Cline* v. *Frink Dairy Co.,* 274 U. S. 445), then "willfully" bringing to pass such an undefined and too uncertain event cannot make it sufficiently definite and ascertainable. "Willfully" doing something that is forbidden, when that something is not sufficiently defined according to the general conceptions of requisite certainty in our criminal law, is not rendered sufficiently definite by that unknowable having been done "willfully." It is true also of a statute that it cannot lift itself up by its bootstraps.

Certainly these considerations of vagueness imply unconstitutionality of the Act at least until 1909. For it was not until 1909 that the word "willfully" was introduced. But the legislative history of that addition affords no evidence whatever that anybody thought that "willfully" was added to save the statute from unconstitutionality. The Joint Committee of Congress on the Revision of Laws (which sponsored what became the Criminal Code) gives no such indication, for it did not propose "willfully"; the reports in neither House of Congress shed any light on the subject, for the bill in neither House proposed that "willfully" be added; no speech by anyone in charge of the

bill in either House sheds any light on the subject; the report of the Conference Committee, from which "willfully" for the first time emerges, gives no explanation whatever; and the only reference we have is that to which the Court's opinion refers (43 Cong. Rec., p. 3599). And that is an unilluminating remark by Senator Daniel of Virginia, who had no responsibility for the measure and who made the remark in the course of an exchange with Senator Heyburn of Idaho, who *was* in charge of the measure and who complained of an alleged attitude on the part of Southern members to filibuster against the bill because of the retention of Reconstruction legislation.

All this bears not merely on the significance of "willfully" in a presumably otherwise unconstitutionally vague statute. It also bears on the fact that, for the purpose of constitutionality, we are dealing not with an old statute that goes back to the Reconstruction days, but only to 1909.

Nor can support be found in the opinions of this Court for the proposition that "willfully" can make definite prohibitions otherwise indefinite.

In *Omaechevarria* v. *Idaho,* 246 U. S. 343, the Court sustained an Idaho statute prohibiting any person having charge of sheep from allowing them to graze "upon any range usually occupied by any cattle grower." The statute was attacked under the Due Process Clause in that it failed to provide for the ascertainment of the boundaries of a "range" or for determining what length of time is necessary to constitute a prior occupation a "usual" one within the meaning of the Act. This attack upon the Idaho statute was rejected and for the following reasons:

"Men familiar with range conditions and desirous of observing the law will have little difficulty in determining what is prohibited by it. Similar expressions are common in the criminal statutes of other [grazing] States. This

statute presents no greater uncertainty or difficulty, in application to necessarily varying facts, than has been repeatedly sanctioned by this court." 246 U. S. at 348.

Certainly there is no comparison between a statute employing the concept of a western range and a statute outlawing the whole range of constitutional rights, unascertained if not unascertainable.

To be sure, the opinion of Mr. Justice Brandeis also brought to its support § 6314 of Revised Codes of Idaho which provided that "In every crime or public offense there must exist a union, or joint operation, of act and intent, or criminal negligence." But this is merely an Idaho phrasing of the conventional saw in text books and decisions dealing with criminal law that there must be a *mens rea* for every offense. In other words, a guilty state of mind is usually required before one can be punished for an outlawed act. But the definition of the outlawed act is not derived from the state of mind with which it must be committed. All that Mr. Justice Brandeis meant by "indefiniteness" in the context of this statute was the claim that the statute did not give enough notice as to the act which was outlawed. But notice was given by the common knowledge of what a "range" was, and for good measure he suggested that under the Act a man would have to know that he was grazing sheep where he had no business to graze them. There is no analogy between the face of this Idaho statute and the face of our statute. The essential difference is that in the Idaho statute the outlawed act was defined; in § 20 it is undefined.

In *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497, New York punished the misrepresentation of meat as "kosher" or as satisfying "orthodox Hebrew religious requirements." Here, too, the objection of indefiniteness was rejected by this Court. The objection bordered on the frivolous. In this case, too, the opinion of the Court, as is the way of opinions, softened the blow by saying that

there was no danger of anyone being convicted for not knowing what he was doing, for it required him to have consciousness that he was offering meat as "kosher" meat when he knew very well that it was not.

Thus in both these cases this Court was saying that the criminal statutes under scrutiny, although very specific, did not expose any innocent person to the hazards of unfair conviction, because not merely did the legislation outlaw specifically defined conduct, but guilty knowledge of such defined criminality was also required. It thereby took the legislation outside the scope of *United States* v. *Balint*, 258 U. S. 250, in which the Court sustained the prosecution of one wholly innocent of knowledge of the act, commission of which the statute explicitly forbade.

This case does not involve denying adequate *power* to Congress. There is no difficulty in passing effective legislation for the protection of civil rights against improper State action. What we are concerned with here is something basic in a democratic society, namely, the avoidance of the injustice of prohibiting conduct in terms so vague as to make the understanding of what is proscribed a guess-work too difficult for confident judgment even for the judges of the highest Court in the land.

III

By holding, in this case, that State officials who violate State law nevertheless act "under color of" State law, and by establishing as federal crimes violations of the vast, undisclosed range of the Fourteenth Amendment, this Court now creates new delicate and complicated problems for the enforcement of the criminal law. The answers given to these problems, in view of the tremendous scope of potential offenses against the Fourteenth Amendment, are bound to produce a confusion detrimental to the administration of criminal justice.

The Government recognizes that "this is the first case brought before this Court in which § 20 has been applied

to deprivations of rights secured by the Fourteenth Amendment." It is not denied that the Government's contention would make a potential offender against this act of any State official who as a judge admitted a confession of crime, or who as judge of a State court of last resort sustained admission of a confession, which we should later hold constitutionally inadmissible, or who as a public service commissioner issued a regulatory order which we should later hold denied due process or who as a municipal officer stopped any conduct we later should hold to be constitutionally protected. The Due Process Clause of the Fourteenth Amendment has a content the scope of which this Court determines only as cases come here from time to time and then not without close division and reversals of position. Such a dubious construction of a criminal statute should not be made unless language compels.

That such a pliable instrument of prosecution is to be feared appears to be recognized by the Government. It urges three safeguards against abuse of the broad powers of prosecution for which it contends. (1) Congress, it says, will supervise the Department's policies and curb excesses by withdrawal of funds. It surely is casting an impossible burden upon Congress to expect it to police the propriety of prosecutions by the Department of Justice. Nor would such detailed oversight by Congress make for the effective administration of the criminal law. (2) The Government further urges that, since prosecutions must be brought in the district where the crime was committed, the judge and jurors of that locality can be depended upon to protect against federal interference with State law enforcement. Such a suggestion would, for practical purposes, transfer the functions of this Court, which adjudicates questions concerning the proper relationship between the federal and State governments, to jurors whose function is to resolve factual questions. Moreover,

if federal and State prosecutions are subject to the same influences, it is difficult to see what need there is for taking the prosecution out of the hands of the State. After all, Georgia citizens sitting as a federal grand jury indicted and other Georgia citizens sitting as a federal trial jury convicted Screws and his associates; and it was a Georgia judge who charged more strongly against them than this Court thinks he should have.

Finally, the Department of Justice gives us this assurance of its moderation:

"(3) The Department of Justice has established a policy of strict self-limitation with regard to prosecutions under the civil rights acts. When violations of such statutes are reported, the Department requires that efforts be made to encourage state officials to take appropriate action under state law. To assure consistent observance of this policy in the enforcement of the civil rights statutes, all United States Attorneys have been instructed to submit cases to the Department for approval before prosecutions or investigations are instituted. The number of prosecutions which have been brought under the civil rights statutes is small. No statistics are available with respect to the number of prosecutions prior to 1939, when a special Civil Rights Section was established in the Department of Justice. Only two cases during this period have been reported: *United States* v. *Buntin*, 10 Fed. 730 (C. C. S. D. Ohio), and *United States* v. *Stone*, 188 Fed. 836 (D. Md.). Since 1939, the number of complaints received annually by the Civil Rights Section has ranged from 8,000 to 14,000, but in no year have prosecutions under both Sections 20 and 19, its companion statute, exceeded 76. In the fiscal year 1943, for example, 31 full investigations of alleged violations of Section 20 were conducted, and three cases were brought to trial. In the following fiscal year there were 55 such investigations, and prosecutions were instituted in 12 cases.

"Complaints of violations are often submitted to the Department by local law enforcement officials who for one reason or another may feel themselves powerless to take action under state law. It is primarily in this area, namely, where the official position of the wrongdoers has apparently rendered the State unable or unwilling to institute proceedings, that the statute has come into operation. Thus, in the case at bar, the Solicitor General of the Albany Circuit in the State of Georgia, which included Baker County, testified (R. 42): 'There has been no complaint filed with me in connection with the death of Bobby Hall against Sheriff Screws, Jones, and Kelley. As to whom I depend for investigation of matters that come into my Court, I am an attorney, I am not a detective and I depend on evidence that is available after I come to Court or get into the case . . . The sheriffs and other peace officers of the community generally get the evidence and I act as the attorney for the state. I rely on my sheriffs and policemen and peace officers and private citizens also who prosecute each other to investigate the charges that are lodged in court.' "

But such a "policy of strict self-limitation" is not accompanied by assurance of permanent tenure and immortality of those who make it the policy. Evil men are rarely given power; they take it over from better men to whom it had been entrusted. There can be no doubt that this shapeless and all-embracing statute can serve as a dangerous instrument of political intimidation and coercion in the hands of those so inclined.

We are told local authorities cannot be relied upon for courageous and prompt action, that often they have personal or political reasons for refusing to prosecute. If it be significantly true that crimes against local law cannot be locally prosecuted, it is an ominous sign indeed. In any event, the cure is a reinvigoration of State responsibility. It is not an undue incursion of remote federal

authority into local duties with consequent debilitation of local responsibility.

The complicated and subtle problems for law enforcement raised by the Court's decision emphasize the conclusion that § 20 was never designed for the use to which it has now been fashioned. The Government admits that it is appropriate to leave the punishment of such crimes as this to local authorities. Regard for this wisdom in federal-State relations was not left by Congress to executive discretion. It is, we are convinced, embodied in the statute itself.

JEWELL RIDGE COAL CORPORATION *v.* LOCAL NO. 6167, UNITED MINE WORKERS OF AMERICA ET AL.

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

No. 721. Argued March 9, 1945.—Decided May 7, 1945.

1. Time spent by miners in traveling underground between the portal and the working face of bituminous coal mines, *held* required by § 7 of the Fair Labor Standards Act to be included in the workweek and to be compensated accordingly. Following *Tennessee Coal Co.* v. *Muscoda Local,* 321 U. S. 590. Pp. 163, 166.
2. The requirement of § 7 of the Fair Labor Standards Act that time spent by miners in traveling underground between the portal and the working face of bituminous coal mines be included in the workweek and compensated accordingly cannot be frustrated by any contrary custom or contract. P. 167.
3. The legislative history of the Fair Labor Standards Act does not require a conclusion different from that here reached. P. 168.
4. A statement of the Administrator of the Wage and Hour Division favoring the computation of working time in the bituminous coal industry on a "face to face" basis, being legally untenable, is not entitled to the weight usually accorded the Administrator's rulings, interpretations, and opinions. P. 169.

145 F. 2d 10, affirmed.

CERTIORARI, 323 U. S. 707, to review the reversal of a judgment for the plaintiff (petitioner here) in a declaratory judgment action seeking a construction of the Fair Labor Standards Act. 53 F. Supp. 935.

Messrs. William A. Stuart and *George Richardson, Jr.* for petitioner.

Mr. Crampton Harris, with whom *Messrs. Welly K. Hopkins, Frank W. Rogers* and *Leonard Muse* were on the brief, for respondents.

Messrs. Edward R. Burke and *John C. Gall* filed a brief on behalf of the Southern Coal Producers Association, as *amicus curiae,* in support of petitioner.

Solicitor General Fahy and *Mr. Douglas B. Maggs* filed a brief on behalf of the Administrator of the Wage and Hour Division, U. S. Department of Labor, as *amicus curiae,* in support of respondents.

MR. JUSTICE MURPHY delivered the opinion of the Court.

In *Tennessee Coal Co.* v. *Muscoda Local,* 321 U. S. 590, this Court held that underground travel in iron ore mines constituted work and hence was included in the compensable workweek within the meaning of Section 7 (a) of the Fair Labor Standards Act of 1938, 52 Stat. 1060, 1063, 29 U. S. C. § 207 (a). The sole issue in this case is whether any different result must be reached as regards underground travel in bituminous coal mines.

The petitioner, Jewell Ridge Coal Corporation, owns two bituminous coal mines in Virginia. It instituted this declaratory judgment action against the respondent unions and certain of their officials, representing all of petitioner's underground mine workers. The respondents filed an answer and a counterclaim. By stipulation,

the parties sought to determine "what constitutes the working time which makes up the workweek of plaintiff's underground employees within the meaning of Section 7 of the Fair Labor Standards Act of 1938, and what amounts, if any, are due and unpaid to such employees under said Section, the determination of such amounts, if any, to be later referred to a special master." This issue relates only to the work performed by petitioner's underground miners between April 1, 1943, and June 20, 1943.

After hearing evidence and argument, the District Court concluded that petitioner had correctly computed the workweek on a "face to face" basis and that the Act did not require that the workweek include "either time spent by such employees outside the portal of the mines before entering therein, or time spent in traveling from the portals to their usual places of work and return." 53 F. Supp. 935, 952. Only the issue as to travel time is involved here. The Fourth Circuit Court of Appeals felt that the *Tennessee Coal* case, which was decided by this Court subsequent to the entry of the District Court's judgment in this proceeding, could not be distinguished in principle and accordingly reversed the judgment on that basis. 145 F. 2d 10.

We agree with the court below that there is no substantial factual or legal difference between this and the *Tennessee Coal* case and that underground travel in bituminous coal mines as well as in iron ore mines is included within the compensable workweek contemplated by § 7 (a) of the Fair Labor Standards Act.

Factually, underground travel between the portals and working faces of petitioner's two bituminous coal mines bears all the indicia of work. While the District Court here found "no such painful and burdensome conditions as those described in the iron ore mines," 53 F. Supp. at 949, all three of the essential elements of work as set forth

in the *Tennessee Coal* case, 321 U. S. at 598, are present in this instance:

1. *Physical or mental exertion* (*whether burdensome or not*). After arriving at petitioner's mines by foot or vehicle, the miners first obtain their lamps from the lamp house near the main portal. They then enter the man trips at the portal and are transported down to the underground man trip stations—a journey varying in distance from 4,250 feet to 25,460 feet. Each man trip is composed of a train of small empty coal cars drawn by an electric motor or locomotive. From seven to eight men sit on a bench or on the floor of each car, which is only a few feet high. The cars apparently are not overcrowded. If the roof of the passageway is sufficiently high the men are able to sit upright as they ride. But they must be on constant guard for the frequent low ceilings which force them to bend over to avoid striking their heads. And the dangers of falling slate and falling ceilings are ever present.

The District Court found that while this journey is "definitely not luxurious" it is "neither painful nor unduly uncomfortable, and is less hazardous than other phases of mining operations." In this connection it should be noted that the record shows that six persons suffered compensable injuries, involving absence from work for seven days or more, while riding on petitioner's man trips from January 1, 1939, to October 31, 1943. There is also evidence of two deaths and numerous minor injuries to the miners.

After arriving at the man trip stations, the miners check in at a nearby check-in board, a practice that differs inconsequentially from the procedure followed by the miners in the *Tennessee Coal* case of checking in at a tally house on the surface. They then collect their tools, equipment, explosives, etc., and carry them on foot to the working places, usually some 500 to 1,500 feet away. This requires that they proceed through dark and dangerous

tunnels, often so low as to force them to crouch over while carrying their burdens. Moreover, they must keep constant vigil against live electric wires, falling rocks and obstacles under foot. At the end of each shift, the miners make their return journey to the man trip stations, deposit their tools and equipment and ascend to the portal via the man trips.

In addition, approximately 72 men at petitioner's Jewell Ridge mine enter the mine at places other than the main portal and either catch the man trips at some man trip station inside the mine or walk all the way to their places of work.

These undisputed facts compel the conclusion that the underground travel in petitioner's mines involves physical and mental exertion. That it may not be so burdensome or disagreeable as some of the aspects of the travel described in the *Tennessee Coal* case is not of controlling significance in this respect.

2. *Exertion controlled or required by the employer.* It is obvious that the underground travel is both controlled and required by petitioner. Both the man trip transportation and travel by foot occur solely on petitioner's property and occur only as and when required by petitioner. Petitioner organizes, operates and supervises all aspects of the man trips. Definite schedules are arranged and maintained by petitioner. A company foreman rides on each man trip and occasionally gives work instructions during the journey. He also compels compliance with the numerous safety rules for man trips adopted by petitioner in compliance with state law. Layoff or discharge may result from a miner's continued failure to obey these rules.

3. *Exertion pursued necessarily and primarily for the benefit of the employer and his business.* It is too obvious to require extended discussion that here, as in the *Tennessee Coal* case, the underground travel is undertaken

necessarily and primarily for the benefit of petitioner and its coal mining operations. The miners do not engage in this travel for their own pleasure or convenience. It occurs only because it is a necessary prerequisite to the extraction of coal from the mines, which is the prime purpose of petitioner's business. Without such travel the coal could not be mined.

Thus the three basic elements of work of a type necessarily included within the workweek as contemplated by the Act are plainly evident from these facts. Those who are forced to travel in underground mines in order to earn their livelihood are unlike the ordinary traveler or the ordinary workman on his way to work. They must journey beneath the crust of the earth, far removed from the fresh and open air and from the beneficial rays of the sun. A heavy toll is exacted from those whose lot it is to ride and walk and mine beneath the surface. From the moment they enter the portal until they leave they are subjected to constant hazards and dangers; they are left begrimed and exhausted by their continuous physical and mental exertion.

To conclude that such subterraneous travel is not work is to ignore reality completely. We therefore are compelled to hold that the only reasonable conclusion to be drawn from the District Court's findings of fact and from other undisputed evidence is that the underground travel in petitioner's two mines is work and that the time spent in such travel should be included within the workweek for purposes of § 7 (a) of the Fair Labor Standards Act.

The other propositions advanced by petitioner are also answered by the principles of the *Tennessee Coal* case. Thus petitioner places heavy reliance upon the conclusion of the District Court that "by the universal custom and usage of the past fifty years, and by agreement of the parties in every collective bargaining agreement which was ever made, it was universally recognized that in the bituminous coal industry, travel time was not work time."

53 F. Supp. at 950. But even though the customs and contracts prevalent in this industry were to compute the workday only from the time spent "face to face" with the seams, we need only repeat what we said on this subject in the *Tennessee Coal* opinion, 321 U. S. at 602: "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 only for 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. 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 rights."

Such a conclusion is the only method of achieving the plain design of § 7 (a) to spread employment through imposing the overtime pay requirement on the employer and to compensate the employee for the burden of a workweek in excess of the hours fixed by the Act. *Walling* v. *Helmerich & Payne,* 323 U. S. 37, 40; *Overnight Motor Co.* v. *Missel,* 316 U. S. 572, 577, 578. This necessitates that the workweek be computed on the basis of the hours spent in actual work and that compensation be paid accordingly. And even those employers who pay wages above the minimum and who maintain no substandard working conditions must respect this statutory pattern. Conversely, employees are not to be deprived of the benefits of the Act simply because they are well paid or because they are represented by strong bargaining agents. This may in some instances require certain modifications and adjustments in existing customs and contracts in order to include all the hours actually worked in the statutory

workweek or to compensate at the proper rate for all of such labor. But if these modifications and adjustments are not made, the plain language and policy of § 7 (a) are frustrated.

Petitioner here has presented no cogent reason for legalizing such a frustration, however unintentional in character, of the statutory scheme. Statements in the legislative history to the effect that the Act was aimed primarily at overworked and underpaid workers and that the Act did not attempt to interfere with bona fide collective bargaining agreements are indecisive of the issue in the present case.[1] Such general remarks, when read fairly and in

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[1] Thus, for example, the District Court relied in part upon a statement made by the Senator in charge of the original bill, which did not become law as it was then framed, to the effect that the bill did not affect collective agreements already made or hereafter to be made between employer and employee. 81 Cong. Rec. 7650. Aside from the fact that this statement was made with reference to entirely different provisions than those presently in the Act, a full and fair reading of the entire debate at the time in question demonstrates that the possibility of affecting or setting aside collective agreements when they did not coincide with statutory standards was definitely understood and appreciated. This is shown by the following remarks (81 Cong. Rec. 7650):

"Mr. Walsh. Next, does the bill affect collective-bargaining agreements already made or hereafter to be made between employers and employees?

"Mr. Black. It does not.

"Mr. Walsh. There is one exception to that, is there not? The bill does not affect collective-bargaining agreements where the hours are less than 40 per week, or where the wages are more than 40 cents per hour?

"Mr. Black. That is correct.

"Mr. Walsh. But if a collective-bargaining agreement has been entered into at 36 cents per hour wages, *the board would have jurisdiction to set that agreement aside* and to fix, if the facts warrant it, a minimum wage of 40 cents?" (Italics added.)

"Mr. Black. The board would have jurisdiction to do it, but under the provisions of the law it would be my judgment that the

light of their true context, were obviously not made with this narrow issue in mind and they cannot be said to demonstrate a Congressional desire to allow the coal industry to use private customs and agreements as an excuse for failure to compute the workweek as contemplated by § 7 (a). In fact, some of these statements expressly recognize the necessity of modifying or setting aside those collective agreements that did not conform with statutory standards.[2]

Nor can we give weight to the fact that the Administrator of the Wage and Hour Division in 1940 issued a public statement that he would not regard the practice of computing working time on a "face to face" basis in the bituminous coal industry as unreasonable in light of the prevailing customs and practices, supported by a long history of bona fide collective bargaining. This statement, being legally untenable, lacks the usual respect to be accorded the Administrator's rulings, interpretations and opinions. Cf. *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140.

Moreover, as in the *Tennessee Coal* case, we are not concerned here with the use of bona fide contracts or customs

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board would be very reluctant, indeed, to attempt to interfere with a bona-fide agreement made between employer and employee.

"Mr. WALSH. I think the Senator is correct; but the situation might well exist that the board, in fixing a minimum wage in a case where the wage of the employees was less than 40 cents, after a survey and study of the question, and taking into consideration some factors that it must take into consideration in fixing the wage, might decide, let us say, upon 38 cents per hour. If it is found that in some other industry of like character and nature there was a collective-bargaining agreement providing for the payment of 36 cents an hour it would, would it not, take jurisdiction and *set aside that collective-bargaining agreement insofar as the facts showed that 38 cents was a fair rate?*" (Italics added.)

"Mr. BLACK. It would."

[2] See note 1, *supra.*

to settle difficult and doubtful questions as to whether certain activity or nonactivity constitutes work. Cf. *Armour & Co.* v. *Wantock,* 323 U. S. 126. Nor do we make any intimations at this time concerning the validity of agreements whereby, in a bona fide attempt to avoid complex difficulties of computation, travel time is averaged or fixed at an arbitrary figure and underground miners are paid on that basis rather than according to their individual travel time.

We are dealing here solely with a set of facts that leaves no reasonable doubt that underground travel in petitioner's two bituminous coal mines partakes of the very essence of work.[3] This travel must therefore be included within the workweek for purposes of § 7 (a) of the Fair Labor Standards Act regardless of any custom or contract to the contrary at the time in question. Thus shall each of petitioner's miners receive his own reward according to his own labor.

Affirmed.

MR. JUSTICE JACKSON, dissenting.

THE CHIEF JUSTICE, MR. JUSTICE ROBERTS, MR. JUSTICE FRANKFURTER, and I are constrained respectfully to dissent from this decision because (1) It either invalidates collectively bargained agreements which govern the matter in difference between these parties or it ignores their explicit terms; (2) Neither invalidation nor disregard of collectively bargained agreements is authorized by any word of Congress, and legislative history gives convinc-

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[3] Indeed, to the extent that petitioner's "face to face" collective bargaining agreements excluded travel time from the compensable workweek there was an implied recognition that underground travel was work and that such work would normally call for additional compensation in the absence of a specific "face to face" provision to the contrary. And the widespread practice in other coal producing nations of including travel time or portions thereof in the workday further bears out the conclusion that underground travel is work.

ing indications that Congress did not intend the Fair Labor Standards Act to interfere with them as this decision holds it does; (3) Congress withheld interference with collectively bargained contracts at the request of the United Mine Workers and expressed a policy to observe and preserve collectively bargained arrangements applying to the coal industry in other almost contemporaneous legislation specifically directed to the problems of that industry; (4) This decision is contrary to interpretations of the Act made by the Administrator upon the recommendation of the United Mine Workers, and it denies to the Administrator's rulings the respect we have been compelling lower courts to render to them in the cases of others; (5) The decision necessarily invalidates the basis on which the Government itself has operated the mines and brings into question the validity of the Government's strike settlement agreements and of all existing miners' agreements; (6) It proceeds on a principle which the Court has unanimously denied to unorganized workmen for whose benefit the Act was passed. It is the purpose of this opinion to set forth particulars supporting these grounds of dissent.

1. *The Court's decision either invalidates or ignores the explicit terms of collectively bargained agreements between these parties based on a half century of custom in the industry.* This action involves labor in two mines, each employing approximately five hundred men. At all times in issue the mines have been unionized and the workmen have been organized by the United Mine Workers of America. This union has been selected and recognized as the bargaining agent of the men. Their hours, wages, and working conditions have been fixed by collective bargaining.

Employees in these mines first were organized as members of the United Mine Workers of America in 1933, following promulgation of the N. I. R. A. Code of Fair Com-

petition for the industry. This code was drawn up by representatives of the Union and of the operators and was approved by the President of the United States. It provided for the "face to face" wage basis which makes no direct allowance for travel time, but, as has been pointed out on behalf of the Union, the wage scale was fixed at a level intended indirectly to compensate travel time. Basic wage agreements thereafter were entered into between the Union and the operators as of April 1, 1934 (continued in effect by successive extension agreements from March 31, 1935 until October 1935); again as of October 1, 1935; and as of April 2, 1937; again as of May 12, 1939, when the Fair Labor Standards Act was nearly a year old and had been in effect for nearly six months, a new agreement was bargained which, like all the previous wage agreements, expressly provided for the "face to face" basis, necessarily excluding all travel time from the workweek. The last basic wage agreement reached by collective bargaining previous to the commencement of this action, dated April 1, 1941 and to extend for a period of two years, did the same. These agreements are admitted and, if valid, govern the dispute between the parties.

But the Court does not honor these agreements. We have repeatedly and consistently held that collectively bargained agreements must be honored, even to the extent that employers may not, while they exist, negotiate with an individual employee or a minority, cf. *J. I. Case Co.* v. *Labor Board,* 321 U. S. 332, and must pay heavy penalties for violating them. Cf. *Order of Railroad Telegraphers* v. *Railway Express Agency,* 321 U. S. 342. And now at the first demand of employees the Court throws these agreements overboard, even intimating that to observe agreements, bargained long before enactment of the Fair Labor Standards Act, would be "legalizing" a frustration of the statutory scheme.

The suggestion that the agreements were "frustrations" of the statutory scheme has not the slightest warrant in this record. This "face to face" basis was traditional in the bituminous coal mining industry in this country and universally was the basis for determination of hours therein for something like half a century. This was contrary to the practice in England and Continental Europe, where the basis has been to calculate time from entry of the mine to leaving it or from "portal to portal" or some modification thereof. The reason American miners accepted this arrangement appears from an official statement by counsel for the United Mine Workers of America to the Administrator of this Act that "The uniform high rates of pay that have always been included in the wage agreement of the mining industry contemplate the employee's working day beginning when he arrives at his usual working place. Hence, travel time was never considered as a part of the agreement or obligation of the employer to pay for in this industry, nor as hours worked by the employees, and this has been the case since the eight-hour day was established in the industry—April 1, 1898," and "This method of measuring the working time at the place 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." [1]

The Court takes refuge in its own decision in *Tennessee Coal Co.* v. *Muscoda Local,* 321 U. S. 590, saying "We agree with the court below that there is no substantial factual or legal difference between this" case and that. But in the *Tennessee* case this Court pointed to facts of very different import saying, "Likewise there was substantial, if not conclusive, evidence that prior to 1938 petitioners [operators] recognized no independent labor unions and engaged in no bona fide collective bargaining with an eye toward reaching agreements on the workweek. Contracts with

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[1] See letter of Houck set forth in Note 9.

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 [operators]. 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." *Tennessee Coal Co.* v. *Muscoda Local, supra,* 601–2.

The Court does not contradict the Union's recognition that the contracts now disregarded by the Court were "contracts fairly arrived at through the process of collective bargaining." And that there is this important difference between the present situation and the situation that was before us in the *Tennessee* case was recognized by the counsel in the *Tennessee* case, the same counsel who argued this case at our bar. He had no difficulty in finding substantial factual and legal differences when he did not want the above-described situation in the *Tennessee* case to be prejudiced by being likened to this situation. The District Court quoted as "quite interesting" an excerpt from the argument made in the brief in that case: " 'We are not trying the case of coal miners. We are not experts on coal mining. We do know that there are two great differences between the coal mining situation and the mining of iron ore in Jefferson County. In coal mining we find a union which has been strong and powerful and which as a union has been engaged in collective bargaining with the coal operators over a long period of years. In our case we find the efforts of the men to organize their union presents a pitiable picture of helplessness against the domination of the mining companies. In coal mining the men work seven hours per day. At no point in the

voluminous record created by the appellants do we find a single ore mining company offering to pay its men on a seven hour day.' "[2]

We submit that there are substantial factual differences between these cases, and we therefore come to the question whether the presence in these cases of genuine collectively bargained contracts covering the matter in dispute has any legal significance. The Court thinks they mean nothing. We cannot agree.

2. *Neither invalidation nor disregard of collectively bargained agreements is authorized by the Fair Labor Standards Act. Both its legislative history and contemporaneous legislation are convincing that Congress did not itself intend to nullify them or to provide any legislative basis for this Court to do so.* It is admitted that the Act contains no express authority for this decision. As was said in *Tennessee Coal Co.* v. *Muscoda Local:* "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) [29 U. S. C. § 207] 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

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[2] 53 F. Supp. 935, 948. Similarly interesting arguments were presented to this Court in the brief which was submitted here in the *Tennessee* case: "The underground employees are not coal miners. They mine iron ore. We did not try out in the courts below the claims and counterclaims of the United Mine Workers of America and the coal operators. We do not see how we can try the issues between coal miners and coal operators on a record portraying the work, the environment and the detailed conditions in the iron mining industry. The judicial process applies to specific cases between designated parties. . . . The case, therefore, hinges on a matter of simple fact." (Respondents' Brief, pp. 28–29.)

times the regular rate. Section 3 (g) [29 U. S. C. § 203 (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.'"[3] This is every straw that can be picked from the statute for the Court to grasp at.

Likewise, the Court is unable to cite any item of legislative history which hints that Congress expected these words to be given this meaning. On the other hand, we find that pains were taken to assure Congress that there was no such intent.

The bills which ultimately resulted in this Act were introduced in 1937. As the District Court said, "Although . . . statements were made at various times while the measure was being amended and revised, and therefore not with respect to the Bill in its final form, they show a continuing intention not to interfere with the processes of collective bargaining."[4] Examples are multiple. The Senate Committee on Education and Labor in its report of July 6, 1937, said:

"The right of individual or collective employees to bargain with their employers concerning wages and hours is recognized and encouraged by this bill. It is not intended that this law shall invade the right of employer and employee to fix their own contracts of employment, wherever there can be any real, genuine bargaining between them. It is only those low-wage and long-working-hour industrial workers, who are the helpless victims of their own bargaining weakness, that this bill seeks to assist to obtain a minimum wage." (Senate Report No. 884, 75th Cong., 1st Sess., pp. 3–4.)

The debates on the bill appear to us to make this intention more explicit. For example, the Congressional

[3] 321 U. S. 590, 597.

[4] 53 F. Supp. 935, 944.

Record, Vol. 81, p. 7650, shows that the following took place in debate in the Senate July 27, 1937:

"Mr. WALSH. Next, does the bill affect collective-bargaining agreements already made or hereafter to be made between employer and employee?

"Mr. BLACK. It does not."

Of course it was agreed on all hands that no agreement could be validly bargained which provided for less than the minimum wages to be fixed by the proposed Board or for more than the specified hours of labor. But beyond observance of these limitations, we read the legislative history to indicate that the control of wages, hours and working conditions by collective contract was left undisturbed.[5]

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[5] The colloquy follows:

"Mr. WALSH. Next, does the bill affect collective-bargaining agreements already made or hereafter to be made between employers and employees?

"Mr. BLACK. It does not.

"Mr. WALSH. There is one exception to that, is there not? The bill does not affect collective-bargaining agreements where the hours are less than 40 per week, or where the wages are more than 40 cents per hour?

"Mr. BLACK. That is correct.

"Mr. WALSH. But if a collective-bargaining agreement has been entered into at 36 cents per hour wages, the board would have jurisdiction to set that agreement aside and to fix, if the facts warrant it, a minimum wage of 40 cents?

"Mr. BLACK. The board would have jurisdiction to do it, but under the provisions of the law it would be my judgment that the board would be very reluctant, indeed, to attempt to interfere with a bona-fide agreement made between employer and employee.

"Mr. WALSH. I think the Senator is correct; but the situation might well exist that the board, in fixing a minimum wage in a case where the wage of the employees was less than 40 cents, after a survey and study of the question, and taking into consideration some factors that it must take into consideration in fixing the wage, might decide, let us say, upon 38 cents per hour. If it is found that in some other industry

Definite assurances to that effect repeatedly given to the House are noted in the margin.[6] Nor are these assurances surprising or paradoxical.

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of like character and nature there was a collective-bargainng agreement providing for the payment of 36 cents an hour it would, would it not, take jurisdiction and set aside that collective-bargaining agreement insofar as the facts showed that 38 cents was a fair rate?

"Mr. BLACK. It would." 81 Cong. Rec. 7650.

[6] The District Court summarized these as follows:

"Mrs. NORTON. . . . It is not the intention of this amendment, or of the bill, to start fixing wages in all industries but only in those in which oppressive wages are being paid to a substantial portion of workers . . ." (House, December 13, 1937, Congressional Record, Vol. 82, p. 1391.)

"Mr. RANDOLPH. . . . It [the bill] is not concerned with that fortunate majority of the laboring classes whose collective bargaining power is sufficiently potent to insure the preservation of their industrial rights.

"But it is concerned with those millions in industry who are unprotected and unorganized. . . ." (House, December 13, 1937, Congressional Record, Vol. 82, p. 1395.)

"Mr. CURLEY. . . . There is no conflict of jurisdiction, under the provisions of this fair standards of labor bill, and the existing labor organizations of this country. The bill concerns only of relieving the paralysis which, at present, shackles misery and poverty to millions of heads of families, who are underpaid and causing a colossal financial loss in purchasing power because of existing deplorable conditions." (House, May 23, 1938, Congressional Record, Vol. 83, p. 7283.)

"Mr. BOILEAU. . . . What is more, we are preserving for organized labor its right to bargain collectively, and it will bargain for a higher wage than that." (House, May 23, 1938, Congressional Record, Vol. 83, p. 7290.)

"Mr. ALLEN. . . . This bill has a threefold purpose as I see it. First, it eliminates sweat shops— . . . The bill does not affect organized labor, but those 5,000,000 American working men and women who have not yet been benefited by organized labor." (House, May 23, 1938, Congressional Record, Vol. 83, p. 7291.)

"Mr. FITZGERALD. . . . I would have you observe that this proposed legislation will not improve the wages and hours of the majority of workers, nor does it attempt to. For I am greatly pleased to say that the majority of workers do not need this legislation because they

3. *Congress refrained from enacting authority for this result at the request of the United Mine Workers, expressed in the testimony of their responsible representatives, whose plan for regulating the coal industry was enacted in the Guffey Coal Act.* In 1937, bills which ultimately resulted in the Fair Labor Standards Act were introduced in both houses of Congress and hearings were held. Major Percy Tetlow, an official of the International Union, United Mine Workers of America, as a witness in this case, summarized the attitude of the mine workers as follows:

"No, the Miners' organization has always taken the position that the question of wages, hours and conditions of employment should be governed and controlled by agreements under collective bargaining in the industry more so than by legislation. We have always taken the position that any legislation which will improve standards of working men and women,—to favor it and foster it and support it. Fundamentally, we are opposed to legislation that controls the daily wage and conditions of employment. We think that is a relationship that should exist between employer and employee." This is in accord with the testimony of Mr. John L. Lewis, President of the United Mine Workers of America, before the congressional committees, when he said:

"For instance, frankly I would not want this bill to convey power to a board to order an investigation into all of the wage agreements in the mining industry right now, or to give the board power to decide that the collective-bargaining agreements in the mining industry were not sound, not proper, were confiscatory, or not in harmony with the facts of the industry, and order a modification thereof. I think the power of the board should be limited

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are receiving a living wage and are not forced to work unreasonable hours." (House, May 23, 1938, Congressional Record, Vol. 83, p. 7310.)

to cases which run below the level of the standards fixed by Congress. I see endless confusion in the adoption of section 5 now. I see a drift toward the complete fixation of wages in all industry by governmental action." [7]

Far from interfering with employer-employee agreements by this Act, the United Mine Workers advocated and Congress enacted contemporaneous specific legislation to confirm them in the coal industry. The same Congress which enacted the Fair Labor Standards Act of 1938 enacted the second Bituminous Coal Act of 1937, (50 Stat. 72, Chap. 127, 15 U. S. C. § 828), which states that

"(a) . . . It is hereby declared to be the public policy of the United States that—

(1) Employees of producers of coal shall have the right to organize and to bargain collectively with respect to their hours of labor, wages, and working conditions through representatives of their own choosing, without restraint, coercion, or interference on the part of the producers." 15 U. S. C. § 839.

It is impossible to believe that Congress in April of 1937 wrote such a specific declaration in favor of collective bargaining and a short time later by general phrases of the Fair Labor Standards Act intended to invalidate or disregard collective bargaining.

It may safely be said that over the past half century Congress has given more detailed and specific consideration to the bituminous coal mining industry than to any other single industry with the possible exception of transportation. The efforts of Congress, the travail of mine labor, and the difficulties of operators are recited in this case and in extensive briefs by the Government and parties interested in the coal mine litigations that have been considered here. Cf. *Appalachian Coals* v. *United States*, 288

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[7] Joint Hearings before the Committee on Education and Labor, United States Senate and the Committee on Labor, House of Representatives, June 2–22, 1937 (75th Cong., 1st Sess.) p. 281.

U. S. 344; *Carter* v. *Carter Coal Co.,* 298 U. S. 238; *Sunshine Anthracite Co.* v. *Adkins,* 310 U. S. 381. In the twenty-three years between 1913 and 1935 when the first Bituminous Coal Conservation Act was passed there were no less than nineteen investigations and hearings by congressional committees or specially created commissions with respect to conditions in this industry which were of grave national concern. These investigations had dealt with bitterly contested strikes, and with serious disorders which frequently resulted in bloodshed and martial law, and which on at least four occasions were restrained by intervention of federal troops. Other investigations were concerned with coal shortages and high prices and with the demoralization of the industry. The plight of this industry at that time was graphically summarized by Mr. Justice Douglas in *Sunshine Coal Co.* v. *Adkins,* 310 U. S. 381, for an all but unanimous Court: "For a generation there have been various manifestations of incessant demand for federal intervention in the coal industry. The investigations preceding the 1935 and 1937 Acts are replete with an exposition of the conditions which have beset that industry. Official and private records give eloquent testimony to the statements of Mr. Justice Cardozo in the *Carter* case (p. 330) that free competition had been 'degraded into anarchy' in the bituminous coal industry. Overproduction and savage, competitive warfare wasted the industry. Labor and capital alike were the victims. Financial distress among operators and acute poverty among miners prevailed even during periods of general prosperity. This history of the bituminous coal industry is written in blood as well as in ink.

"It was the judgment of Congress that price-fixing and the elimination of unfair competitive practices were appropriate methods for prevention of the financial ruin, low wages, poor working conditions, strikes, and disruption of the channels of trade which followed in the wake

of the demoralized price structures in this industry. If the strategic character of this industry in our economy and the chaotic conditions which have prevailed in it do not justify legislation, it is difficult to imagine what would."[8]

It was against this economic background so well known to Congress that the plan for stabilization of the bituminous coal industry, through elimination of "competitive warfare" was adopted in the interests both of labor and the operators. In the light of the sustained attention Congress had given to the delicate economy of the coal industry and its plan to stabilize it by collective bargaining and price-fixing, it is unbelievable that it would undo a substantial part of that plan by the casual and ambiguous implication which the Court now attributes to the Fair Labor Standards Act.

4. *The decision of the Court is contrary to the interpretations of the Act made by its Administrator on the recommendation of the United Mine Workers, and it denies to the Administrator's rulings the respect we have been compelling lower courts to render to such administrative rulings in the cases of others.* It was not until 1940 that anyone appears to have thought the Act affected the coal miners' agreements. In the year 1940, an investigator of the Wage and Hour Administration, investigating operations of a coal mining company in Pennsylvania, raised the question whether underground travel time must be included in the workweek under the terms of the Act. He stated his opinion that the "face to face" basis, excluding travel time, was the proper one to be applied in the coal-mining industry, but indicated that if a rule theretofore applied in the case of a gold mining company were required the coal company would owe some $70,000 to underground workers. This was brought to the attention of the President of the Central Pennsylvania Coal Pro-

[8] 310 U. S. 395.

ducers Association, and he in turn brought it to the attention of other operators and of Mr. Lewis, President of the International Union, United Mine Workers of America. Thereafter representatives of both the operators and the United Mine Workers conferred from time to time with the representatives of the Wage and Hour Administration. Both the operators and the Union officials opposed any construction of the Act which would require payment for travel time. On July 9, 1940, representatives of the operators and Mr. Earl Houck, director of the legal department of the United Mine Workers of America, jointly composed and sent to the Administrator of the Wage and Hour Division a letter setting out their views on the subject.[9] They urged that such a change "would create so

[9] The letter appears in the opinion of the district court:

1617 PENNSYLVANIA BOULEVARD,
Philadelphia, Pennsylvania, July 9, 1940.

Col. PHILIP B. FLEMING,
Administrator, Wage and Hour Division,
Department of Labor, Washington, D. C.

DEAR MR. ADMINISTRATOR: As a result of certain investigations which have been conducted by the Wage & Hour Division at bituminous coal mines in Pennsylvania, particularly at the Revloc shaft of the Monroe Coal Mining Company, and a conference that has been held by your Supervising Inspector, Mr. Caffey, at Pittsburgh, Pa., with a committee of the Western Pennsylvania Coal Operators' Association, concerning the application of the Fair Labor Standards Act to the bituminous coal mining industry, certain questions have arisen that are disturbing to both employers and employees within the industry. These uncertainties have been continuing for some time and are causing much concern to the mine workers and the mine operators, especially with reference to "travel time."

Today, the Negotiating Committee of the Appalachian Wage Conference, namely: Messrs. J. D. A. Morrow, President of Pittsburgh Coal Company; L. T. Putnam of the Raleigh Wyoming Mining Company, Beckley, W. Va.; L. C. Gunter, of the Southern Appalachian Coal Operators' Association, Knoxville, Tenn.; Charles O'Neill, President of the United Eastern Coal Sales Corporation, New York City; C. E. Cowan, Vice President of Monroe Coal Mining Company; Frederick

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

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H. Knight, counsel for Monroe Coal Mining Company; W. L. Robison, President of the Youghiogheny & Ohio Coal Company and Chairman of the Appalachian Wage Conference, on the one hand, and Mr. Earl E. Houck, Director of the Legal Department of the United Mine Workers of America, met with Mr. Dorsey, Regional Director, Philadelphia, Pa., and Mr. Gallagher, Regional Counsel, Philadelphia, Pa., at which time these questions were discussed at length, particularly the application of the Act as to the question of hours of work in the bituminous coal industry.

The mine workers and the mine operators present presented their views to representatives of the Wage and Hour Division as to the provisions of the Appalachian Wage Agreement covering maximum hours and working time. We have filed with the Division copy of the Appalachian Wage Agreement, and the entire provision as to maximum hours and working time is included therein. The pertinent language, however, is "Seven hours of labor shall constitute a day's work. The seven-hour day means seven hours' work in 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 . . ." The Appalachian Wage Agreement is the basic agreement for the bituminous mines in the States of Pennsylvania, Ohio, West Virginia, Virginia, Eastern Kentucky, Southeastern Tennessee and Maryland. In this territory there are several thousand rail shipping mines employing from 300,000 to 325,000 men, and some twenty-three operating districts. Each of the districts work out a local wage agreement covering its own territory, subject, however, to the provision that it must include within it all of the provisions of the Appalachian Agreement. The mines in the Appalachian region produce 70% of the total bituminous coal produced in the United States annually. Also, the Appalachian Agreement is used by the United Mine Workers of America as the basic agreement upon which the district agreements of the remaining 30% of the country is predicated.

The United Mine Workers of America and coal operators of the United States have been negotiating wage agreements for a period of fifty years. The Appalachian Agreement, covering as it does a great number of men and mines, has been worked out over that period of time and covers within its general provisions myriad wage rates, conditions of work, and hours of employment. This agreement, with its

in the United States. Such a ruling, moreover, would establish such diversity of time actually spent at productive work as between different bituminous coal mines and

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twenty-three supplemental agreements, constitutes a whole document. In those conferences, of course, hours of work has been one of the principal matters of consideration during this period of time. Hours of work with wage rates constitute the heart of any such agreement. In this basic industry we have provided for seven-hour days, five-day weeks, thirty-five hours per week, with high rates of pay. The basic inside day rate in the North is $.857 per hour, and in the south it is $.80 per hour. The underground workers are paid on this basis with maximum rates for mobile loading machine operators, approximately $1.09 per hour. In addition, the agreement provides, "work by mine workers paid by hour or day in excess of seven hours in one day, or thirty-five hours in any one week, shall be paid for it at the rate of time and one-half . . ." It is our opinion that these substantive provisions of the agreement are among the highest standards of labor provided in any industry in the United States, both as to hours of working time and as to wages paid. There is full and complete understanding in the industry between employer and employees as to the application of these provisions. This method of measuring the working time at the place 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.

There are many reasons why the provision as to working time has been set out as provided by this agreement. The impracticability of measuring time by any other method is inherent in the very nature of mining coal. Coal mines are sometimes very extensive. When they are first opened up, the working places are, of course, close by and near to the opening of the mine. In such cases there is no problem of either transportation of the men, to the working places or time consumed in reaching them; but 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. This is usually provided by what is known in the industry as "man trips." These trips are scheduled to leave the outside or opening of the mine at a certain hour, so that all the employees will reach their working places by the hour at which work regularly begins at the working places throughout the mine, and these trips are also scheduled to leave the inside of the mine when the day's work

within each mine that there would be no basis on which any general wage scales could be predicated, collective bargaining would therefore be rendered impossible through-

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is done, at the conclusion of the seven-hour period of work at the working places. Among other provisions of the agreement, there is provided a time for starting the day's work and a lunch period, as well as a time for expiration of the work day. There is some variation in this, depending upon local conditions as to the starting and quitting time at the various collieries. The agreement provides for a certain tolerance. In any event, the starting and quitting time are no more than seven hours apart, exclusive of the lunch period.

In the many conferences that have been held over this period of fifty years, naturally all manner of suggestions and proposals for amplification or amendment of the agreement has been made both by the mine workers and the operators.

The uniform high rates of pay that have always been included in the wage agreement of the mining industry contemplate the employee's working day beginning when he arrives at his usual working place. Hence, travel time was never considered as a part of the agreement or obligation of the employer to pay for in this industry, nor as hours worked by the employees, and this has been the case since the eight-hour day was established in the industry—April 1, 1898.

It is urged that any ruling requiring such a change in the custom, tradition and contract provision so as to change the work day from "seven hours' work in the mines at the usual working places" to any new standard for the measurement of time worked, and to the adjustment of wage rates made necessary thereby, 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. Such a ruling, moreover, would establish such diversity of time actually spent at productive work as between different bituminous coal mines and within each mine that there would be no basis on which any general wage scales could be predicated, collective bargaining would therefore be rendered impossible throughout this industry, and the very purpose of the Fair Labor Standards Act would be defeated. In such an event, it would make necessary the reassembling of the Appalachian Joint Wage Conference and it would be faced with an issue that would be almost impossible of solution by agreement, resulting in an industrial conflict that could paralyze the nation. This

out this industry, and the very purpose of the Fair Labor Standards Act would be defeated." In response to the joint representations and recommendation of both oper-

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would be a most unhappy result to flow from an act that was passed by the Congress to aid workers in industries that had unreasonably long hours and unreasonably low rates of pay, as contrasted with the short hours and the high rates of pay in the bituminous coal mines. The great amount of money involved in the case of extra payment by the operators or the great changes that would be required in the rates of pay to the miners, should any change in the present contract be necessary by reason of a new standard for the measurement of time worked, is so serious that a negotiated adjustment would seem to be impossible.

For the foregoing reasons, we believe that your Division should accept the standards of wages and hours of work, and the definition of working time, as set forth in the Appalachian Agreement (which embodies the custom and traditions of the bituminous mining industry), as complying both with the provisions of the Fair Labor Standards Act and of Interpretive Bulletin No. 13, to the effect that "reasonable standards agreed upon between the employer and the employee will be accepted for the purposes of the Act."

We therefore respectfully request that your Division issue a supplement to interpretive Bulletin No. 13, stating that the standard of wages and hours of work, and definition of working time, set forth in the Appalachian Agreement, entered into on May 12, 1940, between twenty-three district associations of bituminous coal operators comprising the Appalachian coal producing area and the International Union, United Mine Workers of America, and the several district agreements based thereon, conform to and satisfy the requirements of the Wage & Hour Act.

Respectfully submitted.

For the United Mine Workers of America:

[S] EARL E. HOUCK,
Director of the Legal Department.

For the Operators:

[S] W. L. ROBISON, *Chairman,*
[S] CHARLES O'NEILL,
[S] L. T. PUTNAM,
[S] L. C. GUNTER,
[S] J. D. A. MORROW,
Appalachian Joint Conference Negotiating Committee.

ators and the United Mine Workers, the Administrator, July 18, 1940, ruled that "working time on a 'face to face' basis in the bituminous coal mining industry would not be unreasonable."[10] We have admonished lower courts that they must give heed to these interpretations. *Armour & Co.* v. *Wantock,* 323 U. S. 126; *Skidmore* v. *Swift & Co.,* 323 U. S. 134. The District Court in this case did so, only to find them brushed aside here as of no importance.

5. *This decision necessarily invalidates the basis on which the Government in operating the mines contracted with the miners and brings into question the validity of all the existing mine agreements.* It appears to have been wartime restrictions on flat wage increases which finally led the United Mine Workers to reverse their former and to take their present position. It was not until the wage conference of 1943 that the United Mine Workers for the first time demanded that "To conform with the basic and legal requirement for the industry, the maximum hours and working time provisions be amended to establish portal to portal for starting and quitting time for all underground workers."[11] But this condition was to be satisfied by a flat wage increase for all mine workers, whether or not they spent any time traveling underground, and was not to be based on each individual worker's actual travel time, as the Court now holds the Act requires. The evolution of the Union's present demands is traceable through the sequence of events.

This March 1943 Wage Conference fell into dispute. The case was certified on April 22, 1943 to the National War Labor Board. The parties agreed after request by President Roosevelt to extend the 1941 agreement to May 1. The National War Labor Board on April 24, 1943 directed them, pending decision, to continue work under

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[10] 3 Wage and Hour Rep. 332, 333.

[11] 53 F. Supp. 941.

the previous terms. When May 1st came around, however, the miners went on strike, the Government seized the mines, and the strike came to an end May 6, under a temporary arrangement extending the old contract to May 31. On May 14, the Board directed the Wage Conference to resume negotiations. This reconvened and negotiations continued until June 20. However, when the extension agreement expired on May 31, a second strike began. On June 3, President Roosevelt appealed to the miners to return to work, and they did so after the President of the Mine Workers ordered them to resume until June 20. On that day there was a third strike, which lasted three days, when it was terminated on appeal by President Roosevelt, the Union again directing the miners to resume work until October 31. The conferences did not agree and the controversy went again to the National War Labor Board.

The Board found as follows: "The Mine Workers' demand of $2.00 a day was . . . based upon an assumption or estimate that the travel time amounted on the average to an hour and one-half a day. . . . The United Mine Workers proposed to spread this amount over all the workers including those who did not go underground, and so arrived at the proposed general wage increase of $2.00 for all mine workers. . . . It is obvious that these figures are out of all proportion to any amount that could possibly be due to the mine workers under the Fair Labor Standards Act, even if the courts should decide all questions in controversy in favor of the mine workers. The demand is plainly and unmistakably a demand for an 'indirect wage increase in violation of the wage stabilization policies,' contrary to the Board's directive order of May 25, 1943." [12] And in a release on June 18, 1943, the Board said: ". . . The United Mine Workers have not proposed to change the 'face to face' basis of payment. On

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[12] 9 War Lab. Rep. 118.

the contrary they have proposed merely to increase the hourly rate under the present contract system. . . . It would not be in fact payment to the mine workers for portal to portal. It is merely a general wage increase supported by the argument that the mine workers . . . think they ought to have a general wage increase because on the average they will spend a certain amount of time in travel."

Finding itself thus frustrated in its demand for a flat wage increase, the Union then negotiated with the Illinois Coal Operators' Association an agreement which provided for a $1.25 increase for each working day. The National War Labor Board refused to approve this as also violative of the national wage stabilization program. It was then, and apparently because it afforded the only means of obtaining an increase that did not conflict with the wage stabilization program, that the Mine Workers negotiated the second Illinois Agreement, dated September 23, 1943, of which the National War Labor Board said: "The Illinois Agreement now submitted to the Board presents for the first time a true portal-to-portal method of compensation for the mine workers. The 1941–1943 contract provides for a seven-hour day and 35-hour week of productive time at the working face, excluding travel time. . . . The Illinois Agreement proposes to substitute for this method of compensation an 8½-hour day inclusive of travel time, with payment at straight time rates for the 8½ hours and overtime payment at rate and one-half for all time beyond 40 hours a week." [13] The Board found that the effect of this was an increase which it could not wholly approve.

Meantime the Government had taken over the mines and on November 3, 1943, the Ickes-Lewis agreement was made. The method of wage calculation under the Ickes-Lewis agreement was to treat each employee as having

[13] 11 War Lab. Rep. 687.

forty-five minutes of travel time, irrespective of his actual travel time. The War Labor Board on November 5, 1943 approved the Ickes-Lewis agreement, and thus in effect granted a flat wage increase, uniform for all miners irrespective of their individual actual travel time.

The testimony in this case closed on November 24, 1943 with the mines still in the hands of the Government. The Government's policy, however, was not to return the mines until an operating agreement could be reached and approved by the miners and the operators. The operators by collective bargaining reached agreements which followed the provisions of the Ickes-Lewis agreement, the mines were returned, and this uniform method continues in use as a result of collective bargaining.

It is important to observe that, while there has thus been introduced a change in the method of computing working time, it by no means complies with and did not purport to be adopted because of the requirements of the Fair Labor Standards Act as now interpreted by this Court. If it is illegal for the operators and the miners by collective bargaining to agree that there shall be no travel time, it is obviously equally illegal to agree that the travel time shall be fixed at an arbitrary figure which does not conform to the facts. That the assumption of forty-five minutes of travel is an unfounded one is evident from the record in this case, which indicates that the average daily travel time in one of the petitioner's mines is eighty-eight minutes; and in the other, 67.1 minutes. If United Mine Workers' agreements are ineffective to make all of this time non-working time, how can they be effective to make half of it non-working time? Moreover, the averaging means that a part of the travel time earned by one miner is taken away from him and given to another who has earned less than the average, a procedure utterly unwarranted in the statute, if the statute applies at all. If the Fair Labor Standards Act entitles each individual

miner to travel time, not according to the terms of his collectively bargained agreements, but according to the time actually spent, as the Court now holds, these Government agreements violated that law, the present agreements do also, and heavy liabilities both for overtime and penalties are daily being incurred by the entire industry.

6. *This decision proceeds on a principle denied to unorganized workmen for whose benefit the Act was passed.* The ink is hardly dry on this Court's pronouncement, in which all of the majority in this case joined, that: "The legislative debates indicate that the prime purpose of the legislation was to aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage." *Brooklyn Savings Bank* v. *O'Neil,* 324 U. S. 697, 707, n. 18. That coat ill fits the United Mine Workers. But let us contrast the advantage which this decision extends to a powerful group so plainly outside of the policy of the Act with the treatment of groups that, being unprotected and unorganized, were clearly within it.

Little more than six months ago this Court unanimously remanded to the lower courts for trial and findings on the facts a case involving night waiting time of seven unorganized firemen. It said that "We have not attempted to, and we cannot, lay down a legal formula to resolve cases so varied in their facts as are the many situations in which employment involves waiting time. Whether in a concrete case such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court. . . . This involves scrutiny and construction of the agreements between the particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the surrounding circumstances. . . . The

law does not impose an arrangement upon the parties. It imposes upon the courts the task of finding what the arrangement was." *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 136–37. That was in keeping with other holdings. Cf. *Armour & Co.* v. *Wantock*, 323 U. S. 126, 132–3.

Now comes this case involving the organized miners, and the Court holds that ". . . we are not concerned here with the use of bona fide contracts or customs to settle difficult and doubtful questions as to whether certain activity or nonactivity constitutes work." It is held in this case that the time must be counted "regardless of any custom or contract to the contrary at the time in question." Can it be that this sudden refusal to weigh the facts is because as found by the District Court on almost undisputed evidence they are so decisively against the conclusion the Court is reaching? *Jewell Ridge Coal Corp.* v. *Local No. 6167, United Mine Workers*, 53 F. Supp. 935. This was made plain also by the Circuit Court of Appeals, which said:

"In view of the long established custom in the coal industry not to include travel time in the work week, the collective bargaining contracts extending over a long period recognizing the 'face to face' basis of pay, the testimony before the committees of Congress, the reason and purpose of the Fair Labor Standards Act . . . and the probable effects and consequences of construing the act to require travel time in bituminous coal mines to be included in the work week, there is strong reason for thinking, as everyone connected with the matter seems to have thought until recently, that it was not the intent of Congress that the act should be so construed in its application to the coal mining industry. The reasons in support of this conclusion are fully and ably set forth in the opinion of the learned judge below and need not be repeated. They would be convincing, were it not for the decision of the Supreme Court in *Tennessee Coal, Iron & R. Co.* v.

Muscoda Local No. 123, etc., 321 U. S. 590, 64 S. Ct. 698, 703, which we do not think can be distinguished in principle from the case at bar." And it added, "Under the circumstances, there is nothing for us to do but reverse the decision below. If it is thought that the decision of the Supreme Court should be overruled or limited so as not to apply to a case of this character, that is a matter for the Supreme Court and not for us." *Local No. 6167, United Mine Workers* v. *Jewell Ridge Coal Corp.,* 145 F. 2d 10, 11, 13.

The Court now says *Tennessee Coal Co.* v. *Muscoda* is a precedent which controls this case and "that there is no substantial factual or legal difference between this and the *Tennessee Coal* case." That can be said only because the Court declines to look at the record of factual differences, casts them out as being immaterial. The fact is that the *Tennessee* case differed from this as night does from day. Two courts below had decided the vital facts in that case in the miners' favor. One court below has found the facts in this case against them, and the other agrees that its findings are convincing. The Court now declines to appraise the factual difference of this case and holds that this case was decided, although not before us, by the *Tennessee* case opinion, regardless of any variation of facts. This, too, although we have unanimously replied to one litigant who sought the benefit of statements therein that "The context of the language cited from the *Tennessee Coal* case should be sufficient to indicate that the quoted phrases were not intended as a limitation on the Act, and have no necessary application to other states of facts." *Armour & Co.* v. *Wantock,* 323 U. S. 126, 133. We ought not to play fast and loose with the basic implications of this Act.

The "face to face" method, whatever its other defects, is a method by which both operators and miners have tried to bring about uniformity of labor costs in the different

unionized mines and to remove the operator's resistance to improved wage scales based on fear of competition. Under this decision there can be no uniform wage in this industry except by disregarding the very duty which this decision creates to pay each miner for his actual travel time. Thus, two men working shoulder to shoulder, but entering the mine at different portals must receive either different amounts of pay in their envelopes or must stay at their productive work a different length of time. Thus, too, old mines which have burrowed far from their portals must shoulder greatly increased labor cost per ton. The differential may be sufficient to make successful operation of some of the older mines impossible. Mining labor has tended to locate its dwellings near its work, and the closing of mines results in corresponding dislocations of mining labor. These are the considerations, so fully set forth in the Houck letter to the Administrator, which the Court is disregarding.

We can not shut our eyes to the consequence of this decision which is to impair for all organized labor the credit of collective bargaining, the only means left by which there could be a reliable settlement of marginal questions concerning hours of work or compensation. We have just held that the individual workman is deprived of power to settle such questions. *Brooklyn Savings Bank* v. *O'Neil; Dize* v. *Maddrix,* 324 U. S. 697. Now we hold collective bargaining incompetent to do so. It is hard to see how the long-range interests of labor itself are advanced by a holding that there is no mode by which it may bind itself to any specified future conduct, however fairly bargained. A genuinely collectively bargained agreement as to wages, hours or working conditions is not invalidated or superseded by this Act and both employer and employee should be able to make and rely upon them, and the courts in deciding such cases should honor them.

We doubt if one can find in the long line of criticized cases one in which the Court has made a more extreme exertion of power or one so little supported or explained by either the statute or the record in the case. Power should answer to reason none the less because its fiat is beyond appeal.

UNITED STATES ALKALI EXPORT ASSOCIATION, INC. ET AL. v. UNITED STATES.

NO. 1016. CERTIORARI TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.*

Argued May 1, 2, 1945.—Decided May 21, 1945.

1. An order of a district court in a suit brought by the United States under § 4 of the Sherman Act against export associations and members thereof to restrain violations of the Act, denying a motion of the defendants to dismiss, made on the ground that, under §§ 1, 2 and 5 of the Webb-Pomerene Act, exclusive jurisdiction of the matters charged in the complaint is vested in the first instance in the Federal Trade Commission, *held* reviewable here by certiorari under § 262 of the Judicial Code. P. 201.

   (a) Where the proceeding is one in respect of which this Court has exclusive appellate jurisdiction, an application for a common law writ in aid of appellate jurisdiction must be to this Court. P. 202.

   (b) The hardship which would be imposed on the defendants by a long postponed appellate review, coupled with the attendant infringement of the asserted Congressional policy of conferring primary jurisdiction on the Commission, together support the appeal to the discretion of this Court to exercise its power to review the ruling of the district court in advance of final judgment. P. 204.

2. Exercise of the powers conferred on the Federal Trade Commission by § 5 of the Webb-Pomerene Act—to investigate activities of any export association which are believed to be in violation of the Sherman Act; if violations are found, to make recommendations

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*Together with No. 1017, *California Alkali Export Association et al.* v. *United States,* also on certiorari to the District Court of the United States for the Southern District of New York.

to such association for readjustment of its business; and upon failure of the association to comply, to refer its findings and recommendations to the Attorney General—is not a prerequisite to a suit by the United States against an export association to restrain violations of the Sherman Act. P. 205.

(a) The Webb-Pomerene Act's grant of power to the Commission would curtail the authority of the United States to conduct anti-trust suits only if it were deemed an implied repeal *pro tanto* of § 4 of the Sherman Act. Repeals by implication are not favored. P. 209.

(b) The principle that equity will not lend its aid to a plaintiff who has not first exhausted his administrative remedies is inapplicable, since the function of the Commission under § 5 of the Webb-Pomerene Act is to investigate, recommend and report. The Commission, under that Act, can give no remedy; it can make no controlling finding of law or fact; and its recommendation need not be followed by any court or administrative or executive officer. P. 210.

58 F. Supp. 785, affirmed.

CERTIORARI, 324 U. S. 834, to review an order of a district court denying a motion of the defendants to dismiss a suit brought by the United States to restrain violations of the Sherman Act.

Mr. Wm. Dwight Whitney, with whom *Messrs. Leland Hazard, David A. Reed, Calvin A. Campbell, Robert T. McCracken, Ralph S. Harris, H. G. Hitchcock, H. Webster Stull, J. E. F. Wood, F. C. Lowthorp, Bruce Bromley, George S. Collins, Fred N. Oliver, Edward D. Lyman* and *Willard P. Scott* were on the brief, for petitioners.

Assistant Attorney General Berge, with whom *Assistant Solicitor General Cox, Messrs. Charles H. Weston* and *Herbert A. Berman* were on the brief, for the United States.

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

This is a suit in the District Court for Southern New York, brought by the United States under § 4 of the Sher-

man Antitrust Act, 15 U. S. C. § 4, to restrain violations of the Act. The defendants, who are petitioners here, are two incorporated export associations, thirteen domestic members of one or the other, and a British corporation and its American subsidiary, all of which are producers of alkalies. The bill of complaint alleges that petitioners are engaged in a conspiracy to eliminate exports of alkalies to the United States by the foreign members of the conspiracy; to restrict or eliminate exports of alkalies by domestic producers from the United States to many world markets; to prevent independent domestic producers from competing with petitioners, in the export of alkalies; to restrict their production of alkalies in the United States; and to fix prices of caustic soda in the United States, all in violation of § 1 of the Sherman Act, 15 U. S. C. § 1.

The district court denied, 58 F. Supp. 785, petitioners' motion to dismiss the complaint, made on the ground that exclusive jurisdiction of the matters charged in the complaint is vested in the first instance in the Federal Trade Commission, under §§ 1, 2, and 5 of the Webb-Pomerene Act of April 10, 1918, c. 50, 40 Stat. 516, 15 U. S. C. §§ 61, 62, 65. Petitioners then filed here petitions for certiorari under § 262 of the Judicial Code, 28 U. S. C. § 377, seeking review of the order of the district court denying the motion to dismiss.

The questions for decision are (1) whether the order of the district court, denying petitioners' motion to dismiss the complaint, may appropriately be reviewed here by writ of certiorari issued under § 262 of the Judicial Code and, if so, (2) whether §§ 1, 2, and 5 of the Webb-Pomerene Act confer primary jurisdiction on the Federal Trade Commission, exclusive of that of the district court, to pass upon alleged violations of the Sherman Act by export associations.

Section 4 of the Sherman Act invests the several district courts with jurisdiction to restrain violations of the Act;

and it imposes on district attorneys of the United States, under the direction of the Attorney General, the duty to institute suits in equity in their respective districts, to restrain such violations. But § 2 of the Webb-Pomerene Act exempts from the prohibitions of the Sherman Act, associations "entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade" and also any "agreement made or act done in the course of export trade by such association, provided such association, agreement, or act is not in restraint of trade within the United States, and is not in restraint of the export trade of any domestic competitors of such association." To this is added a second proviso "that such association does not, either in the United States or elsewhere, enter into any agreement, understanding, or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein."

The first paragraph of § 5 of the Webb-Pomerene Act requires each association engaged solely in export trade to file with the Federal Trade Commission a statement giving information concerning its officers and stockholders or members, and its place of business, and a copy of its articles of incorporation or its contract of association; the association is required to refile annually such statements with suitable corrections, and to furnish such further specified information as the Commission may from time to time request. Section 5 further provides in its second paragraph that whenever the Commission shall have reason to believe that an export association is violating the Sherman Act in the ways excepted by the provisos of § 2 from its exemptions, the Commission shall conduct an investigation into the alleged violations. If "it shall conclude that the law has been violated, it may make to

such association recommendations for the readjustment of its business, in order that it may thereafter maintain its organization and management and conduct its business in accordance with law." If the association fails to comply with the recommendations of the Commission, it "shall refer its findings and recommendations to the Attorney General of the United States for such action thereon as he may deem proper." [1]

Petitioners do not question the district court's rulings, in denying their motion, that the complaint alleges violations of the Sherman Act, and that under its allegations petitioners are not within any immunity from the Sherman Act secured by § 2 of the Webb-Pomerene Act. Their sole contention on the merits is that § 5 of the latter Act, by authorizing the proceedings before the Federal Trade Commission, deprives the district courts of jurisdiction in Sherman Act cases until the Commission has made its

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[1] The second paragraph of § 5 of the Webb-Pomerene Act, with which we are especially concerned, reads as follows:

"Whenever the Federal Trade Commission shall have reason to believe that an association or any agreement made or act done by such association is in restraint of trade within the United States or in restraint of the export trade of any domestic competitor of such association, or that an association either in the United States or elsewhere has entered into any agreement, understanding, or conspiracy, or done any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein, it shall summon such association, its officers, and agents to appear before it, and thereafter conduct an investigation into the alleged violations of law. Upon investigation, if it shall conclude that the law has been violated, it may make to such association recommendations for the readjustment of its business, in order that it may thereafter maintain its organization and management and conduct its business in accordance with law. If such association fails to comply with the recommendations of the Federal Trade Commission, said commission shall refer its findings and recommendations to the Attorney General of the United States for such action thereon as he may deem proper."

investigation and recommendations, the associations have failed to comply with them, and the Commission has referred its findings and recommendations to the Attorney General.

I

Petitioners argue that this Court may appropriately review the order of the district court by writ of certiorari, issued under § 262 of the Judicial Code. They point out that § 2 of the Expediting Act of February 11, 1903, as amended, 15 U. S. C. § 29, governing appeals in Sherman Act cases, makes no provision for appeals from interlocutory orders or judgments, and provides that "an appeal from the final decree of the district court will lie only to the Supreme Court." See *United States* v. *California Canneries,* 279 U. S. 553. But it is urged that the district court is deprived of its jurisdiction by § 5 of the Webb-Pomerene Act, until the Trade Commission has made the investigation and followed the further procedure outlined by § 5; that the assertion by the district court of its jurisdiction, without awaiting an investigation by the Commission, will entail protracted litigation and impose on the parties great expense before the error can be corrected on appeal from the final judgment to this Court. All this will be avoided, it is said, by awaiting action by the Commission. Hence petitioners insist that the case is appropriate for the exercise by this Court of its extraordinary power to review the order of the district court by writ of certiorari.

Section 262 of the Judicial Code provides that the Supreme Court, circuit courts of appeals and the district courts, "shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." Under § 262, this Court has power, in aid of its appellate jurisdiction, to review judgments and orders of the district courts by

resort to the common law writs of certiorari, mandamus and prohibition. *Whitney* v. *Dick*, 202 U. S. 132; *McClellan* v. *Carland*, 217 U. S. 268, and cases cited; *In re 620 Church Street Corp.*, 299 U. S. 24, 26, and cases cited; *Ex parte Peru*, 318 U. S. 578, and cases cited; *House* v. *Mayo*, 324 U. S. 42, and cases cited; compare *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21. These writs are granted or withheld in the sound discretion of the Court. See *Roche* v. *Evaporated Milk Assn., supra*, 25, and cases cited. In the usual case this Court will decline to issue a writ prior to review in the Circuit Court of Appeals, whether by ordinary appeal, *In re Tampa Suburban R. Co.*, 168 U. S. 583, 588, or by an extraordinary remedy, see *Ex parte Peru, supra*, 584. But where, as here, sole appellate jurisdiction lies in this Court, application for a common law writ in aid of appellate jurisdiction must be to this Court.

The traditional use of such writs both at common law and in the federal courts has been, in appropriate cases, to confine inferior courts to the exercise of their prescribed jurisdiction or to compel them to exercise their authority when it is their duty to do so. *In re Chetwood*, 165 U. S. 443, 462 (citing Tidd's Prac. *398, and Bac. Ab., Certiorari); *Whitney* v. *Dick, supra*, 139–140; *Ex parte Peru, supra*, 583, and cases cited.[2] It is evident that hardship is imposed on parties who are compelled to await the correction of an alleged error at an interlocutory stage by an appeal from a final judgment. But such hardship does not necessarily justify resort to certiorari or other of the extraordinary writs as a means of review. In such cases

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[2] See also *Regina* v. *Yarrington*, 1 Salk. 406, 91 Eng. Rep. 353 (Q. B. 1710); *King* v. *Justices of the West Riding of Yorkshire*, 5 T. R. 629, 101 Eng. Rep. 352 (K. B. 1794); *King* v. *Justices of Somersetshire*, 5 Barn. & Cress. 816, 108 Eng. Rep. 303 (K. B. 1826); *King* v. *Judge Clements* [1932] 2 K. B. 535; *King* v. *Middlesex Justices* [1933] 1 K. B. 72.

appellate courts are reluctant to interfere with decisions of lower courts, even on jurisdictional questions, which they are competent to decide and which are reviewable in the regular course of appeal. *In re Tampa Suburban R. Co., supra; Ex parte Harding,* 219 U. S. 363, 369; *Roche* v. *Evaporated Milk Assn., supra,* 30–31, and cases cited; cf. *Stoll* v. *Gottlieb,* 305 U. S. 165; *Treinies* v. *Sunshine Mining Co.,* 308 U. S. 66. The writs may not be used as a substitute for an authorized appeal; and where, as here, the statutory scheme permits appellate review of interlocutory orders only on appeal from the final judgment, review by certiorari or other extraordinary writ is not permissible in the face of the plain indication of the legislative purpose to avoid piecemeal reviews. *Roche* v. *Evaporated Milk Assn., supra,* 30, and cases cited; and see *Cobbledick* v. *United States,* 309 U. S. 323.

But the present case is not the ordinary one of hardship resulting from overruling a plea in bar or denying a preliminary motion which, if well founded, would end the litigation on the merits—decisions which Congress, in the absence of other provisions for appeal, must have contemplated would, in the ordinary course, be reviewed on appeal from the final judgment. The questions now presented involve the propriety of the exercise, by the district court, of its equity jurisdiction, and an asserted conflict between its jurisdiction and that of an agency of Congress said to be charged with the duty of enforcing the antitrust laws in the circumstances of the present case. If petitioners' motion was well founded, its denial operated to thwart the asserted purpose of Congress to afford to export associations, which overstep the bounds of the granted immunity, opportunity, with the expert aid of the Trade Commission, to retrace their steps, without being subjected to the penalties of the law. Exercise of its jurisdiction by the district court would preclude the Commission from carrying out its asserted functions of investigation,

recommendation and report before any suit by the United States. This would be more than the mere denial of the right of a suitor such as Congress must have contemplated would be corrected by recourse to the prescribed appeal procedure. It would be a frustration of the functions which Congress has directed the Commission to perform and of the policy which Congress presumably sought to effectuate by their performance.

The hardship imposed on petitioners by a long postponed appellate review, coupled with the attendant infringement of the asserted Congressional policy of conferring primary jurisdiction on the Commission, together support the appeal to the discretion of this Court to exercise its power to review the ruling of the district court in advance of final judgment. The case is analogous to those in which this Court has, by writs issued under § 262, reviewed the action of district courts, alleged to be in excess of their authority, by which they have foreclosed the adjudication of rights or the protection of interests committed to the jurisdiction of a state officer or tribunal, see *In re Chetwood, supra; McClellan* v. *Carland, supra; Ex parte Metropolitan Water Co.,* 220 U. S. 539; *Ex parte Skinner & Eddy Corp.,* 265 U. S. 86; *Maryland* v. *Soper (No. 1),* 270 U. S. 9; *Ex parte Northern Pacific R. Co.,* 280 U. S. 142; *Colorado* v. *Symes,* 286 U. S. 510; or by which they have deprived a party of a trial by jury. *Ex parte Simons,* 247 U. S. 231; *Ex parte Peterson,* 253 U. S. 300, 305.

For these reasons we think the case is an appropriate one for review of the district court's order by certiorari, and we pass to the consideration of the merits.

II

Petitioners do not deny that the allegations of the complaint are sufficient to charge violations of the Sherman Act not within the exemptions created by § 2 of the Webb-

Pomerene Act. The contention is that since the alleged violations are being committed by and on behalf of export associations which have conformed to § 5 of the latter Act, the authority of the United States to maintain the suit is suspended until the Federal Trade Commission has proceeded against the associations by way of investigation and, if found appropriate, by way of recommendations to them and reference of its findings to the Attorney General, as specified in § 5.

It is conceded that § 5 contains no explicit restriction on the authority of the United States to institute antitrust suits in the normal way, nor any explicit requirement that resort be had to the Commission prior to the institution of such an antitrust suit. Petitioners argue that this is to be implied from the structure of the Act, which first, by § 2, exempts from the Sherman Act certain activities of export associations, with specified exceptions; and then by the second paragraph of § 5, gives the Commission authority, in language substantially identical with that of the exceptions in § 2, to investigate such activities as continue to be violations of the Sherman Act. It is argued that Congress, by authorizing the Commission to investigate violations and in appropriate cases to report to the Attorney General any violations found, has expressed the purpose that the action by the Commission and the Attorney General should be consecutive and not concurrent.

It would follow that however strong the evidence, and however clear the violation of the Sherman Act, the Attorney General must await the action of the Commission, which may or may not undertake to proceed with the case, and that in any event the Attorney General and the courts must abide by the Commission's determination that there are no violations to report. During the twenty-eight years between the enactment of the Sherman Act and the passage of the Webb-Pomerene Act, the plenary authority and settled practice of the Department of Justice to

institute antitrust suits, without prior proceedings by other agencies, became firmly established. A *pro tanto* repeal of that authority, by conferring upon the Commission primary jurisdiction to determine when, if at all, an antitrust suit may appropriately be brought, would require a clear expression of that purpose by Congress. *United States* v. *Borden Co.,* 308 U. S. 188, 198–199, 203–206; see also *Georgia* v. *Pennsylvania R. Co.,* 324 U. S. 439, 456–457. The Webb-Pomerene Act, as we have said, contains no explicit indication to that end. Nor may such an implication be readily drawn from the language of the statutes, or their legislative history.

In determining whether the Webb-Pomerene Act curtailed the then existing authority of the United States to bring antitrust suits, it is important to consider what that Act did not do, as well as what it did. True, it exempted from the antitrust laws some, but not all, acts which would otherwise have been violations. But while it empowered the Commission to investigate, recommend and report, it gave the Commission no authority to make any order or impose any prohibition or restraint, or make any binding adjudication with respect to these violations.

This is in marked contrast to the Commission's power to issue cease and desist orders with respect to violations of § 5 of the Federal Trade Commission Act, as amended, 15 U. S. C. § 45,[3] and with respect to violations of the Clayton Act, §§ 1, 3, 7, 8, 11, as amended, 15 U. S. C. §§ 13, 14, 18, 19, 21.[4] On the other hand, it is consonant with

[3] Section 5 of the Federal Trade Commission Act, as amended, 15 U. S. C. § 45, declares that "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce" are unlawful.

[4] Section 1 of the Clayton Act, 15 U. S. C. § 13, prohibits certain discriminations in price and services; § 3, 15 U. S. C. § 14, certain sales or leases where the purchaser is required to refrain from dealing with competitors of the seller; § 7, 15 U. S. C. § 18, certain acquisitions by corporations of stocks in other corporations; and § 8, 15

and closely related to another important function of the Commission, which from the beginning has had extensive powers to investigate and report on practices which concern or affect the enforcement of laws relating to trade and commerce, including the antitrust laws.[5] Such investigations by the Commission have never been deemed prerequisite to antitrust suits by the United States; and there is nothing to suggest that Congress, in authorizing the Commission to investigate export associations, intended to place such investigations on any different footing than others, which the Commission had already been authorized to conduct.

It is suggested that Congress could not have contemplated "concurrent jurisdiction" of the Commission and the courts, because of the inconvenience to suitors in not being afforded an opportunity to mend their ways by

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U. S. C. § 19, certain interlocking directorates. Section 11, 15 U. S. C. § 21, confers on the Commission power to issue cease and desist orders with respect to violations of §§ 1, 3, 7 and 8.

[5] Section 6 (e) of the Federal Trade Commission Act, 15 U. S. C. § 46 (e), authorizes the Commission, in language comparable to that of § 5 of the Webb-Pomerene Act, "upon the application of the Attorney General to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust Acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law." Section 6 further authorizes the Commission to investigate the organization, business, practices and management of any corporation engaged in interstate commerce; to require such corporations to file annual and special reports and answers to questions concerning such matters; to investigate the manner in which corporations, defendants in Sherman Act suits brought by the Government, have complied with the decrees, and to transmit to the Attorney General its "findings and recommendations"; to investigate and report, upon the direction of the President or Congress, the facts relating to any "violations of the antitrust Acts by any corporation"; to investigate trade conditions in foreign countries where trade practices may affect our foreign trade, and to report to Congress its recommendations.

following the Commission's recommendations. And petitioners urge that Congress could not have intended concurrent jurisdiction, since it explicitly provided for it when it so desired. Thus §§ 1, 3, 7, and 8 of the Clayton Act, as amended, 15 U. S. C. §§ 13, 14, 18, 19, may be enforced either by cease and desist orders of the Commission, § 11, 15 U.S. C. § 21, or by suits in equity instituted by the several district attorneys in their respective districts, under the direction of the Attorney General, § 15, 15 U. S. C. § 25.

This argument overlooks the fact that the Commission's authority is to investigate and recommend, not to restrain violations of the antitrust laws (save as they may incidentally be violations of other statutes, which the Commission may enforce). The Commission, by its investigations and recommendations, may render a useful service in bringing violations to the attention of the Department of Justice or by showing that resort to the courts is unnecessary, either because there has been no violation or because the associations have satisfactorily corrected their trade practices. But the Commission, under the Webb-Pomerene Act, does not enforce the antitrust laws; its powers are exhausted when it has referred its findings to the Attorney General. Indeed, the provisions for such reference are necessary not because the Commission has a primary jurisdiction, but only because it cannot itself enforce the antitrust laws. Further, there is no want of specific authority for the United States to enforce the antitrust laws; the violations here alleged are not violations of the Webb-Pomerene Act, but of the Sherman Act, and it is the latter which provides for suits to be brought by the United States.

But even if the case were one of concurrent jurisdiction, we cannot assume that there would be any unseemly conflict between the Commission and the Department of Justice. Congress has found no such objection to the

concurrent jurisdiction to enforce the provisions of the Clayton Act to which we have referred. The two agencies will seldom act simultaneously. There would be no occasion for an investigation by the Commission if the Attorney General had already procured the requisite evidence of violations and was ready to proceed with his suit, as is said to be the case here. And there is no basis for interpreting the statute as though it had been contrived to prevent hostile action rather than to encourage efficient cooperation between the Commission and the Department of Justice.

As we have said, the Webb-Pomerene Act's grant of power to the Commission would curtail the authority of the United States to conduct antitrust suits only if it were deemed to be an implied repeal *pro tanto* of § 4 of the Sherman Act. As we pointed out in *United States* v. *Borden Co., supra,* 198–199, 203–206, such repeals by implication are not favored. There we held that provisions of the Capper-Volstead Act, 7 U.S. C. §§ 291, 292, comparable to those of §§ 2 and 5 of the Webb-Pomerene Act, did not operate to restrict the authority of the United States to maintain suits for violation of the antitrust laws.

Sections 1 and 2 of the Capper-Volstead Act, c. 57, 42 Stat. 388, 7 U. S. C. §§ 291, 292, authorized collective marketing by members of agricultural cooperatives but empowered the Secretary of Agriculture to issue cease and desist orders, upon investigation and findings that any such cooperative associations monopolized or restrained interstate trade and commerce to such an extent that the prices of any agricultural products were thereby unduly enhanced. And the Act gave jurisdiction to the district courts to enforce the Secretary's orders.

This Court rejected the contention that the Capper-Volstead Act gave to the Secretary "exclusive jurisdiction" to determine in the first instance whether the acts of the

cooperatives were violations of the Sherman Act because they went beyond the immunity granted by the Capper-Volstead Act. And we held for the same reasons, which are controlling here, that neither the language nor the structure of the Capper-Volstead Act indicated a Congressional purpose to make the procedure by the Secretary, which it established, either a substitute for or a prerequisite to a suit by the United States under the Sherman Act. *A fortiori* no such purpose is to be inferred from the Webb-Pomerene Act, which has withheld from the Commission any authority to enforce the Sherman Act.

Petitioners appeal to the familiar principle that equity will not lend its aid to a plaintiff who has not first exhausted his administrative remedies. *Natural Gas Co.* v. *Slattery,* 302 U. S. 300, 310–311; *Myers* v. *Bethlehem Corp.,* 303 U. S. 41, 51, and n. 9, and cases cited. And especially they urge that the Government may not proceed with the prosecution of a Sherman Act case until the relevant issues have been submitted to and passed upon by an administrative tribunal established by the Government to determine those issues. See *United States* v. *Pacific & Arctic Co.,* 228 U. S. 87, 106–108. To this the answer is, as already indicated, that the only function of the Federal Trade Commission under § 5 of the Webb-Pomerene Act is to investigate, recommend and report. It can give no remedy. It can make no controlling finding of law or fact. Its recommendation need not be followed by any court or administrative or executive officer.

Thus the words of the Webb-Pomerene Act and its setting lend no support to petitioners' contention. And there is nothing in its legislative history to show a Congressional purpose to restrict the authority of the United States to maintain suits for every kind of violation of the antitrust laws. The precise problem presented by the present case was not referred to in the committee reports or the debates, except in a remark by Senator Pomerene, indicating that

the Act does not preclude suits by the United States before the Commission has made its investigation.[6] But the absence of more extended discussion of the matter is in itself persuasive evidence that there was no purpose to repeal any portion of § 4 of the Sherman Act. And Congress's clear purpose to insure continued and vigorous application of the antitrust laws to domestic restraints of trade, notwithstanding the Webb-Pomerene Act, is shown by the Committee Reports[7] as well as by statements of the sponsors of the legislation on the floors of Congress,[8] and is a strong indication that there was no thought of depriving the Attorney General of any of his powers to prosecute antitrust suits.

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[6] In response to a question by Senator Weeks, that "assuming . . . that the conclusion of the commission might be altogether wise, what assurance has the commission that the Department of Justice may not take a different view and proceed against these combinations under the provisions of the Sherman Antitrust Act?", Senator Pomerene answered: "It might do that." 55 Cong. Rec. 2788.

[7] H. Rep. No. 1118, 64th Cong., 1st Sess., p. 3; S. Rep. No. 1056, 64th Cong., 2d Sess., pp. 3–4. See also H. Rep. No. 50, 65th Cong., 1st Sess., pp. 1, 3; S. Rep. No. 109, 65th Cong., 1st Sess., pp. 3-4; Federal Trade Commission, Report on Cooperation in American Export Trade, (1916) Vol. 1, p. 376, *et seq.*

[8] Senator Pomerene said, 56 Cong. Rec. 173: "It [the bill] does not repeal, it does not affect the Sherman law so far as it applies to domestic commerce. It strengthens the Sherman law and the Federal Trade Commission law, in so far as unfair practices are concerned, beyond territorial lines." And he also said: "this bill does not repeal the Sherman law," and that associations not remaining within the immunity granted by § 2 "violate the law of the land." (p. 172.) He said further that such an association "would be subject to the jurisdiction of the authorities of this country, including both the Federal Trade Commission and the Department of Justice." (p. 170.) Congressman Webb, in discussing the amendment to § 5, said that the language of the provisions of § 2 "is a perfect preservation of the Sherman law in all of its virility within the confines of this country," 56 Cong. Rec. 4724, and that associations straying beyond the confines of their immunity "are liable both under the Federal Trade Commission law and the Sherman antitrust law." 55 Cong. Rec. 3579.

We conclude that the United States was authorized to bring this suit, and that the Commission's powers conferred by § 5 of the Webb-Pomerene Act do not preclude the suit before the Commission has acted. The order of the district court is therefore

Affirmed.

MR. JUSTICE ROBERTS concurs in this opinion in respect of this Court's exercise of jurisdiction under § 262 of the Judicial Code. He dissents from the decision that the District Court had power to hear the cause in the absence of an investigation and recommendation by the Federal Trade Commission.

DE BEERS CONSOLIDATED MINES, LTD. ET AL. *v.* UNITED STATES.

NO. 1189. CERTIORARI TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.*

Argued May 2, 1945.—Decided May 21, 1945.

In a civil proceeding brought by the United States against foreign corporations and individuals, seeking equitable relief upon a charge that the defendants were engaged in a conspiracy to restrain and monopolize commerce of the United States with foreign nations in gem and industrial diamonds, in violation of §§ 1 and 2 of the Sherman Act and § 73 of the Wilson Tariff Act, the district court granted a preliminary injunction restraining the corporate defendants from withdrawing, selling, transferring, or disposing of any property belonging to them in the United States, until the cause finally shall have been determined and the defendants shall have complied with all orders of the court. *Held:*

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*Together with No. 1190, *Societe Internationale Forestiere et Miniere du Congo et al.* v. *United States,* also on certiorari to the District Court of the United States for the Southern District of New York.

1. The order of the district court granting the preliminary injunction was reviewable here by certiorari under § 262 of the Judicial Code. P. 217.

(a) If the preliminary injunction here granted, unless set aside, will stand throughout the course of the trial and for an indefinite period thereafter, and if the order was beyond the powers conferred upon the court, the case is an appropriate one for the exercise of jurisdiction by this Court under § 262. *United States Alkali Export Assn.* v. *United States, ante,* p. 196. P. 217.

(b) The order did not grant such relief as could be afforded by any final injunction, but dealt with matters lying wholly outside the issues in the case; no decision of the suit on the merits could redress any injury done by the order; and unless it can be reviewed under § 262 it can never be corrected if beyond the power of the trial court. P. 217.

2. The preliminary injunction here issued was not authorized by statute or by the usages of equity, and the order granting it must be reversed. P. 219.

(a) Rule 70 of the Rules of Civil Procedure, which permits the issue of a writ of attachment or sequestration against the property of a disobedient party to compel satisfaction of a judgment, is operative only after a judgment is entered. P. 218.

(b) The preliminary injunction here issued was not authorized by § 4 of the Sherman Act or by § 262 of the Judicial Code. P. 218.

(c) The preliminary injunction here issued deals with a matter lying wholly outside the issues in the suit; it deals with property which in no circumstances can be dealt with in any final injunction that may be entered. P. 220.

(d) Cases involving interlocutory injunctions granted with respect to funds or property which would have been the subject of the provisions of final decrees, and cases involving injunctions by federal courts to restrain interference with their jurisdiction, do not sustain the preliminary injunction here issued. P. 220.

(e) The practice in respect of writs of *ne exeat* is not analogous. P. 221.

(f) Since under the circumstances the district court is without jurisdiction to demand security, it is equally without authority to compel the furnishing of a bond by the seizure of property. P. 222.

Reversed.

CERTIORARI, 324 U. S. 839, to review an order of the district court granting a preliminary injunction against de-

fendants in a suit brought by the United States to restrain alleged violations of the Sherman Act and the Wilson Tariff Act.

Mr. Wm. Dwight Whitney, with whom *Mr. Robert T. Swaine* was on the brief, for petitioners in No. 1189. *Mr. John M. Harlan,* with whom *Mr. John E. F. Wood* was on the brief, for petitioners in No. 1190.

Mr. Herbert A. Berman, with whom *Assistant Solicitor General Cox, Assistant Attorney General Berge* and *Mr. Edward S. Stimson* were on the brief, for the United States.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

These cases come before the court on petitions for certiorari presented pursuant to § 262 of the Judicial Code.[1] Each petition is by several of the defendants in a single suit pending in the District Court.

Two matters are presented: the propriety of review of the action below by certiorari, and the alleged excess of jurisdiction by the court below in making the order of which the petitioners complain. An understanding of the issues requires a statement of the nature of the suit and of the order made.

The United States filed a complaint in the District Court against the three petitioners in No. 1189, which are corporations organized under the laws of South Africa; the petitioners in No. 1190, which are respectively corporations organized under the laws of the Belgian Congo and under the laws of Portugal; and four other corporations, one organized under the laws of Belgium, one under the laws of the Belgian Congo, and two under the laws of the United Kingdom of Great Britain and Northern

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[1] 28 U. S. C. § 377.

Ireland, and seven individuals respectively characterized as stockholder, or stockholder and director, or stockholder and employee, or managing agent, or managing director of one or more of the corporations. The complaint sought equitable relief based upon a charge that the defendants were engaged in a conspiracy to restrain and monopolize the commerce of the United States with foreign nations in gem and industrial diamonds, in violation of §§1 and 2 of the Sherman Act[2] and §73 of the Wilson Tariff Act.[3] The complaint alleged that all of the corporate defendants were doing business within the United States.

With the complaint the United States filed a motion for a preliminary injunction in which it prayed that all of the corporate defendants be restrained from withdrawing from the country any property located in the United States, and from selling, transferring or disposing of any property in the United States "until such time as this Court shall have determined the issues of this case and defendant corporations shall have complied with its orders." The reason given in support of the motion was:

"The injury to the United States of America from the withdrawal of said deposits, diamonds or other property would be irreparable because sequestration of said property is the only means of enforcing this Court's orders or decree against said foreign corporate defendants. The principal business of said defendants is carried on in foreign countries and they could quickly withdraw their assets from the United States and so prevent enforcement of any order or decree which this Court may render."

Amongst other supporting papers was an affidavit by counsel for the United States which stated that "the investigation which he has made shows the foreign corporate defendants named herein have endeavored to avoid sub-

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[2] 26 Stat. 209 as amended 15 U. S. C. §§ 1, 2.

[3] 28 Stat. 570 as amended 15 U. S. C. § 8.

jecting themselves to the jurisdiction of the courts of the United States by making their sales abroad only and requiring customers to pay in advance for all purchases."

There was also a motion for a restraining order without notice. The requested restraining order was issued and served on a number of banks; one, a bank in which De Beers had, the same day, established a credit of $59,320; others in which Forestiere had credits of approximately $632,000. Bank credits of petitioner Diamantes affected aggregate approximately $47,000. Both the two last named petitioners had purchased machinery and supplies in the United States of an approximate value of $100,000, which were covered by the injunction. Upon a showing that as the corporate defendants were foreign corporations and would be required to obtain information and affidavits in support of their contention that service of process in the suit had not been made upon them, and in support of other motions addressed to failure to state a cause of action under the statutes, time to plead or answer was extended; and the injunction was from time to time modified and continued. Counsel for the petitioners, appearing specially, moved for dissolution of the injunction. The case was heard on affidavits and oral argument, the application was denied, and the injunction was continued in force. Thereupon the petitioners applied to this court for certiorari under § 262. That section provides in part:

"The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

All the petitioners attack the order as in substance a sequestration of property beyond the power of the court and an abuse of discretion in the circumstances. The petitioners in No. 1189 also seek a reversal on the ground that the complaint does not state a claim cognizable by United States courts and that the affidavits filed by these peti-

tioners establish that the court below has no jurisdiction over the persons of the defendants. It is obvious from the record that these contentions are still open in the court below and that court has not yet passed upon them. In the view we take of the case it is unnecessary for us presently to consider them.

In *United States Alkali Export Assn.* v. *United States*, *ante*, p. 196, the court has discussed the propriety of review under § 262 in a suit brought under the Anti-Trust laws where there is a substantial question whether the District Court has jurisdiction of a suit which it has retained for trial on the merits. What is there said applies in this instance. If the preliminary injunction here granted, unless set aside, will stand throughout the course of the trial and for an indefinite period after its termination, and if the order was beyond the powers conferred upon the court, it is plain, under the decisions mentioned, that the petitions present an appropriate case for the exercise of our jurisdiction under § 262. As hereafter noted the order in question was not made to grant interlocutory relief such as could be afforded by any final injunction, but is one respecting a matter lying wholly outside the issues in the case; no decision of the suit on the merits can redress any injury done by the order; and therefore unless it can be reviewed under § 262 it can never be corrected if beyond the power of the court below.[4] When Congress withholds interlocutory reviews, § 262 can, of course, not be availed of to correct a mere error in the exercise of conceded judicial power. But when a court has no judicial power to do what it purports to do—when its action is not mere error but usurpation of power—the situation falls precisely within the allowable use of § 262. We proceed, therefore, to inquire whether the District Court is empowered to enter the order under attack.

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[4] See *In re Chetwood*, 165 U. S. 443, 462; *Maryland* v. *Soper*, 270 U. S. 9, 30.

Although the Government based its motion upon the theory that the entry of the requested injunction would amount to a sequestration of the defendants' assets, and so argued in the court below, it has abandoned that position, because Rule 70 of the Rules of Civil Procedure,[5] which permits the issue of a writ of attachment or sequestration against the property of a disobedient party to compel satisfaction of a judgment, is operative only after a judgment is entered.

The Government disclaims any benefit of Rule 64, which provides for an attachment at the commencement of, or during the course of, an action for the purpose of securing payment of any judgment ultimately obtained, under and in accordance with the law of the state in which the court sits or under any existing federal statute. It is admitted that there is no applicable federal statute and that, under the law of New York, an attachment may issue only in an action seeking a money judgment and will not issue in an equity suit such as the instant one.[6]

The court below deduced the power to grant the injunction from § 4 of the Sherman Act[7] and from § 262 of the Judicial Code, the section under which petitioners seek review in this court. The respondent seeks to sustain the injunction under the same statutory provisions.

Section 4 of the Sherman Act confers jurisdiction on District Courts "to prevent and restrain violations of this act." That jurisdiction, as we have held,[8] is to be exercised according to the general principles which govern

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[5] 28 U. S. C. foll. § 723c.

[6] N. Y. Civil Practice Act § 902; 7 Carmody, New York Practice, § 309; *Thorington* v. *Merrick,* 101 N. Y. 5, 3 N. E. 794; *Brown* v. *Chaminade Velours,* 176 Misc. 238, 26 N. Y. S. 2d 1009; *Avery* v. *Avery,* 119 App. Div. 698, 104 N. Y. S. 290. Compare *Lazenby* v. *Codman,* 28 F. Supp. 949; *Shiel* v. *Patrick,* 59 F. 992.

[7] 15 U. S. C. § 4.

[8] *Appalachian Coals* v. *United States,* 288 U. S. 344, 377.

the granting of equitable relief. Since it confers no new or different power than those traditionally exercised by courts of equity, we are remitted to examination of the practice of such courts, unless § 262 has enlarged those powers. That section empowers District Courts to issue all writs not specifically provided for by statute which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law. It turns out, therefore, that we are again remitted to an inquiry as to what is the usage, and what are the principles of equity applicable in such a case.

Preliminary to a discussion of the course of decision in chancery it will be well to note exactly what is the substance of the injunction, since the name given to the process is not determinative. In truth the purpose and effect of the injunction is to provide security for performance of a future order which may be entered by the court. Its issue presupposes or assumes the following things: (1) that the court has obtained jurisdiction of the persons of the defendants; (2) that it may be found and adjudged that the United States has stated a cause of action in its complaint; (3) that a decree may be entered after trial on the merits enjoining and restraining the defendants from certain future conduct; (4) that the defendants may disobey the decree entered; (5) that a proceeding may be instituted for contempt and will result adversely to the defendants; (6) that a fine may be imposed; (7) that the defendants may neglect or refuse to pay the fine; (8) that an execution issued for the collection of the fine pursuant to 18 U. S. C. 569 may be ineffectual to seize property or money of the defendants in liquidation of the fine, unless the moneys and properties covered by the injunction are held to await the event.

Under the Sherman Act and the Wilson Tariff Act, the District Court has no jurisdiction in this suit to enter a money judgment. Its only power is to restrain the future

continuance of actions or conduct intended to monopolize or restrain commerce. It, of course, has the power, pending final action in this respect, to restrain action or conduct violative of the statute. A preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally. The injunction in question is not of this character. It is not an injunction in the cause, and it deals with a matter lying wholly outside the issues in the suit. It deals with property which in no circumstances can be dealt with in any final injunction that may be entered. It is not a form of seizure of property used in offending against the statute, for the property is not such as might be seized under § 6 of the Sherman Act,[9] or under § 76 of the Wilson Act,[10] and the complaint and affidavits do not purport so to charge. This process is, and can only be, sustained as a method of providing security for compliance with other process which conceivably may be issued for satisfaction of a money judgment for contempt.

The parties agree that neither of them can find any decision or textbook authority for the requisition of such security on the footing of a complaint in equity. The respondent refers us to certain cases as analogous but, upon examination, they are all found to be cases in which an interlocutory injunction was granted with respect to a fund or property which would have been the subject of the provisions of any final decree in the cause,[11] or against action which would ultimately have been subject to injunction by final decree.[12] The Government also refers us to cases where federal courts have enjoined inter-

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[9] 15 U. S. C. § 6.

[10] 15 U. S. C. § 11.

[11] *Deckert* v. *Independence Corp.*, 311 U. S. 282.

[12] *Looney* v. *Eastern Texas R. Co.*, 247 U. S. 214; *Ohio Oil Co.* v. *Conway*, 279 U. S. 813; *Virginian R. Co.* v. *System Federation*, 300 U. S. 515; *Gibbs* v. *Buck*, 307 U. S. 66.

ference with their jurisdiction.[13] Thus it argues that a court of equity has inherent power to protect its jurisdiction. The fallacy, in the application of the principle here, is that, if service of the defendants is properly obtained, and if the complaint states a cause of action, no one questions the jurisdiction of the District Court to enter an appropriate injunction against future conduct violative of the Anti-Trust Acts. The injunction here granted cannot aid or protect this exercise of its powers, and is not intended to do so.

Federal and State courts appear consistently to have refused relief of the nature here sought.[14] The Government nevertheless urges that equity should extend its jurisdiction for the purpose envisaged in the issue of the injunction and advances several reasons in support of its position. It suggests that, by analogy to the practice of issuing writs *ne exeat*,[15] the court, if it would restrain, by such a writ, an individual defendant in a similar case, should restrain the removal of the property of a corporate defendant from the jurisdiction. The analogy is not a helpful one, for the writ *ne exeat* would not be issued in a case of this sort where the defendant presently owes no debt to the complainant nor is under any fixed duty by

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[13] This power has often been exercised in cases where a court of equity has first taken jurisdiction of a *res* and where some other court has thereafter essayed to deal with that *res*. See, e. g. *Wabash R. Co.* v. *Adelbert College*, 208 U. S. 38, 45; *Palmer* v. *Texas*, 212 U. S. 118, 129, 130; *Princess Lida* v. *Thompson*, 305 U. S. 456, 467.

[14] *Martin* v. *Berry Sons' Co.*, 83 F. 2d 857; *Cities Service Co.* v. *McDowell*, 13 Del. Ch. 109, 116 A. 4; *Wahlgren* v. *Bausch & Lomb Optical Co.*, 77 F. 2d 121; *Campbell* v. *Ernest*, 64 Hun 188, 19 N. Y. S. 123; *Platt* v. *Elias*, 101 App. Div. 518, 91 N. Y. S. 1079; *Maine Products Co.* v. *Alexander*, 115 App. Div. 112, 100 N. Y. S. 711; *Golden* v. *Tauster*, 68 Misc. 459, 125 N. Y. S. 83; *Wright Co.* v. *Aero Corp.*, 128 N. Y. S. 726; *Broadfoot* v. *Miller*, 106 Misc. 455, 174 N. Y. S. 497; compare *Gordon* v. *Washington*, 295 U. S. 30, 37.

[15] See 28 U. S. C. § 376.

reason of the receipt of moneys to account to the complainant therefor.[16]

The Government urges that the supposed hardship imposed upon the defendants by the entry of the injunction is exaggerated; that, by giving a bond, the defendants could release their moneys and property. To this there are several sufficient answers. If the court is without jurisdiction to demand security under the circumstances presented, it is equally without authority to compel the proffer of a bond by the seizure of property. If the process be justified in the present posture of the case, there is nothing to prevent other and further seizures of property or money brought into the United States in connection with transactions unrelated to any supposed violation of the Anti-Trust laws. Moreover, the very indefiniteness of the obligation, the remoteness of any possible exoneration of the surety, and the citizenship of the defendants would, as common experience tells us, require the posting of collateral with any bondsman, which would, in effect, tie up assets of value equal to that of those frozen by the injunction.

To sustain the challenged order would create a precedent of sweeping effect. This suit, as we have said, is not to be distinguished from any other suit in equity. What applies to it applies to all such. Every suitor who resorts to chancery for any sort of relief by injunction may, on a mere statement of belief that the defendant can easily make away with or transport his money or goods, impose an injunction on him, indefinite in duration, disabling him to use so much of his funds or property as the court deems necessary for security or compliance with its possible decree. And, if so, it is difficult to see why a plaintiff in any action for a personal judgment in tort or contract may not, also, apply to the chancellor for a so-called injunction sequestrating his opponent's assets pending recovery and

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[16] *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208.

satisfaction of a judgment in such a law action. No relief of this character has been thought justified in the long history of equity jurisprudence.

We are of opinion that the injunction issued in this case is not authorized either by statute or by the usages of equity and that the decree granting the injunction should be reversed.

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

I think the writ should be dismissed. For I do not think this is a proper case in which to exercise our jurisdiction under § 262 of the Judicial Code, 28 U. S. C. § 377.

Our jurisdiction under § 262 has been fully reviewed by the Chief Justice in *U. S. Alkali Export Assn.* v. *United States, ante,* p. 196. I agree that the exercise of our extraordinary jurisdiction was appropriate in that case. For the question presented not only went to the jurisdiction of the District Court to entertain the suit. If the defendants in that suit were right in their contention, a trial on the merits would have frustrated the statutory scheme which Congress had designed for the control of anti-trust activities.

But there is no such extraordinary situation presented here. This is precisely the kind of decree which Congress by the Expediting Act of February 11, 1903, as amended, 15 U. S. C. § 29, intended should not be brought here for review. With reference to the change made by that Act, Mr. Justice Brandeis speaking for the Court in *United States* v. *California Cooperative Canneries,* 279 U. S. 553, 558, said: "These provisions governing appeals in general were amended by the Expediting Act so that in suits in equity under the Anti-Trust Act 'in which the United States is complainant,' the appeal should be direct to this

Court from the final decree in the trial court. Thus, Congress limited the right of review to an appeal from the decree which disposed of all matters, see *Collins* v. *Miller,* 252 U. S. 364; and it precluded the possibility of an appeal to either court from an interlocutory decree."

To allow this appeal is to defeat that policy. Long ago in *Bank of Columbia* v. *Sweeney,* 1 Pet. 567, 569, Chief Justice Marshall stated that an allowance of an appeal from an interlocutory ruling where Congress permitted an appeal only from a final judgment would be a "plain evasion" of the Act of Congress. We made a like ruling only recently in *Roche* v. *Evaporated Milk Assn.,* 319 U. S. 21, 30, where we said: "Where the appeal statutes establish the conditions of appellate review, an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions and thwart the Congressional policy against piecemeal appeals in criminal cases."

The present case presents no issue which warrants a departure from that long settled practice. This case raises no question of grave public importance. It is by no means comparable to *Ex parte United States,* 287 U. S. 241, where the interlocutory decree was equivalent to a denial of the absolute right of the government to put the accused on trial. It is wholly unlike the cases cited in *U. S. Alkali Export Assn.* v. *United States, supra,* where writs were issued under § 262 to review interlocutory orders which foreclosed the adjudication of rights entrusted to the jurisdiction of a state tribunal or which deprived a party of his basic right of trial by jury. The public importance of the present question is not apparent. The actual hardship imposed upon the defendants is no more than the cost of procuring a bond. It has always been assumed that mere hardship or inconvenience alone was not sufficient to justify resort to the extraordinary course of review by way of § 262. *U. S. Alkali Export Assn.* v. *United*

States, supra. Is the inconvenience of private litigants to be the newly found ground for evading the Expediting Act?

The reason advanced for departing from the long standing practice is that "the order was beyond the powers conferred upon the court." By that test every interlocutory order which is wrong can be reviewed here under § 262. That is novel doctrine. That seems to be the test for the Court says that the order can now be reviewed because it involves "a matter lying wholly outside the issues in the case." In other words, we look to the merits and take the case under § 262 if it appears that the District Court exceeded its authority. But it always exceeds its authority when it abuses its discretion. Thus we must now entertain these appeals on interlocutory orders, though Congress said we should not, in order to determine whether the District Court kept within bounds. Certainly Congress knew that some interlocutory orders might be erroneous when it chose to make them non-reviewable. It did not draw the distinction now suggested between interlocutory orders which are an abuse of conceded judicial power and interlocutory orders which otherwise exceed judicial authority. Congress moreover knew that if immediate review of interlocutory orders could not be had, no decision on the merits might be able to "redress any injury done by the order." But that was the choice which it made. We should respect it.

The decision, if followed, will open the flood gates to review of interlocutory decrees. It circumvents the policy of Congress to restrict review in these cases to final judgments.

WILLIAMS ET AL. v. NORTH CAROLINA.

CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA.

No. 84. Argued October 13, 1944.—Decided May 21, 1945.

1. A man and a woman, domiciled in North Carolina, left their spouses in North Carolina, obtained decrees of divorce in Nevada, married and returned to North Carolina to live. Prosecuted in North Carolina for bigamous cohabitation, they pleaded the Nevada divorce decrees in defense but were convicted. *Held* that, upon the record, the judgments of conviction were not invalid as denying the Nevada divorce decrees the full faith and credit required by Art. IV, § 1 of the Constitution. Pp. 234, 236.
2. A decree of divorce rendered in one State may be collaterally impeached in another by proof that the court which rendered the decree had no jurisdiction, even though the record of the proceedings in that court purports to show jurisdiction. P. 229.
3. Under our system of law, judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicil. P. 229.
4. As to the truth or existence of a fact, like that of domicil, upon which depends the power to exert judicial authority, a State not a party to the exertion of such judicial authority in another State but seriously affected by it has a right, when asserting its own unquestioned authority, to ascertain the truth or existence of that crucial fact. P. 230.
5. Punishment of a person for an act as a crime when ignorant of the facts making it so, does not involve a denial of due process. P. 238.
6. The prior decision of this Court in this case, *Williams* v. *North Carolina,* 317 U. S. 287, did not foreclose a second trial upon the issue of domicil. P. 239.

224 N. C. 183, 29 S. E. 2d 744, affirmed.

CERTIORARI, 322 U. S. 725, to review a judgment affirming judgments of conviction of bigamous cohabitation.

Mr. W. H. Strickland for petitioners.

Hughes J. Rhodes, Assistant Attorney General of North Carolina, with whom *Harry McMullan,* Attorney General, and *Mr. J. E. Tucker* were on the brief, for respondent.

Mr. Justice Frankfurter delivered the opinion of the Court.

This case is here to review judgments of the Supreme Court of North Carolina, affirming convictions for bigamous cohabitation,[1] assailed on the ground that full faith and credit, as required by the Constitution of the United States, was not accorded divorces decreed by one of the courts of Nevada. *Williams* v. *North Carolina,* 317 U. S. 287, decided an earlier aspect of the controversy. It was there held that a divorce granted by Nevada, on a finding that one spouse was domiciled in Nevada, must be respected in North Carolina, where Nevada's finding of domicil was not questioned, though the other spouse had neither appeared nor been served with process in Nevada and though recognition of such a divorce offended the policy of North Carolina. The record then before us did not present the question whether North Carolina had the power "to refuse full faith and credit to Nevada divorce decrees because, contrary to the findings of the Nevada court, North Carolina finds that no *bona fide* domicil was acquired in Nevada." *Williams* v. *North Carolina, supra,* at 302. This is the precise issue which has emerged after retrial of the cause following our reversal. Its obvious importance brought the case here. 322 U. S. 725.

The implications of the Full Faith and Credit Clause, Article IV, § 1 of the Constitution,[2] first received the sharp

[1] The prosecution was under § 14–183 of the General Statutes of North Carolina (1943): "If any person, being married, shall contract a marriage with any other person outside of this state, which marriage would be punishable as bigamous if contracted within this state, and shall thereafter cohabit with such person in this state, he shall be guilty of a felony and shall be punished as in cases of bigamy. Nothing contained in this section shall extend . . . to any person who at the time of such second marriage shall have been lawfully divorced from the bond of the first marriage . . ."

[2] "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."

analysis of this Court in *Thompson* v. *Whitman*, 18 Wall. 457. Theretofore, uncritical notions about the scope of that Clause had been expressed in the early case of *Mills* v. *Duryee*, 7 Cranch 481. The "doctrine" of that case, as restated in another early case, was that "the judgment of a state court should have the same credit, validity, and effect, in every other court in the United States, which it had in the state where it was pronounced." *Hampton* v. *M'Connel*, 3 Wheat. 234, 235. This utterance, when put to the test, as it was in *Thompson* v. *Whitman, supra*, was found to be too loose. *Thompson* v. *Whitman* made it clear that the doctrine of *Mills* v. *Duryee* comes into operation only when, in the language of Kent, "the jurisdiction of the court in another state is not impeached, either as to the subject matter or the person." Only then is "the record of the judgment . . . entitled to full faith and credit." 1 Kent, Commentaries (2d ed., 1832) * 261 n. b. The essence of the matter was thus put in what *Thompson* v. *Whitman* adopted from Story: " 'The Constitution did not mean to confer [upon the States] a new power or jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within their territory.' "[3] 18 Wall. 457, 462. In short, the Full Faith and Credit Clause puts the Constitution behind a judgment instead of the too fluid, ill-defined concept of "comity."[4]

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[3] It is interesting to note that this more critical analysis by Mr. Justice Story of the nature of the Full Faith and Credit Clause first appeared in 1833, twenty years after his loose characterization in *Mills* v. *Duryee, supra*. 3 Story, Commentaries on the Constitution (1st ed., 1833) p. 183.

[4] "There is scarcely any doctrine of the law which, so far as respects formal and exact statement, is in a more unreduced and uncertain condition than that which relates to the question what force and effect should be given by the courts of one nation to the judgments rendered by the courts of another nation." James C. Carter and Elihu Root, Appellants' brief, p. 49, in *Hilton* v. *Guyot*, 159 U. S.

But the Clause does not make a sister-State judgment a judgment in another State. The proposal to do so was rejected by the Philadelphia Convention. 2 Farrand, The Records of the Federal Convention of 1787, 447–48.[5] "To give it the force of a judgment in another state, it must be made a judgment there." *M'Elmoyle* v. *Cohen,* 13 Pet. 312, 325. It can be made a judgment there only if the court purporting to render the original judgment had power to render such a judgment. A judgment in one State is conclusive upon the merits in every other State, but only if the court of the first State had power to pass on the merits—had jurisdiction, that is, to render the judgment.

"It is too late now to deny the right collaterally to impeach a decree of divorce made in another State, by proof that the court had no jurisdiction, even when the record purports to show jurisdiction . . ." It was "too late" more than forty years ago. *German Savings Society* v. *Dormitzer,* 192 U. S. 125, 128.

Under our system of law, judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicil. *Bell* v. *Bell,* 181 U. S. 175; *Andrews* v. *Andrews,* 188 U. S. 14. The framers of the Constitution were familiar with this jurisdictional prerequisite, and since 1789 neither this Court nor any other court in the English-speaking world has questioned it. Domicil implies a nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance. The domicil of one spouse within a State gives power to that State, we have held, to dis-

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113. See, as to "comity," *Loucks* v. *Standard Oil Co.,* 224 N. Y. 99, 120 N. E. 198.

[5] The reach of Congressional power given by Art. IV, § 1 is not before us. See Jackson, Full Faith and Credit—the Lawyer's Clause of the Constitution (1945) 45 Col. L. Rev. 1, 21–24; Cook, Logical and Legal Bases of Conflict of Laws (1942) 98 *et seq.*

solve a marriage wheresoever contracted. In view of *Williams* v. *North Carolina, supra,* the jurisdictional requirement of domicil is freed from confusing refinements about "matrimonial domicil," see *Davis* v. *Davis,* 305 U. S. 32, 41, and the like. Divorce, like marriage, is of concern not merely to the immediate parties. It affects personal rights of the deepest significance. It also touches basic interests of society. Since divorce, like marriage, creates a new status, every consideration of policy makes it desirable that the effect should be the same wherever the question arises.

It is one thing to reopen an issue that has been settled after appropriate opportunity to present their contentions has been afforded to all who had an interest in its adjudication. This applies also to jurisdictional questions. After a contest these cannot be relitigated as between the parties. *Forsyth* v. *Hammond,* 166 U. S. 506, 517; *Chicago Life Ins. Co.* v. *Cherry,* 244 U. S. 25, 30; *Davis* v. *Davis, supra.* But those not parties to a litigation ought not to be foreclosed by the interested actions of others; especially not a State which is concerned with the vindication of its own social policy and has no means, certainly no effective means, to protect that interest against the selfish action of those outside its borders. The State of domiciliary origin should not be bound by an unfounded, even if not collusive, recital in the record of a court of another State. As to the truth or existence of a fact, like that of domicil, upon which depends the power to exert judicial authority, a State not a party to the exertion of such judicial authority in another State but seriously affected by it has a right, when asserting its own unquestioned authority, to ascertain the truth or existence of that crucial fact.[6]

[6] We have not here a situation where a State disregards the adjudication of another State on the issue of domicil squarely litigated in a truly adversary proceeding.

These considerations of policy are equally applicable whether power was assumed by the court of the first State or claimed after inquiry. This may lead, no doubt, to conflicting determinations of what judicial power is founded upon. Such conflict is inherent in the practical application of the concept of domicil in the context of our federal system.[7] See *Worcester County Co.* v. *Riley,* 302 U. S. 292; *Texas* v. *Florida,* 306 U. S. 398; *District of Columbia* v. *Murphy,* 314 U. S. 441. What was said in *Worcester County Co.* v. *Riley, supra,* is pertinent here. "Neither the Fourteenth Amendment nor the full faith and credit clause requires uniformity in the decisions of the courts of different states as to the place of domicil, where the exertion of state power is dependent upon domicil within its boundaries." 302 U. S. 292, 299. If a finding by the court of one State that domicil in another State has been abandoned were conclusive upon the old domiciliary State, the policy of each State in matters of most intimate concern could be subverted by the policy of every other State. This Court has long ago denied the existence of such destructive power. The issue has a far reach. For domicil is the foundation of probate jurisdiction precisely as it is that of divorce. The ruling in *Tilt* v. *Kelsey,* 207 U. S. 43, regarding the probate of a will, is equally applicable to a sister-State divorce decree: "the full faith and credit due to the proceedings of the New Jersey court do not require that the courts of New York shall be bound by its adjudication on the question of domicil. On the contrary, it is open to the courts of any State in the trial of a collateral issue to determine upon the evidence produced the true domicil of the deceased." 207 U. S. 43, 53.

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[7] Since an appeal to the Full Faith and Credit Clause raises questions arising under the Constitution of the United States, the proper criteria for ascertaining domicil, should these be in dispute, become matters for federal determination. See *Hinderlider* v. *La Plata Co.,* 304 U. S. 92, 110.

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Although it is now settled that a suit for divorce is not an ordinary adversary proceeding, it does not promote analysis, as was recently pointed out, to label divorce proceedings as actions *in rem*. *Williams* v. *North Carolina*, *supra*, at 297. But insofar as a divorce decree partakes of some of the characteristics of a decree *in rem*, it is misleading to say that all the world is party to a proceeding *in rem*. See *Brigham* v. *Fayerweather*, 140 Mass. 411, 413, 5 N. E. 265, quoted in *Tilt* v. *Kelsey*, *supra*, at 52. All the world is not party to a divorce proceeding. What is true is that all the world need not be present before a court granting the decree and yet it must be respected by the other forty-seven States provided—and it is a big proviso—the conditions for the exercise of power by the divorce-decreeing court are validly established whenever that judgment is elsewhere called into question. In short, the decree of divorce is a conclusive adjudication of everything except the jurisdictional facts upon which it is founded, and domicil is a jurisdictional fact. To permit the necessary finding of domicil by one State to foreclose all States in the protection of their social institutions would be intolerable.

But to endow each State with controlling authority to nullify the power of a sister State to grant a divorce based upon a finding that one spouse had acquired a new domicil within the divorcing State would, in the proper functioning of our federal system, be equally indefensible. No State court can assume comprehensive attention to the various and potentially conflicting interests that several States may have in the institutional aspects of marriage. The necessary accommodation between the right of one State to safeguard its interest in the family relation of its own people and the power of another State to grant divorces can be left to neither State.

The problem is to reconcile the reciprocal respect to be accorded by the members of the Union to their adjudica-

tions with due regard for another most important aspect of our federalism whereby "the domestic relations of husband and wife . . . were matters reserved to the States," *Popovici* v. *Agler,* 280 U. S. 379, 383–84, and do not belong to the United States. *In re Burrus,* 136 U. S. 586, 593–94. The rights that belong to all the States and the obligations which membership in the Union imposes upon all, are made effective because this Court is open to consider claims, such as this case presents, that the courts of one State have not given the full faith and credit to the judgment of a sister State that is required by Art. IV, § 1 of the Constitution.

But the discharge of this duty does not make of this Court a court of probate and divorce. Neither a rational system of law nor hard practicality calls for our independent determination, in reviewing the judgment of a State court, of that rather elusive relation between person and place which establishes domicil. "It is not for us to retry the facts," as was held in a case in which, like the present, the jurisdiction underlying a sister-State judgment was dependent on domicil. *Burbank* v. *Ernst,* 232 U. S. 162, 164. The challenged judgment must, however, satisfy our scrutiny that the reciprocal duty of respect owed by the States to one another's adjudications has been fairly discharged, and has not been evaded under the guise of finding an absence of domicil and therefore a want of power in the court rendering the judgment.

What is immediately before us is the judgment of the Supreme Court of North Carolina. We have authority to upset it only if there is want of foundation for the conclusion that that Court reached. The conclusion it reached turns on its finding that the spouses who obtained the Nevada decrees were not domiciled there. The fact that the Nevada court found that they were domiciled there is entitled to respect, and more. The burden of undermining the verity which the Nevada decrees import

rests heavily upon the assailant. But simply because the Nevada court found that it had power to award a divorce decree cannot, we have seen, foreclose reexamination by another State. Otherwise, as was pointed out long ago, a court's record would establish its power and the power would be proved by the record. Such circular reasoning would give one State a control over all the other States which the Full Faith and Credit Clause certainly did not confer. *Thompson* v. *Whitman, supra.* If this Court finds that proper weight was accorded to the claims of power by the court of one State in rendering a judgment the validity of which is pleaded in defense in another State, that the burden of overcoming such respect by disproof of the substratum of fact—here domicil—on which such power alone can rest was properly charged against the party challenging the legitimacy of the judgment, that such issue of fact was left for fair determination by appropriate procedure, and that a finding adverse to the necessary foundation for any valid sister-State judgment was amply supported in evidence, we cannot upset the judgment before us. And we cannot do so even if we also found in the record of the court of original judgment warrant for its finding that it had jurisdiction. If it is a matter turning on local law, great deference is owed by the courts of one State to what a court of another State has done. See *Michigan Trust Co.* v. *Ferry,* 228 U. S. 346. But when we are dealing as here with an historic notion common to all English-speaking courts, that of domicil, we should not find a want of deference to a sister State on the part of a court of another State which finds an absence of domicil where such a conclusion is warranted by the record.

When this case was first here, North Carolina did not challenge the finding of the Nevada court that petitioners had acquired domicils in Nevada. For her challenge of the Nevada decrees, North Carolina rested on *Haddock* v.

Haddock, 201 U. S. 562. Upon retrial, however, the existence of domicil in Nevada became the decisive issue. The judgments of conviction now under review bring before us a record which may be fairly summarized by saying that the petitioners left North Carolina for the purpose of getting divorces from their respective spouses in Nevada and as soon as each had done so and married one another they left Nevada and returned to North Carolina to live there together as man and wife. Against the charge of bigamous cohabitation under § 14–183 of the North Carolina General Statutes, petitioners stood on their Nevada divorces and offered exemplified copies of the Nevada proceedings.[8] The trial judge charged that the State had the burden of proving beyond a reasonable doubt that (1) each petitioner was lawfully married to one person; (2) thereafter each petitioner contracted a second marriage with another person outside North Carolina; (3) the spouses of petitioners were living at the time of this second marriage; (4) petitioners cohabited with one another in North Carolina after the second marriage. The burden, it was charged, then devolved upon petitioners "to satisfy the trial jury, not beyond a reasonable doubt nor by the greater weight of the evidence, but simply to satisfy" the jury from all the evidence, that petitioners were domiciled in Nevada at the time they obtained their divorces. The court further charged that "the recitation" of *bona fide* domicil in the Nevada decree

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[8] As to petitioner Hendrix these included the pleadings, evidence and decree. As to petitioner Williams essentially the same evidence with respect to his domicil is in the record from witnesses in this case. It shows when Williams left North Carolina, when he arrived in Nevada, the prompt filing of his divorce suit (Nevada requires six weeks' residence prior to filing a suit for divorce), marriage to petitioner Hendrix immediately after petitioners were divorced, and his prompt return to North Carolina. All of this bears on abandonment of the North Carolina domicil and the intent to remain indefinitely elsewhere.

was "prima facie evidence" sufficient to warrant a finding of domicil in Nevada but not compelling "such an inference." If the jury found, as they were told, that petitioners had domicils in North Carolina and went to Nevada "simply and solely for the purpose of obtaining" divorces, intending to return to North Carolina on obtaining them, they never lost their North Carolina domicils nor acquired new domicils in Nevada. Domicil, the jury was instructed, was that place where a person "has voluntarily fixed his abode . . . not for a mere special or temporary purpose, but with a present intention of making it his home, either permanently or for an indefinite or unlimited length of time."

The scales of justice must not be unfairly weighted by a State when full faith and credit is claimed for a sister-State judgment. But North Carolina has not so dealt with the Nevada decrees. She has not raised unfair barriers to their recognition. North Carolina did not fail in appreciation or application of federal standards of full faith and credit. Appropriate weight was given to the finding of domicil in the Nevada decrees, and that finding was allowed to be overturned only by relevant standards of proof. There is nothing to suggest that the issue was not fairly submitted to the jury and that it was not fairly assessed on cogent evidence.

State courts cannot avoid review by this Court of their disposition of a constitutional claim by casting it in the form of an unreviewable finding of fact. *Norris* v. *Alabama,* 294 U. S. 587, 590. This record is barren of such attempted evasion. What it shows is that petitioners, long-time residents of North Carolina, came to Nevada, where they stayed in an auto-court for transients, filed suits for divorce as soon as the Nevada law permitted, married one another as soon as the divorces were obtained, and promptly returned to North Carolina to live. It cannot reasonably be claimed that one set of inferences rather

than another regarding the acquisition by petitioners of new domicils in Nevada could not be drawn from the circumstances attending their Nevada divorces. It would be highly unreasonable to assert that a jury could not reasonably find that the evidence demonstrated that petitioners went to Nevada solely for the purpose of obtaining a divorce and intended all along to return to North Carolina. Such an intention, the trial court properly charged, would preclude acquisition of domicils in Nevada. See *Williamson* v. *Osenton,* 232 U. S. 619. And so we cannot say that North Carolina was not entitled to draw the inference that petitioners never abandoned their domicils in North Carolina, particularly since we could not conscientiously prefer, were it our business to do so, the contrary finding of the Nevada court.

If a State cannot foreclose, on review here, all the other States by its finding that one spouse is domiciled within its bounds, persons may, no doubt, place themselves in situations that create unhappy consequences for them. This is merely one of those untoward results inevitable in a federal system in which regulation of domestic relations has been left with the States and not given to the national authority. But the occasional disregard by any one State of the reciprocal obligations of the forty-eight States to respect the constitutional power of each to deal with domestic relations of those domiciled within its borders is hardly an argument for allowing one State to deprive the other forty-seven States of their constitutional rights. Relevant statistics happily do not justify lurid forebodings that parents without number will disregard the fate of their offspring by being unmindful of the status of dignity to which they are entitled. But, in any event, to the extent that some one State may, for considerations of its own, improperly intrude into domestic relations subject to the authority of the other States, it suffices to suggest that any such indifference by a State to the bond of the Union should be discouraged, not encouraged.

In seeking a decree of divorce outside the State in which he has theretofore maintained his marriage, a person is necessarily involved in the legal situation created by our federal system whereby one State can grant a divorce of validity in other States only if the applicant has a *bona fide* domicil in the State of the court purporting to dissolve a prior legal marriage. The petitioners therefore assumed the risk that this Court would find that North Carolina justifiably concluded that they had not been domiciled in Nevada. Since the divorces which they sought and received in Nevada had no legal validity in North Carolina and their North Carolina spouses were still alive, they subjected themselves to prosecution for bigamous cohabitation under North Carolina law. The legitimate finding of the North Carolina Supreme Court that the petitioners were not in truth domiciled in Nevada was not a contingency against which the petitioners were protected by anything in the Constitution of the United States. A man's fate often depends, as for instance in the enforcement of the Sherman Law, on far greater risks that he will estimate "rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death." *Nash* v. *United States,* 229 U. S. 373, 377. The objection that punishment of a person for an act as a crime when ignorant of the facts making it so, involves a denial of due process of law has more than once been overruled. In vindicating its public policy and particularly one so important as that bearing upon the integrity of family life, a State in punishing particular acts may provide that "he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance." *United States* v. *Balint,* 258 U. S. 250, 252, quoting *Shevlin-Carpenter Co.* v. *Minnesota,* 218 U. S. 57, 69–70. Mistaken notions about one's legal rights are not sufficient to bar prosecution for crime.

We conclude that North Carolina was not required to yield her State policy because a Nevada court found that petitioners were domiciled in Nevada when it granted them decrees of divorce. North Carolina was entitled to find, as she did, that they did not acquire domicils in Nevada and that the Nevada court was therefore without power to liberate the petitioners from amenability to the laws of North Carolina governing domestic relations. And, as was said in connection with another aspect of the Full Faith and Credit Clause, our conclusion "is not a matter to arouse the susceptibilities of the States, all of which are equally concerned in the question and equally on both sides." *Fauntleroy* v. *Lum*, 210 U. S. 230, 238.

As for the suggestion that *Williams* v. *North Carolina*, *supra*, foreclosed the Supreme Court of North Carolina from ordering a second trial upon the issue of domicil, it suffices to refer to our opinion in the earlier case.

Affirmed.

MR. JUSTICE MURPHY, concurring.

While I join in the opinion of the Court, certain considerations compel me to state more fully my views on the important issues presented by this case.

The State of Nevada has unquestioned authority, consistent with procedural due process, to grant divorces on whatever basis it sees fit to all who meet its statutory requirements. It is entitled, moreover, to give to its divorce decrees absolute and binding finality within the confines of its borders.

But if Nevada's divorce decrees are to be accorded full faith and credit in the courts of her sister states it is essential that Nevada have proper jurisdiction over the divorce proceedings. This means that at least one of the parties to each ex parte proceeding must have a bona fide domicil within Nevada for whatever length of time Nevada may prescribe.

This elementary principle has been reiterated by this Court many times. In *Bell* v. *Bell,* 181 U. S. 175, this Court held that "because neither party had a domicil in Pennsylvania" the Pennsylvania court had no jurisdiction to grant a divorce and its decree "was entitled to no faith and credit in New York or in any other state." The same rule was applied in the companion case of *Streitwolf* v. *Streitwolf,* 181 U. S. 179. Referring to these two prior cases as holding that "domicil was in any event the inherent element upon which the jurisdiction must rest," the Court in *Andrews* v. *Andrews,* 188 U. S. 14, repeated that bona fide domicil in a state is "essential to give jurisdiction to the courts of such state to render a decree of divorce which would have extra-territorial effect." The *Andrews* case made it clear, moreover, that this requirement of domicil is not merely a matter of state law. It was stated specifically that "without reference to the statute of South Dakota and in any event" domicil in South Dakota was necessary. 188 U. S. at 41. All of the opinions in *Haddock* v. *Haddock,* 201 U. S. 562, recognized this principle, with Mr. Justice Brown's dissenting opinion stating that "the courts of one state may not grant a divorce against an absent defendant to any person who has not acquired a bona fide domicil in that state." Finally, in *Williams* v. *North Carolina,* 317 U. S. 287, the Court acknowledged that the plaintiff's domicil in a state "is recognized in the *Haddock* case and elsewhere (Beale, Conflict of Laws, § 110.1) as essential in order to give the court jurisdiction which will entitle the divorce decree to extraterritorial effect, at least when the defendant has neither been personally served nor entered an appearance." See also *Atherton* v. *Atherton,* 181 U. S. 155.

The jury has here found that the petitioner's alleged domicil in Nevada was not a bona fide one, which in common and legal parlance means that it was acquired fraud-

ulently, deceitfully or in bad faith. This means, in other words, that the jury found that the petitioners' residence in Nevada for six weeks was not accompanied by a bona fide intention to make Nevada their home and to remain there permanently or at least for an indefinite time, as required even by Nevada law. *Lamb* v. *Lamb,* 57 Nev. 421, 430, 65 P. 2d 872. This conclusion is supported by overwhelming evidence satisfying whatever standard of proof may be propounded. Under these circumstances there is no reason to doubt the efficacy of jury trials in relation to the question of domicil or to speculate as to whether another jury might have reached a different verdict on the same set of facts.

Thus the court below properly concluded that Nevada was without jurisdiction so as to give extraterritorial validity to the divorce decrees and that North Carolina was not compelled by the Constitution to give full faith and credit to the Nevada decrees. North Carolina was free to consider the original marriages still in effect, the Nevada divorces to be invalid, and the Nevada marriage to be bigamous, thus giving the Nevada marriage the same force and effect that Nevada presumably would have given it had Nevada considered the original marriages still outstanding. Cf. *State* v. *Zichfeld,* 23 Nev. 304, 46 P. 802.

By being domiciled and living in North Carolina, petitioners secured all the benefits and advantages of its government and participated in its social and economic life. As long as petitioners and their respective spouses lived there and retained that domicil, North Carolina had the exclusive right to regulate the dissolution of their marriage relationships. However harsh and unjust North Carolina's divorce laws may be thought to be, petitioners were bound to obey them while retaining residential and domiciliary ties in that state.

No justifiable purpose is served by imparting constitutional sanctity to the efforts of petitioners to establish a false and fictitious domicil in Nevada. Such a result would only tend to promote wholesale disregard of North Carolina's divorce laws by its citizens, thus putting an end to "the existence of all efficacious power on the subject of divorce." *Andrews* v. *Andrews, supra,* 32. Certainly no policy of Nevada dictates lending the full faith and credit clause to protect actions grounded in deceit. Nevada has a recognizable interest in granting only two types of ex parte divorces: (a) those effective solely within the borders of Nevada, and (b) those effective everywhere on the ground that at least one of the parties had a bona fide domicil in the state at the time the decree was granted. Neither type of divorce is involved here. And Nevada has no interest that we can respect in issuing divorce decrees with extraterritorial effect to those who are domiciled elsewhere and who secure sham domicils in Nevada solely for divorce purposes.

There are no startling or dangerous implications in the judgment reached by the Court in this case. All of the uncontested divorces that have ever been granted in the forty-eight states are as secure today as they were yesterday or as they were before our previous decision in this case. Those based upon fraudulent domicils are now and always have been subject to later reexamination with possible serious consequences.

Whatever embarrassment or inconvenience resulting to those who have made property settlements, contracted new marriages or otherwise acted in reliance upon divorce decrees obtained under conditions found to exist in this case is not insurmountable. The states have adequate power, if they desire to exercise it, to enact legislation providing for means of validating any such property settlements or marriages or of relieving persons from other unfortunate consequences.

Nor are any issues of civil liberties at stake here. It is unfortunate that the petitioners must be imprisoned for acts which they probably committed in reliance upon advice of counsel and without intent to violate the North Carolina statute. But there are many instances of punishment for acts whose criminality was unsuspected at the time of their occurrence. Indeed, for nearly three-quarters of a century or more individuals have been punished under bigamy statutes for doing exactly what petitioners have done. *People* v. *Dawell,* 25 Mich. 247; *State* v. *Armington,* 25 Minn. 29, 56 S. E. 673; *People* v. *Baker,* 76 N. Y. 78; *State* v. *Westmoreland,* 76 S. C. 145. Petitioners especially must be deemed to have been aware of the possible criminal consequences of their actions in view of the previously settled North Carolina law on the matter. *State* v. *Herron,* 175 N. C. 754, 94 S. E. 698. This case, then, adds no new uncertainty and comes as no surprise for those who act fraudulently in establishing a domicil and who disregard the laws of their true domiciliary states.

As Mr. Justice Holmes said in his dissenting opinion in the *Haddock* case, 201 U. S. at 628, "I do not suppose that civilization will come to an end whichever way this case is decided." Difficult problems inevitably arise from the fact that people move about freely among the forty-eight states, each of which has its own policies and laws. Until the federal government is empowered by the Constitution to deal uniformly with the divorce problem or until uniform state laws are adopted, it is essential that definite lines of demarcation be made as regards the scope and extent of the varying state practices. See 91 Cong. Rec. 4238–4241 (May 3, 1945). This case illustrates the drawing of one such line, a line that has been drawn many times before without too unfortunate dislocations resulting among those citizens of a divorced status. There is no reason to believe that any different or more

serious consequences will result from retracing that line today.

THE CHIEF JUSTICE and MR. JUSTICE JACKSON join in these views.

MR. JUSTICE RUTLEDGE, dissenting.

Once again the ghost of "unitary domicil" returns on its perpetual round, in the guise of "jurisdictional fact," to upset judgments, marriages, divorces, undermine the relations founded upon them, and make this Court the unwilling and uncertain arbiter between the concededly valid laws and decrees of sister states. From *Bell* and *Andrews* to *Davis* to *Haddock* to *Williams* and now back to *Haddock* and *Davis* through *Williams* again [1]—is the maze the Court has travelled in a domiciliary wilderness, only to come out with no settled constitutional policy where one is needed most.

Nevada's judgment has not been voided. It could not be, if the same test applies to sustain it as upholds the North Carolina convictions.[2] It stands, with the marriages founded upon it, unimpeached. For all that has been determined or could be, unless another change is in the making, petitioners are lawful husband and wife in Nevada. *Williams* v. *North Carolina I,* 317 U.S. 287; *Williams* v. *North Carolina II, ante,* p. 226. They may be such everywhere outside North Carolina. Lawfully wedded also, in North Carolina, are the divorced spouse of one and his wife, taken for all we know in reliance upon the Nevada decree.[3] That is, unless another jury shall find they

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[1] Cf. text *infra* Part I.

[2] Presumably it would be our function "to retry the facts" no more if the Nevada decree were immediately under challenge here than it is to do so when the North Carolina judgment is in issue. It would seem therefore that we owe the same deference to Nevada's finding of domicil as we do to North Carolina's. Cf. text at note 4 *et seq.*

[3] The record indicates that Mr. Hendrix "had brought no divorce proceeding against the *feme* defendant prior to the first trial of this

too are bigamists for their reliance. No such jury has been impanelled. But were one called, it could pronounce the Nevada decree valid upon the identical evidence from which the jury in this case drew the contrary conclusion. That jury or it and another, if petitioners had been tried separately, could have found one guilty, the other innocent, upon that evidence unvaried by a hair. And, by the Court's test, we could do nothing but sustain the contradictory findings in all these cases.

I do not believe the Constitution has thus confided to the caprice of juries the faith and credit due the laws and judgments of sister states. Nor has it thus made that question a local matter for the states themselves to decide. Were all judgments given the same infirmity, the full faith and credit clause would be only a dead constitutional letter.

I agree it is not the Court's business to determine policies of divorce. But precisely its function is to lay the jurisdictional foundations upon which the states' determinations can be made effective, within and without their borders. For in the one case due process, in the other full faith and credit, commands of equal compulsion upon the states and upon us, impose that duty.

I do not think we perform it, we rather abdicate, when we confide the ultimate decision to the states or to their juries. This we do when, for every case that matters, we make their judgment conclusive. It is so in effect when the crucial concept is as variable and amorphous as "domicil," is always a conclusion of "ultimate fact," and can be established only by proof from which, as experience shows,

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cause, . . . but that he has since and remarried." Although the evidence shows institution of this proceeding, it does not show a decree was entered prior to his remarriage. Whether or not he actually relied upon the Nevada decree, thousands of spouses so divorced do so rely, thus founding new relations which are equally subject to invalidation by jury finding and are always beclouded by a judgment like that rendered in this case.

contradictory inferences may be made as strikes the local trier's fancy. The abdication only becomes more obviously explicit when we avowedly confess that the faith and credit due may be determined either way, wherever "it cannot reasonably be claimed that one set of inferences rather than another" could not be drawn concerning the very matter determined by the judgment; and the final choice upon such a balance is left with the local jury.

No more unstable foundation, for state policies or marital relations, could be formulated or applied. In no region of adjudication or legislation is stability more essential for jurisdictional foundations. Beyond abnegating our function, we make instability itself the constitutional policy when the crux is so conceived and pivoted.

I

What, exactly, are the effects of the decision? The Court is careful not to say that Nevada's judgment is not valid in Nevada. To repeat, the Court could not so declare it, unless a different test applies to sustain that judgment than supports North Carolina's. Presumably the same standard applies to both; and each state accordingly is free to follow its own policy, wherever the evidence, whether the same or different, permits conflicting inferences of domicil, as it always does when the question becomes important.[4]

This must be true unless, contrary to the disclaimer, this Court itself is "to retry the facts." The Court no more could say that the Nevada evidence permitted no conclusion of domicil there than it now can say the North Carolina evidence would not allow a finding either way. This apparently is conceded. The proof was not identical. But it was not so one-sided in either case that only one conclusion was compelled. The evidence in Nevada was

[4] Cf. text at notes 2, 5, 7, 9, 11 *et seq.*

neither that strong nor that weak.[5] Seldom, if ever, is it so.

The necessary conclusion follows that the Nevada decree was valid and remains valid within her borders. So the marriage is good in Nevada, but void in North Carolina, just as it was before "the jurisdictional requirement of domicil [was] freed from confusing refinements about 'matrimonial domicil,' see *Davis* v. *Davis,* 305 U. S. 32, 41, and the like." See also *Haddock* v. *Haddock,* 201 U. S. 562.

The characterization "in rem" has been dropped. But it is clear from the result and from the opinion that the more "confusing refinements" and consequences, including the anomalous status *Haddock* approved, have not completely disappeared. We are not told definitely whether Nevada's adjudication or North Carolina's must be respected, when the question is raised in some one of the other forty-six states. But one thing we do know. "*The State of domiciliary origin* should not be bound by *an unfounded, even if not collusive,* recital in the record of a court of another State." The opinion goes on to repeat: "If a finding by the court of one State that domicil in another State has been abandoned were conclusive *upon the old domiciliary State,* the policy of each State in matters of most intimate concern could be subverted by the policy of every other State." (Emphasis added.)

The question is not simply pertinent, it is imperative, whether "matrimonial domicil" has not merely been recast

[5] The Nevada court knew that petitioners recently had come from North Carolina, resided in tourist quarters, an auto court, and by inference at least that they had come together. There was in the facts sufficient basis for conclusion that they had no *"bona fide"* intention of remaining permanently or indefinitely, after the decrees were rendered, if the court had wished to draw that conclusion. Credibility in such circumstances is always for the trier of fact. *Worcester County Trust Co.* v. *Riley,* 302 U. S. 292, 299; *Burbank* v. *Ernst,* 232 U. S. 162, 164.

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and returned to the play under the common law's more ancient name of "domicil of origin." For North Carolina is the only state which, upon the facts, conceivably could qualify either as "matrimonial domicil" or as "domicil of origin," whether or not they differ. Under the former conception it was at least doubtful whether sheer reexamination of "the jurisdictional fact" previously determined could be made outside the state granting the divorce and the state of "matrimonial domicil."[6] Now we are told the decree "must be respected by the other forty-seven States *provided—and it is a big proviso*—the conditions for the exercise of power by the divorce-decreeing court are validly established *whenever* that judgment is *elsewhere* called into question." (Emphasis added.)

If this means what it says, the proviso is big. It swallows the provision. Unless "matrimonial domicil," banished in *Williams I,* has returned renamed in *Williams II,* every decree becomes vulnerable in every state. Every divorce, wherever granted, whether upon a residence of six weeks, six months or six years, may now be reexamined by every other state, upon the same or different evidence, to redetermine the "jurisdictional fact," always the ultimate conclusion of "domicil." For the grounds of the decision wholly negate that its effect can be limited to decrees of states having so-called "liberal" divorce policies; or to decrees recently granted; or to cases where different evidence is presented. It is implicit and inherent in the "unitary-domicil, jurisdictional-fact, permissible-inference" rule that any decree, granted after any length of time, upon any ground for divorce, and however solid the proof, may be reexamined either by "the state of domiciliary origin" or by any other state, as the case uncertainly may be. And all that is needed, to disregard it, is *some* evidence from which a jury reasonably may conclude there was no domiciliary intent when the decree was rendered. That is, unless the Court means to reserve

[6] *Haddock* v. *Haddock,* 201 U. S. 562, 572.

decision upon the weight of the evidence and thus "to retry the facts," contrary to its declared intention, in some case or cases not defined or indicated.

II

Obviously more is involved than full faith and credit for judgments of other states. Beneath the judgment of Nevada lie her statutory law and policy. These too are denied recognition. This is not a case in which the denial extends, or could extend, to the judgment alone. For the North Carolina verdict and judgment do not purport to rest on any finding of fraud or other similar ground, whereby the petitioners procured judgments from the Nevada courts which the manner of their procurement vitiates.[7]

No such issue, impeaching the Nevada decree, has been made. The state asked no instructions on such a theory and none were given.[8] The verdict and judgment there-

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[7] The case was not tried on any theory that Nevada's court was defrauded or her law evaded. No effort was made to bring it within that well recognized exception to the binding effect of judgments generally. *United States* v. *Throckmorton*, 98 U. S. 61; *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399. Nor is that ground asserted here to support the denial of credit. It was not suggested, and is not now, that Nevada either would, or could be required to, set aside her judgment or reach a different result, upon the evidence this record presents; or that she now is bound to give full faith and credit to North Carolina's decision. Nor has it been contended that the Nevada evidence was not adequate to support her finding.

[8] Petitioners' motion for judgment by nonsuit, which the court denied, was grounded in part upon the absence of evidence of fraud upon the Nevada court or law and alleged incompetence of such evidence if tendered. They also objected to the portions of the charge which submitted the issue of "bona fide domicil" without reference to the effect of the evidence as tending to vitiate the Nevada decree. "Bona fides" is inherently an element in domiciliary intent. Merely adding the phrase as qualifying adjective does not raise an issue of fraud. For this reason, founded in the state of the record, the Court eschews grounding the decision upon fraud or collusion.

fore have not determined and do not rest upon any such ground.

In view of this fact I am completely at loss to understand what is meant, in the context of this case, by "an *unfounded,* even if *not collusive,* recital" which the state of domiciliary origin, perhaps others too, is free to disregard. The statement itself negates collusion as a ground for the decision. And, as I read the remainder of the opinion, it concedes and must concede, if the two judgments are to be tested alike, that the Nevada decree was not unfounded. The shape the issues have taken compels this conclusion.

Accordingly the case must be considered as shorn of any element of fraud, deceit or evasion of Nevada's law, of showing that the Nevada court was imposed upon in any way or did other than apply the Nevada law according to its true intent and purpose. It must be taken also as devoid of any showing that Nevada failed in any way to comply with every requirement this Court has made respecting jurisdiction or due process of law, for rendering a valid divorce decree. *Williams* v. *North Carolina,* 317 U. S. 287.

The case therefore stands stripped of every difference, presently material, from the Nevada proceedings save two. There was none, jurisdictionally, in the issues. There was only different evidence upon which the same issue was determined in opposite fashions. And the states had different policies concerning divorce.

The difference in the evidence affected solely events taking place after the Nevada decree, the return to North Carolina and the cohabitation there. Ordinarily, valid judgments are not overturned, *Schneiderman* v. *United States,* 320 U. S. 118, or disregarded upon such retroactive proof.[9] But here this proof was not tendered in attack

[9] Cf. *Cochrane* v. *Deener,* 95 U. S. 355; *United States* v. *Maxwell Land-Grant Co.,* 121 U. S. 325, 381; *United States* v. *San Jacinto Tin*

upon the Nevada decree. It was offered and admitted exclusively to relitigate the same issue that decree had determined, upon adequate evidence and in full compliance with Nevada law and the federal law giving Nevada jurisdiction to determine it. *Williams I*; *Williams II*. Its sole function was to show that petitioners did not have the very intent the Nevada court, with eyes not blinded,[10] had found they possessed.

Moreover, the character of the Court's ruling makes the difference in the evidence, as it bore upon the controlling issue, of no materiality. It is not held that denial of credit will be allowed, only if the evidence is different or depending in any way upon the character or the weight of the difference. The test is not different evidence. It is evidence, whether the same or different and, if different, without regard to the quality of the difference, from which an opposing set of inferences can be drawn by the trier of fact "not unreasonably." Presumably the Court will not "retry the facts" in either case.

But it does not define "not unreasonably." It vaguely suggests a supervisory function, to be exercised when the denial strikes its sensibilities as wrong, by some not stated standard. So to suspend the matter is not law. It is only added uncertainty.

If the Court means not "to retry the facts," the suggestion is wholly out of place. Then the test will be as it is in other cases where the question is whether a jury's verdict will be sustained, upon an issue alleging want of supporting evidence. There will be no "weighing." There will be only examination for sufficiency, with the limits marked by "scintillas" and the like.[11]

Co., 125 U. S. 273, 300; *Lalone* v. *United States*, 164 U. S. 255; *United States* v. *American Bell Tel. Co.*, 167 U. S. 224. See 9 Wigmore, Evidence (3rd ed.) § 2498.

[10] Cf. note 5.

[11] Cf. *Commissioners of Marion County* v. *Clark*, 94 U. S. 278, 284; *Jones* v. *East Tennessee, V. & G. R. Co.*, 128 U. S. 443, 445; *Tiller* v.

If this is the test, for all practical purposes the Court might as well declare outright that states of domiciliary origin are free to deny faith and credit to divorces granted elsewhere. For the case will be rare indeed where, by this standard, "domicil" can be determined as a matter of law, when divorce has been secured after departure from such a state. These are the only cases that matter. The issue does not arise with stay-at-homes. With others, it always can be raised and nearly always with "some" evidence, more than a "scintilla," to sustain both contentions.

But if the test is different, "weighing" necessarily becomes involved and implicitly is what has been done in this case, notwithstanding the disclaimer. In that event, the crux of jurisdiction becomes the difference in the evidence; in this case, the return to North Carolina and cohabitation there.

If this is the decision's intended effect, it should be squarely so declared. Too much hangs for too many people and for the states themselves upon beclouding it with a "different set of inferences—refusal to retry the facts" gloss or otherwise. It cannot be assumed that the matter will affect only a few. For this has become a nation of transient people. Lawyers everywhere advise for or against divorce and courts grant or deny it, depending not on the probability that the case will come here, but on what is done here with the few cases which do come. The matter is altogether too serious, for too many, for glossing over the crucial basis of decision.

Whether the one test or the other is intended, or perhaps still another not suggested, North Carolina's action comes down to sheer denial of faith and credit to Nevada's law and policy, not merely to her judgment; and the decision here, to approval of this denial. The real difference, in

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Atlantic Coast Line R. Co., 318 U. S. 54, 68; *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350, 353, 354; *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29, 35; 9 Wigmore, § 2494.

my opinion the only material one, as the issues and the decision have been made on this record, is that one suit and judgment took place in Nevada, the other in North Carolina, and the two states have different policies relating to divorce. Nor does the degree or quality of the difference in policies matter. It also is not weighed.[12] The difference may be small for anything that is said, yet there is freedom to withhold credit.

If this is the test, every divorce granted a person who has come from another state is vulnerable wherever state policies differ, as they do universally if no account is taken of the weight of difference.

It is always a serious matter for us to say that one state is bound to give effect to another's decision, founded in its different policy. That mandate I would not join in any case if not compelled by the only authority binding both the states and ourselves. Conceivably it might have been held that the full faith and credit clause has no application to the matters of marriage and divorce. But the Constitution has not left open that choice. And such has not been the course of decision. The clause applies, but from today it would seem only to compel "respect" or something less than faith and credit, whenever a jury concludes "not unreasonably," by ultimate inference from the always conflicting circumstantial evidence, that it should not apply. Wherever that situation exists, the finding that there was no "bona fide" domiciliary intent comes in every practical effect to this and nothing more.

Permitting the denial is justified, it is said, because we must have regard also for North Carolina's laws, policies and judgments. And so we must. But thus to state the question is to beg the controlling issue. By every test remaining effective, and not disputed, Nevada had power to alter the petitioner's marital status. She made the alteration. If it is valid, neither North Carolina nor we

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[12] Cf. note 16.

are free to qualify it by saying it shall not be effective there, while it is effective in Nevada, and stands without impeachment for ineffectiveness there.

Just that denial is what the terms of the Constitution and the Act of Congress implementing them forbid. It is exactly for the situation where state policies differ that the clause and the legislation were intended. Without such differences, the need for constitutional limitation was hardly one of magnitude. The apparent exceptions for fraud and want of jurisdiction were never intended to enable the states to disregard the provision and each other's policies, crystallized in judgment, when every requisite for jurisdiction has been satisfied and no showing of fraud has been presented. They have a different purpose, one consistent with the constitutional mandate, not destructive of its effect. That purpose is to make sure that the state's policy has been applied in the judgment, not to permit discrediting it or the judgment when the one validly crystallizes the other. Such an exception, grafted upon the clause, but nullifies it. It does so totally when the weight and quality of the difference in policies has no bearing on the issue.

Lately this fact has been recognized increasingly in relation to other matters than divorce.[13] The very function of the clause is to compel the states to give effect to the contrary policies of other states when these have been validly embodied in judgment. To this extent the Constitution has foreclosed the freedom of the states to apply their own local policies. The foreclosure was not intended only for slight differences or for unimportant matters. It was also for the most important ones. The Constitution was not dealing with puny matters or inconsequential limitations. If the impairment of the power of the states is large, it is one the Constitution itself has made. Neither

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[13] Cf. *Milwaukee County* v. *M. E. White Co.*, 296 U. S. 268; *Titus* v. *Wallick*, 306 U. S. 282; *Texas* v. *Florida*, 306 U. S. 398, 410.

the states nor we are free to disregard it. The "local public policy" exception is not an exception, properly speaking. It is a nullifying compromise of the provision's terms and purpose.

The effort at such compromise, in matters of divorce and remarriage, has not been successful. Together with the instrument by which the various attempts have been made, i. e., the notion of "unitary domicil" constitutionalized as "jurisdictional fact," this effort has been the source of the long confusion in the circle of decision here. To it may be attributed the reification of the marital status, now discarded in name if not in substance, and the splitting of the *res* to make two people husband and wife in one state, divorced in another. *Haddock* v. *Haddock, supra;* cf. *Williams II.* Now it leads to practical abandonment of the effort, of this Court's function, and of the obligation placed upon the states, by committing to their juries for all practical effects the final choice to disregard it.

III

I do not concur in the abdication. I think a major operation is required to prevent it. The Constitution does not mention domicil. Nowhere does it posit the powers of the states or the nation upon that amorphous, highly variable common-law conception. Judges have imported it. The importation, it should be clear by now, has failed in creating a workable constitutional criterion for this delicate region. In its origin the idea of domicil was stranger to the federal system and the problem of allocating power within it. The principal result of transplanting it to constitutional soil has been to make more complex, variable and confusing than need be inherently the allocation of authority in the federal scheme. The corollary consequence for individuals has been more and more to infuse with uncertainty, confusion, and caprice those human relations which most require stability and depend for it upon how the distribution of power is made.

In my opinion these consequences are inevitable as long as "unitary domicil" usurps the role of "jurisdictional fact" and is applied under the "permissible inference" rule to turn questions of power first for creating jurisdiction, then for nullifying the effects of its exercise, to settle and then unsettle the human relations resting upon the power's exertion. The conception has outlived its jurisdictional usefulness unless caprice, confusion and contradiction are the desirable criteria and consequences of jurisdictional conceptions.

Stripped of its common-law gloss, the basic constitutional issue inherent in the problem is whether the states shall have power to adopt so-called "liberal" divorce policies and grant divorces to persons coming from other states while there transiently or for only short periods not sufficient in themselves, absent other objective criteria, to establish more than casual relations with the community. One could understand and apply, without decades of confusion, a ruling that transient divorces, founded on fly-by-night "residence," are invalid where rendered as well as elsewhere; in other words, that a decent respect for sister states and their interests requires that each, to validly decree divorce, do so only after the person seeking it has established connections which give evidence substantially and objectively that he has become more than casually affiliated with the community. Until then the newcomer would be treated as retaining his roots, for this purpose, as so often happens for others, at his former place of residence. One equally could understand and apply with fair certainty an opposite policy frankly conceding state power to grant transient or short-term divorces, provided due process requirements for giving notice to the other spouse were complied with.

Either solution would entail some attenuation of state power. But that would be true of any other, which would not altogether leave the matter to the states and thus

nullify the constitutional command. Strong considerations could be stated for either choice. The one would give emphasis to the interests of the states in maintaining locally prevailing sentiment concerning familial and social institutions. The other would regard the matter as more important from the standpoint of individual than of institutional relations and significance. But either choice would be preferable to the prevailing attempt at compromise founded upon the "unitary domicil-jurisdictional fact-permissible inference" rule.

That compromise gives effect to neither policy. It vitiates both; and does so in a manner wholly capricious alike for the institutional and the individual aspects of the problem. The element of caprice lies in the substantive domiciliary concept itself and also in the mode of its application.

Domicil, as a substantive concept, steadily reflects neither a policy of permanence nor one of transiency. It rather reflects both inconstantly. The very name gives forth the idea of home with all its ancient associations of permanence. But "home" in the modern world is often a trailer or a tourist camp. Automobiles, nation-wide business and multiple family dwelling units have deprived the institution, though not the idea, of its former general fixation to soil and locality. But, beyond this, "home" in the domiciliary sense can be changed in the twinkling of an eye, the time it takes a man to make up his mind to remain where he is when he is away from home. He need do no more than decide, by a flash of thought, to stay "either permanently or for an indefinite or unlimited length of time." [14] No other connection of permanence is

[14] Citation of authority is hardly needed for reference to the difficulties courts have encountered in the effort to define this intent. "Animus manendi" is often a Latin refuge which succeeds only in evading, not in resolving, the question with which Job wrestled in his suffering.

required. All of his belongings, his business, his family, his established interests and intimate relations may remain where they have always been. Yet if he is but physically present elsewhere, without even bag or baggage, and undergoes the mental flash, in a moment he has created a new domicil though hardly a new home.

Domicil thus combines the essentially contradictory elements of permanence and instantaneous change. No legal conception, save possibly "jurisdiction," of which it is an elusive substratum, affords such possibilities for uncertain application. The only thing certain about it, beyond its uncertainty, is that one must travel to change his domicil. But he may travel without changing it, even remain for a lifetime in his new place of abode without doing so. Apart from the necessity for travel, hardly evidentiary of stabilized relationship in a transient age, the criterion comes down to a purely subjective mental state, related to remaining for a length of time never yet defined with clarity.

With the crux of power fixed in such a variable, small wonder that the states vacillate in applying it and this Court ceaselessly seeks without finding a solution for its quandary. But not all the vice lies in the substantive conception. Only lawyers know, unless now it is taxpayers[15] and persons divorced, how rambling is the scope of facts from which proof is ever drawn to show and negate the ultimate conclusion of subjective "fact." They know, as do the courts and other tribunals which wrestle with the problem, how easily facts procreative of conflicting inferences may be marshalled and how conjectural is the

[15] Cf. *Tilt* v. *Kelsey*, 207 U. S. 43; *Iowa* v. *Slimmer*, 248 U. S. 115; *Worcester County Trust Co.* v. *Riley*, 302 U. S. 292; *Texas* v. *Florida*, 306 U. S. 398; *Sweeney* v. *District of Columbia*, 113 F. 2d 25, cert. denied, 310 U. S. 631. Compare *District of Columbia* v. *Murphy*, 314 U. S. 441, with *District of Columbia* v. *Pace*, 320 U. S. 698. See 121 A. L. R. 1200; Tweed and Sargent, Death and Taxes Are Certain—But What of Domicile? (1939) 53 Harv. L. Rev. 68.

outcome. There is no greater legal gamble. Rare is the situation, where much is at stake, in which conflicting circumstances cannot be shown and where accordingly conflicting ultimate inferences cannot be drawn.

The essentially variable nature of the test lies therefore as much in the proof and the mode of making the conclusion as in the substantive conception itself. When what must be proved is a variable, the proof and the conclusion which follows upon it inevitably take on that character. The "unitary domicil-jurisdictional fact-permissible inference" variable not only is an inconstant, vacillating pivot for allocating power. It is inherently a surrender of the power to make the allocation.

That effect is not nullified by vague reservation of supervisory intent. For supervision in any case that matters, that is, wherever the issue is crucial, nullifies the test. I think escape should be forthright and direct. It can be so only if the attempt to compromise what will not yield to compromise is forsworn, with the ancient gloss that serves only to conceal in familiar formula its essentially capricious and therefore nullifying character. This discarded, choice then would be forced between the ideas of transiency with due process safeguards and some minimal establishment of more than casual or transitory relations in the new community, giving the newcomer something of objective substance identifying him with its life.

With this choice made, objective standards of proof could apply, for the thing to be proved would be neither subjective nor so highly variable as inference of state of mind in ambiguous situation always must be. Neither domicil's sharp subjective exclusions between the old and the new nor its effort to probe the unprovable workings of thought at some past moment, as in relation to the length of time one purposed remaining or whether there was vestigial and contingent intent to return, would be material.

With the subjective substratum removed, the largest source of variable and inconstant decision would disappear. This would be true, whether transiency guarded by due process or some more established but objectively determinable relation with the community were chosen for the standard to turn the existence of power. Either choice would be preferable to the variable which can give only inconstant and capricious effects, nullifying both policies.

If by one choice states of origin were forced to modify their local policies by giving effect to the different policies of other states when crystallized in valid judgments, that would be no more than the Constitution in terms purports to require. And it may be doubted their surrender would be much greater in practical effects than the present capricious and therefore deceptive system brings about.[16] If by some more restrictive choice states now free to give essentially transient divorce were required

[16] The residence requirements of the states for absolute divorce vary depending at times on the ground for divorce relied on, the place where the cause of action arose, or other factors. Speaking generally, approximately 33 states require one year's residence in most divorce actions. Nine states are more severe, 7 of these requiring 2 years' residence and two a longer period. Six states are less severe. Of these North Carolina at present requires a 6 months' residence and the others six weeks to three months. See Warren, Schouler Divorce Manual (1944) 705–720. Thus, practically speaking, 39 states require one year or less, only 9 longer.

It seems questionable, at any rate, that the grounds for divorce as such have "jurisdictional" significance. Presumably, if length of residence is the controlling factor, all of the states would be required to give effect to divorces granted by the 42 requiring one year or longer, unless the greatly preponderant legislative judgment is to be disregarded. The permissible denial accordingly would extend at the most to decrees granted by the six states requiring less than one year. It is difficult to see how greatly disruptive effects would be created for them or for the other states by requiring them to approximate the generally prevailing judgment as to the length of the period appropriate for granting impeccable divorce.

to modify that policy for locally valid effects, within the limits of any objective standard that conceivably would be acceptable for constitutional purposes, the obligations they owe to the nation and to sister states would seem amply to justify that modest curtailment of their power. It is hard to see what legitimate substantial interest a state may have in providing divorces for persons only transiently there or for newcomers before they have created, by reasonable length of stay or other objective standards, more than fly-by-night connections.

I therefore dissent from the judgment which, in my opinion, has permitted North Carolina at her substantially unfettered will to deny all faith and credit to the Nevada decree, without in any way impeaching or attempting to impeach that judgment's constitutional validity. But if she is not to be required thus to give the faith and credit due, in my opinion she should not be allowed to deny it by any standard of proof which is less than generally is required to overturn or disregard a judgment upon direct attack. Cf. *Schneiderman* v. *United States,* 320 U. S. 118. The solemnity of the judicial act and the very minimum of "respect" due the action of a sister state should compel adherence to this standard, though doing so would not give the *full* faith and credit which the Constitution commands. To approximate the constitutional policy would be better than to nullify it.

MR. JUSTICE BLACK, dissenting.

Anglo-American law has, until today, steadfastly maintained the principle that before an accused can be convicted of crime, he must be proven guilty beyond a reasonable doubt. These petitioners have been sentenced to prison because they were unable to prove their innocence to the satisfaction of the State of North Carolina. They have been convicted under a statute so uncertain in its

application that not even the most learned member of the bar could have advised them in advance as to whether their conduct would violate the law. In reality the petitioners are being deprived of their freedom because the State of Nevada, through its legislature and courts, follows a liberal policy in granting divorces. They had Nevada divorce decrees which authorized them to remarry. Without charge or proof of fraud in obtaining these decrees,[1] and without holding the decrees invalid under Nevada law, this Court affirms a conviction of petitioners, for living together as husband and wife. I cannot reconcile this with the Full Faith and Credit Clause and with Congressional legislation passed pursuant to it.

It is my firm conviction that these convictions cannot be harmonized with vital constitutional safeguards designed to safeguard individual liberty and to unite all the states of this whole country into one nation. The fact that two people will be deprived of their constitutional rights impels me to protest as vigorously as I can against affirmance of these convictions. Even more, the Court's opinion today will cast a cloud over the lives of countless numbers of the multitude of divorced persons in the United States. The importance of the issues prompts me to set out my views in some detail.

Statistics indicate that approximately five million divorced persons are scattered throughout the forty-eight states.[2] More than 85% of these divorces were granted in

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[1] Previous decisions of this Court have asserted that a state cannot justify its refusal to give another state's judgment full faith and credit, at least, in the absence of a showing that fraud is an adequate ground for setting the judgment aside in the state where it was rendered. See *Christmas* v. *Russell*, 5 Wall. 290, 302–304; *Maxwell* v. *Stewart*, 22 Wall. 77, 81; *Bigelow* v. *Old Dominion Copper Co.*, 225 U. S. 111, 134.

[2] According to the best available statistics more than five million divorces were granted in the last twenty years and the annual rate is steadily increasing. See Marriage and Divorce Statistics, Bureau of

uncontested proceedings.[3] Not one of this latter group can now retain any feeling of security in his divorce decree. Ever present will be the danger of criminal prosecution and harassment.

All these decrees were granted by state courts. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, and cases following it, recognized the obvious truth, that rules of law laid down by state courts are binding. These judicial "laws" are represented by decrees, judgments and court opinions. Today's opinion, however, undermines and makes uncertain the validity of every uncontested divorce decree. It wipes out every semblance of their finality and decisiveness. It achieves what the Court terms the "desirable effect" of providing the "same" quality to *every* divorce decree,

the Census, 1942, and the same reports for different years; Divorce, Depression and War, Social Forces, University of North Carolina Press, Dec. 1943, 191, 192; Social and Statistical Analysis, Law and Contemporary Problems, Duke University, Summer 1944; 1940 Census, Bureau of the Census, Vol. 4, Tables 29 and 48; Ogburn, Marriages, Births and Divorces, Annals, American Academy, Sept. 1943, 20.

[3] This percentage is shown by the various "Marriage and Divorce" publications of the Bureau of the Census, Department of Commerce. Careful studies in particular localities have indicated that the percentage of uncontested divorces is substantially above the 85% shown in Census Reports. In Maryland, for instance, 3,306 petitions for divorce were filed in 1929. 1,847 defendants failed to answer and the complainant had decrees in all but six cases. "A total of 1,459 defendants, however, filed answers to the plaintiff's allegations and thus staged a technical contest. This does not necessarily mean that a given defendant was opposed to a decree being granted. Of these 1,459 technically contested actions, 442 dropped out without coming to hearing, thus leaving 1,017 technical contests in the field. . . . If we accompany the plaintiffs in the 1,017 remaining technical contests to the hearing, we find little in the way of substantial contest. There is a positive record of no contest in 808 cases; of a contest in 81 cases; and data are not available with respect to contest in 128 cases. . . . It seems likely that in less than 100 cases was there at the hearing a contest concerning whether a decree should be granted." Marshall and May, The Divorce Court, 226–227.

"wherever the question arises"—it endows them all alike with the "same" instability and precariousness. The result is to classify divorced persons in a distinctive and invidious category. A year ago, a majority of this Court in a workmen's compensation case declared that the Full Faith and Credit Clause of the Constitution was a "nationally unifying force"; [4] today, as to divorce decrees, that clause, coupled with a new content recently added to the Due Process Clause, has become a nationally disruptive force. Uncontested divorce decrees are thus so degraded that a person who marries in reliance upon them can be sent to jail. With much language the Court has in effect adopted the previously announced hypothesis upon which the North Carolina Supreme Court permitted another person to be sent to prison, namely, that "the full faith and credit clause does not apply to actions for divorce, and that the states alone have the right to determine what effect shall be given to the decrees of other states in this class of cases." *State* v. *Herron,* 175 N. C. 754, 758, 94 S. E. 698; cf. *Matter of Holmes,* 291 N. Y. 261, 273, 52 N. E. 2d 424.

The petitioners were married in Nevada. North Carolina has sentenced them to prison for living together as husband and wife in North Carolina. This Court today affirms those sentences without a determination that the Nevada marriage was invalid under that state's laws. This holding can be supported, if at all, only on one of two grounds: (1) North Carolina has extra-territorial power to regulate marriages within Nevada's territorial boundaries, or, (2) North Carolina can punish people who live together in that state as husband and wife even though they have been validly married in Nevada. A holding based on either of these two grounds encroaches upon the general principle recognized by this Court that a marriage validly consummated under one state's laws is valid in

[4] *Magnolia Petroleum Co.* v. *Hunt,* 320 U. S. 430, 439.

every other state.[5] If the Court is today abandoning that principle, it takes away from the states a large part of their hitherto plenary control over the institution of marriage. A further consequence is to subject people to criminal prosecutions for adultery and bigamy merely because they exercise their constitutional right to pass from a state in which they were validly married into another state which refuses to recognize their marriage. Such a consequence runs counter to the basic guarantees of our federal union. *Edwards* v. *California,* 314 U. S. 160. It is true that persons validly married under the laws of one state have been convicted of crime for living together in other states.[6] But those state convictions were not approved by this Court. And never before today has this Court decided a case upon the assumption that men and women validly married under the laws of one state could be sent to jail by another state for conduct which involved nothing more than living together as husband and wife.

The Court's opinion may have passed over the marriage question on the unspoken premise that the petitioners were without legal capacity to marry. If so, the primary question still would be whether that capacity, and other issues subsidiary to it, are to be determined under Nevada, North Carolina, or federal law. Answers to these ques-

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[5] *Loughran* v. *Loughran,* 292 U. S. 216, 223–225; *Dudley* v. *Dudley,* 151 Iowa 142, 130 N. W. 785; *Ex parte Crane,* 170 Mich. 651, 136 N. W. 587; see Radin, Authenticated Full Faith and Credit Clause, 39 Ill. L. R. 1, 32. See also Annotations, 60 Am. St. Rep. 942; 28 L. R. A. N. S. 754; 127 A. L. R. 437.

[6] This question has arisen most frequently in the application of state laws making it a criminal offense for persons of different races to live together as husband and wife. See e. g., *State* v. *Bell,* 7 Baxt. (Tenn.) 9. That case has been explained as a holding that "Without denying the validity of a marriage in another state, the privileges flowing from marriage may be subject to the local law." *Yarborough* v. *Yarborough,* 290 U. S. 202, 218. See also *Greenhow* v. *James,* 80 Va. 636. Cf. *Pearson* v. *Pearson,* 51 Cal. 120; *State* v. *Ross,* 76 N. C. 242; *Whittington* v. *McCaskill,* 65 Fla. 162, 61 So. 236.

tions require a discussion of the divorce decrees awarded to the petitioners in a Nevada court prior to their marriage there.

When the Nevada decrees were granted, the petitioners' former spouses lived in North Carolina. When petitioners were tried and convicted, one of their former spouses was dead and the other had remarried. Under the legal doctrine prevailing in Nevada and in most of the states, these facts would make both the decrees immune from attack unless, perhaps, by persons other than the North Carolina spouses, whose property rights might be adversely affected by the decrees.[7] So far as appears from the record no person's property rights were adversely affected by the dissolution decrees. None of the parties to the marriage, although formally notified of the Nevada divorce proceedings, made any protest before or after the decrees were rendered. The state did not sue here to protect any North Carolinian's property rights or to obtain support for the families which had been deserted. The result of all this is that the right of the state to attack the validity of these decrees in a criminal proceeding is today sustained, although the state's citizens, on whose behalf it purports to act, could not have done so at the time of the conviction in a civil proceeding. Furthermore, all of the parties to the first two marriages were apparently satisfied that their happiness did not lie in continued marital cohabitation. North Carolina claims no interest in abridging their individual freedom by forcing them to live together against their own desires. The state's interest at the time these petitioners were convicted

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[7] See e. g., *Foy* v. *Smith's Estate,* 58 Nev. 371, 81 P. 2d 1065; *Dwyer* v. *Nolan,* 40 Wash. 459, 82 P. 746, 1 L. R. A. N. S. 551; *Chapman* v. *Chapman,* 224 Mass. 427, 113 N. E. 359; *Matter of Bingham,* 265 App. Div. 463, 39 N. Y. S. 2d 756; *Moyer* v. *Koontz,* 103 Wis. 22, 79 N. W. 50; *Leathers* v. *Stewart,* 108 Me. 96, 79 A. 16, Ann. Cas. 1913B, 366, 369–372; *Kirschner* v. *Dietrich,* 110 Cal. 502, 42 P. 1064; Schouler Divorce Manual, 588–590.

thus comes down to its concern in preserving a bare marital status for a spouse who had already married again. If the state's interest before that time be considered, it was to preserve a bare marital status as to two persons who had sought a divorce and two others who had not objected to it. It is an extraordinary thing for a state to procure a retroactive invalidation of a divorce decree, and then punish one of its citizens for conduct authorized by that decree, when it had never been challenged by either of the people most immediately interested in it. I would not permit such an attenuated state interest to override the Full Faith and Credit Clause of the Constitution and an Act of Congress pursuant to it.[8] Here again, North Carolina's right to attack this judgment, despite the Full Faith and Credit Clause and the Congressional enactment, is not based on Nevada law; nor could it be. For in Nevada, even the Attorney General could not have obtained a cancellation of the decree on the ground that it was rendered without jurisdiction. *State* v. *Moore,* 46 Nev. 65, 207 P. 75. This makes it clear beyond all doubt that North Carolina has not given these decrees the same effect that they would be given in the courts of Nevada.

The Court permits North Carolina to disregard the decrees on the following line of reasoning. No state need give full faith and credit to a "void" decree. A decree

[8] Here too we approach the domain where the line may be shadowy between the individual rights of people to choose and keep their own associates and the power of the state to prescribe who shall be their most intimate associates. People in this country do not "belong" to the state. *Le Mesurier* v. *Le Mesurier,* [1895] A. C. 517. Our Constitution preserves an area of individual freedom which the state has no right to abridge. The flavor of the Court's opinion is that a state has supreme power to control its domiciliaries' conduct wherever they go and that the state may prohibit them from getting a divorce in another state. In this aspect the decision is not confined to a holding which relates to state as opposed to federal rights. It contains a restriction of individual as opposed to state rights. See Radin, *supra,* 28–32.

rendered by a court without "jurisdiction" is "void." No state court has "jurisdiction" to grant a divorce unless one of the parties is "domiciled" in the state. The North Carolina court has decided that these petitioners had no "domicile" in Nevada. Therefore, the Nevada court had no "jurisdiction," the decrees are "void," and North Carolina need not give them faith or credit. The solution to all these problems depends in turn upon the question common to all of them—does state law or federal law apply?

The Constitution provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the *Effect thereof*." (Emphasis added.) Acting pursuant to this constitutional authority, Congress in 1790 declared what law should govern and what "Effect" should be given the judgments of state courts. That statute is still the law. Its command is that they "shall have such faith and credit given to them . . . as they have by law or usage in the Courts of the state from which they are taken." 28 U. S. C. 687. If, as the Court today implies, divorce decrees should be given less effect than other court judgments, Congress alone has the constitutional power to say so. We should not attempt to solve the "divorce problem" by constitutional interpretation. At least, until Congress has commanded a different "Effect" for divorces granted on a short sojourn within a state, we should stay our hands. A proper respect for the Constitution and the Congress would seem to me to require that we leave this problem where the Constitution did. If we follow that course, North Carolina cannot be permitted to disregard the Nevada decrees without passing upon the "faith and credit" which Nevada itself would give to them under its own "law or usage." The Court has decided the matter as though it were a purely *federal* question; Congress and the

Constitution declared it to be a *state* question. The logic of the Court does not persuade me that we should ignore these mandates of the Congress and the Constitution. Nevada's decrees purported to grant petitioners an absolute divorce with a right to remarry. No "law or usage" of Nevada has been pointed out to us which would indicate that Nevada would, under any circumstances, consider its decrees so "void" as to warrant imprisoning those who have remarried in reliance upon such existing and unannulled decrees.

A judgment may be "void" in the general sense, and yet give rise to rights and obligations. While on the books its existence is a fact, not a theory. And it may be said of decrees, later invalidated, as of statutes held unconstitutional, that "The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects,—with respect to particular relations, individual and corporate, and particular conduct, private and official . . . an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified." *Chicot County Drainage District* v. *Baxter State Bank,* 308 U. S. 371, 374. Despite the conclusion that a judgment is "void," courts have in the interest of substantial justice and fairness declined to attribute a meaning to that word which would make such judgments, for all purposes, worthless scraps of paper.[9] After a judgment has been declared "void" it still remains to decide as to the consequences attached to good faith conduct between its rendition and its nullification. That determination, I think, must, in this case, under the Full Faith and Credit Clause, be made in

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[9] *Gray* v. *Brignardello,* 1 Wall. 627, 634; *Colvin* v. *Colvin,* 2 Paige (N. Y.) 385; Harper, The Myth of the Void Divorce, 2 Law and Contemporary Problems, 335; The Validity of Void Divorces, 79 U. Pa. L. Rev. 158; Tainter, Restitution of Property Transferred Under Void or Later Reversed Judgments, 9 Miss. L. J. 157.

accordance with the "law or usage" of Nevada—not of North Carolina or the federal government.

This brings me to the Court's holding that Nevada decrees were "void." That conclusion rests on the premise that the Nevada court was without jurisdiction because the North Carolina Court found that the petitioners had no "domicile" in Nevada. The Nevada court had based its decree on a finding that "domicile" had been established by evidence before it. As I read that evidence, it would have been sufficient to support the findings, had the case been reviewed by us. Thus, this question of fact has now been adjudicated in two state courts with different results. It should be noted now that this Court very recently has said as to the Full Faith and Credit Clause and the 1790 Congressional enactment, that "From the beginning this Court has held that these provisions have made that which has been adjudicated in one state res judicata to the same extent in every other." *Magnolia Petroleum Co.* v. *Hunt, supra,* at 438.[10] That it was appropriate for

[10] The Nevada court had general jurisdiction to grant divorces, and the complaint was required to allege domicile along with the other requisite allegations. Domicile is as much an integral element in the litigation as the proof of cruelty or any of the other statutory grounds for divorce in Nevada. Labeling domicile as "jurisdictional" does not make it different from what it was before. Since the Nevada court had no power to render a divorce without proof of facts other than domicile, there is nothing to prevent this Court, under its expansive interpretation of the Due Process Clause, from labeling these other facts as "jurisdictional" and taking more state powers into the federal judicial orbit. Both these types of facts, however labeled, were part of the controversy which the Nevada legislature gave its courts power to resolve. The state could label them "jurisdictional" and, having the exclusive power to grant divorces, could attach such consequences to them as it sees fit. But, while Congress might, under the Full Faith and Credit Clause, prescribe the "effect" in other states, of decrees based on the finding, I do not think the federal courts can, by their mere label, attach jurisdictional consequences to the state's requirement of domicile. Hence, I think the quoted statement from the Magnolia Petroleum case should control this case.

the Nevada court to pass upon the question of domicile can hardly be doubted, since the concurring opinion in our first consideration of this case correctly said that the "Nevada decrees do satisfy the requirements of the Due Process Clause and are binding in Nevada on the absent spouses . . ." 317 U. S. 287, 306. The Court today, however, seems to place its holding that the Nevada decrees are void on the basis that the Due Process Clause makes domicile an indispensable prerequisite to a state court's "jurisdiction" to grant divorce. It further holds that this newly created federal restriction of state courts projects fact issues which the state courts cannot finally determine for themselves. *Davis* v. *Davis,* 305 U. S. 32, provides a possible exception to this holding. It decided that where both spouses appeared, a state court could finally determine the question of domicile. Whether the Court today overrules that case I cannot be sure. Certainly, if a state court cannot finally determine the question of domicile because it is a federal question, each divorce controversy involving domicile must be subject to review here whether both parties appear or not.

I cannot agree to this latest expansion of federal power and the consequent diminution of state power over marriage and marriage dissolution which the Court derives from adding a new content to the Due Process Clause. The elasticity of that clause necessary to justify this holding is found, I suppose, in the notion that it was intended to give this Court unlimited authority to supervise all assertions of state and federal power to see that they comport with our ideas of what are "civilized standards of law." See *Malinski* v. *New York,* 324 U. S. 401. I have not agreed that the Due Process Clause gives us any such unlimited power, but unless it does, I am unable to understand from what source our authority to strip Nevada of its power over marriage and divorce can be thought to derive. Certainly, there is no language in the Constitu-

tion which even remotely suggests that the federal government can fix the limits of a state court's jurisdiction over divorces. In doing so, the Court today exalts "domicile," dependent upon a mental state, to a position of constitutional dignity. State jurisdiction in divorce cases now depends upon a state of mind as to future intent. Thus "a hair perhaps divides" the constitutional jurisdiction or lack of jurisdiction of state courts to grant divorces. Cf. *Pollock* v. *Williams,* 322 U. S. 4, 21. And this "hair-line" division involves a federal question, apparently open to repeated adjudications at the instance of as many different parties as can be found to raise it. Moreover, since it is a federal question, each new litigant has a statutory right to ask us to pass on it.

The two cases cited by the Court do not support this novel constitutional doctrine. *Bell* v. *Bell,* 181 U. S. 175, held a Pennsylvania decree invalid on the ground that there was no domicile shown. It specifically stated, however, that *Pennsylvania law* required one year's domicile. Neither the decision in that case, nor any of the others on which it relied, rested on an interpretation of the Due Process Clause as requiring "domicile." [11] Nor did the decision in *Andrews* v. *Andrews,* 188 U. S. 14, support today's Due Process Clause extension, for there it was said that ". . . it is certain that the Constitution of the United States confers no power whatever upon the government of the United States to regulate marriage . . ." [12]

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[11] *Streitwolf* v. *Streitwolf,* 181 U. S. 179, decided the same day as *Bell* v. *Bell,* held a North Dakota divorce decree invalid. That holding did not rest on any "federal concept of domicile," but on the fact that North Dakota law required "a domicile in good faith . . . for ninety days as a prerequisite to jurisdiction of a case of divorce."

[12] *Andrews* v. *Andrews* did not assert that any particular federal constitutional provision made domicile a state jurisdictional requirement in divorce cases. It emphasized state and common law concepts of domicile and a state's power over its "inhabitants." This emphasis led the Court to permit Massachusetts to invalidate a South

It is a drastic departure from former constitutional doctrine to hold that the Federal Constitution measures the power of state courts to pass upon petitions for divorce. The jurisdiction of state courts over persons and things within their boundaries has been uniformly acknowledged through the years, without regard to the length of their sojourn or their intention to remain. And that jurisdiction has not been thought to be limited by the Federal Constitution. Legislative dissolution of marriage was common in the colonies and the states up to the middle of the Nineteenth Century. A legislative dissolution of marriage, granted without notice or hearing of any kind, was sustained by this Court long after the Fourteenth Amendment was adopted. *Maynard* v. *Hill,* 125 U. S. 190; cf. *Pennoyer* v. *Neff,* 95 U. S. 714, 734–735. The provision that made "due process of law" a prerequisite to deprivation of "life, liberty, or property" was not considered applicable to proceedings to sever the marital status. It was only when legislatures attempted to create or destroy financial obligations incident to marriage that courts began to conclude that their Acts encroached upon the right to a judicial trial in accordance with due pro-

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Dakota divorce decree, even though both husband and wife had appeared in the South Dakota Court. Cf. *Davis* v. *Davis, supra.* Massachusetts had a statute which prohibited its "inhabitants" from going into another state to get a divorce on account of conduct which occurred in Massachusetts, or for conduct which would not have authorized a divorce under Massachusetts law. This statute obviously rested on a hypothesis that each state possesses these sweeping powers over individuals: (1) power to make it a crime for its inhabitants to go to another state to engage in conduct which might be lawful there; (2) power to punish an inhabitant who went into another state and engaged in conduct in harmony with that state's laws. If North Carolina has attempted to impose such sweeping statutory prohibition upon its inhabitants, it has not been called to our attention. In its absence the *Andrews* decision gives no support to the opinion and judgment in this case.

cess.[13] The Court's holding now appears to overrule *Maynard* v. *Hill,* sub silentio. This perhaps is in keeping with the idea that the Due Process Clause is a blank sheet of paper provided for courts to make changes in the Constitution and the Bill of Rights in accordance with their ideas of civilization's demands. I should leave the power over divorces in the states. And in the absence of further federal legislation under the Full Faith and Credit Clause, I should leave the effect of divorce decrees to be determined as Congress commanded—according to the laws and usages of the state where the decrees are entered.[14]

Implicit in the majority of the opinions rendered by this and other courts, which, whether designedly or not, have set up obstacles to the procurement of divorces, is the assumption that divorces are an unmitigated evil, and that the law can and should force unwilling persons to live with each other. Others approach the problem as one which can best be met by moral, ethical and religious teachings. Which viewpoint is correct is not our concern. I am confident, however, that today's decision will no more aid in the solution of the problem than the *Dred Scott* decision aided in settling controversies over slavery. This decision, I think, takes the wrong road. Federal courts should have less, not more, to do with divorces. Only when one state refuses to give that faith and credit to a divorce decree which Congress and the Constitution command, should we enter this field.

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[13] *Wright* v. *Wright's Lessee,* 2 Md. 429, 453; *Crane* v. *Meginnis,* 1 G. & J. Rep. (Md.) 463; *Dwyer* v. *Nolan, supra.* See also *Owens* v. *Claytor,* 56 Md. 129; 2 Schouler, Marriage, Divorce and Separation, Sixth Edition, Pars. 1471-1473; Validity of Legislative Divorce, 18 L. R. A. 95.

[14] For an interesting discussion of the consequences of shifting divorces from the legislatures to the courts, to be worked out in the pattern of adversary controversies, see Marshall and May, *supra,* Chap. VI, The Mirage of Judicial Controversy. For bibliography of pertinent discussions see same, 338-341.

The Court has not only permitted North Carolina to invalidate a Nevada decree contrary to the law and usage of that state. It has actually placed the burden of establishing the validity of that decree on a defendant charged with crime. The only contested question was the validity of the decree, since the petitioners openly lived together as man and wife. And the only issue involved concerning that validity was domicile. The burden of proving that single issue upon which petitioners' liberty depended was cast upon them. Cf. *State* v. *Herron*, 175 N. C. 754, 759, 94 S. E. 698. The jury was not charged that the state must prove the defendants guilty; they were required to prove their innocence. The result is that a state court divorce decree is no protection from being sent to prison in another state unless a defendant charged with acting as it authorized can prove the state court rendering the decree made no error in resolving facts as to domicile. State court judgments exalted by the Constitution and by Congress are thus degraded to a lowly status by today's decision. State courts, no less than federal courts, were recognized by the founding fathers as instruments of justice. I would continue to recognize them as such. At the very minimum we should not permit holders of these decrees to be convicted of crime unless another state sustained the burden of invalidating them. In a case involving nothing but property, this Court has declined to permit a second marriage to be impugned through an alleged prior marriage "save upon proof so clear, strong and unequivocal as to produce a moral conviction of the existence of that impediment." *Sy Joc Lieng* v. *Sy Quia*, 228 U. S. 335, 339. And we declined to permit a naturalization decree to be set aside because of an absence of "clear, unequivocal and convincing evidence." *Schneiderman* v. *United States*, 320 U. S. 118, 125, 159, 164, 166–170. It is no justification for requiring a less burdensome requirement here to say that in these former cases we were

dealing with federal questions. That is exactly what is done here. For the basic question in this case revolves around the Full Faith and Credit constitutional provision and the 1790 Congressional Act. The standard of proof sustained is a federal, not a state, standard. To require a defendant in a criminal case to carry the burden of proof in sustaining his decree to prove his innocence deprives him of all but the last shred of protection that the Full Faith and Credit Clause and the 1790 Act of Congress sought to give him. Cf. *Tot* v. *United States,* 319 U. S. 463, 473. It makes of human liberty a very cheap thing—too cheap to be consistent with the principles of a free government.

Moreover, the Court's unjustifiable devitalization of the Full Faith and Credit Clause and the Act passed pursuant to it creates a situation which makes the North Carolina statute an inescapable trap for any person who places the slightest reliance on another state's divorce decree—a situation which a proper interpretation of the federal question would avoid. The North Carolina statute excludes from its coverage those who "have been lawfully divorced." Who after today's decision can know or guess what "right" he can safely exercise under a divorce decree in the intervening period between the day of its entry and the day of its invalidation by a jury?[15] This Court has said that "a statute which either forbids or requires the

[15] The answer is that, by reason of today's decision, no person can exercise any right whatever under an uncontested divorce decree without subjecting himself to possible penitentiary punishment. "To make the enjoyment of a right dependent upon an impossible condition is equivalent to an absolute denial of the right under any condition, and such denial, enforced for a past act, is nothing less than punishment imposed for that act." *Cummings* v. *Missouri,* 4 Wall. 277, 327. The "condition" here, that a divorced person cannot remarry without the possibility of being subjected to repeated prosecutions in all the states where he lives as a married person, would seem to rank as "an impossible condition." If, therefore, the Court's object is to make divorces

doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and *differ as to its application,* violates the first essential of due process of law" (italics added).[16] The North Carolina statute, as applied to condemn these two petitioners to serve prison sentences, falls precisely within this description. It does so, because the sole essential contested issue in this case was the validity of the divorce decrees. Involved in this issue are questions of law mixed with questions of fact which perplex lawyers and judges little less than they baffle "men of common intelligence." Today's decision adds new intricacies to the whole problem for lawyers to argue about. It provides a new constitutional concept of "jurisdiction," which itself rests on a newly announced federal "concept of domicile." No final determination as to its own "jurisdiction" can hereafter be made by a state court in an uncontested divorce case. And so far as I can tell, no other court can ever finally determine this question. It might do so as between any two litigants, but I suppose the question of domicile would still be left open for others to challenge. A man might be tried for bigamy in two or more states. He might be convicted in one or both or all, I suppose. The affirmance of these convictions shows that a divorced person's liberty, so far as this North Carolina statute is concerned, hinges on his ability to "guess" at what may ultimately be the legal and factual conclusion resulting from a consideration of two of the most uncertain word symbols in all the judicial lexicon, "jurisdiction" and

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dangerous, its object has been accomplished. I think divorce policy is the business of the people and their legislatures—not that of this Court.

[16] *Connally* v. *General Construction Co.,* 269 U. S. 385, 391. See also *Yu Cong Eng* v. *Trinidad,* 271 U. S. 500, 518; *United States* v. *Cohen Grocery Co.,* 255 U. S. 81, 89–93; *Lanzetta* v. *New Jersey,* 306 U. S. 451; *Smith* v. *Cahoon,* 283 U. S. 553; *Screws* v. *United States, ante,* p. 91; cf. *Nash* v. *United States,* 229 U. S. 373, 377 with *Cline* v. *Frink Dairy Co.,* 274 U. S. 445, 457, 463–464.

"domicile." While the doctrine that "Ignorance of the law excuses no man" has sometimes been applied with harsh consequences, American courts have not been in the habit of making ignorance of law the crucial and controlling element in a penitentiary offense. Men have from time to time been sent to prison for violating court commands which were later held invalid.[17] It is quite a different thing, however, to send people to prison for lacking the clairvoyant gift of prophesying when one judge or jury will upset the findings of fact made by another.

In earlier times, some Rulers placed their criminal laws where the common man could not see them, in order that he might be entrapped into their violation. Others imposed standards of conduct impossible of achievement to the end that those obnoxious to the ruling powers might be convicted under the forms of law. No one of them ever provided a more certain entrapment, than a statute which prescribes a penitentiary punishment for nothing more than a layman's failure to prophesy what a judge or jury will do. This Court's decision of a federal question today does just that.

MR. JUSTICE DOUGLAS joins in this dissent.

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[17] See e. g., *People* v. *Morley*, 72 Colo. 421, 211 P. 643; *Holbrook* v. *Prichard Motor Co.*, 27 Ga. App. 480, 109 S. E. 164; *St. George's Society* v. *Sawyer*, 204 Iowa 103, 214 N. W. 877; *State* v. *La Follette*, 100 Ore. 1, 196 P. 412.

ESENWEIN v. COMMONWEALTH EX REL. ESENWEIN.

CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

No. 20. Argued October 12, 13, 1944.—Decided May 21, 1945.

1. Relying upon a Nevada divorce decree, petitioner applied to a Pennsylvania court for revocation of an order for the support of his wife. The application was denied. *Held* that, upon the record, the Pennsylvania court was warranted in finding that petitioner did not have a *bona fide* domicil in Nevada when he obtained his decree of divorce; and the Nevada divorce decree therefore was not denied the full faith and credit required by the Constitution. *Williams* v. *North Carolina, ante,* p. 226. P. 280.
2. The claim that the Pennsylvania courts did not afford the petitioner an opportunity to be heard on the question of domicil is without support in the record. P. 281.

348 Pa. 455, 35 A. 2d 335, affirmed.

CERTIORARI, 322 U. S. 725, to review a judgment which sustained the denial of petitioner's application for revocation of an order for the support of his wife.

Mr. Sidney J. Watts, with whom *Mr. Fred C. Houston* was on the brief, for petitioner.

Mr. J. Thomas Hoffman for respondent.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This case involves the same problem as that which was considered in *Williams* v. *North Carolina, ante,* p. 226. There are minor variations of fact, but the considerations which controlled the result in the *Williams* case govern this.

Petitioner and respondent were married in Pennsylvania in 1899. They separated in 1919 but continued to live there. The wife, respondent, obtained a support order in the Pennsylvania courts which was modified from

time to time. Twice the petitioner sought a divorce in Pennsylvania and failed. In 1941 he went to Nevada, arriving at Las Vegas on June 23rd. Six weeks later, promptly within the minimum period allowed by Nevada law, he there filed a suit for divorce. It was granted September 8th. Shortly thereafter, early in October, he left Nevada and took up his residence in Cleveland, Ohio, where he made his home. On February 1, 1943 petitioner filed an application before the County Court for Allegheny County, Pennsylvania, for total relief from the support order. He did so on the basis of the decision in *Williams* v. *North Carolina,* 317 U. S. 287, which had been decided on December 21, 1942. Exemplified copies of the Nevada proceedings, with other relevant evidence, were submitted to the County Court, which, after argument, denied the application. Its decision was affirmed by the Superior Court on the ground that petitioner did not have a *bona fide* domicil in Nevada when he obtained his decree of divorce. 153 Pa. Super. 69, 33 A. 2d 675. This was sustained by the Supreme Court of Pennsylvania, 348 Pa. 455, 35 A. 2d 335, and we then granted certiorari. 322 U. S. 725.

Since, according to Pennsylvania law, a support order does not survive divorce, *Commonwealth* v. *Parker,* 59 Pa. Super. 74; *Commonwealth* v. *Kurniker,* 96 Pa. Super. 553, the efficacy of the Nevada divorce in Pennsylvania is the decisive question in the case. The facts relating to domicil are not essentially different from those set forth in *Williams* v. *North Carolina, ante,* p. 226, except that petitioner, instead of staying in an auto court, lived in a hotel and did not return to Pennsylvania, his domiciliary state before he came to Nevada, but went to Ohio.

The Full Faith and Credit Clause placed the Pennsylvania courts under duty to accord *prima facie* validity to the Nevada decree. The burden is on the litigant who would escape the operation of a judgment decreed in an-

other State. Pennsylvania recognized that burden, but its courts were warranted in finding that the respondent sustained her burden of impeaching the foundation of the Nevada decree on the jurisdictional prerequisite of *bona fide* domicil. The Pennsylvania Supreme Court rightly indicated that if merely the Nevada decree had been in evidence, it was entitled to carry the day. But the Supreme Court found that on the entire showing there was convincing countervailing evidence to disprove petitioner's intention to establish a domicil in Nevada. The Pennsylvania courts have viewed their Constitutional duty correctly. It is not for us to retry the facts, and we cannot say that in reaching their conclusion the Pennsylvania courts did not have warrant in evidence and did not fairly weigh the facts.

Petitioner makes a subsidiary claim which need not detain us long. He asserts that he had no notice that the Nevada domicil was to be put in issue, and that therefore it was unfair to decide that question on this record. He points to the fact that for its decision the County Court relied on the Pennsylvania denials of divorce as *res judicata,* whereas the appellate courts rested their decisions on the issue of domicil. Since the record does not support the basis of this claim, we are relieved from considering its legal significance. The issue of domicil was appropriately pleaded in defense, it was contested at the trial, and before the Superior Court petitioner filed a supplemental brief on that issue. A claim of deprivation of opportunity to be heard on the question of domicil before the Pennsylvania courts is without merit.

Affirmed.

MR. JUSTICE DOUGLAS, concurring.

I think it is important to keep in mind a basic difference between the problem of marital capacity and the problem of support.

We held in *Williams* v. *North Carolina,* 317 U. S. 287, that a Nevada divorce decree granted to a spouse domiciled there was entitled to full faith and credit in North Carolina. That case involved the question of marital capacity. The spouse who obtained the Nevada decree was being prosecuted in North Carolina for living with the one woman whom Nevada recognized as his lawful wife. Quite different considerations would have been presented if North Carolina had merely sought to compel the husband to support his deserted wife and children, whether the Nevada decree had made no provision for the support of the former wife and children or had provided an amount deemed insufficient by North Carolina. In other words, it is not apparent that the spouse who obtained the decree can defeat an action for maintenance or support in another State by showing that he was domiciled in the State which awarded him the divorce decree. It is one thing if the spouse from whom the decree of divorce is obtained appears or is personally served. See *Yarborough* v. *Yarborough,* 290 U. S. 202; *Davis* v. *Davis,* 305 U. S. 32. But I am not convinced that in absence of an appearance or personal service the decree need be given full faith and credit when it comes to maintenance or support of the other spouse or the children. See *Pennoyer* v. *Neff,* 95 U. S. 714. The problem under the full faith and credit clause is to accommodate as fully as possible the conflicting interests of the two States. See *Magnolia Petroleum Co.* v. *Hunt,* 320 U. S. 430, 447 (dissenting opinion). The question of marital capacity will often raise an irreconcilable conflict between the policies of the two States. See *Williams* v. *North Carolina, supra.* One must give way in the larger interest of the federal union. But the same conflict is not necessarily present when it comes to maintenance or support. The State where the deserted wife is domiciled has a deep concern in the welfare of the family deserted by the head of the household. If he is required to support his former wife, he is not made a bigamist and

the offspring of his second marriage are not bastardized. In that view Pennsylvania in this case might refuse to alter its former order of support or might enlarge it, even though Nevada in which the other spouse was domiciled and obtained his divorce made a different provision for support or none at all. See Radin, The Authenticated Full Faith and Credit Clause, 39 Ill. L. Rev. 1, 28.

MR. JUSTICE BLACK joins in this opinion.

MR. JUSTICE RUTLEDGE, concurring.

In accordance with the views which I have expressed in *Williams* v. *North Carolina, ante,* p. 226, I do not think full faith and credit have been given by the Pennsylvania courts to the Nevada decree in this case. But upon the basis of the Court's decision in that case, made applicable also in this one, I concur in the result. In doing so, however, it is appropriate to indicate my agreement with the views expressed in the concurring opinion of MR. JUSTICE DOUGLAS that the jurisdictional foundation for a decree in one state capable of foreclosing an action for maintenance or support in another may be different from that required to alter marital status with extraterritorial effect.

COMMISSIONER OF INTERNAL REVENUE v. ESTATE OF BEDFORD ET AL.

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

No. 710. Argued March 29, 1945.—Decided May 21, 1945.

1. A petition for a writ of certiorari to review a decision of the Circuit Court of Appeals for the Second Circuit was filed within three months after "entry" of the "judgment," as required by § 8 of the Act of February 13, 1925, when filed within three months after the date of that court's "Order for Mandate," though more than three months after the date of the "Opinion." P. 287.
2. A distribution of cash out of earnings and profits of a corporation, pursuant to a recapitalization which was a reorganization as de-

fined by § 112 (g) of the Revenue Act of 1936, *held* to have had the "effect of the distribution of a taxable dividend" within the meaning of § 112 (c) (2), and to be taxable in full under that section and not as a capital gain under § 112 (c) (1). P. 290.

3. The result here is the same whether the case be treated as one of statutory construction for the independent judgment of this Court, or as one within the principle of *Dobson* v. *Commissioner*. P. 292.

144 F. 2d 272, reversed.

Certiorari, 323 U. S. 707, to review a judgment reversing a decision of the Tax Court, 1 T. C. 478, which sustained the Commissioner's determination of a deficiency in income tax.

Miss Helen R. Carloss, with whom *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Mr. Sewall Key* and *Miss Helen Goodner* were on the brief, for petitioner.

Mr. Erwin N. Griswold, with whom *Mr. Holt S. McKinney* was on the brief, for respondent.

Mr. Justice Frankfurter delivered the opinion of the Court.

At the threshold, the jurisdiction of the Court is challenged on the ground that the petition for the writ of certiorari was not filed within three months after "entry" of the "judgment" below as required by the Judiciary Act of February 13, 1925.[1]

[1] "Sec. 8 (a). That no writ of error, appeal, or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree, excepting that writs of certiorari to the Supreme Court of the Philippine Islands may be granted where application therefor is made within six months: *Provided*, That for good cause shown either of such periods for applying for a writ of certiorari may be extended not exceeding sixty days by a justice of the Supreme Court." 43 Stat. 936, 940, 28 U. S. C. § 350.

The steps by which the case came here are these. On August 8, 1944, the Circuit Court of Appeals for the Second Circuit filed a document entitled "Opinion"; on the same day, the Clerk made a docket entry reading, "Order reversed, A. N. Hand, *C. J.*"; on August 29, 1944, a document entitled "Order for Mandate" was filed, and the mandate issued that day; on November 29, 1944, the petition for writ of certiorari was filed. The petition was filed too late if the "Opinion," as respondent contends, constitutes the "judgment." It was filed in time if the "Order for Mandate" may properly be deemed the "judgment." The issue was ably pressed before us, and, since it concerns our power to review cases coming from what is perhaps the busiest circuit, it calls for more than summary treatment.

Even long continued practice cannot alter the limits within which Congress has bound the appellate jurisdiction of this Court. See *Dept. of Banking* v. *Pink*, 317 U. S. 264. But such practice may be decisive in interpreting procedural ways which, as a matter of dialectic or abstract analysis, may appear dubious. We are naturally impressed by the common understanding that in the Circuit Court of Appeals for the Second Circuit the so-called "Order for Mandate" is deemed the judgment. Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States (1936) § 384. We have taken and decided as a matter of course a considerable number of cases in which certiorari was sought within three months after entry of the "Order for Mandate" but not within three months after the "Opinion." [2] This practical understanding of the controlling significance, for appellate

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[2] During the 1941, 1942 and 1943 Terms, this Court entertained reviews and affirmed judgments of the Circuit Court of Appeals for the Second Circuit in not less than ten such cases: *Commercial Molasses Corp.* v. *N. Y. Barge Corp.*, 314 U. S. 104; *New York* v. *United States*, 315 U. S. 510; *Mother Lode Co.* v. *Comm'r*, 317 U. S. 222; *Smith* v. *Shaughnessy*, 318 U. S. 176; *Helvering* v. *Griffiths*, 318 U. S.

purposes, of the "Order for Mandate" is supported and certainly not contradicted by all that is conveyed by the "Opinion" and "Order for Mandate" and the Rules of the lower court.

It does not detract from the "Opinion" as an opinion that in its heading it gives as dates "Argued January 6, 1944. Decided August 8, 1944," and that it concludes with "The order of the Tax Court is reversed." The same or similar phrases are commonly employed in opinions of this Court without changing their character as opinions. Nor do like phrases in the opinions of the other circuit courts of appeals turn them into judgments, since in all other circuits judgment orders are separately filed. In spite of its title, the "Order for Mandate" on its face fulfills the function of such a judgment order. It recites that "it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is reversed.

"It is further ordered that a Mandate issue to the said The Tax Court of the United States in accordance with this decree.

ALEXANDER M. BELL,
Clerk.
By A. DANIEL FUSARO,
Deputy Clerk."

This language plainly imports that this is the judgment and that it is then being rendered. Nor does the fact that the order was prepared by the clerk and bears his signature detract from its quality as a judgment. A judgment "is the act of the court," *Ex parte Morgan,* 114 U. S. 174, 175, even though a clerk does all of the ministerial acts, as here, in conformity with his court's standing instructions.

371; *Emil* v. *Hanley,* 318 U. S. 515; *Fisher Co.* v. *Witmark & Sons,* 318 U. S. 643; *Equitable Society* v. *Comm'r,* 321 U. S. 560; *Medo Corp.* v. *Labor Board,* 321 U. S. 678; *United States ex rel. Brensilber* v. *Bausch & Lomb Optical Co.,* 320 U. S. 711 (equally divided court).

The Rules of the court below governing opinions, rehearings, issuance of mandate and stay of mandate are invoked to show that the "Opinion" is the appealable "judgment." These Rules, like other rules, are not phrased with such fastidious precision as to make of all the parts a perfect harmony. But while substantial debating points may be taken,[3] nothing in these Rules contradicts the natural meaning yielded by the terms of the "Opinion" and the "Order for Mandate," as reflected in the practice of the Second Circuit and in our own, which treats not the "Opinion" but the "Order for Mandate" as the order of judgment. The Rules would have to be far less artistic than they are to warrant us in holding that the Circuit Court of Appeals has consistently misinterpreted some of its own Rules. Whether the announcement of an opinion and its entry in the docket amounts to a judgment for purposes of appeal or whether that must await some later formal act, ought not to be decided on nice-spun argumentation in disregard of the judicial habits of the court whose judgment is called into question, of the bar practising be-

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[3] Respondent argues that the Rules of the court below, with respect to the opinions of the court, rehearings, issuance of mandate, and stay of mandate, show that the "opinion" is meant to constitute the court's judgment. But these Rules compute time, with respect to filing of petitions for rehearing and for issuance of mandate, not from entry of a "judgment" but from the "filing of the opinion of this court." Some difficulty is raised because Rule 27 refuses a rehearing "unless a judge who concurred in the judgment desires it." Also respondent finds it paradoxical to "stay" the court's mandate under Rule 30 when the mandate is customarily issued on the same day the "Order for Mandate" is filed. And respondent argues that the court could not have meant to confer upon its clerk discretion to hold up, for varying lengths of time, the rendering of a judgment until fees have been paid by the prevailing party. In this case the "Order for Mandate" and issuance of the mandate were delayed for twenty-one days, and were not entered within fifteen days from the filing of the opinion which Rule 30 and the court's instructions require; the time has been variously extended in other cases.

fore it, of the clerk who embodies its procedural traditions, as well as in conflict with the assumption of the reviewing court.

But now that the existing practice has revealed abstract disharmonies, if not difficulties, the Circuit Court of Appeals will doubtless establish a more tidy system for meeting the technical requirements for review here. The normal time for entering a judgment, as the starting point for determining whether review will be sought or whether there has been acquiescence in a judgment, should be fixed. The uncertainties inherent in litigation should not be needlessly prolonged. The entry of the "Order for Mandate," which in the Second Circuit begins the running of the period for appeal, is apparently variable and vagrant. In these days of rapid communication, the statutory allowance of three months is more than ample for an unsuccessful litigant to determine whether to seek further review. So long a period ought not to be extended by delay in entering a judgment nor should the burden of securing such entry be put upon the successful litigant. There are bound to be diversities in the modes of rendering and recording judgments of the forty-eight systems of State courts. Uniformity in the entry of judgment among the eleven circuits forming the single federal judicature ought to be capable of achievement without loss to the geographic flexibility of the system.

This brings us to the merits, which involve the validity of an income tax deficiency assessment for 1937. The case is this. The estate of Edward T. Bedford, who died May 21, 1931, included 3,000 shares of cumulative preferred stock (par value $100) of Abercrombie & Fitch Company. Pursuant to a plan of recapitalization respondent, as executor of the estate, in 1937 exchanged those shares for 3,500 shares of cumulative preferred stock (par value $75), 1,500 shares of common stock (par value $1), and $45,240 in cash (on the basis of $15.08 for each of the old preferred shares). The recapitalization had been pro-

posed because the company, after charging against its surplus account stock dividends totaling $844,100, distributed in 1920, 1928, and 1930, had incurred a book deficit in that account of $399,771.87. Because of this deficit, the company, under applicable State law, was unable to pay dividends although for the fiscal year ending January 31, 1937 it had net earnings of $309,073.70.

By comparing the fair market value of the old preferred shares at the date of Bedford's death with the market value of the new stock and cash received the gain to his estate was $139,740. Admittedly the recapitalization was a reorganization, § 112 (g) (1) (D) of the Revenue Act of 1936, 49 Stat. 1648, 1681, 26 U. S. C. § 112 (g) (1) (E), so that only the cash received, but none of the stock, is taxable. Sections 112 (b) (3), 112 (c) (1), 49 Stat. 1648, 1679, 1680, 26 U. S. C. §§ 112 (b) (3), 112 (c) (1). The sole issue is whether the cash, $45,240, is taxable as a dividend, or merely as a capital gain to the extent of 40%. The Tax Court sustained the determination of the Commissioner that the cash was taxable as a dividend, 1 T. C. 478, but was reversed by the Circuit Court of Appeals. 144 F. 2d 272. On a showing of importance to the administration of the Revenue Acts, we granted certiorari. 323 U. S. 707.

The precise question is whether the distribution of cash in this recapitalization "has the effect of the distribution of a taxable dividend" under § 112 (c) (2) of the Revenue Act of 1936 and as such is fully taxable, or is taxable only at the rate of 40% as a capital gain under § 112 (c) (1) of that Act. The relevant provisions read: "(c) *Gain from Exchanges not Solely in Kind.*—(1) If an exchange would be within the provisions of subsection (b) (1), (2), (3), or (5) of this section if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such

money and the fair market value of such other property. (2) If a distribution made in pursuance of a plan of reorganization is within the provisions of paragraph (1) of this subsection but has the effect of the distribution of a taxable dividend, then there shall be taxed as a dividend to each distributee such an amount of the gain recognized under paragraph (1) as is not in excess of his ratable share of the undistributed earnings and profits of the corporation accumulated after February 28, 1913. The remainder, if any, of the gain recognized under paragraph (1) shall be taxed as a gain from the exchange of property."

The history of this legislation is not illuminating. Section 112 (c) (2) originated in § 203 (d) (2) of the Revenue Act of 1924, 43 Stat. 253, 257. But the reports of the Congressional Committees merely use the language of the section to explain it. H. Rep. No. 179, 68th Cong., 1st Sess., pp. 14–15; S. Rep. No. 398, 68th Cong., 1st Sess., pp. 15–16. Nor does the applicable Treasury Regulation add anything; it repeats substantially the Committee Reports. Treas. Reg. 94, Art. 112 (g)–4. We are thrown back upon the legislative language for ascertaining the meaning which will best accord with the aims of the language, the practical administration of the law and relevant judicial construction.

Although Abercrombie & Fitch showed a book deficit in the surplus account because the earlier stock dividends had been charged against it, the parties agree that for corporate tax purposes at least earnings and profits exceeding the distributed cash had been earned at the time of the recapitalization. That cash therefore came out of earnings and profits and such a distribution would normally be considered a taxable dividend, see § 115 (a),[4] and has so

[4] "(a). *Definition of Dividend.*—The term 'dividend' when used in this title (except in section 203 (a) (3) and section 207 (c) (1), relating to insurance companies) means any distribution made by a

been treated by the courts in seemingly similar situations. It has been ruled in a series of cases that where the stock of one corporation was exchanged for the stock of another and cash and then distributed, such distributions out of earnings and profits had the effect of a distribution of a taxable dividend under § 112 (c) (2). *Comm'r* v. *Owens,* 69 F. 2d 597; *Comm'r* v. *Forhan Realty Corp.,* 75 F. 2d 268; *Rose* v. *Little Investment Co.,* 86 F. 2d 50; *Love* v. *Comm'r,* 113 F. 2d 236; *Campbell* v. *United States,* 144 F. 2d 177. The Tax Court has reached the same result, that is, has treated the distribution as a taxable dividend, in the case of the recapitalization of a single corporation. *McCord* v. *Comm'r,* 31 B. T. A. 342, 344; *J. Weingarten, Inc.* v. *Comm'r,* 44 B. T. A. 798, 808–809; *Knapp Monarch Co.* v. *Comm'r,* 1 T. C. 59, 69–70, affirmed on other grounds, 139 F. 2d 863. We cannot distinguish the two situations and find no implication in the statute restricting § 112 (c) (2) to taxation as a dividend only in the case of an exchange of stock and assets of two corporations.

Respondent, however, claims that this distribution more nearly has the effect of a "partial liquidation" as defined in § 115 (i).[5] But the classifications of § 115, which governs "Distributions of Corporations" apart from reorganizations, were adopted for another purpose. They do not apply to a situation arising within § 112. The definition of a "partial liquidation" in § 115 (i) is specifically limited

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corporation to its shareholders, whether in money or in other property, (1) out of its earnings or profits accumulated after February 28, 1913, or (2) out of the earnings or profits of the taxable year (computed as of the close of the taxable year without diminution by reason of any distributions made during the taxable year), without regard to the amount of the earnings and profits at the time the distribution was made."

[5] "(i). *Definition of Partial Liquidation.*—As used in this section the term 'amounts distributed in partial liquidation' means a distribution by a corporation in complete cancellation or redemption of a part of its stock, or one of a series of distributions in complete cancellation or redemption of all or a portion of its stock."

to use in § 115. To attempt to carry it over to § 112 would distort its purpose. That limitation is not true of § 115 (a) which defines "dividend" for the purpose of the whole title. Accordingly, this definition is infused into § 112 (c) (2). Under § 115 (a) a distribution out of accumulated earnings and profits is a "dividend," thus confirming the conclusion that a distribution of earnings and profits has the "effect of the distribution of a taxable dividend" under § 112 (c) (2).

Recapitalization does not alter the "effect." Although the capital of a company is reduced, the cash received is a distribution of earnings and profits and as such falls within the federal tax. That the company's treatment of its stock dividends may bring consequences under State law requiring a capital reduction does not alter the character of the transactions which bring them within the federal income tax. Recapitalization is one of the forms of reorganization under § 112 (g) (1) (D). It cannot therefore be urged as a reason for taking the transaction out of the requirements of § 112 and forcing it into the mold of § 115. The reduction of capital brings § 112 into operation and does not give immunity from the requirements of § 112 (c) (2).

Treating the matter as a problem of statutory construction for our independent judgment, we hold that a distribution, pursuant to a reorganization, of earnings and profits "has the effect of a distribution of a taxable dividend" within § 112 (c) (2). As is true of other teasing questions of construction raised by technical provisions of Revenue Acts the matter is not wholly free from doubt. But these doubts would have to be stronger than they are to displace the informed views of the Tax Court. And if the case can be reduced to its own particular circumstances rather than turn on a generalizing principle we should feel bound to apply *Dobson* v. *Commissioner*, 320 U. S. 489, and sustain the Tax Court.

Reversed.

ANGELUS MILLING CO. *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 610. Argued March 7, 8, 1945.—Decided May 21, 1945.

1. The evidence in this case was insufficient to establish that the Commissioner of Internal Revenue, by investigating the merits of a claim for refund of processing taxes paid under the Agricultural Adjustment Act of 1933, had waived compliance with requirements of Treasury Regulations as to the form of the claim; and the claim was therefore properly rejected. P. 297.
2. The requirements of Treasury Regulations as to the information which shall be contained in the claim for refund were not satisfied even though the claim of the taxpayer together with that of another might have furnished the required data. P. 299.

144 F. 2d 469, affirmed.

CERTIORARI, 323 U. S. 703, to review the affirmance of a decision of the Tax Court, 1 T. C. 1031, dismissing a proceeding for refund of a processing tax paid under the Agricultural Adjustment Act.

Mr. Prew Savoy for petitioner.

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

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This is a suit under Title VII of the Revenue Act of 1936, 49 Stat. 1648, 1747, 7 U. S. C. § 644 *et seq.*, for a refund of processing taxes paid under the Agricultural Adjustment Act of 1933. The problem of the case derives from the procedural requirements of a claim for such a refund.

The petitioner, Angelus Milling Company, known until June, 1933 as the Middleport Flour Mills, Inc., was a processor of wheat, with its principal office in Niagara Falls, New York. During the years for which the refund is claimed—1933 to 1936—its processing operations were closely connected with those of the Niagara Falls Milling Company. The two companies had the same officers, employees, and majority stockholder, and a joint bank account. They also had a common set of books, but the respective transactions of the two companies—purchases, costs of manufacture, sales—were entered in their separate accounts on the books. Between July 9, 1933, and January 31, 1935, the companies filed joint processing tax returns. Between February 1, 1935, and November 30, 1935, Niagara filed returns in its name on behalf of itself and petitioner.

After *United States* v. *Butler*, 297 U. S. 1, invalidated the processing tax, three claims were filed with the Commissioner on June 22, 1936, all stating the name of the taxpayer and claimant as "Niagara Falls Milling Co., Inc. and/or Middleport Flour Mills, Inc." Each of these claims is for only part of the period during which the tax was paid, and their total is $434,045.27. Admittedly the form of these claims did not satisfy the requirements of the statute[1] or the authorized Treasury Regulations.[2] They

[1] Section 903 of Title VII of the 1936 Revenue Act, 49 Stat. 1648, 1747, requires that no refund be made or allowed "unless . . . a claim for refund has been filed . . . in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon in support of such claim shall be clearly set forth under oath."

[2] The applicable regulations provide for the making of claims on prescribed forms, presentation of the grounds urged, and submission of evidence, etc. Treas. Reg. 96, Arts. 201, 202, 601, 603, 605, 606. The only information furnished in these claims is the name and address of the joint claimants, and a statement of the dates and amounts of the tax payments made by the Niagara Milling Company.

were filed on an old Form 843 and not on the required Form P. T. 79. While these claims were still undetermined, Niagara, on June 30, 1937, filed a claim in the sum of $436,231.73. This claim was in due form but was filed by Niagara on its own behalf alone. Thereafter, on August 15, 1938, petitioner filed a claim, designated "Amendment to Claim," for itself alone for the refund of $145,839.12. While this claim was submitted on Form P. T. 79, it failed to give the information required by the form and the regulations, containing merely an apportionment between Angelus and Niagara of the three earlier claims. An attached affidavit stated that this claim "was originally filed on the 22nd day of June 1936 in the name of the Niagara Falls Milling Company and/or Middleport Flour Mills, Inc." The Commissioner, on May 23, 1941, denied this claim.

To review this disallowance, petitioner brought proceedings in the United States Processing Tax Board of Review. A motion to dismiss, because of a fatal defect in the claim, was denied by the Board, but the Commissioner in his answer stood on his ground that the Board was without jurisdiction to entertain the proceedings. At this stage in the litigation Congress abolished the Processing Tax Board of Review and transferred its jurisdiction to the present Tax Court. That Court granted the Commissioner's renewed motion to dismiss, 1 T. C. 1031, and the Circuit Court of Appeals for the Second Circuit affirmed. 144 F. 2d 469. We brought the case here, 323 U. S. 703, because conflict was urged with the decision in *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62.[3]

Petitioner's claim for recovering processing taxes paid by it was properly rejected by the Commissioner if it did

[3] After we granted certiorari in this case, the same question of timeliness as to filing of the petition emerged as is raised in *Commissioner* v. *Estate of Bedford, ante*, p. 283. The decision in the *Bedford* case governs this.

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not satisfy the conditions which Congress directly and through the rule-making power given to the Treasury laid down as a prerequisite for such refund. Insofar as Congress has made explicit statutory requirements, they must be observed and are beyond the dispensing power of Treasury officials. *Tucker* v. *Alexander*, 275 U. S. 228, 231-232; *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 71; *United States* v. *Garbutt Oil Co.*, 302 U. S. 528, 533. Without needless elaboration, we conclude that there is nothing in what Congress has explicitly commanded to bar the claim. The effective administration of these modern complicated revenue measures inescapably leads Congress to authorize detailed administrative regulations by the Commissioner of Internal Revenue. He may insist upon full compliance with his regulations. See *United States* v. *Memphis Cotton Oil Co.*, *supra*, at 71; *Commissioner* v. *Lane-Wells Co.*, 321 U. S. 219, 223–224. It is hardly contended that the confusing series of petitioner's claims which we have summarized, whether singly or in conjunction, obeyed the regulations. For such default the Commissioner could have rejected the claims out of hand. He did not do that, and by what he did do he has given rise to the contention that he waived the requirement of his regulations. The basis of this claim of waiver is that the Commissioner through his agents dispensed with the formal requirements of a claim by investigating its merits.

Candor does not permit one to say that the power of the Commissioner to waive defects in claims for refund is a subject made crystal-clear by the authorities. The question has been somewhat complicated by cases involving amendments of claim. Thus, in *United States* v. *Memphis Cotton Oil Co.*, *supra*, a claimant's amendment was allowed because filed before his original claim was rejected on formal grounds. According to what was there said, there can be no amendment after a rejection though

the Commissioner had examined the claimant's books and tentatively found an overpayment. See *Edwards* v. *Malley,* 109 F. 2d 640; 10 Mertens, Law of Federal Income Taxation (1942) § 58.19. It smacks too much of the strangling niceties of common law pleading to find no existing claim to which a curative amendment may be attached, although there has been an examination of the merits, simply because of the prior rejection of a formally defective claim and yet find waiver of a formal defect merely because an examination of the merits by the Commissioner manifests consideration of the claim.

Treasury Regulations are calculated to avoid dilatory, careless, and wasteful fiscal administration by barring incomplete or confusing claims. *Tucker* v. *Alexander, supra,* at 231; *Commissioner* v. *Lane-Wells Co., supra,* at 223–224. But Congress has given the Treasury this rule-making power for self-protection and not for self-imprisonment. If the Commissioner chooses not to stand on his own formal or detailed requirements, it would be making an empty abstraction, and not a practical safeguard, of a regulation to allow the Commissioner to invoke technical objections after he has investigated the merits of a claim and taken action upon it. Even tax administration does not as a matter of principle preclude considerations of fairness.

Since, however, the tight net which the Treasury Regulations fashion is for the protection of the revenue, courts should not unduly help disobedient refund claimants to slip through it. The showing should be unmistakable that the Commissioner has in fact seen fit to dispense with his formal requirements and to examine the merits of the claim. It is not enough that in some roundabout way the facts supporting the claim may have reached him. The Commissioner's attention should have been focused on the merits of the particular dispute. The evidence should be clear that the Commissioner understood the specific claim

that was made even though there was a departure from form in its submission. We do not think that the petitioner has made out such a case here.

The evidence of waiver largely rests upon a letter from a General Deputy Collector requesting an examination of certain books, and upon affidavits of two accountants, one an officer of the company, to the effect that the Commissioner examined petitioner's books in order to consider the claim. We agree with the Tax Court that the evidence is insufficient to establish waiver. The letter from the General Deputy Collector requesting petitioner's president to allow examination of the "records of the Middleport Flour Mills, Inc., and Angelus Flour Mills, Inc." was in connection with the claim which had been filed by the Niagara Milling Company. In view of the confusing identity of interest of the two companies, it is not unreasonable to attribute this inquiry, as did the Tax Court, to Niagara's claim and not to petitioner's. For similar reasons, the affidavits regarding the purpose of the Commissioner's representatives bear interpretation of a like significance.

In the *Memphis Cotton Oil* case, where an amendment was allowed out of time, the Deputy Commissioner, after an audit of the taxpayer's books, notified the taxpayer in writing that its refund claims had been considered and that its taxes had been readjusted in accordance with a proven overassessment. Similar evidence of preoccupation by the Commissioner with the particular claim and controversy has been offered in cases where waiver was recognized. See, *e. g., United States* v. *Elgin Watch Co.*, 66 F. 2d 344; *United States* v. *Humble Oil & Refining Co.*, 69 F. 2d 214; *Weihman* v. *United States,* 4 F. Supp. 155. To be sure, it is not essential for the establishment of a waiver that the Commissioner communicate his ruling on the merits to the taxpayer. But in the absence of such explicitness the implication that formal requirements were dispensed with should not be tenuously argu-

mentative. No more than that can be squeezed out of the materials in this record. Thus it is claimed that the Commissioner offered a refund, subject to offsets, to the Niagara Falls Milling Company. But this rather confirms the indication the Commissioner was bent on Niagara's claim. The Commissioner may have acquired knowledge of petitioner's affairs but only by the way, incidentally to his investigation of Niagara's claims. Petitioner has failed to sustain his burden of showing that the Commissioner, by examining the facts of petitioner's claim in order to determine the merits, dispensed with the exactions of the regulations.

An additional argument of the petitioner need not detain us long. It urges that taking the claims filed by Niagara and petitioner together, they furnish all the data required by the regulations. But it is not enough that somewhere under the Commissioner's roof is the information which might enable him to pass on a claim for refund. The protection of the revenue authorizes the Commissioner to demand information in a particular form, and he is entitled to insist that the form be observed so as to advise him expeditiously and accurately of the true nature of the claim.

Affirmed.

MR. JUSTICE DOUGLAS dissents.

FINN, TRUSTEE, *v.* MEIGHAN, SUBSTITUTED TRUSTEE.

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

No. 953. Argued April 27, 1945.—Decided May 21, 1945.

1. Section 70 (b) of the Bankruptcy Act as amended, which § 102 makes applicable to proceedings under Chapter X, authorizes enforcement of an express covenant providing for termination of the lease upon approval of a petition under Chapter X for reorganization of the lessee. P. 302.
2. A provision of a lease authorizing forfeiture "if the tenant shall be adjudged bankrupt or insolvent by any Court," *held* operative upon approval of a petition for reorganization of the tenant under Chapter X of the Bankruptcy Act. P. 303.
3. Since the covenant here provides for forfeiture upon an adjudication of insolvency "by any Court," it is not to be construed as limited to an adjudication of insolvency by New York courts under the Debtor and Creditor Law. P. 304.

146 F. 2d 594, affirmed.

CERTIORARI, 324 U. S. 834, to review the affirmance of an order in a proceeding under Chapter X of the Bankruptcy Act adjudging the termination of a lease held by the debtor.

Mr. Joseph Lorenz for petitioner.

Mr. Burton C. Meighan, Jr., with whom *Mr. Louis A. Marchisio* was on the brief, for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Childs Company operates a chain of restaurants. In August 1943 it filed a voluntary petition for reorganization under Ch. X of the Bankruptcy Act (52 Stat. 885, 886, 11 U. S. C. §§ 526, 530) alleging that it was unable to pay its debts as they matured. The petition was approved

and petitioner was appointed trustee of the debtor. Childs Company had been lessee of, and had operated a restaurant on, certain premises in New York City for over forty years. Its present lease is for a term of twenty-one years ending in 1947. That lease contains the following provision:

"The tenant covenants that . . . if a petition in bankruptcy shall be filed by the tenant or *if the tenant shall be adjudged bankrupt or insolvent by any Court,* or if a trustee in bankruptcy of the tenant shall be appointed in any suit or proceeding brought by or against the tenant, then and in each and every such case, the term hereby granted shall immediately cease, determine and come to an end, and the landlord may recover and resume possession of the demised premises by any legal means." (Italics added.)

In May 1944 petitioner advised the lessor that it desired to assume the lease. Respondent replied that the lease had ceased and come to an end by virtue of the bankruptcy proceedings. Thereafter, respondent petitioned the bankruptcy court for an order adjudging that the term granted by the lease had terminated. The court granted the relief asked by the petition. The Circuit Court of Appeals affirmed. 146 F. 2d 594. The case is here on certiorari.

The bankruptcy court does not look with favor upon forfeiture clauses in leases. They are liberally construed in favor of the bankrupt lessee so as not to deprive the estate of property which may turn out to be a valuable asset. *Gazlay* v. *Williams,* 210 U. S. 41; *Model Dairy Co.* v. *Foltis-Fischer,* 67 F. 2d 704, 706. But an express covenant of forfeiture has long been held to be enforceable against the bankruptcy trustee. *Empress Theatre Co.* v. *Horton,* 266 F. 657; *Jandrew* v. *Bouche,* 29 F. 2d 346. And the 1938 revision of the Bankruptcy Act made no change in that regard. Congress granted the trustee sixty

days (unless reduced or extended) in which to assume or reject a lease. § 70 (b) of the Bankruptcy Act as amended, 11 U. S. C. § 110 (b). But at the same time, Congress provided:

"A general covenant or condition in a lease that it shall not be assigned shall not be construed to prevent the trustee from assuming the same at his election and subsequently assigning the same; but an express covenant that an assignment by operation of law or the bankruptcy of a specified party thereto or of either party shall terminate the lease or give the other party an election to terminate the same shall be enforceable."

This provision was merely declaratory of the law as it then existed.[1]

There is some suggestion, however, that that provision is applicable only in ordinary bankruptcy proceedings and not to reorganizations under Ch. X. It is pointed out that frequently the value of enterprises is greatly enhanced by leases on strategic premises and that if forfeiture clauses were allowed to be enforced, reorganization plans might be seriously impaired. But Congress has made the forfeiture provision of § 70 applicable to reorganization proceedings under Ch. X. By § 102 (11 U. S. C. § 502) it provided that the provisions of Ch. VII (which includes § 70) should be applicable to proceedings under Ch. X "insofar as they are not inconsistent or in conflict with the provisions" of that chapter.[2] Moreover, Congress provided in § 102 that "provisions relating to 'bankrupts' shall be deemed to relate also to 'debtors,' and 'bankruptcy proceedings' or 'proceedings in bankruptcy' shall be deemed to include proceedings under this chapter."

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[1] See 4 Collier on Bankruptcy (14th Ed. 1942), pp. 1239–1241; Weinstein, The Bankruptcy Law of 1938, p. 159.

[2] And see §§ 114 and 115. As respects the rejection or assumption of leases under Ch. X see §§ 116 (1), 202, 216 (4). Cf. *In re Chase Commissary Corp.*, 11 F. Supp. 288.

Thus we must read § 70 (b) as providing that an express covenant is enforceable which allows the lessor to terminate the lease if a petition to reorganize the lessee under Ch. X is approved. Cf. *In re Walker*, 93 F. 2d 281. That being the policy adopted by Congress, our duty is to enforce it.

The question remains whether this lease should be so construed. There is to be a forfeiture "if the tenant shall be adjudged bankrupt or insolvent by any Court." It is said that "insolvent" is used interchangeably with "bankrupt." But it has long been held that a general assignment is an act of bankruptcy whether or not the debtor is insolvent. *West Co.* v. *Lea,* 174 U. S. 590. Thus it would seem that "adjudged bankrupt" and "adjudged insolvent" do not cover precisely the same ground. Moreover, insolvency in the equity sense has always meant an inability of the debtor to pay his debts as they mature.[3] Under the Bankruptcy Act it means an insufficiency of assets at a fair valuation to pay the debts. § 1 (19), 11 U. S. C. § 1 (19). It was long the practice to initiate reorganizations in the federal equity courts by the filing of a general creditor's bill which alleged insolvency in the equity sense.[4] There would accordingly seem to be no doubt that if a receiver were appointed pursuant to such a bill, it would bring into operation an express covenant providing for a forfeiture of a lease "if the tenant shall be adjudged insolvent by any Court." No reason is apparent why the same result should not obtain in cases of reorganization under Ch. X.

We do not believe a different result is indicated in this case merely because the provision for forfeiture on ad-

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[3] Glenn, Creditors' Rights and Remedies (1915), § 370.

[4] *Re Metropolitan Railway Receivership*, 208 U. S. 90; 1 Gerdes, Corporate Reorganizations (1936) §§ 13, 19. Part VIII, Report on the Study and Investigation of Protective and Reorganization Committees, Securities and Exchange Commission (1940), pp. 24 *et seq.*

judication of insolvency appears in a paragraph otherwise exclusively devoted to the contingency of bankruptcy. Petitioner relies on the New York Debtor and Creditor Law, Consol. L., c. 12, which provides for the discharge of insolvent debtors in proceedings in the New York courts. §§ 50–88. It is said that insolvency under that statute means insolvency in the bankruptcy sense (§ 52) and that the covenant in question was drawn so as to provide for a forfeiture in the event of such an adjudication. But as we have said, the covenant in this lease provides for forfeiture on an adjudication of insolvency "by any Court." It is difficult to see in that language a limitation of the covenant to an adjudication of insolvency by the New York courts under the Debtor and Creditor Law.[5]

Affirmed.

CHASE SECURITIES CORP., NOW KNOWN AS AMEREX HOLDING CORP., *v.* DONALDSON ET AL., EXECUTORS.

APPEAL FROM THE SUPREME COURT OF MINNESOTA.

No. 110. Argued February 27, 1945.—Decided May 21, 1945.

1. Upon the record of this suit to recover the purchase price of securities sold in violation of the Minnesota Blue Sky Law and on misrepresentations, the defendant's immunity from suit can not be said to have been finally adjudicated by the state courts prior to the legislature's enactment of an Act which operated to abolish any defense that the defendant may have had under the state statutes of limitations, and the Act therefore did not deprive the defendant of property without due process of law in violation of the Fourteenth Amendment. Following *Campbell* v. *Holt,* 115 U. S. 620. P. 310.

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[5] The other provisions of New York law dealing with insolvency commonly define it as an inability to pay debts as they mature. The New York authorities are reviewed by Judge Knox in *In re Schulte Retail Stores Corp.,* 22 F. Supp. 612, 616.

2. The essential holding in *Campbell* v. *Holt*—that where lapse of time has not invested a party with title to real or personal property, a state legislature, consistently with the Fourteenth Amendment, may repeal or extend a statute of limitations, even after right of action is barred thereby, restore to the plaintiff his remedy, and divest the defendant of the statutory bar—so far as applicable to this case, is sound and should not be overruled. Pp. 311, 315.
3. The Act in question was a general one, applying to all similarly situated persons or transactions, and did not violate the equal protection clause of the Fourteenth Amendment. P. 309, n. 5.
4. That the defendant had no opportunity to submit testimony of legislators as to the intent of the Act did not constitute a denial of due process of law. P. 309, n. 5.

216 Minn. 269, 13 N. W. 2d 1, affirmed.

Appeal from a judgment upholding the constitutionality of a state statute in a suit to recover the purchase price of securities sold to the plaintiff.

Mr. Henry Root Stern, with whom *Messrs. Frederick H. Stinchfield, Jr., John M. Palmer* and *Floyd E. Nelson* were on the brief, for appellant.

Mr. Benedict S. Deinard, with whom *Mr. Hyman Edelman* was on the brief, for appellees.

Mr. Justice Jackson delivered the opinion of the Court.

This appeal from a judgment of the Supreme Court of Minnesota attacks as violative of the Fourteenth Amendment a provision of the Minnesota statutes enacted as part of a general revision of the Minnesota Securities or Blue Sky Law. Its effect upon appellant was to lift the bar of the statute of limitations in a pending litigation, which appellant contends amounts to taking its property without due process of law.

This action was brought in state court in November, 1937, to recover the purchase price of "Chase units," sold by appellant in Minnesota to the appellees' testate August

10, 1929. The "units" had not been registered as required by the laws of that state. The action was based in part on illegality of the sale, but it also was grounded on common-law fraud and deceit. Defendant relied among other defenses on the statute of limitations. Plaintiff countered that the running of the statute had been suspended because defendant had withdrawn from the state and the statute did not run during its absence. The case was tried by the court without a jury. It found that there was a sale in violation of the Blue Sky Law, that the Minnesota 6-year statute of limitations applying to actions "upon a liability created by statute" governed the case but had been tolled by withdrawal of the appellant from the state in 1931. Judgment was therefore rendered for the purchase price adjusted for interest and dividends and the court found it unnecessary to pass on the fraud issues.

The Supreme Court of Minnesota reversed.[1] It held by reference to a companion case[2] that the statute of limitations had not been tolled by the appellant's absence from the state because it had designated agents to receive service of process after its departure as required by statute. The case was remanded on January 10, 1941 without prejudice to further proceedings on "issues other than that of the tolling of the statute of limitations."

While proceedings were pending in the lower court, the legislature enacted a statute, effective July 1, 1941, which amended the Blue Sky Law in many particulars not pertinent here. The section in question added a specific statute of limitations applicable to actions based on violations of the Blue Sky Law[3] as to which there had been no provi-

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[1] *Donaldson* v. *Chase Securities Corp.*, 209 Minn. 165, 296 N. W. 518.

[2] *Pomeroy* v. *National City Co.*, 209 Minn. 155, 296 N. W. 513.

[3] The section reads:

"Other actions or prosecutions not limited.—No action shall be maintained for relief upon a sale of securities made in violation of

sion except a general statute of limitations. Under the former law the limitation on actions for fraud did not commence to run until its discovery. Under the new law, actions for failure to disclose non-registration or for misrepresentations concerning registration, or for falsity of representations implied from the fact of sale, all of which grounds were set up in this action, must be brought within six years of delivery of the securities. Aggrieved pur-

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any of the provisions of this act, or upon a sale of securities made in violation of any of the provisions of a registration thereof under this act, or for failure to disclose that the sale thereof was made in violation of any of the provisions of this act or in violation of any of the provisions of a registration thereof under this act, or upon any representation with respect to the registration or nonregistration of the security claimed to be implied from any such sale, unless commenced within six years after the date on which said securities were delivered to the purchaser pursuant to such sale, provided that if, prior to the effective date of this section, more than five years shall have elapsed from the date of such delivery, then such action may be brought within a period of one year following such effective date, and provided further that no purchaser of a security otherwise entitled thereto shall bring any action for relief of the character above set forth who shall have refused or failed, within 30 days after the receipt thereof by such purchaser, to accept a written offer from the seller or from any person who participated in such sale to take back the securities in question and to refund the full amount paid therefor by such purchaser, together with interest on such amount from the date of payment to the date of repayment, such interest to be computed at the same rate as the fixed interest or dividend rate, if any, provided for in such securities, or, if no rate is so provided, at the rate of six per centum per annum, less in every case the amount of any income received by the purchaser on such securities. Any written offer so made to a purchaser of a security shall be of no force or effect unless a duplicate thereof shall be filed with the commissioner of securities prior to the delivery thereof to such purchaser.

"Nothing in this section, except as herein expressly set forth, shall limit any other right of any person to bring any action in any court for any act involved in or right arising out of a sale of securities or the right of the state to punish any person for any violation of law." Mason's Minn. Stat. 1941 Supp., § 3996-24.

chasers were therefore denied future benefit of suspension of the period of limitation during the time such frauds or grounds of action remained undiscovered. But it also was provided that where delivery had occurred more than five years prior to the effective date of the Act, which was the fact in this case, the action might be brought within one year after the law's enactment. The effect of this was to abolish any defense that appellant might otherwise have made under the Minnesota statutes of limitation.

Both appellant and appellee moved in the trial court, shortly after the Act became effective, for supplemental findings. Appellant asked findings in its favor on the theory that the action was barred, that the new Act was inapplicable, and that there was no proof of actual fraud. Appellee contended that the 1941 law applied and that by reason of it recovery was not barred. The trial court determined that the plaintiff was entitled to recover in tort both on the ground of an illegal sale and on the ground of common-law fraud and deceit; that plaintiff had not discovered the deception until shortly before the action was begun; that the provisions of the 1941 Act applied to the plaintiff's "cause of action, or any of the separate grounds of relief asserted by plaintiff," and operated to extend the time for the commencement of action thereon to July 1, 1942 and that plaintiff's action was therefore commenced within the time limited by the statutes of Minnesota. The appellant moved for amended findings and then for the first time raised the federal constitutional question that the statute, if applied so to lift the bar, deprived appellant of property without due process of law, in violation of the Fourteenth Amendment. Its motion was denied.

Appealing again to the Supreme Court of Minnesota, appellant among other things urged this federal constitutional question. The Supreme Court again did not reach decision of the fraud aspects of the case. It held that the

Blue Sky Law required the securities to be registered and was violated by the sale; that the action was one in tort to recover as damages the purchase price of unregistered securities sold in Minnesota; that the new limitations statute was applicable and had the effect of lifting any pre-existing bar of the general limitation statute and that in so doing it did not violate the due process clause of the Fourteenth Amendment. The court relied on *Campbell* v. *Holt,* 115 U. S. 620, saying, "We do not find that *Campbell* v. *Holt* has been reversed or reconsidered, and we regard it as sound law; and, certainly, so far as the federal constitution is concerned, it is binding on this court until reversed by the Supreme Court."[4] The judgment was therefore affirmed, rehearing was sought and denied,[5] and the case brought here by appeal.

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[4] *Donaldson* v. *Chase Securities Corp.,* 216 Minn. 269, 276, 13 N. W. 2d 1.

[5] The petition for rehearing for the first time raised two questions also urged here, but which may be disposed of shortly.

1. That the Act in question violated the Fourteenth Amendment in denying equal protection of the law. Even if seasonably made, which is doubtful (see *American Surety Co.* v. *Baldwin,* 287 U. S. 156), the claim is without merit. The statute on its face is a general one, applying to all similarly situated persons or transactions. It appears that a number of cases were involved. Among other litigations were *Stern* v. *National City Co.* (D. C. Minn.), 25 F. Supp. 948, aff'd, *sub nom. City Co. of New York* v. *Stern* (C. C. A. 8th), 110 F. 2d 601, rev'd, 312 U. S. 666; *Chase Securities Corp.* v. *Vogel* (C. C. A. 8th), 110 F. 2d 607, rev'd, 312 U. S. 666. These were remanded by this Court to the Circuit Court of Appeals "for further proceedings with respect to any questions not determined by the Supreme Court of Minnesota" in the *Pomeroy* and *Donaldson* cases. Also in this class of cases was *Shepard* v. *City Co. of New York* (D. C. Minn.), 24 F. Supp. 682. That the motivation for the Act may have arisen in a few cases or in a single case would not establish that a general act such as we have described would deny equal protection.

2. The claim that appellant was denied due process of law because it had no opportunity to submit testimony of legislators as to legislative intent appears to us frivolous. The state court has seen fit to

As the case stood in the state courts it is not one where a defendant's statutory immunity from suit had been fully adjudged so that legislative action deprived it of a final judgment in its favor. The lower court had decided against appellant. The Supreme Court had confined its reversal to one question—whether the defendant's withdrawal from the state tolled the running of the statute of limitations. The case was returned to the lower court without prejudice to any other question.

Appellant, however, insists that it was sued upon two separate and independent causes of action, one being "upon a liability created by statute," and that its immunity from suit on that cause of action had been finally adjudicated. The argument is not consistent with the holdings of the state court. The Blue Sky Law imposes duties upon a seller of certain securities, but it does not expressly define a liability for their omission or create a cause of action in favor of a buyer of unregistered securities. The state courts, nevertheless, held that such an illegal sale will support a common-law action in tort. *Drees* v. *Minnesota Petroleum Co.,* 189 Minn. 608, 250 N. W. 563. And on the second appeal of this case the court said, "The action was brought in tort to recover as damages the purchase price of unregistered securities . . . It also sought recovery on the ground of deceit based on misrepresentation, but, in view of our disposition of the case, we need not con-

draw inferences as to the intent of an act from its timing and from its provisions and from background facts of public notoriety. But that does not mean that the judgment must be set aside to afford a party the opportunity to call legislators to prove that the court's inferences as to intent were wrong. Statutes ordinarily bespeak their own intention, and when their meaning is obscure or dubious a state court may determine for itself what sources of extrastatutory enlightenment it will consult. Our custom of going back of an act to explore legislative history does not obligate state courts to do so, and there is nothing in the Constitution which by the widest stretch of the imagination could be held to require taking testimony from a few or a majority of the legislators to prove legislative "intent."

sider that phase of the case."[6] It is not uncommon that a single cause of action in tort will rest both on omission of a statutory duty and on common-law negligence; the two bases do not necessarily multiply the causes of action. Cf. *Baltimore Steamship Co.* v. *Phillips,* 274 U. S. 316, 321; *New York Central R. Co.* v. *Kinney,* 260 U. S. 340, 346; *Seaboard Air Line R. Co.* v. *Koennecke,* 239 U. S. 352, 354. This appears to be permitted by the law of Minnesota. *Tuder* v. *Oregon Short Line R. Co.,* 131 Minn. 317, 318–19, 155 N. W. 200. It is true that the Supreme Court in disposing of the first appeal relied on a companion case in which it was said that "plaintiff must be considered to have sued 'upon a liability created by statute.'"[7] The pleadings in the companion case are not before us. No separate statement of a statutory cause of action is set out in the complaint in this case. The state court did not dispose of the liability for statutory violation as a separate cause of action by dismissal or otherwise. We cannot say that it was finally or separately adjudicated. The state courts seem to have treated the complaint as setting up several bases for a single common-law cause of action in tort which had been remanded for retrial at the time the new statute was enacted. We must regard it in that same light.

The substantial federal questions which survive the state court decision are whether this case is governed by *Campbell* v. *Holt* and, if so, whether that case should be reconsidered and overruled.

In *Campbell* v. *Holt, supra,* this Court held that where lapse of time has not invested a party with title to real or personal property, a state legislature, consistently with the Fourteenth Amendment, may repeal or extend a statute of limitations, even after right of action is barred thereby, restore to the plaintiff his remedy, and divest the defend-

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[6] *Donaldson* v. *Chase Securities Corp.,* 216 Minn. 269, 270–71.

[7] *Pomeroy* v. *National City Co.,* 209 Minn. 155, 156, 296 N. W. 513.

ant of the statutory bar. This has long stood as a statement of the law of the Fourteenth Amendment, and we agree with the court below that its holding is applicable here and fatal to the contentions of appellant.[8]

Appellant asks that in case we find *Campbell* v. *Holt* controlling it be reconsidered and overruled. We are reminded that some state courts have not followed it in construing provisions of their constitutions similar to the due process clause.[9] Many have, as they are privileged to do, so interpreted their own easily amendable constitutions

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[8] Appellant invokes the principle of our decisions in *William Danzer & Co.* v. *Gulf & Ship Island R. Co.,* 268 U. S. 633, and *Davis* v. *Mills,* 194 U. S. 451. But the state court so construed the relationship between its limitation acts and the state law creating the asserted liability as to make these cases inapplicable, and we do not think it did so improperly. In the *Danzer* case it was held that where a statute in creating a liability also put a period to its existence, a retroactive extension of the period after its expiration amounted to a taking of property without due process of law. Read with the *Danzer* case, *Davis* v. *Mills* stands for the proposition that the result may be the same if the period of limitation is prescribed by a different statute if it "was directed to the newly created liability so specifically as to warrant saying that it qualified the right." 194 U. S. 454. But the situation here plainly does not parallel that in the *Danzer* case, and the state court whose province it is to construe state legislation has found no parallel to the *Davis* case. At the time this action was commenced the Blue Sky Law of Minnesota had imposed on appellant a duty; it had not explicitly created a liability. The liability was implied by the state's common law; the period of limitation was found only in the general statute of limitations enacted many years earlier. The state court concluded that the challenged statute did not confer on appellees a new right or subject appellant to a new liability. It considered that the effect of the legislation was merely to reinstate a lapsed remedy, that appellant had acquired no vested right to immunity from a remedy for its wrong in selling unregistered securities, and that reinstatement of the remedy by the state legislature did not infringe any federal right under the Fourteenth Amendment, as expounded by this Court in *Campbell* v. *Holt.*

[9] *Wasson* v. *State,* 187 Ark. 537, 60 S. W. 2d 1020; *Bussey* v. *Bishop,* 169 Ga. 251, 150 S. E. 78; *Board of Education* v. *Blodgett,* 155 Ill.

to give restrictive clauses a more rigid interpretation than we properly could impose upon them from without by construction of the federal instrument which is amendable only with great difficulty and with the cooperation of many States.

We are also cited to some criticisms of *Campbell* v. *Holt* in legal literature.[10] But neither in volume nor in weight are they more impressive than has been directed at many decisions that deal with controversial and recurrent issues.

Statutes of limitations always have vexed the philosophical mind for it is difficult to fit them into a completely logical and symmetrical system of law. There has been controversy as to their effect. Some are of opinion that like the analogous civil law doctrine of prescription[11] limitations statutes should be viewed as extinguishing the claim and destroying the right itself. Admittedly it is troublesome to sustain as a "right" a claim that can find no remedy for its invasion. On the other hand, some common-law courts have regarded true statutes of limitation as doing no more than to cut off resort to the courts for enforcement of a claim.[12] We do not need to settle these arguments.

441, 40 N. E. 1025; *Jackson* v. *Evans*, 284 Ky. 748, 145 S. W. 2d 1061; *Wilkes County* v. *Forester*, 204 N. C. 163, 167 S. E. 691; *Raymer* v. *Comley Lumber Co.*, 169 Okla. 576, 38 P. 2d 8; *Cathey* v. *Weaver*, 111 Tex. 515, 242 S. W. 447; *Re Swan's Estate*, 95 Utah 408, 79 P. 2d 999; *Eingartner* v. *Illinois Steel Co.*, 103 Wis. 373, 79 N. W. 433.

[10] Appellant cites 2 Lewis' Sutherland, Statutory Construction (2d ed. 1904) § 708, p. 1288; 1 Wood, Limitations (4th ed. 1916) § 11, pp. 47–49; 24 Col. Law Rev. 803 (1924); 10 Corn. L. Q. 212 (1925); 2 Geo. Wash. Law Rev. 100 (1933); Rottschaefer, Constitutional Law (1939) § 252, pp. 548–9.

[11] See La. Civ. Code, Arts. 3457–3459; *Billings* v. *Hall*, 7 Cal. 1, 4; *Goddard's Heirs* v. *Urquhart*, 6 La. 659, 673.

[12] See *Gilbert* v. *Selleck*, 93 Conn. 412, 106 A. 439; *In re Estate of Daniel*, 208 Minn. 420, 294 N. W. 465; *Bates* v. *Cullum*, 177 Pa. 633, 35 A. 861.

Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. *Order of Railroad Telegraphers* v. *Railway Express Agency,* 321 U. S. 342, 349. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation.[13] They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.

This Court, in *Campbell* v. *Holt,* adopted as a working hypothesis, as a matter of constitutional law, the view that statutes of limitation go to matters of remedy, not to destruction of fundamental rights. The abstract logic of the distinction between substantive rights and remedial or procedural rights may not be clear-cut, but it has been found a workable concept to point up the real and valid difference between rules in which stability is of prime importance and those in which flexibility is a more important value. The contrast between the acceptable result of the reasoning of *Campbell* v. *Holt* and its rather unsatisfactory rationalization was well pointed out by Mr. Justice Holmes when as Chief Justice of Massachusetts he wrote:

[13] For history of these acts see Atkinson, "Some Procedural Aspects of the Statute of Limitations," 27 Col. Law Rev. 157 (1927).

"Nevertheless in this case, as in others, the prevailing judgment of the profession has revolted at the attempt to place immunities which exist only by reason of some slight technical defect on absolutely the same footing as those which stand on fundamental grounds. Perhaps the reasoning of the cases has not always been as sound as the instinct which directed the decisions. It may be that sometimes it would have been as well not to attempt to make out that the judgment of the court was consistent with constitutional rules, if such rules were to be taken to have the exactness of mathematics. It may be that it would have been better to say definitely that constitutional rules, like those of the common law, end in a penumbra where the Legislature has a certain freedom in fixing the line, as has been recognized with regard to the police power. *Camfield* v. *United States*, 167 U. S. 518, 523, 524. But however that may be, multitudes of cases have recognized the power of the Legislature to call a liability into being where there was none before, if the circumstances were such as to appeal with some strength to the prevailing views of justice, and if the obstacle in the way of the creation seemed small." *Danforth* v. *Groton Water Co.*, 178 Mass. 472, 476, 59 N. E. 1033. This statement was approved and followed by the New York Court of Appeals in *Robinson* v. *Robins Dry Dock Co.*, 238 N. Y. 271, 144 N. E. 579.

The essential holding in *Campbell* v. *Holt*, so far as it applies to this case, is sound and should not be overruled. The Fourteenth Amendment does not make an act of state legislation void merely because it has some retrospective operation. What it does forbid is taking of life, liberty or property without due process of law. Some rules of law probably could not be changed retroactively without hardship and oppression, and this whether wise or unwise in their origin. Assuming that statutes of limitation, like other types of legislation, could be so manipulated that

their retroactive effects would offend the Constitution, certainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is *per se* an offense against the Fourteenth Amendment. Nor has the appellant pointed out special hardships or oppressive effects which result from lifting the bar in this class of cases with retrospective force. This is not a case where appellant's conduct would have been different if the present rule had been known and the change foreseen. It does not say, and could hardly say, that it sold unregistered stock depending on a statute of limitation for shelter from liability. The nature of the defenses shows that no course of action was undertaken by appellant on the assumption that the old rule would be continued. When the action was commenced, it no doubt expected to be able to defend by invoking Minnesota public policy that lapse of time had closed the courts to the case, and its legitimate hopes have been disappointed. But the existence of the policy at the time the action was commenced did not, under the circumstances, give the appellant a constitutional right against change of policy before final adjudication. Whatever grievance appellant may have at the change of policy to its disadvantage, it had acquired no immunity from this suit that has become a federal constitutional right. The judgment is

Affirmed.

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

AMBASSADOR, INC. ET AL. *v.* UNITED STATES ET AL.

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

No. 446. Argued March 9, 12, 1945.—Decided May 21, 1945.

1. The District Court properly enjoined the appellant proprietors of hotels from collecting, in violation of a regulation filed by the telephone companies with the Federal Communications Commission pursuant to the Communications Act, surcharges from guests who make interstate or foreign long distance telephone calls or receive such calls "collect." Pp. 324, 326.
2. Questions of the justness or reasonableness of the regulation must be addressed in the first instance to the Commission. P. 325.
3. In the circumstances of this case, it was within the discretion of the District Court to enjoin the hotels, though it did not enjoin the telephone companies. P. 325.
4. It is unnecessary here to determine whether the hotels were "agents" of the telephone company or "subscribers." Whatever the relationship, it was one which the statute contemplates shall be governed by reasonable regulations initiated by the telephone company but subject to the approval and review of the Commission. P. 326.

Affirmed.

DIRECT appeal under the Expediting Act from a decree sustaining the validity of a tariff filed with the Federal Communications Commission and enjoining its violation by the defendant hotels.

Mr. Parker McCollester, with whom *Messrs. George deForest Lord* and *Joseph W. Wyatt* were on the brief, for appellants.

Solicitor General Fahy, with whom *Messrs. Chester T. Lane, Charles R. Denny, Harry M. Plotkin* and *Joseph M. Kittner* were on the brief, for the United States; and *Mr. T. Brooke Price,* with whom *Messrs. Spencer Gordon, John T. Quisenberry, John H. Ray* and *R. A. Van Orsdel* were on the brief, for the American Telephone & Tele-

graph Co. and the Chesapeake & Potomac Telephone Co., appellees.

MR. JUSTICE JACKSON delivered the opinion of the Court.

This action was instituted at request of the Federal Communications Commission in the District Court of the United States for the District of Columbia. The Chesapeake & Potomac Telephone Co., which is engaged in rendering telephone service in the District of Columbia, and the American Telephone & Telegraph Co. were made defendants, as also were the appellants, comprising the proprietors of twenty-seven hotels in the District of Columbia. The complaint asks and the court below has granted an injunction which forbids the hotels to make charges against their guests in connection with any interstate or foreign message toll service to or from their premises, other than the toll charges of the telephone companies and applicable federal taxes. The prohibition is based on a provision to that effect in the tariff filed by the telephone companies. Upon the trial, evidence was limited by stipulation to the facts about the Shoreham Hotel, accepted as typical of all defendants.

Telephone service is available to patrons of the hotel without a charge by the hotel. In or near the lobbies, telephone booths have direct connection with telephone company central offices. Calls can there be made without involving the services of the hotel personnel and at the usual tariff rates of the telephone company paid through its coin boxes.

However, modern hotel standards require that telephone service also be made available in the rooms. Equipment for this purpose is specified by the hotel but is installed and owned by the telephone company. The hotel pays a monthly charge for its use, and its operation is at the hotel's expense. The operating cost is substantial, rentals of the Shoreham in 1943 being $8,680.10 and payrolls for operation amounting to $21,895.62.

Typical equipment consists of a private branch exchange, known as a PBX board, connected with a number of outside or trunk lines and also with extension lines to each serviced room, and other items. This equipment permits calls for various kinds of room service, communication between guests, and calls from station to station within the hotel for which no use of other lines of the telephone company is necessary. The same switchboard and its hotel-employed operators also handle both incoming and outgoing calls for guests, including many long distance messages.

So far as the telephone company is concerned, the toll message coming to its central office from the hotel switchboard is handled much as a similar message from a residence or business station. Within the hotel, however, room telephone service necessitates additional labor as well as use of the equipment. When a call is made from the station in a room, it is placed with the switchboard operator employed by the hotel, and she in turn places the call with the telephone company's long distance operator. It is customary also to render services described as secretarial. Incoming messages may be received during the guest's absence and memoranda of them are made for and delivered to him. Outgoing messages may be transmitted for the guest. Information as to his whereabouts may be left with the operator for communication to callers; he may arrange to be reached at other locations than his room; he may arrange to have telephone service suspended for a period; incoming calls may be limited to those from designated persons, and various other services helpful to comfortable living are supplied by those in charge of the interior telephone system.

Each long distance call placed through the hotel's switchboard is charged by the telephone company to the hotel, not to the guest. The hotel pays the charge and is reimbursed, less credit losses, by collections from the guest.

The reimbursement item is separately stated on the guest's bill and is not itself involved in this controversy.

The hotel also seeks to recoup the cost of its service, including equipment rentals, and perhaps some margin of profit, by a service charge to the guests who make long distance calls from their rooms. This charge varies in different hotels but this typical case shows charges of ten cents for toll calls where the telephone tariff is one dollar or less, ten percent of the telephone tariff where the charge is more than one dollar, with a maximum of three dollars per call. This service charge appears on the guest's bill as a separate item, but is stated, like the reimbursement charge, as "Long distance," abbreviated to "LDIST".

In January 1942, a proceeding was instituted by the Federal Communications Commission for the purpose of determining whether the charges collected by hotels, apartment houses and clubs in the District of Columbia in connection with interstate and foreign telephone communication were subject to the jurisdiction of the Commission under the Communications Act and what tariffs, if any, should be filed with the Commission showing such charges. No such tariffs were on file with the Commission at the time the proceeding was instituted.

The Commission, December 10, 1943, found that it does have jurisdiction under the Communications Act over the charges collected by hotels and others and ruled that, if such charges are to be collected at all, they must be shown on tariffs on file with the Commission. It thought that the hotel should be regarded as the agent of the telephone companies. It issued an order directing the two telephone companies either to file appropriate tariffs showing charges collected by the hotels in connection with interstate and foreign telephone communications or to file an appropriate tariff regulation containing a specific provision with respect to conditions under which such interstate and foreign service would be furnished to hotels, apartment houses and clubs.

Confronted with these alternatives, The Chesapeake & Potomac Telephone Company filed a tariff provision in which the American Telephone & Telegraph Company concurred, which reads as follows:

"Message toll telephone service is furnished to hotels, apartment houses and clubs upon the condition that use of the service by guests, tenants, members, or others shall not be made subject to any charge by any hotel, apartment house or club in addition to the message toll charges of the Telephone Company as set forth in this tariff."

This tariff provision became effective by its terms February 15, 1944. Four days later, this suit was instituted to enjoin the hotels from collecting charges made in violation of the tariff provision, and to enjoin the telephone companies from furnishing such service to these hotels or others which continued to make charges.

The District Court sustained the validity of the tariff.[1] It regarded the hotels as subscribers rather than as agents of the telephone companies. It held that the tariff was violated by collection of surcharges from guests who make interstate or foreign long distance telephone calls or receive such calls "collect." The court did not pass upon the justness or reasonableness of the tariff, being of opinion that such questions were in the first instance to be submitted to and determined by the Commission in appropriate proceedings. An injunction issued against the hotels but not against the telephone companies, the court, however, retaining jurisdiction over the proceedings as to all defendants for the purpose of issuing such further orders as might be necessary to effectuate its decision. Direct appeal was taken by the hotel defendants to this Court.[2]

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[1] The opinion was rendered orally and is not reported.

[2] Pursuant to § 2 of Expediting Act, 32 Stat. 823; 36 Stat. 1167; 15 U. S. C. § 29; 49 U. S. C. § 45; and Communications Act of 1934, 48 Stat. 1093, 47 U. S. C. § 401 (d). Also § 238 (1) of Judicial Code as amended, 43 Stat. 938, 28 U. S. C. § 345 (1).

It has long been recognized that if communications charges are to correspond even roughly to the cost of rendering the service, the use to which telephone installations may be put by subscribers must be subject to some kind of classification and regulation which will conform the actual service to that contracted for. Familiar examples are the classification of residence as against business service with a requirement that the subscriber confine his use of the instruments accordingly. Of course, the subscriber who installs a private branch exchange with multiple trunk lines and many extensions has obviously contracted for a class of service different from one whose installation consists of a single station. One of the problems incident to the service of a subscriber who takes facilities greatly in excess of his own needs in order to accommodate others is to fix upon what terms he may extend the use of telephone facilities to others. This is an aspect of the problem of resale of utility service which is not confined to the telephone business.[3]

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[3] Cf. *Re New York Telephone Co.,* 26 P. U. R. (N. S.) 311 (N. Y. 1938), 30 P. U. R. (N. S.) 350 (N. Y. 1939); *People ex rel. Public Service Commission* v. *New York Telephone Co.,* 262 App. Div. 440, 29 N. Y. S. 2d 513 (1941), aff'd without opinion, 287 N. Y. 803, 40 N. E. 2d 1020; *Hotel Pfister* v. *Wisconsin Telephone Co.,* 203 Wis. 20, 233 N. W. 617 (1930); *Jefferson Hotel Co.* v. *Southwestern Bell Telephone Co.,* 15 P. U. R. (N. S.) 265 (Mo. 1936); *Re Hotel Marion Co.,* P. U. R. 1920 D, 466 (Ark. 1920); *Connolly* v. *Burleson,* P. U. R. 1920 C, 243 (N. Y. 1920); *Re Hotel Telephone Service and Rates,* P. U. R. 1919 A, 190 (Mass. 1918); *Hotel Sherman Co.* v. *Chicago Telephone Co.,* P. U. R. 1915 F, 776 (Ill. 1915); *1015 Chestnut Street Corp.* v. *Bell Telephone Co.,* P. U. R. 1931 A, 19, 7 P. U. R. (N. S.) 184 (1930, 1934); *Budd* v. *Southwestern Bell Telephone Co.,* 28 P. U. R. (N. S.) 235 (Mo. 1939).

Remetering of electric energy creates similar problems of regulation, often dealt with by tariff prohibition of remetering. See *Lewis* v. *Potomac Electric Power Co.,* 64 F. 2d 701 (App. D. C. 1933); *Karrick* v. *Potomac Electric Power Co.,* P. U. R. 1932 C, 40 (D. C. Sup. Ct. 1931); *Florida Power & Light Co.* v. *Florida ex rel. Malcolm,* 107 Fla.

The Communications Act of 1934 recognizes that tariffs filed by communications companies may contain regulations binding on subscribers as to the permissible use of the rented communications facilities. The supervisory power of the Commission is not limited to rates and to services, but the formula oft repeated in the Act to describe the Commission's range of power over the regulated companies is "charges, practices, classifications, and regulations for and in connection with such communication service." 48 Stat. 1070, 47 U. S. C. § 201 (b). It is in all of these matters that the Act requires the filed tariffs to be "just and reasonable" and declares that otherwise they are unlawful.[4] By none of these devices may the companies perpetrate an unjust or unreasonable discrimination or preference.[5] All of these must be filed with the Commission in the form it prescribes, may not be changed except after due notice, and must be observed in the conduct of its business by the company.[6] These provisions clearly authorize the companies to promulgate rules binding on PBX subscribers as to the terms upon which the use of the facilities may be extended to others not themselves subscribers.

Of course, such authority is not unlimited. The telephone companies may not, in the guise of regulating the communications service, also regulate the hotel or apartment house or any other business. But where a part of

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317, 144 So. 657 (1932); *Sixty-seven South Munn* v. *Board of Public Utility Commissioners,* 106 N. J. Law 45, 147 A. 735 (Sup. Ct. 1929), aff'd 107 N. J. Law 386, 152 A. 920 (Court of Errors and Appeals 1930), cert. denied, 283 U. S. 828; *Public Service Commission* v. *J. & J. Rogers Co.,* 184 App. Div. 705, 172 N. Y. S. 498 (N. Y. 1918); *People ex rel. N. Y. Edison Co.* v. *Public Service Commission,* 191 App. Div. 237, 181 N. Y. S. 259 (N. Y. 1920), aff'd, 230 N. Y. 574, 130 N. E. 899 (1920).

[4] 47 U. S. C. § 201.

[5] 47 U. S. C. § 202.

[6] 47 U. S. C. § 203 (a), (b), (c).

the subscriber's business consists of retailing to patrons a service dependent on its own contract for utility service, the regulation will necessarily affect, to that extent, its third party relationships. Such a regulation is not invalid *per se* merely because, as to the communications service and its incidents, it places limitation upon the subscriber as to the terms upon which he may invite others to communicate through such facilities.

It is urged, however, that the regulation in question is unlawful because it is unreasonable. It is said that it invades the relationship between hotel and guest excessively, and denies to the hotel the right reasonably to recoup its cost and to profit by the services it renders. But we agree with the District Court that where the claim of unlawfulness of a regulation is grounded in lack of reasonableness, the objection must be addressed to the Commission and not as an original matter brought to the court. We think that the Act confers jurisdiction upon the Commission to hear appellants' grievances against the substance of this regulation. Indeed, appellants inform us that the American Hotel Association, on behalf of its members, including the appealing hotels, has filed a formal complaint with the Commission alleging that the new provision of the tariff schedule was unreasonable, discriminatory and unlawful, and asking for investigation and, at the same time, asserting that the tariff was illegal. Action on that complaint has been held in abeyance by the Commission pending the final decision on the jurisdictional question in this suit.

It is clear that the charges being made in this case violate the regulation. The charges made are not based on the service rendered by the hotel but vary in accordance with the toll charge made by the telephone company for communications services. So far as appears, the service rendered by the hotel in handling a guest's toll call from Washington to Baltimore is substantially the same as for

a call to San Francisco. But, for like service, the charge varies with the amount of the telephone tariff for the communication. The guest's charges are so identified with the communications service that they are brought within the prohibitions of this regulation.

Since the regulation, apart from questions of reasonableness which must be presented to the Commission, is a valid regulation of the subscriber's use of the telephone facilities involved, a departure from the regulation is forbidden by the Act and the prosecution of an action to restrain a violation is authorized.[7] When an action for enforcement is instituted in any District Court, the Act expressly provides that it shall be lawful "to include as parties, in addition to the carrier, all persons interested in or affected by the charge, regulation, or practice under consideration," and decrees may be made against such parties in the same manner and to the same extent as authorized with respect to carriers.[8] One can hardly gainsay the Government's assertion that the appellants here are persons interested in and affected by the regulation in question and, therefore, are proper parties defendant in the action and injunction could properly issue against them.

It is urged, however, that inasmuch as the Court did not enjoin the telephone companies, the hotels should not be enjoined. Four days after the effective date of this regulation, the hotels had indicated no intention to comply with it although they had had due notice. It was well within the discretion of the trial court to conclude that this justified an injunction. Four days of default by the subscriber, however, might not be regarded as requiring an injunction which would compel the telephone companies to cut off service on which many persons rely. We are unable to see that the hotels have been prejudiced by

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[7] 47 U. S. C. § 401.

[8] 47 U. S. C. § 411.

the failure to enjoin the telephone companies or are in a position to complain of the omission of what would have been an additional hardship to themselves.

Much has been said in argument about the theory of the relationship between the hotel and the telephone company and the discrepancy between the view of the Commission that the contract created an agency and that of the District Judge who said that the evidence fails to show that the hotels are agents of the telephone company, and held that "the hotels are subscribers." We do not think it is necessary in determining the application of a regulatory statute to attempt to fit the regulated relationship into some common-law category. It is sufficient to say that the relation is one which the statute contemplates shall be governed by reasonable regulations initiated by the telephone company but subject to the approval and review of the Federal Communications Commission.

Without prejudice to determination by the Commission of any of the questions raised in this case, we hold that the injunction was properly issued and the judgment below is

Affirmed.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

SINCLAIR & CARROLL CO., INC. v. INTERCHEMICAL CORPORATION.

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

No. 656. Argued April 5, 1945.—Decided May 21, 1945.

1. In suits in the federal courts for infringement of patents, the better practice usually is for the court to inquire fully into the validity of the patent. P. 330.
2. It is essential to the validity of a patent that the subject-matter reveal "invention," "more ingenuity . . . than the work of a mechanic skilled in the art." P. 330.
3. Patent No. 2,087,190, claims 3, 10, 11, 12 and 13, to Gessler, for a printer's ink which is non-volatile at room temperature and highly volatile when heated, which involved merely the selection of a known compound to meet known requirements, *held* invalid for want of invention. P. 334.

144 F. 2d 842, reversed.

CERTIORARI, 323 U. S. 705, to review a decree which, upon appeal from a decree holding a patent invalid and not infringed, 50 F. Supp. 881, held the patent valid and infringed.

Mr. William D. Mitchell, with whom *Messrs. Walter H. Free* and *Mark N. Donohue* were on the brief, for petitioner.

Mr. Robert W. Byerly, with whom *Mr. Ralph M. Watson* was on the brief, for respondent.

MR. JUSTICE JACKSON delivered the opinion of the Court.

This infringement suit was brought by the assignees of a patent on a printing ink. Respondent, Interchemical Corporation, asserts that inks made by the petitioner infringe on claims 3, 10, 11, 12 and 13 of U. S. Patent No. 2,087,190 which was issued to Albert E. Gessler on July 13, 1937. Claim 3, which is typical, is as follows: "A print-

ing ink which is substantially non-drying at ordinary temperatures and dries instantly on heating of the printed matter, consisting of coloring matter dispersed in an organic viscous vehicle consisting of a liquid component and a solid component completely dissolved in the liquid component in sufficient quantity to give the ink the consistency of an ordinary oil-varnish printing ink—the solid component being a member of the group consisting of natural and synthetic resins and cellulose compounds, substantially all of the liquid component having a vapor pressure at 20° C. as low as that of diethylene glycol monobutyl ether at 20° C., and the major part of the liquid component having a vapor pressure which at 150° C. approximates that of ethyl alcohol at ordinary temperatures and forming a stable solution with the solid component." In other words, Gessler claims to have invented an ink which will not dry at room temperature but which will dry instantly upon the application of heat after printing. Such an ink is of no particular value in the printing of newspapers or other publications which use absorbent paper. This can be done acceptably with ordinary inks containing linseed oil which is non-volatile at all relevant temperatures. The paper absorbs the ink when one side is printed, and the other side can be printed immediately without danger of smudging.

But the ink disclosed in the patent does have utility in the printing of magazines and other materials which use smooth non-absorbent paper. Since its disclosure by Gessler, it or similar inks which are claimed to infringe have been used to print "The New Yorker," "Collier's," and "The Saturday Evening Post." Such publications previously would require considerably more time for printing since the reverse side of the paper which they used could not be printed until the first side was dry. Nor could the sheets be stacked or folded without danger of "offset" printing. The smooth paper would not absorb the linseed-

oil inks, and delay of from one to twenty-four hours was necessary before printing was sufficiently dry to allow the sheets to be worked upon again.

Many efforts were made to eliminate the necessity for delay. The problem was complicated by the fact that the presses used in this kind of printing are equipped with a long series of ink-distributing rollers to spread out the ink to the optimum thin film before it is applied to the type. Hence, when inks with volatile components were used, they would dry on the rollers before they got to the type. And if inks with non-volatile ingredients—like linseed oil—were used, they would not dry except by slow oxidation. Other approaches to the solution of the problem included the exposure of sheets printed from linseed-oil inks to ozone, but that process was dangerous and not wholly satisfactory. Gessler's ink combines the qualities of an ink which does not dry on the rollers and one which dries quickly after printing when heat is applied to it.

These characteristics of the ink result from the nature of the solvent which is one of its components. Gessler, in his specification, named butyl carbitol (diethylene glycol monobutyl ether is said to be the more accurate scientific term) but that compound was given only as an example, and most of the inks which his company now makes contain "narrow cuts" of petroleum in place of butyl carbitol. A narrow cut of petroleum consists of only a few kinds of hydrocarbons, and consequently evaporates consistently since each of the hydrocarbons has substantially the same vapor pressure curve. The allegedly infringing inks similarly are made with narrow cuts of petroleum. All of these solvents have the peculiar quality of being relatively non-volatile at ordinary room temperature but highly volatile at a temperature of 150° C., a temperature to which paper can safely be heated without burning. There is no question that inks containing these solvents have enabled magazines to be printed on high-speed ro-

tary presses which are furnished with heating devices, without interruption for drying.

The District Court held Gessler's patent invalid because anticipated by the prior art, and held that the petitioner's inks did not infringe. *Interchemical Corp.* v. *Sinclair & Carroll Co.,* 50 F. Supp. 881. The Circuit Court reversed, holding the patent valid and infringed. *Interchemical Corp.* v. *Sinclair & Carroll Co.,* 144 F. 2d 842. We granted certiorari. 323 U. S. 705.

There has been a tendency among the lower federal courts in infringement suits to dispose of them where possible on the ground of non-infringement without going into the question of validity of the patent. *Irvin* v. *Buick Motor Co.,* 88 F. 2d 947, 951; *Aero Spark Plug Co.* v. *B. G. Corp.,* 130 F. 2d 290; *Franklin* v. *Masonite Corp.,* 132 F. 2d 800. It has come to be recognized, however, that of the two questions, validity has the greater public importance, *Cover* v. *Schwartz,* 133 F. 2d 541, and the District Court in this case followed what will usually be the better practice by inquiring fully into the validity of this patent.

A long line of cases has held it to be an essential requirement for the validity of a patent that the subject-matter display "invention," "more ingenuity . . . . than the work of a mechanic skilled in the art." *Hicks* v. *Kelsey,* 18 Wall. 670; *Slawson* v. *Grand Street R. Co.,* 107 U. S. 649; *Phillips* v. *Detroit,* 111 U. S. 604; *Morris* v. *McMillin,* 112 U. S. 244; *Saranac Automatic Machine Corp.* v. *Wirebounds Patents Co.,* 282 U. S. 704; *Honolulu Oil Corp.* v. *Halliburton,* 306 U. S. 550; *Cuno Engineering Corp.* v. *Automatic Devices Corp.,* 314 U. S. 84, 90. This test is often difficult to apply; but its purpose is clear. Under this test, some substantial innovation is necessary, an innovation for which society is truly indebted to the efforts of the patentee. Whether or not those efforts are of a special kind does not concern us. The primary purpose of our patent system is not reward of the individual but

the advancement of the arts and sciences.[1] Its inducement is directed to disclosure of advances in knowledge which will be beneficial to society; it is not a certificate of merit, but an incentive to disclosure. See *Hartford-Empire Co.* v. *United States,* 323 U. S. 386, 432–433. Consequently it is not concerned with the quality of the inventor's mind, but with the quality of his product.

The patent in suit was not the product of long and difficult experimentation. Although like other patent cases, this has an extensive record, it is hard to see wherein Gessler's invention consists. In 1930, he was asked to make an odorless ink, and he selected from a catalog of a chemical manufacturer three solvents which the catalog indicated to be relatively odorless. Their vapor pressures, that is, their rates of evaporation at various temperatures, were also listed. He tried inks made with each of the compounds as a solvent and decided that butyl carbitol was the most satisfactory, since it did not dry while on the rollers, at ordinary temperature.

The company which had requested the odorless ink, however, found that it was unsatisfactory for other reasons and, after some further effort, Gessler stopped trying to solve that problem. Sometime in 1932, however, the same company asked Gessler whether he could supply them with an ink "that would be dry after being printed? We can put it over some kind of heating device." Gess-

[1] See the testimony of Commissioner Coe before the TNEC: "It is not the principal purpose of the patent laws of our own country or of any nation to reward an individual. The purpose is much deeper and the effect much wider than individual gain. It is the promotion of science and the advancement of the arts looking to the general welfare of the Nation that the patent laws hope to accomplish. The individual reward is only the lure to bring about this much broader objective. Every patent granted benefits society by adding to the sum total of human knowledge, but that is not enough, and that alone will not achieve the ultimate goal of the patent system." TNEC Hearings, Part 3, p. 857.

ler's answer was, "Yes, I think we could. In fact, one of those inks I made for you in the beginning would do that." Gessler testified as follows: "And now, when Mr. Cray came, in the year 1932, and told me that heating units, steam-heated rollers are used on printing presses, that was the last key that I needed for the solution of the problem. I had not known that before, and I knew that if I could apply any heat to the thin film of those inks that they would dry almost instantaneously. With that in mind that was the mental background, I would say, that I sent this particular ink to Mr. Cray. I did not send him a number of inks or a selection of inks, but I sent him just one specific ink." And with respect to the solvents he had chosen, Gessler testified further:

> Q. What I want to get straight in my mind, Dr. Gessler, is this: You selected these three, is that right? A. That is right.
>
> Q. Did you select them from a much longer list? A. That is right.
>
> Q. And before you selected them you tried them all out, did you? A. No. You see the list is listed according to the boiling point, and if you followed on I took it from a certain boiling point on upwards.
>
> Q. Oh, I see. You took them out of a long list in accordance with their boiling point? A. That is correct. That was my first indication of evaporation rate.
>
> . . . . .
>
> Q. . . . In selecting these three solvents that you referred to, butyl cellosolve, carbitol and butyl carbitol, did you have reference to a Carbide & Carbon Chemicals Corporation catalog? A. I knew them. I don't know if I had reference, but I knew naturally those solvents.
>
> Q. You may have referred to a catalog? A. I may have, certainly. I most probably had the catalog.
>
> Q. You got copies of their catalogs, did you? A. Oh, yes.
>
> . . . . .

Q. On the fly-leaf of the Carbide & Carbon catalog there is a list of their products. Do you remember that list (handing to witness)? A. A similar list.

Q. That gives boiling points and vapor pressures? A. It does.

Q. And you may have selected these three solvents that we are talking about from that list? A. That is possible, although I knew the solvents. I was very conversant with them. I told you a while ago why.

Butyl carbitol was first put on the market in 1929, and subsequently was listed in the catalogs of Carbide & Carbon Chemicals Corporation. It cannot be said that Gessler's contribution was a recognition that a solvent having the peculiar qualities of negligible vapor pressure at room temperature and high vapor pressure at 150° C. was what was needed. Both the circuit court and the district court found that an article written in 1931, referred to as the Hanson article, had posed the problem.[2] It is difficult to believe that if Hanson had known of the qualities of butyl carbitol, if he had had the Carbide & Carbon catalog before him, he or any other person skilled in the art could not have devised the ink which Gessler claims to have invented. We reach this conclusion even though

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[2] The relevant part of the Hanson article, which appears in the record, is as follows: "The solvents available have different boiling points ranging through a broad scale, but unfortunately for this problem their vapor pressure curves are nearly parallel. If we choose one from the group with a boiling point well under 250° F. [121° C.], the highest practical heat to apply to a printed sheet, we find that at room temperature its vapor pressure is still so great that drying will progress rapidly. On the other hand, if one is selected with a vapor pressure so low at room temperature that little drying takes place, at 200° to 250° F., we find the boiling point hardly attained or not even reached.

"If we could only flatten the curve of a high boiling solvent with a vapor pressure of 1 in. of mercury or less at 80° down to a point where at 30 in. the boiling temperature would be reduced to only 150° or so it would not take us long to compound an ink to meet the general characteristics for a plastic ink set forth above."

Hanson testified in an affidavit introduced in support of a motion for rehearing that he had worked for over a year trying to produce such an ink and did not succeed.

The District Court based its judgment on anticipation by prior patents. Most of these pertained to inks which were not used in ordinary printing: Lefferts and Stevens, No. 380,654, issued April 3, 1888, was an ink used for printing on celluloid and other pyroxyline compounds; the Doughty and McElroy patents, Nos. 1,439,696 and 1,450,692, issued December 26, 1922 and April 3, 1923 taught an ink which was mainly useful for stamping with metallic inks by means of heated dies. But the Jirousek patent, No. 1,954,627, issued April 10, 1934, was for an ordinary printing ink. Jirousek's patent was directed to "a composition . . . which can set quickly and dry rapidly and also handle and feed properly and distribute freely." And the patent specifies, "In the use of such compositions, immediately after the impression is made, heat should be applied, and most advantageously this may be accomplished by a suitable heater, electric, gas, etc., arranged on or adjacent the press, so that the delivered printed impression is subjected to a substantial degree of heat to complete the setting action."

The inks disclosed in these prior patents did not contain the same solvent or solvents similar to those which Gessler recommended and which his company and the petitioners now use. They had different vapor pressures both at room temperature and at 150° C. But all these patents taught an ink made with a solvent that would be non-volatile at room temperature and highly volatile when heated. Gessler's solvent is undoubtedly more satisfactory than any of the solvents mentioned in these patents, but it must be remembered that all but one of these patents were granted before butyl carbitol appeared on the market. The fact is that Gessler himself to a large extent has abandoned butyl carbitol and now uses a narrow

cut of petroleum. Even assuming that if Gessler had discovered the compound he would be entitled to a patent, he did not discover it. Reading a list and selecting a known compound to meet known requirements is no more ingenious than selecting the last piece to put into the last opening in a jig-saw puzzle. It is not invention. The judgment below is

Reversed.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS concur in the result.

INTERNATIONAL UNION OF MINE, MILL & SMELTER WORKERS, LOCALS NOS. 15, 17, 107, 108 and 111, (C. I. O.) ET AL. v. EAGLE-PICHER MINING & SMELTING CO. ET AL.

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

No. 337. Argued January 31, 1945.—Decided May 28, 1945.

1. Labor unions which intervened in the Circuit Court of Appeals in support of a petition by the National Labor Relations Board to revoke an enforcement order and to remand the cause to the Board, *held* to have standing to seek review of a denial of the petition, even though the Board elected not to seek review. P. 338.
2. The National Labor Relations Board, having sought and obtained a decree of the Circuit Court of Appeals for enforcement of an order of the Board, is not entitled as of right—in the absence of fraud or mistake chargeable to the respondent, and after expiration of the term of court at which the decree was entered—to have remedial provisions of the decree set aside and the case remanded to it for prescription of relief which it deems more appropriate to effectuate the policy of the National Labor Relations Act. P. 339.
3. *American Chain & Cable Co.* v. *Federal Trade Commission,* 142 F. 2d 909, distinguished. P. 342.

141 F. 2d 843, affirmed.

CERTIORARI, 323 U. S. 695, to review a decree dismissing a petition of the National Labor Relations Board to vacate

part of a decree of enforcement and to remand the cause to the Board.

Mr. Louis N. Wolf, with whom *Mr. Sylvan Bruner* was on the brief, for petitioners.

Mr. Alvin J. Rockwell, with whom *Solicitor General Fahy, Mr. A. Norman Somers* and *Miss Ruth Weyand* were on the brief, for the National Labor Relations Board; and *Mr. John G. Madden,* with whom *Messrs. A. C. Wallace, H. W. Blair, James E. Burke* and *Ralph M. Russell* were on the brief, for the Eagle-Picher Mining & Smelting Co. et al., respondents.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The question presented is whether the National Labor Relations Board after seeking and obtaining a court order of enforcement of its own order, in the absence of fraud or mistake induced by the respondent, and after expiration of the term, is entitled to have the provisions of the decree prescribing the nature of the remedy set aside and the case remanded to it, for the prescription of relief it deems more appropriate to enforce the policy of the National Labor Relations Act.[1]

In a proceeding instituted by the petitioner unions the Board found that the respondent companies had been guilty of unfair labor practices in violation of Sections 8 (1) and 8 (3) of the Act.[2] The hearings were protracted both as to the alleged discrimination and as to the remedy which should be adopted. With all relevant data open to it, the Board ordered the employers to cease and desist from certain practices and to reinstate 209 employees with back pay. Based on the Board's understanding as to the opportunity for reinstatement of the 209 men in question and all others eligible for reemployment, it devised a for-

[1] 49 Stat. 449; 29 U. S. C. 151 ff.

[2] 29 U. S. C. 158 (1), (3).

mula for the calculation of back pay for the members of the class to whom the award was made.[3]

The employers were dissatisfied with the order and sought a review by the Circuit Court of Appeals. Thereupon the Board filed a transcript of the record in the same court and sought enforcement of its order. The Unions, who are petitioners in this court, were permitted to intervene and were heard in support of the Board's order. The court modified the order as to matters not here relevant and decreed enforcement.[4] Two paragraphs of the decree thus obtained by the Board with the assistance of the present petitioners specified the method of computing back pay to the claimants whom the Board had found entitled. This decree was entered June 27, 1941. The companies proceeded to compute back pay due the claimants in accordance with the terms of the decree and tendered the amount they ascertained to be due thereunder. The Board, by its agents, examined the corporate records and reached the conclusion that a different method of compensation to the claimants should have been adopted in the original proceeding.

February 4, 1943, nearly two years after the final decree, and after attempted compliance by the employers, the Board petitioned the Circuit Court of Appeals to vacate that portion of its decree which dealt with the award of back pay and to remand the cause to the Board. The petitioner labor unions were permitted to intervene and to support the Board's petition.

It is somewhat difficult to characterize the allegations of the petition. It does not accuse the companies of fraud, but indicates that certain evidence produced by them created a wrong impression on the mind of the Board which could have been corrected had they gone into greater detail and disclosed certain facts within their knowledge, and it

[3] 16 N. L. R. B. 727; 18 N. L. R. B. 320.

[4] 119 F. 2d 903.

avers that the Board prescribed its remedy in reliance upon a mistaken understanding of conditions touching possible reemployment of the claimants. To this petition the employers replied challenging the jurisdiction of the court to vacate its decree, moved to dismiss the petition, and answered on the merits, categorically denying the averments of the petition. Thereupon the Board moved for judgment on its motion. The matter was heard. The court held that there had been no showing that the order and decree were obtained by misrepresentation or wrongful conduct of the employers or that any mistake of the Board had resulted in a decree which was unfair, and consequently held that there was no justification for revocation or remand of the portion of the decree involved. The petition of the Board was accordingly dismissed.[5] The Board did not apply for certiorari but the intervening unions whose petition had also been dismissed applied for the writ. The Board was made a respondent in this court but appeared in support of the petition.

The employers made a persuasive showing that, as respects material elements of the problem of back pay, the record of the Board's hearing, and the decision of the Circuit Court of Appeals enforcing the Board's order, demonstrate that all the facts now relied upon by the Board for revocation and reformation of its order sufficiently appeared prior to the entry of the order. In the view we take, it is unnecessary to consider this matter.

They also attack the standing of the petitioners to seek review by this court when the Board, the body charged with the enforcement of the National Labor Relations Act, has elected not to seek review. We think that, in the circumstances disclosed, the petitioners, though they could not have instituted enforcement proceedings,[6] had stand-

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[5] 141 F. 2d 843.

[6] *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261; *National Licorice Co.* v. *Labor Board*, 309 U. S. 350, 362–363; *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 193.

ing to seek review of the order denying the Board's petition.[7]

The important question presented is whether, despite a decree entered at the Board's behest, prescribing the method of enforcement of the relief granted by the Board, that body retains a continuing jurisdiction to be exercised whenever, in its judgment, such exercise is desirable and may, therefore, oust the jurisdiction of the court and recall the proceeding for further hearing and action.

It will be noted that this is not a bill of review based upon fraud or mistake. If it were to be treated as such obviously the relief prayed could not be granted without a trial, in view of the issues made by the employers' answer. The Board's insistence is that, upon its petition, the averments of which are denied, it is entitled to an opening of the decree and the remand of the cause upon its mere statement that it now thinks the relief orginally granted was inappropriate to the situation as the Board now conceives it.

We are not dealing here with an administrative proceeding. That proceeding has ended and has been merged in a decree of a court pursuant to the directions of the National Labor Relations Act. The statute provides that if, in the enforcement proceeding, it appears that any further facts should be developed the court may remand the cause to the Board for the taking of further evidence and for further consideration. (§ 10 (e).[8]) But it is plain that the scheme of the Act contemplates that when the record has been made and is finally submitted for action by the Board the judgment "shall be final." It is to have all the qualities of any other decree entered in a litigated cause upon full hearing, and is subject to review by this court on certiorari as in other cases. (§ 10 (e) *supra.*) The

[7] *Consolidated Edison Co.* v. *Labor Board,* 305 U. S. 197, 218; *Williams* v. *Morgan,* 111 U. S. 684.

[8] 29 U. S. C. 160 (e).

position of the petitioners is, and necessarily must be, that, while the court's decree is final as respects the matter of the alleged unfair labor practices found by the Board, it is never final as respects the relief prescribed by the Board. It must follow that at any time, however remote, and for any reason satisfactory to the Board, it may recall the proceeding from the Circuit Court of Appeals insofar as concerns the relief granted and start afresh as if an enforcement decree had never been entered.

Finality to litigation is an end to be desired as well in proceedings to which an administrative body is a party as in exclusively private litigation. The party adverse to the administrative body is entitled to rely on the conclusiveness of a decree entered by a court to the same extent that other litigants may rely on judgments for or against them. The petitioners' contention is that the nature and extent of the back pay remedy are primarily and peculiarly matters lying within the administrative discretion of the Board (see *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 194; *Labor Board* v. *Link-Belt Co.,* 311 U. S. 584, 600), and that a court's function is limited to imparting legal sanction to the back pay remedy once it has determined that the Board has acted within the confines of its authority, since a court is prohibited from exercising the discretion reposing exclusively in the Board; and it can, therefore, neither affirm nor reverse a Board order relating to back pay on the basis of its own conception of effectuating the policies of the Act.

All this is true, and we have allowed the Board great latitude in devising remedies which it deems necessary to effectuate the purposes of the Act. But it is not we who essay to interfere with the discretion of an administrative body; it is the Board which is seeking to vacate a court order. The Board had exercised its discretion and devised a remedy. It gave long consideration to the problem of adequate relief for the employees discriminated against, and now asserts that it made a mistake. That is all that

it asserts—not even the Board claims that the court below is usurping its functions. What the Board complains of is that it is not permitted to exercise its admittedly wide discretion a second time, or any number of times it may choose.

Administrative flexibility and judicial certainty are not contradictory; there must be an end to disputes which arise between administrative bodies and those over whom they have jurisdiction. This does not mean that the Board could not frame an order which by its terms required modification should conditions change. But here the order was definite and complete; it contemplated only arithmetical computation. The conditions remained the same; what had changed was the Board's awareness of them. Discussion of the Board's peculiar administrative ability serves no end where the matter is one of simple mistake. It rings hollow when it refers to what on the whole is little more than a mistake in arithmetic, and, in one instance, is just that.

Not only has this Court allowed large scope to the discretion of administrators, but the National Labor Relations Act specifically gives the Board wide powers of modification. Until the transcript of a case is filed in court, the Board may, after reasonable notice, modify any finding or order in whole or in part.[9] After the case has come under the jurisdiction of the court, either party may apply to the court for remand to the Board.[10] There is no dearth of discretion or opportunity for its exercise, but opportunities should not be unlimited. If the petitioners are right, it must follow that in any case in which the court refuses to remand, the Board need merely wait until the "final" decree is entered and then proceed to resume jurisdiction, ignore the court's decree, and come again to it, asking its imprimatur on a new order.

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[9] 29 U. S. C. 160 (d).

[10] 29 U. S. C. 160 (e).

Petitioners place great reliance on *American Chain & Cable Co.* v. *Federal Trade Commission*, 142 F. 2d 909, but far from supporting them, that case emphasizes the lack of statutory authority here for what was permitted there. There, the court ordered the Federal Trade Commission to consider a petition that the Commission ask the court to vacate its enforcing decree because of war conditions. But the statute in that case reads: "After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require." [11] This statute specifically allows the Commission to modify its order after it has become final. And the court merely held that it was reasonable to suppose that Congress intended the Commission's power to extend to cases where its order had become final by court decree as well as to cases where the order had become final by failure to appeal. The National Labor Relations Board is vested with no such power. Section 10 (d) [12] of the Act provides: "Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it."

There is no question that the Act intended to vest exclusive jurisdiction in the courts once the Board in the exercise of its discretion had reached its determination and applied for enforcement. This prevents conflict of authority. *Ford Motor Co.* v. *Labor Board*, 305 U. S. 364.

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[11] 15 U. S. C. 45 (b).

[12] 29 U. S. C. 160 (d).

In the *Ford* case, we said, "The authority conferred upon the Board by § 10 (d) of the National Labor Relations Act, to modify or set aside its findings and order, ended with the filing in court of the transcript of record." 305 U. S. 364, 368. But the petitioners and the Board contend that although the court has entered its decree, the Board may resume jurisdiction in the same case when it pleases, disregarding the court's decree. This would, indeed, be a peculiar scheme of jurisdiction, devised to prevent interference with the court while it is deliberating to determine what its decree shall be, but allowing the decree to be ignored after it is entered.

The circumstances of the case show how unfair it would be to hold with the petitioners. The employers challenged the Board's order in the original enforcement proceeding, not only as it affected the charged unfair labor practices, but as touching the appropriate relief. When the Circuit Court of Appeals modified and affirmed the order, the companies had an opportunity to apply to this court for review, or to comply with the decree as modified by the court. They elected to follow the latter course only to be confronted, years later, with an attempt to rewrite a portion of that decree at a time when their right of review of other portions of it had expired.

We are dealing here with a decree of a court entered in a judicial proceeding. The term at which the decree was entered has long since expired. The only recourse open to the Board is the same that would be open to any other litigant, namely, a bill of review. If the petition disclosed any basis for such a review the answer of the employers sharply raised issues of fact which required resolution before any relief in the nature of a review could be granted. Unless the National Labor Relations Act so requires, the Board was not entitled, as of right, to have the decree it had procured set aside in part and the cause remanded for trial *de novo* in part. There is nothing in the Act to indi-

cate that such a decree is dual in character; part of it final and part of it subject to vacation and reexamination by the Board regardless of the showing made to the court and regardless of the view the court holds as to the propriety of such vacation.

The judgment is

Affirmed.

MR. JUSTICE MURPHY, dissenting.

This case raises important questions concerning the relationship of courts and administrative agencies subsequent to the entry of a judicial decree enforcing an administrative order. Because the particular facts of this case are so essential to a proper determination of these questions and because the Court has not seen fit to refer to the factual situation in other than general terms, it is necessary to review the facts at some length before discussing my reasons for disagreement with the Court's conclusion.

The National Labor Relations Board, after conducting proceedings instituted upon charges filed by the petitioner unions, found that the respondent companies had committed unfair labor practices in violation of Sections 8 (1) and 8 (3) of the National Labor Relations Act, 49 Stat. 449, 452. On October 27, 1939, the Board entered an order requiring the companies to cease and desist from their unfair labor practices and to take certain affirmative action, including the reinstatement of 209 employees with back pay. Inasmuch as the record at that time convinced the Board that employment opportunities with the companies had been permanently and substantially curtailed subsequent to the critical date of July 5, 1935, the Board felt the normal remedy of full back pay would be inappropriate. Under the assumed circumstances, the normal remedy would require the companies to pay in back wages an amount greater than that which they would have paid to the victims of discrimination had

there been no unfair labor practices. And it would also give the group of 209 employees more than it presumably would have received under curtailed employment opportunities. The Board therefore devised and set forth in its opinion a special formula giving each claimant only a portion of the full back pay to which he otherwise would have been entitled.[1] 16 N. L. R. B. 727; amended in 18 N. L. R. B. 320.

The companies then filed a petition for review in the court below on November 6, 1939, and the Board countered with a cross-petition for enforcement of its order. On February 10, 1940, the petitioner unions sought and obtained permission from the court to intervene in the proceedings on the claim that since certain of their members had been allowed affirmative relief by the Board they were "vitally concerned with the enforcement of said order of the Board." Leave was also given them to file briefs and participate in the oral argument. Subsequently, on May 21, 1941, the court below rendered an opinion affirming the Board's order with certain modifications not here material and a decree enforcing the order was entered accordingly. 119 F. 2d 903.

On August 23, 1941, the companies offered reinstatement to the 209 employees, thereby fixing that day as the terminal date of the period commencing July 5, 1935, for which back pay was due under the terms of the court's decree enforcing the Board's order. The companies submitted their back pay computations to the Board in May, 1942, and tendered the sum of $8,409.39 in purported full payment of all back pay, although they later averred that no more than $5,400 was due under the formula specified by the Board. In accordance with its usual procedure the Board thereupon examined the pertinent pay rolls and records of the companies to verify their computations

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[1] This special formula was noted by this Court in *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 198–199, note 7.

and to determine whether there had been compliance with the decree. This investigation was completed in October, 1942, at which time the Board became convinced that the provisions of its order as enforced by the court contained certain errors and mistakes relating to back pay and that in framing the special formula it had misconceived the facts as to the availability of employment with the companies for the 209 employees. It appeared to the Board that the companies during the period from July 5, 1935, to August 23, 1941, had been in a position to accord full employment to these 209 claimants as well as to all other former employees reapplying for work and that the normal back-wage computations should have been used.

The Board on February 1, 1943, filed a petition with the court below setting forth the situation. It requested that the pertinent paragraphs of the court's decree enforcing the Board's order be vacated and that so much of the cause as was thereby affected be remanded to the Board for further consideration. The companies filed an answer. The unions also filed a brief and participated in the oral argument on this matter. The court, treating the Board's petition as one "in the nature of a bill of review to set aside, for fraud, mistake and newly discovered evidence, paragraphs 2 (d) and 3 (b) of the final decree of this Court," dismissed the petition on its merits. 141 F. 2d 843. The court later denied without opinion the Board's petition for rehearing and the union's separate motion to modify the decree or to vacate the paragraphs in question and remand to the Board.

I

Turning to the facts relative to the alleged error, we find that the Board in framing its back pay formula for the 209 employees expressly desired to make them whole and "to restore the situation, as nearly as possible, to that which would have obtained but for the illegal dis-

crimination." 16 N. L. R. B. at 834. Normally the Board would have directed payment of full back pay to each claimant from the date of discrimination to the date of offer of reinstatement or placement on a preferential rehiring list, allowing due credit for net interim earnings received from other employment. But the Board felt that "the peculiar factual situation here presents unusual difficulties in fashioning our remedy so as to restore the status quo," 16 N. L. R. B. at 834, and that a special remedy should be devised.

It appears that a strike, beginning on May 8, 1935, caused the companies to close down for several weeks. On that day approximately 1,100 men were employed by the companies. Operations were resumed on June 12 and the Board found that thereafter the companies discriminatorily refused to rehire the 209 employees in question, referred to as the claimants. Evidence was introduced by the companies, however, to show that after July 5, 1935, the effective date of the Act, certain of their mines were sold, many operations suspended, production methods reorganized and specific jobs abolished—resulting in a drastic curtailment of the number of available jobs. According to the Board, only about 600 men were employed by July 5. Some 350 of the 500 employees not then working were claimants in the case, although discrimination was found only as to 209 of them. After July 5 a substantial number of additional men were put to work, but the total number of employees was still considerably short of the pre-strike level of 1,100. The Board apparently assumed that all 1,100 men would reapply for work after the settlement of the strike, thus making the number of available jobs insufficient. As it later became evident, however, not all of the 1,100 reapplied and there were, according to the Board, sufficient opportunities at substantially all times for all who actually reapplied, including the 209 victims of discrimination.

On the assumption that "there were presumably at all times less jobs open than old employees available," 16 N. L. R. B. at 834, and that there was no way of knowing which men would have been reinstated had the companies acted legally, the Board devised a special formula for computing back pay. It directed that there be computed as a lump sum the total amount of wages actually paid to all persons hired or reinstated from and after July 5, 1935, up to the date of compliance with the Board order reinstating or placing the 209 employees on a preferential list. The Board indicated that "we shall not credit the entire lump sum to the claimants discriminated against, since we cannot assume that they and only they would have been given these jobs had the respondents acted lawfully. But we can and do assume for this purpose that a proportionate amount of such claimants would have been given the jobs." 16 N. L. R. B. at 835, 836. Accordingly, the Board directed that a proportion of the lump sum should be distributed to the 209 claimants. This proportion was to be determined by a governing fraction having as its numerator the number of claimants and as its denominator the total number of claimants and all other pre-strike employees who reapplied for work, whether successfully or not, after July 5, 1935. Thus, by way of illustration, if the lump sum amounted to $360,000 and there were 200 claimants and 100 other reapplicants, the governing fraction would be two-thirds and the basic sum of $240,000 would be divided among the 200 claimants, with adjustments being made for net earnings elsewhere. Neither the Board's order nor the court's enforcing decree fixed the amount of back pay due under this formula. The determination of that sum was left to be made after the period of discrimination ended.

Following the close of the period of discrimination, the Board examined the payrolls and other records of the companies to determine the exact amount of back wages

due the 209 claimants. According to the Board, this investigation revealed that, despite any curtailment of employment, the companies at virtually all times after July 5, 1935, had jobs opening up in numbers equal to and at times in excess of the total number of claimants and reapplicants and that such positions were available at virtually all times to all the claimants and reapplicants. This information was submitted by the Board in support of its petition to vacate and remand the portions of the court's decree relating to back pay. It claimed that it had been led into error in framing its original formula by the evidence and contention of the companies relative to curtailed employment and that such a formula, under the facts as they now appeared to the Board, would be grossly inequitable to those who had suffered deprivation of earnings as a consequence of the companies' unfair labor practices.

The parties differ as to whether the Board at the time it framed the special formula was aware of or had access to the facts which it now relies upon. The Board alleges that it was ignorant of these facts and thus misconceived the remedy. The companies state, however, that the Board actually knew of these facts and that, in the exercise of its discretion, it decreed that partial rather than full back wages should be paid. We need not pause to determine this controversy for it appears obvious that, assuming the figures submitted by the Board are true, the special formula specified by the Board is grossly inadequate and falls far short of achieving the expressed desire of the Board in this case "to restore the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination."

If it were true that there were insufficient jobs for the 209 claimants as well as for the other reapplicants the special formula would be appropriate. Then it could be said that it was impossible to tell whether the 209 claimants would all have been employed by the companies sub-

sequent to July 5, 1935, and that it was therefore necessary to apportion the available jobs among claimants and other reapplicants for purposes of determining how much back pay was due the claimants. But if it is a fact that there were sufficient employment opportunities for all the 209 claimants and the reapplicants at virtually all times, the back pay formula framed by the Board becomes inadequate. Since all of the claimants would then presumably have been employed by the companies at all times but for the discrimination, all of them suffered the loss of the full wages which they would have received and any formula which gives them less than that amount fails to make them whole. And the companies escape paying the full amount of wages they would have paid had they acted legally.

We cannot ascribe to the Board a deliberate intention to prescribe something less than a full make whole remedy. Nothing appears in the Board's opinion or order to that effect. Indeed, the Board's statements of its objectives in this case expressly negative such an intention. And the reason given for fashioning the special formula—the fact that there were presumably at all times less jobs open than old employees available—is consistent only with a desire to compensate the claimants as fully and as equitably as possible under the facts as then contemplated.

In addition to the alleged inappropriateness of the formula as a whole, the Board claims that there are numerous other errors in the back pay provisions that warrant remand for purposes of correction. Thus footnote 185 of the Board's opinion inadvertently contains a serious omission which, contrary to the Board's intention, limits the lump sum used in the formula to the earnings of only 209 employees rather than to the earnings of 209 employees plus the number of old employees reapplying.[2]

[2] This footnote appears at 16 N. L. R. B. at 835. With the words in brackets originally being omitted by the Board and being added here

The governing fraction includes the latter employees and the lump sum should in turn reflect their earnings. Otherwise the claimants are limited to a small part of their proportionate loss in wages. Moreover, the formula illogically requires that there be deducted from each claimant's share the full amount rather than a pro rata share of his interim earnings. These errors and certain ambiguities [3] serve to make the partial back pay formula an ineffective means for making the employees as whole as possible even on the assumption that employment opportunities had been curtailed. The remedy which the Board originally found to be essential to carry out the purposes of the Act is thereby rendered inadequate.

The practical impact of this situation on the employees involved is serious and substantial. Under the Board's partial and mathematically inaccurate back pay formula, which this Court now insists must be followed, the companies claim that the 209 employees are entitled to only $5,400. But if the true facts are as represented by the Board and if it should be determined that the full back pay formula should be utilized under such circumstances, approximately $800,000 would be due these 209 employees

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to indicate the Board's intended modification, this footnote reads as follows:

"If at any given time during this period the number of such new or reinstated employees then working exceeds the number of claimants discriminated against [plus the number of old employees reapplying], only the earnings of a number of such employees equal to the number of claimants discriminated against [plus the number of old employees reapplying] shall be counted in computing the lump sum. . . ."

[3] The Board claims that since the number of claimants and reapplicants varies from week to week, the formula is ambiguous as to whether a single governing fraction, based on the average or on the maximum numbers of claimants and reapplicants, or successive governing fractions, based on the actual numbers, are to be constructed for the period of discrimination. It is also said that the formula fails to define the "average earnings" referred to in the last sentence of footnote 185 of the Board's opinion.

after allowance for interim earnings elsewhere. Thus these employees must bear the loss of nearly $795,000 in unpaid back wages resulting from the unfair labor practices of the companies. On them rests the penalty for what this Court euphemistically calls "little more than a mistake in arithmetic."

It is thus clear that unless the Board is given some opportunity to reexamine its back pay remedy much of the loss resulting from the companies' unfair labor practices may be shifted from the companies to the employees and the public policy of the Act may be largely circumvented. Our concern here is not with the truth of the facts alleged by the Board or with the appropriateness of any other remedy the Board might devise. It is enough that the Board has cast sufficient doubt on the appropriateness and correctness of its original remedy to warrant resubmission of the matter to the Board for further consideration. The Court today does not attempt to deny that the situation is an intolerable one in light of the alleged facts or that modification or remand of the back pay provisions of the decree is a reasonable request under such circumstances. Hence, unless some principle of law or statute compels the opposite conclusion, such a remand should have been made.

II

The pertinent legal and statutory rules, in my opinion, do not preclude remand of the back pay provisions of the court's decree to the Board under these circumstances.

The companies argue that the exercise of the Board's discretion in devising a back pay formula became a finality by virtue of the enforcing decree of the court below and that this formula cannot be modified or reconsidered at this late date. It is claimed that all rights and liabilities under the decree were fixed and fully accrued on August 23, 1941, the terminal date of the period of discrimination,

and that the court below had no jurisdiction to vacate or remand any portion of that decree subsequent to the end of the term in which it was entered.

But it is plain that the back pay formula, as enforced by the court's decree, was at most provisional and tentative in character. Cf. *United States* v. *Swift & Co.*, 286 U. S. 106, 114. It did not pretend to be based upon detailed and comprehensive findings as to actual employment opportunities and actual losses suffered during the entire period of discrimination, facts which were impossible to determine until after the close of that period. Even though the hearing closed on April 29, 1938, that part of the order relating to back pay spoke as of July 5, 1935. The Board merely assumed from certain evidence and allegations that there would be decreased employment opportunities at all times after July 5, 1935, and left to the future the problem of uncovering the complete facts. The formula was drawn in light of that assumption, an assumption that necessarily contemplated that undisclosed or new facts or a removal of a misconception of the true facts might call for an adjustment in the remedy to be applied. And the enforcing decree of the court in no way affected the tentative and unexecuted nature of this formula.

The rights and liabilities under such a back pay formula could not become final until the Board or the courts were satisfied with the application of the formula to the actual facts or until the formula ripened into an executed decree. The sole purpose of the remedy was to vindicate the public policy by compensating the employees for the losses they had suffered due to the unfair labor practices of the companies rather than to punish the companies. Until it was authoritatively determined that the remedy did accomplish this purpose as applied to the actual facts, or until the decree was fully executed, no rights and liabilities can be said finally to have accrued.

Thus the companies had no vested right on the day they ceased their discriminatory policy relative to the 209 employees to compensate those employees according to a formula which woefully failed to make the employees whole. The relevant portions of the decree could still be modified or remanded.

As the court below recognized, it retained "jurisdiction over the enforcement of all of the provisions of its decree which remain unexecuted." 141 F. 2d at 845. A court has the unquestioned and continuing power to make corrections and changes in its unexecuted decrees even after the term of court in which they were originally entered has expired. See *Root* v. *Woolworth,* 150 U. S. 401; *Shields* v. *Thomas,* 18 How. 253; 8 Cyclopedia of Federal Procedure (2d ed.) § 3598 and cases there cited. This includes the power to modify or grant additional relief in the interest of enforcing or effectuating decrees. Thus the doctrine of finality of judgment has no relevance as applied to unexecuted decrees and cannot be utilized to deny power in the court below to modify or remand the back pay provisions of the decree to the Board. No specific provision in the National Labor Relations Act, moreover, is necessary in order to appreciate that any decree requiring future action is upon entry partly final and partly unexecuted. "A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need." *United States* v. *Swift & Co.,* 286 U. S. 106, 114. As to the unexecuted portion of the decree below, finality obviously has not accrued.

On the facts alleged in the Board's petition and in the unions' motion, the court below plainly erred in refusing to allow the Board to reconsider the back pay remedy. Under § 10 (c) of the Act, the Board is authorized to require such affirmative remedial action, "including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." As the Court

recognizes, the nature and extent of the back pay remedy are thus primarily and peculiarly matters lying within the administrative discretion of the Board, and a court's function is limited to imparting legal sanction to the back pay remedy once it has determined that the Board has acted within the confines of its authority. A court cannot exercise the discretion that Congress has given only to the Board. But if, as conceded, a court can neither affirm nor reverse a Board order relating to back pay on the basis of its own conception of effectuating the policies of the Act, no less should it refuse to allow the Board to reconsider an unexecuted remedy once proposed if the Board reasonably feels that the public policy which it guards demands such action. The special competence of the Board to require affirmative remedial action necessarily includes a special competence to modify, amend or repeal such a requirement prior to its consummation.

It does not follow, as the Court assumes, that the Board at any time and for any reason satisfactory to it may recall that part of the enforcing decree relating to affirmative relief and start afresh. The requirement of reasonableness applies here as elsewhere. If the Board's request is so baseless and unnecessary as to exceed the bounds of reasonableness, refusal to remand lies within the sound discretion of the court. But here it is undeniable that if the facts stated by the Board are true the unexecuted remedy is entirely inadequate to achieve the purposes for which it was designed. Employees suffer for the sins of their employers and the public policy underlying the requirement of back pay is largely frustrated. To deny a remand under such circumstances is to abuse a court's discretion and to transform the judicial system into a weapon against the innocent victims of an administrative error.

The responsibility of the Board for proposing remedies to effectuate the policies of the Act is a continuing one. Cf. *Franks Bros. Co.* v. *Labor Board,* 321 U. S. 702, 705–

706. It is not necessarily lifted by reason of the entry of a judicial decree of enforcement, although it may be suspended temporarily during the pendency of review proceedings in the appellate court. *Ford Motor Co.* v. *Labor Board,* 305 U. S. 364. If at any time before the decree is executed the Board becomes convinced that the remedy as tentatively approved by the court will no longer serve the statutory purposes, reason and justice dictate that the Board should have the opportunity to reconsider the matter. Whether the inadequacy of the remedy be due to inadvertence, negligence, fraud or other reasons, there is no recognizable public or private interest in executing such a remedy. To hold that a particular back pay remedy must be imposed when the Board reasonably suspects that it is incorrect or inadequate is to project legalism to an absurd and dangerous length.

We are not dealing here with an ordinary common law money judgment which one party seeks to set aside for fraud, mistake, or newly discovered evidence. Nor are we met with an ordinary litigant seeking relief for itself from a judicial decree. We are concerned, rather, with the attempt of an administrative agency to effectuate the policies set forth in a Congressional mandate. Until those policies are effectuated through the enforcement and execution of statutory remedies, the agency and the courts should coordinate their efforts to realize the plain will of the people. *United States* v. *Morgan,* 307 U. S. 183, 191.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE RUTLEDGE join in this dissent.

UNITED STATES ET AL. v. CAPITAL TRANSIT CO. ET AL.

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

No. 663. Argued April 30, 1945.—Decided May 28, 1945.

1. The Interstate Commerce Commission's finding, supported by evidence, that application of the Motor Carrier Act to the transportation of passengers between the District of Columbia and Government installations in nearby Virginia was necessary to carry out the national transportation policy, wherefore the transportation was within an exception to the commercial-zone exemption prescribed by § 203 (b) (8), justified the exercise of jurisdiction over such transportation, including the rates thereof, by the Commission. P. 360.
2. The Interstate Commerce Commission's findings, supported by evidence, justify its order, under the Motor Carrier Act, prescribing fares for interstate transportation by a company which operates streetcars and buses as an integrated unit in such interstate service, and prescribing joint fares for interstate transportation furnished by such company and participating bus lines. P. 362.
3. Though some passengers paid a combination of two rates, one for travel wholly within the District, the other for travel between the District and Virginia, and the journey from their residences to Virginia and return was made in two segments, the total interstate trip was nevertheless on a "through route." P. 363.

56 F. Supp. 670, reversed.

APPEAL from a decree of a district court of three judges which set aside an order of the Interstate Commerce Commission.

Mr. Paul A. Freund, with whom *Solicitor General Fahy* was on the brief, for the United States, and *Mr. Daniel W. Knowlton* for the Interstate Commerce Commission, appellants.

Mr. Robert E. Quirk, with whom *Messrs. G. Thomas Dunlop, E. Barrett Prettyman, F. G. Awalt, Raymond*

Sparks, J. Ninian Beall, Hugh H. Obear, Franklin K. Lane and *Wilmer A. Hill* were on the brief, for the Capital Transit Co. et al.; and *Mr. Henry E. Ketner* for the State Corporation Commission of Virginia, appellees.

Messrs. Richmond B. Keech and *Lloyd B. Harrison* filed a brief on behalf of the Public Utilities Commission of the District of Columbia, and *Mr. Frederick G. Hamley* on behalf of the National Association of Railroad and Utilities Commissioners, as *amici curiae*, urging affirmance.

MR. JUSTICE BLACK delivered the opinion of the Court.

A federal district court of three judges, one judge dissenting, set aside and permanently enjoined enforcement of an order of the Interstate Commerce Commission, 258 I. C. C. 559, on the ground that the findings were inadequate and that the Commission acted beyond its jurisdiction. 56 F. Supp. 670.[1] The case is here on direct appeal. 28 U. S. C. § 345.

At the request of the Secretaries of War and the Navy, the Interstate Commerce Commission instituted an investigation into the reasonableness of the fares of four carriers, transporting passengers by bus between points in the District of Columbia and nearby points in the State of Virginia, where are located certain military and naval offices and installments employing more than 40,000 government workers. More than half these workers live in the District so that the number of individual passenger trips to and from government work on the four motor lines is in excess of 31,000 per day. The fares of the different lines were not identical for performance of substantially the same interstate transportation, and dissatisfaction of

[1] The district court had previously set aside a Commission order in the same case because of inadequate findings. 55 F. Supp. 51, 256 I. C. C. 769. Thereafter the Commission heard additional evidence, made additional findings and entered the order here under review.

Army and Navy employees and officials had arisen on the ground that the charges of all the companies were excessive. The Commission, after a hearing, found some existing fares to be reasonable and others unreasonable. Its order required some of the rates to be reduced but permitted others to be increased.

A complicating factor arose from the distinctive type of business carried on by Capital Transit, one of the four companies transporting passengers to and from the Virginia government agencies. In addition to its District-Virginia bus service, it operated an urban and suburban transportation system, carrying passengers both by bus and streetcar. Since District terminals of all the bus companies were located in or adjacent to the central business sections, most government employees, in going to and returning from their work, were compelled to begin or complete their trips by utilizing buses or streetcars of Capital Transit. It accorded to its own bus and streetcar passengers, but denied to passengers on other Virginia buses, a privilege of transfers to and from some of its Virginia buses which lowered the total fares between District residences and their Virginia places of work. The Commission treated Transit Company's local bus and streetcar business as an integrated unit, and its findings, supported by evidence, show that its intra-company transfer practices were the equivalent of establishment by Transit of through interstate routes with joint rates to and from District residences to the Virginia points. Accordingly it ordered that analogous joint arrangements as to fares, including transfer privileges, be established between Transit and the other bus lines carrying passengers to and from Virginia government agencies. This, and other elements of the Commission order not passed on by the district court, were separately attacked here. In order that final disposition of the case may not be further delayed, we shall consider all questions argued before us.

First. It is argued that the Commission is without jurisdiction to regulate any of the District-Virginia transportation here involved. The argument emphasizes that the movement begins and ends in a single "community," all within an area which the Commission has previously recognized as the "commercial zone" of Washington. 3 M. C. C. 243. We are referred here to the holding of this Court in 1912 that a street-railway, carrying passengers between Omaha, Nebraska and Council Bluffs, Iowa, was "local," serving the use of a "single community," and was not the kind of "railroad" which the Interstate Commerce Act empowered the Commission to regulate. *Omaha Street R. Co.* v. *Interstate Commerce Comm'n,* 230 U. S. 324. Cf. *United States* v. *Village of Hubbard,* 266 U. S. 474, 479–480. The same principle, we are told, should exclude similar local bus operations. But this Court's decision in the *Omaha* case did not hold that Congress could not authorize the Commission to regulate movements that took place across state lines in a single local community. The power of Congress over such movements cannot be doubted. The *Omaha* case only decided that Congress had not granted such power to the Commission under the law as it then existed.

We must now test the Commission's power in this case by the provisions of a statute enacted subsequent to the *Omaha* case, *supra,* the Motor Carrier Act, 49 Stat. 543, under which the order here was entered. Section 203 (b) of that Act provides the controlling rule. It specifically defines the circumstances under which the Commission can regulate interstate activities which happen to take place in a single "commercial zone."

That Section, to a limited extent, excludes from the Commission's jurisdiction "The transportation of passengers or property in interstate or foreign commerce wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of

any such municipality or municipalities . . ." Other parts of the same Section authorize the Commission to apply the Act to these zone activities, however, if it finds that (1) "such application is necessary" to carry out the national transportation policy declared in the Act, or (2) if the carrier is not "engaged in . . . intrastate transportation of passengers over the entire length of such interstate route." The Commission held that the four bus companies came within both these exceptions and therefore were not excluded from its jurisdiction. We need not consider whether they came within the second exception, because of our conclusion that the Commission's findings justified its order under the first exception. Those findings were that it was necessary for the Commission to exercise its jurisdiction in order to carry out the Act's declared policy, "to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, . . . to the end of developing, coordinating, and preserving a national transportation system . . . adequate to meet the needs of the commerce of the United States, of the postal service, and of the national defense." 54 Stat. 899.

On its second hearing the Commission heard evidence from employees of the Army and Navy as to dissatisfaction with the fares. The Secretaries of both War and Navy made complaints concerning the situation produced by the rate structure. A number of witnesses testified as to the dissatisfaction of employees with the prevailing rates. If evidence was necessary to prove that unreasonably high rates were calculated to disturb the morale of workers forced to pay them, and thus to impair the national defense program, there can be no doubt but that the findings of the Commission were well supported. It is to be remembered that these were interstate rates for interstate travel which applied almost exclusively to workers engaged in national defense. Neither the District

nor Virginia had power adequately to regulate the rates; nor had they attempted to do so. Their regulation was rightfully a matter of concern to Army and Navy Departments charged with the serious responsibility of conducting a war. The employees worked in the very center of activities essential in that cause. Congress unequivocally reserved to the Commission power to regulate reasonableness of interstate rates in the light of the needs of national defense. The findings of the Commission on this issue were clear and complete, cf. *Yonkers* v. *United States,* 320 U. S. 685, and justified the Commission in exercising its jurisdiction.

Second. It is argued that the Commission exceeded its authority in prescribing joint fares between the Capital Transit Company and the other bus companies. This contention rests on two assumptions grounded upon the difference in the way the parties view the facts and the law governing them. The first argument of the companies is substantially the same as the one just rejected—that all of the Transit Company's operations, by both bus and streetcar, are purely local and therefore not subject to the Commission's jurisdiction. The second contention is this: Sections 216 (c) and (e) permit but do not require motor carriers to establish through routes and joint rates with other types of carriers; since the companies view the facts as failing to show that through routes or joint rates have voluntarily been established as to Transit's streetcars and the Virginia buses, they argue that the Commission cannot require their establishment. The Commission found, however, that Transit had voluntarily established through routes, and contends its finding has support in the evidence and consequently sustains its order. It also relies on its power under § 216 (e) to prescribe through rates for all segments of an interstate transportation carried on between motor carriers. This power it argues is broad enough to authorize an order for

joint rates for interstate carriage conducted by a company which, as it found this one did, uses streetcars and buses as an integrated unit in carrying out interstate transportation. We think that, under the facts and circumstances shown, the Commission's findings are not subject to attack and that it acted within its statutory authority in prescribing the through rates.

As previously pointed out, twice a day more than 15,000 government employees traveled between the Virginia agencies and their homes via one of the four bus systems. Most of them either went to or from these bus terminals from or to their homes over any of Transit's then available buses or streetcars. Their travel was at certain hours each day, at which special rush hour buses and cars were made available for their carriage. Their interstate journey to work actually began at the time they boarded a Transit bus or streetcar near their home, and actually ended when they alighted from the Virginia-going bus at their place of work. On returning from work their interstate journey actually began when they boarded a bus near their work and actually ended when they alighted from a Transit streetcar or bus near their home. True, their interstate trip was broken at the District termini of the Virginia buses, when they stepped from one vehicle to another. But in the commonly accepted sense of the transportation concept, their entire trip was interstate. *Baltimore & Ohio S. W. R. Co.* v. *Settle,* 260 U. S. 166. And the fact that, except as to Transit, they paid a combination of two rates, one for travel wholly within the District, and the other for travel between the District and Virginia, and the journey from their residences to Virginia and back again was taken in two segments, does not mean that the total interstate trip was not on a "through route." *Virginian R. Co.* v. *United States,* 272 U. S. 658, 666–667; *St. Louis S. W. R. Co.* v. *United States,* 245 U. S. 136, 139–140.

Moreover, Transit Company itself conducted its own traffic to and from Virginia and District residential points as one continuous journey. As previously noted, a Virginia worker could board its local bus or streetcar, ride to a District terminal of Transit's Virginia-bound bus, board it, and obtain the benefit of a transfer supplied by Transit. So also could Transit's passenger get the benefit of a transfer on the return journey home from work. Had Transit not owned the separate vehicles used in the transportation, these arrangements would have constituted "joint rates" for a "through route" within the statutory meaning of the term. As carried out by Transit the arrangements were the exact equivalent of transportation on a "through route" for a joint fare. Had Transit not owned the vehicles transporting the passengers on each leg of this interstate journey, it could not have established, consistently within the Interstate Commerce Act, joint rates with a particular Virginia bus line to the exclusion of its competitors, for the reason that one given a monopoly of through traffic could "soon be able to drive its competitors out of business." *United States* v. *Pennsylvania R. Co.,* 323 U. S. 612, 617. The Motor Carrier Act, which is part of the Interstate Commerce Act, need not be interpreted so as to permit the accomplishment of such a result.

Section 216 (e) expressly authorizes the Commission to declare unlawful any unreasonable, preferential, or prejudicial rule, classification, regulation or practice arising from any "individual or joint rate, fare, or charge, demanded, charged, or collected by any common carrier or carriers by motor vehicle or by any common carrier or carriers by motor vehicle in conjunction with any common carrier or carriers by railroad . . ." and to "prescribe the lawful rate, fare, or charge . . . thereafter to be observed . . ." We think that under the Commission's findings, supported by evidence, it did have power to declare these

rates unreasonable and unlawful as it did, and thereafter to prescribe the lawful rate to be charged for the interstate trip. This did not, as argued, constitute a regulation of intrastate commerce.

Other contentions urged by the carriers have been considered, but need not be discussed, since we are satisfied with the disposition made of them by the Interstate Commerce Commission. Finding no error in the order of the Commission, the judgment of the district court declining to enforce it is

Reversed.

MR. JUSTICE ROBERTS is of the opinion that the Commission had no jurisdiction of the fares in question, for the reasons set forth in the opinions below, 55 F. Supp. 51, and 56 F. Supp. 670. MR. JUSTICE REED and MR. JUSTICE DOUGLAS dissent from part Second of the opinion.

TRUST UNDER THE WILL OF BINGHAM ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 932. Argued April 27, 1945.—Decided June 4, 1945.

1. The questions whether, on the facts found by the Tax Court, expenses incurred by trustees in contesting an income tax deficiency assessment and in winding up the trust after its expiration are deductible under § 23 (a) (2) of the Internal Revenue Code as expenses for the "management . . . of property held for the production of income," are clear-cut questions of law, the decision of which by the Tax Court does not foreclose their decision by the Circuit Court of Appeals or this Court, although their decision by the Tax Court is entitled to great weight. P. 371.
2. There was no error of law in the Tax Court's determination, upon the facts found, that expenses incurred by trustees in contesting an income tax deficiency assessment and in winding up the trust after its expiration were deductible under § 23 (a) (2) of the Internal

Revenue Code as expenses for the "management . . . of property held for the production of income"; and reversal by the Circuit Court of Appeals on the ground that such expenses were not "for the production of income" and not for the management of "property held for the production of income" within the meaning of that section was unwarranted. Pp. 373, 376.

3. The trust properties did not cease to be "held for the production of income" even though, as the trust term reached its expiry date, the trustees were under a duty to distribute the property among the remaindermen. P. 373.

4. Section 23 (a) (2) is comparable and *in pari materia* with § 23 (a) (1), authorizing the deduction of business or trade expenses. P. 373.

5. The costs of distribution of the corpus of the trust were expenses of a function of "management" of the trust property quite as much as were expenses incurred in producing the trust income. P. 375.

6. References in the House Committee Report accompanying the bill which became the Revenue Act of 1942, and in Treasury Regulations 103, § 19.23 (a)-15, to the non-deductibility of administrators' and executors' expenses, incurred in the administration of the estate of the decedent, including those of distributing assets to the beneficiaries, do not require by analogy that the trustees' distribution expenses here in question be deemed non-deductible. P. 375.

7. Section 23 (a) (2) does not restrict deductions to those litigation expenses which alone produce income; on the contrary, by its terms and in analogy with the rule under § 23 (a) (1), the trust may deduct litigation expenses when they are directly connected with or proximately result from the enterprise—the management of property held for production of income. *Kornhauser* v. *United States*, 276 U. S. 145. P. 376.

8. To the extent that Treasury Regulations 103, § 19.23 (a)-15 purports to deny deduction of litigation expense unless it is to produce income, and to the extent that it departs from the rule of *Kornhauser* v. *United States,* it conflicts with the meaning and purpose of § 23 (a) (2) and is unauthorized. P. 377.

145 F. 2d 568, reversed.

CERTIORARI, 324 U. S. 835, to review the reversal of a decision of the Tax Court, 2 T. C. 853, which set aside the Commissioner's determination of a deficiency in income tax.

Mr. Arthur A. Ballantine, with whom *Mr. George E. Cleary* was on the brief, for petitioners.

Mr. Ralph F. Fuchs, with whom *Assistant Solicitor General Cox, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key, J. Louis Monarch* and *L. W. Post* were on the brief, for respondent.

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

Petitioners are the trustees of a testamentary trust created for a term of twenty-one years under the will of Mary Lily (Flagler) Bingham. The testatrix bequeathed to the trustees the residue of her estate, including a large number of securities. The trustees were empowered in their discretion to sell any of the property held in trust (except certain securities of two companies designated as the "principal properties"), to invest and reinvest the proceeds and the income from the trust fund, and to use the proceeds and the income for the benefit of the principal properties and for the "maintenance, administration or development of the said principal or subsidiary properties." The trustees were to pay specified amounts annually to certain legatees. When the niece of the testatrix reached a certain age, she was to receive from the trust a specified amount in cash or securities. At the end of twenty-one years, the trustees were directed to pay other legacies, and to distribute the remainder of the fund in equal parts to a brother and two sisters of the testatrix.

In 1935 petitioners paid the bequest to the niece partly in securities. The Commissioner assessed a deficiency of over $365,000 for income tax upon the appreciation in value of the securities while they were in petitioners' hands. In contesting unsuccessfully this deficiency, petitioners paid out in the year 1940 approximately $16,000 in counsel fees and expenses. In that year, also, petitioners paid out about $9,000 for legal advice in connec-

tion with the payment of one of the cash legacies, and in connection with tax and other problems arising upon the expiration of the trust and relating to the final distribution of the trust fund among the three residuary legatees.

The question is whether these legal expenses, paid in 1940, are deductible from gross income in the computation of the trust's income tax, as "non-trade" or "non-business" expenses within the meaning of § 23 (a) (2) of the Internal Revenue Code. That section, added by § 121 of the Revenue Act of 1942, and made applicable to tax years "beginning after December 31, 1938," authorizes the deduction of "all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income." Section 162 of the Code, so far as now relevant, makes § 23 (a) (2) applicable to the income taxation of trusts.

Petitioners, in their income tax return for 1940, took deductions for the legal expenses. The Commissioner disallowed the deductions and assessed a tax deficiency, and petitioners filed the present suit in the Tax Court to set aside the assessment. That Court, after finding the facts as we have stated them, found that the trust property was held for the production of income; that all the items in question were ordinary and necessary expenses of the management of the trust property; and that the fees and expenses for contesting the income tax deficiency assessment were also for the conservation of the trust property. It therefore concluded that all were rightly deducted in calculating the taxable net income of the trust. 2 T. C. 853.

On the Government's petition for review, the Court of Appeals for the Second Circuit reversed. 145 F. 2d 568. We granted certiorari, 324 U. S. 835, on a petition which asserted as grounds for the writ that the decision of the

Court of Appeals departed from the principles laid down in *Dobson* v. *Commissioner,* 320 U. S. 489, governing review of decisions of the Tax Court, and that the decision conflicted in principle with *Commissioner* v. *Heininger,* 320 U. S. 467, and *Kornhauser* v. *United States,* 276 U. S. 145.

The Court of Appeals left undisturbed the Tax Court's findings that the questioned items were ordinary and necessary expenses for the management or conservation of the trust property, but it held that the fees for contesting the tax deficiency were nevertheless not deductible under § 23 (a) (2). It thought that the expenses of contesting the income tax had nothing to do with the production of income and hence were not deductible as expenses "for the production of income" within the meaning of the statute. The court also thought that these expenses were not deductible, because they were paid in connection with property held by the trustees "ready for distribution," and hence not "for the production of income." Similarly it held that the fees for professional services rendered in connection with the payment of legacies and the distribution of the trust fund, were not expenses relating to the management of property held for the production of income, since they were rendered after the trust term had expired and when the property was ready for distribution.

The Government makes like arguments here. In addition it urges that the expenses in connection with the distribution of the trust fund were not expenses of management of the trust property held for the production of income but only expenses relating to its devolution; and that the expenses are not deductible under § 23 (a) (2) because there was no proximate relationship between the expenses when paid and the property then held in trust.

We think that these objections to the deductions fail to take proper account of the plain language of § 23 (a)

(2), and the purpose of the section as disclosed by its statutory setting and legislative history; and that notwithstanding the weight of the Tax Court's decision against them, they raise questions of law reviewable by the Circuit Court of Appeals and by this Court.

The requirement of § 23 (a) (2) that deductible expenses be "ordinary and necessary" implies that they must be reasonable in amount and must bear a reasonable and proximate relation to the management of property held for the production of income. See H. Rep. No. 2333, 77th Cong., 2d Sess., p. 75; Sen. Rep. No. 1631, 77th Cong., 2d Sess., p. 88. Ordinarily questions of reasonableness and proximity are for the trier of fact, here the Tax Court. *Commissioner* v. *Heininger, supra,* 475; *McDonald* v. *Commissioner,* 323 U. S. 57, 64–65; see *Commissioner* v. *Scottish American Investment Co.,* 323 U. S. 119. And even when they are hybrid questions of "mixed law and fact," their resolution, because of the fact element involved, will usually afford little concrete guidance for future cases, and reviewing courts will set aside the decisions of the Tax Court only when they announce a rule of general applicability, that the facts found fall short of meeting statutory requirements. *Dobson* v. *Commissioner, supra,* 502; *Commissioner* v. *Estate of Bedford, ante,* p. 283; cf. Paul, "Dobson v. Commissioner," 57 Harv. Law Rev. 753, at 828–832, 836–837. But whether the applicable statutes and regulations are such as to preclude the decision which the Tax Court has rendered, is, as was recognized in *Dobson* v. *Commissioner, supra,* 492–493, a question of law reviewable on appeal. See also *Commissioner* v. *Heininger, supra,* 475.

Here the decision of the Court of Appeals was that the expenses were not deductible because they were not for the purpose of producing income or capital gain, and because the trust property, being ready for distribution, was no longer held for the production of income. The

terms of the trust, the nature of the property, and the duties of the trustees with respect to it, were all found by the Tax Court and are not challenged. The questions whether, on the facts found, the expenses in question are nondeductible, either because they were not to produce income or because they were related to the management of property which was not held for the production of income, turn in this case on the meaning of the words of § 23 (a) (2), "property held for the production of income." They are therefore questions of law, decision of which is unembarrassed by any disputed question of fact or any necessity to draw an inference of fact from the basic findings. See *Commissioner* v. *Scottish American Investment Co., supra.* They are "clear cut" questions of law, decision of which by the Tax Court does not foreclose their decision by appellate courts, as in other cases, *Dobson* v. *Commissioner, supra,* 492–493, although their decision by the Tax Court is entitled to great weight. *Dobson* v. *Commissioner, supra,* 501–502, and cases cited; cf. *Medo Photo Supply Corp.* v. *Labor Board,* 321 U. S. 678, 681–682, n. 1, and cases cited.

Since our decision in the *Dobson* case we have frequently reexamined, as matters of law, determinations by the Tax Court of the meaning of the words of a statute as applied to facts found by that court.[1] A question of law is not any the less such because the Tax Court's de-

[1] See, e. g., *Security Mills Co.* v. *Commissioner,* 321 U. S. 281, 286; *Douglas* v. *Commissioner,* 322 U. S. 275; *Commissioner* v. *Harmon,* 323 U. S. 44; *McDonald* v. *Commissioner,* 323 U. S. 57; *Claridge Apartments Co.* v. *Commissioner,* 323 U. S. 141, 145; *Fondren* v. *Commissioner,* 324 U. S. 18; *Choate* v. *Commissioner,* 324 U. S. 1; *Commissioner* v. *Estate of Field,* 324 U. S. 113; *Webre Steib Co.* v. *Commissioner,* 324 U. S. 164; *Commissioner* v. *Smith,* 324 U. S. 177; *Commissioner* v. *Wemyss,* 324 U. S. 303; *Commissioner* v. *Wheeler,* 324 U. S. 542; *Estate of Putnam* v. *Commissioner,* 324 U. S. 393; *Angelus Milling Co.* v. *Commissioner, ante,* p. 293; *Commissioner* v. *Estate of Bedford, ante,* p. 283; *Commissioner* v. *Disston, post,* p. 442.

cision of it is right rather than wrong. Whether or not its decision is "in accordance with law" is a question which the statute, Int. Rev. Code, § 1141 (c) (1), expressly makes subject to appellate review. Congress, when it thus authorized review of questions of law only, was not unaware of the difficulties of such a review of the decisions of a tribunal which decides questions both of law and of fact. But Congress did not dispense with such review.

Hence the statute does not leave the Tax Court as the final arbiter of the issue whether its own decisions of questions of law are right or wrong. That can only be ascertained upon resort to the prescribed appellate process by a consideration of the merits of the point of law involved, and by its decision at the conclusion of the process, not before it begins. The fact that the Court of Appeals below, while accepting the Tax Court's findings of fact, has nevertheless reversed its decision, would seem not to leave the question of law decided so free from doubt that the mandate of the statute could rightly be disregarded on any theory. If review were to be denied in this case, it would be difficult to say that any construction of a taxing statute by the Tax Court would be subject to appellate review.

We turn to the first ground for reversal relied on by the Court of Appeals, that the property was held for distribution, and no longer for the production of income. The fact that the trustees, in the administration of the trust, were required to invest its corpus for the production of income and to devote the income to the purposes of the trust, establishes, as the Tax Court held, that the trust property was held for the production of income during the stated term of the trust. The decisive question is whether the property ceased to be held for the production of income because, as the trust term reached its expiry date, the trustees were under a duty to distribute the property among the remaindermen.

It is true that expiration of the trust operated to change the beneficiaries entitled to receive the income of the trust property, from those entitled to the income during the term of the trust to the remaindermen. But the duty of the trustees to hold and conserve the trust property, and until distribution, to receive income from it, continued. The property did not cease to be held for the production of income because, upon the expiration of the trust and until distribution, the trustees were under an additional duty to distribute the trust fund, or because the trustees, upon distribution, were then accountable to new and different beneficiaries, the residuary legatees, both for the principal of the fund and any income accumulating after the expiry date. To exclude from the deduction privilege, expenses which the Tax Court has held to be expenses of management of the trust, on the ground that the trust fund, upon the expiration of the trust, ceased to be "held for the production of the income" would be to disregard the Tax Court's findings of fact and the words of the statute, and would defeat its obvious purpose.

Nor is there merit in the court's conclusion that the expenses were not deductible because they were not for the production of income. Section 23 (a) (2) provides for two classes of deductions, expenses "for the production . . . of income" and expenses of "management, conservation, or maintenance of property held for the production of income." To read this section as requiring that expenses be paid for the production of income in order to be deductible, is to make unnecessary and to read out of the section the provision for the deduction of expenses of management of property held for the production of income.

There is no warrant for such a construction. Section 23 (a) (2) is comparable and *in pari materia* with § 23 (a) (1), authorizing the deduction of business or trade expenses. Such expenses need not relate directly to the production of income for the business. It is enough that

the expense, if "ordinary and necessary," is directly connected with or proximately results from the conduct of the business. *Kornhauser* v. *United States, supra,* 152–153; *Commissioner* v. *Heininger, supra,* 470–471. The effect of § 23 (a) (2) was to provide for a class of non-business deductions coextensive with the business deductions allowed by § 23 (a) (1), except for the fact that, since they were not incurred in connection with a business, the section made it necessary that they be incurred for the production of income or in the management or conservation of property held for the production of income. *McDonald* v. *Commissioner, supra,* 61–62, 66; and see H. Rep. No. 2333, 77th Cong., 2d Sess., pp. 46, 74–76; S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 87–88.

Since there is no requirement that business expenses be for the production of income, there is no reason for that requirement in the case of like expenses of managing a trust, so long as they are in connection with the management of property which is held for the production of income. Section 23 (a) (2) thus treats the trust as an entity for producing income comparable to a business enterprise, and like § 23 (a) (1) permits deductions of management expenses of the trust, even though the particular expense was not an expense directly producing income. It follows that all of the items of expense here in question are deductible if, as the Tax Court has held, they are expenses of management or conservation of the trust fund, whether their expenditure did or did not result in the production of income.

The Government contends that the expenses incurred in connection with the distribution of the corpus of the trust to legatees are not deductible, because they are not expenses of managing income producing property, but expenses in connection with the devolution of the property. If the suggestion is correct, it would follow that expenses incurred in distributing the income of the trust

to the income beneficiaries are likewise not deductible, since the distribution of income is also a devolution of trust property. But the duties of the trustees were not only to hold the property for the production of income and to collect the income, but also, in administering the trust, to distribute the income and the principal so held from time to time, and the remainder of the principal at the expiration of the trust. Performance of each of these duties is an integral part of carrying out the trust enterprise. Accordingly, as the Tax Court held, the costs of distribution here were quite as much expenses of a function of "management" of the trust property as were expenses incurred in producing the trust income; and if "ordinary and necessary," they were deductible.

In support of its contention, the Government relies upon a part of the House Committee Report, accompanying the bill which became the Revenue Act of 1942, see H. Rep. No. 2333, 77th Cong., 2d Sess., p. 75, and upon Treas. Regs. 103, § 19.23 (a)–15, neither of which was mentioned by the Court of Appeals. They state that an administrator or executor may not deduct expenses incurred in the administration of the estate of a decedent, including those of distributing assets to the beneficiaries. It is argued that by analogy like expenses of trustees should not be deductible. But it is to be noted that there is no such statement in the Report or Regulations as to the distribution expenses of trustees. On the contrary, the Regulations, § 19.23 (a)–15, in dealing specifically with expenses of trustees, provides only that their expenses of management and conservation of the trust property held for the production of income are deductible. And the references in the Report to the non-deductibility of expenses of administrators and executors were in explanation of the Congressional purpose to prevent the specified administration expenses from being deductible both for income and estate taxation. To accomplish that pur-

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pose the Report recommended an amendment, which became § 161 (a) of the Revenue Act of 1942, adding § 162 (e) to the Internal Revenue Code. Section 162 (e) provides, with immaterial exceptions, that "amounts allowable under § 812 (b) as a deduction in computing the net estate of a decedent shall not be allowed as a deduction under § 23." Here, as the Tax Court found, there is no possibility of such a double deduction, since the expenses were not deductible under the decedent's estate tax return.

What we have said applies with equal force to the expenses of contesting the tax deficiency. Section 23 (a) (2) does not restrict deductions to those litigation expenses which alone produce income. On the contrary, by its terms and in analogy with the rule under § 23 (a) (1), the business expense section, the trust, a taxable entity like a business, may deduct litigation expenses when they are directly connected with or proximately result from the enterprise—the management of property held for production of income. *Kornhauser* v. *United States*, *supra*, 152–153; *Commissioner* v. *Heininger*, *supra*, 470–471. The Tax Court could find as a matter of fact, as it did, that the expenses of contesting the income taxes were a proximate result of the holding of the property for income. And we cannot say, as a matter of law, that such expenses are any less deductible than expenses of suits to recover income. Cf. *Commissioner* v. *Heininger*, *supra*.

The Government relies on Treas. Regs. 103, § 19.23 (a)–15, which provide that "expenditures incurred . . . for the purpose of recovering taxes (other than recoveries required to be included in income), or for the purpose of resisting a proposed additional assessment of taxes (other than taxes on property held for the production of income) are not deductible expenses under this section [§ 23 (a) (2) of the Code], except that part thereof which the

taxpayer clearly shows to be properly allocable to the recovery of interest required to be included in income." So far as this regulation purports to deny deduction of litigation expense unless it is to produce income, it is not in conformity to the statute, for the reasons already stated, or with the Regulation already mentioned, which provides that in addition to expenses for the production or collection of trust income, expenses of management or conservation of trust property held for the production of income are also deductible. To that extent and to the extent that it departs from the rule of *Kornhauser* v. *United States, supra,* it conflicts with the meaning and purpose of § 23 (a) (2), and so is unauthorized. *Helvering* v. *Reynolds Tobacco Co.,* 306 U. S. 110.

We find no error of law in the judgment of the Tax Court. Its judgment will be affirmed and that of the Court of Appeals reversed.

Reversed.

MR. JUSTICE FRANKFURTER, concurring.

This is one of those cases in which the ground of the decision is more important than the decision itself, except to the parties. And so, while I concur in the result, I feel bound to say that I think the manner in which it is reached is calculated to increase the already ample difficulties in judicial review of Tax Court determinations. The course of our decisions since *Dobson* v. *Commissioner,* 320 U. S. 489, calls for clarification and avoidance of further confusion.

In *Dobson* v. *Commissioner, supra,* this Court elaborately considered the special function of the Tax Court and the very limited functions of the Circuit Courts of Appeals and of this Court in reviewing the Tax Court. The unanimous opinion in the *Dobson* case was surely a case of much ado about nothing, if it did not emphasize the vast range of questions as to which the Tax Court

should have the final say. In making the *Dobson* pronouncement, the Court was not unaware that "questions of fact" and "questions of law" were legal concepts around which dialectic conflicts have been fought time out of mind. The *Dobson* opinion took for granted that they are useful instruments of thought even though not amenable to fixed connotations. The terms are unmanageable and too confusing if it be assumed that unless they have invariant meaning, that is, unless they serve the same purpose for every legal problem in which they are invoked, they can serve no purpose for any problem. The contribution of the *Dobson* case, one had a right to believe, was the restriction of reviewable "questions of law" in tax litigation to issues appropriate for review in relation to the machinery which Congress has designed for such litigation. The *Dobson* case eschewed sterile attempts at differentiation between "fact" and "law" in the abstract. Instead, it found significance in the scheme devised by Congress for adjudicating tax controversies whereby Congress had, in the main, centralized in the Tax Court review of tax determinations by the Treasury and had made the decisions of the Tax Court final unless they were "not in accordance with law," 44 Stat. 9, 110, 26 U. S. C. § 1141 (c) (1), with the result that, as a practical matter, only a small percentage of Tax Court decisions gets into the Circuit Courts of Appeals, and a still smaller percentage reaches this Court.[1] Therefore, the decisions of the Cir-

[1] As a matter of historic survival, some tax litigation still reaches district courts throughout the country. To that extent there is a qualification upon the centralization of review in the Tax Court of Treasury determinations. But the overwhelming volume of tax litigation goes to the Tax Court. The ratio is about 6 to 1. The fact that the district courts continue to have vestigial jurisdiction may call for a scientific revamping of jurisdiction in tax cases. It does not counsel against giving the fullest efficacy to Tax Court decisions consonant with its special responsibility. See Griswold, *The Need for a Court of Tax Appeals* (1944) 57 Harv. L. Rev. 1153; Miller, *Can Tax Appeals Be Centralized?* (1945) 23 Taxes 303.

cuit Courts of Appeals, and even more so of this Court, are bound to be more or less episodic and dependent upon contingencies that cannot give these appellate courts that feel of the expert which is so important for wise construction of such interrelated and complicated enactments as those which constitute our revenue laws. These factors, so decisive in the stream of tax litigation, weigh heavily in apportioning functions between the Tax Court and the courts reviewing the Tax Court. Accordingly, the vital guidance of the *Dobson* opinion was that a decision of the Tax Court should stand unless it involves "a clear-cut mistake of law," 320 U. S. 489, 502. Considerations that may properly govern what are to be deemed questions of fact and questions of law as between judge and jury, or considerations relevant to the drawing of a line between questions of fact and questions of law on appeal from a court of first instance sitting without a jury, or in determining what is a foreclosed question of fact in cases coming to this Court from State courts on claims of unconstitutionality, may be quite misleading when a decision of the Tax Court is challenged in the various Circuit Courts of Appeals or here as "not in accordance with law."

Certainly, all disputed questions regarding events and circumstances—the raw materials, as it were, of situations which give rise to tax controversies—are for the Tax Court to settle and definitively so. Secondly, there are questions that do not involve disputes as to what really happened—as, for instance, what expenses were incurred or what distribution of assets was made—but instead turn on the meaning of what happened as a matter of business practice or business relevance. Here we are in the domain of financial and business interpretation in relation to taxation as to which the Tax Court presumably is as well informed by experience as are the appellate judges and certainly more frequently enlightened by the volume and range of its litigation. Such issues bring us treacherously

near to what abstractly are usually characterized as questions of law, whether the question of division of labor in a litigation is between judges and lay juries, or between judges of first instance and of appellate courts when there is no difference of specialized experience between the two classes of judges. Thus, the construction of documents has for historic reasons been deemed to be a question of law in the sense that the meaning is to be given by judges and not by laymen. But this crude division between what is "law" and what is "fact" is not relevant to the proper demarcation of functions as between the Tax Court and the reviewing courts. To hold that the Circuit Courts of Appeals, and eventually this Court, must make an independent examination of the meaning of every word of tax legislation, no matter whether the words express accounting, business or other conceptions peculiarly within the special competence of the Tax Court, is to sacrifice the effectiveness of the judicial scheme designed by Congress especially for tax litigation to an abstract notion of "law" derived from the merely historic function of courts generally to construe documents, including legislation. More than that. If the appellate courts must make an independent examination of the meaning of every word in tax legislation, on the assumption that the construction of legislative language is necessarily for the appellate courts, how can they reasonably refuse to consider claims that the words have been misapplied in the circumstances of a particular case? Meaning derives vitality from application. Meaning is easily thwarted or distorted by misapplication. If the appellate courts are charged with the duty of giving meaning to words because they are contained in tax legislation, they equally cannot escape the duty of examining independently whether a proper application has been given by the Tax Court.

The specialized equipment of the Tax Court and the trained instinct that comes from its experience ought to

leave with the Tax Court the final say also as to matters which involve construction of legal documents and the application of legislation even though the process may be expressed in general propositions, so long as the Tax Court has not committed what was characterized in the *Dobson* case as a "clear-cut mistake of law."

That serves as a guide for judgment even though no inclusive definition or catalogue is essayed. The Tax Court of course must conform to the procedural requirements which the Constitution and the laws of Congress command. Likewise, in applying the provisions of the revenue laws, the Tax Court must keep within what may broadly be called the outward limits of categories and classifications expressing legislative policy. Congress has invested the Tax Court with primary—and largely with ultimate—authority for redetermining deficiencies. It is a tribunal to which mastery in tax matters must be attributed. The authority which Congress has thus given the Tax Court involves the determination of what really happened in a situation and what it means in the taxing world. In order to redetermine deficiencies the Tax Court must apply technical legal principles. The interpretation of tax statutes and their application to particular circumstances are all matters peculiarly within the competence of the Tax Court. On the other hand, constitutional adjudication, determination of local law questions and common law rules of property, such as the meaning of a "general power of appointment" or the application of the rule against perpetuities, are outside the special province of the Tax Court. See Paul, *Dobson* v. *Commissioner: the Strange Ways of Law and Fact* (1944) 57 Harv. L. Rev. 753, 847–48. Congress did not authorize review of all legal questions upon which the Tax Court passed. It merely allowed modification or reversal if the decision of the Tax Court is "not in accordance with law." But if a statute upon which the Tax

Court unmistakably has to pass allows the Tax Court's application of the law to the situation before it as a reasonable one—if the situation could, without violence to language, be brought within the terms under which the Tax Court placed it or be kept out of the terms from which that Court kept it—the Tax Court cannot in reason be said to have acted "not in accordance with law." In short, there was no "clear-cut mistake of law" but a fair administration of it.

If these considerations are to prevail, the sole question before a Circuit Court of Appeals is whether the decision by the Tax Court presents a "clear-cut mistake of law." There should be an end of the matter once it is admitted that the application made by the Tax Court was an allowable one. If a question becomes a reviewable question in tax cases because, abstractly considered, it may be cast into a "pure question of law," it would require no great dialectical skill to throw most questions which are appealed from the Tax Court into questions of law independently reviewable by the Circuit Courts of Appeals. The road would be open to a new insistence for increased tax reviews by this Court on *certiorari*. The intention of the *Dobson* case was precisely otherwise. It was to centralize responsibility in the Tax Court, to minimize isolated intrusions by the Circuit Courts of Appeals into the technical complexities of tax determinations except when the Tax Court has clearly transcended its specialized competence, and to discourage resort to this Court in tax cases except where conflict among the circuits or constitutional questions or a "clear-cut mistake of law" of real importance may call for our intervention.

Let us apply these governing considerations to the case in hand. The trustees here paid, as expenses in connection with the trust, certain legal fees, and these charges they deducted from the gross trust income for 1940. The Commissioner disallowed these deductions. The legal

services concerned (1) litigation in which the trustees unsuccessfully contested a deficiency claim based on taxable gain to the estate, (2) payment of a legacy, and (3) problems arising from the expiration of the trust and the disposition of its assets. The sole question before the Tax Court was whether these fees and charges were deductible as expenses incurred "for the management, conservation, or maintenance of property held for the production of income" under § 121 (a) of the Revenue Act of 1942, 56 Stat. 798, 819.

Whether these payments constituted expenses "for the management . . . of property held for the production of income," may as fairly be said to be a question of fact, namely, the purpose which these payments served with relation to property held for the production of income, as it could be said that they involve a proper construction of what the statute means by "management" of such property. The truth of the matter is that the problem involves a judgment regarding the interplay of both questions, namely, what relation do these payments have to what may properly be deemed the managerial duties of trustees. It is possible to transform every so-called question of fact concerning the propriety of expenses incurred by trustees into a generalized inquiry as to what the duties of a trustee are and, therefore, whether a particular activity satisfied the conception of management which trusteeship devolves upon a trustee. Such a way of dealing with these problems inevitably leads to casuistries which are to be avoided by a fair distribution of functions between the Tax Court and the reviewing courts. The fact that this problem may be cast in the form of intellectually disinterested abstractions goes a long way to prove that its solution should be left with the Tax Court.

If the decision by the Tax Court may fairly be deemed to have been restricted to the facts of this case, as it may, it certainly would be an issue of "fact." But even assum-

ing that the "issues are broader than the particular facts presented" by this case, the Tax Court's decision is not deprived of finality. Yet an assumption to the contrary is at the core of the Government's argument. Simply because the correctness of "certain general propositions" is involved does not make the position taken by the Tax Court a question of law. The real question is: What is the nature of the issue upon which the Tax Court has pronounced? If the issue presents a difficulty which it is peculiarly within the competence of the Tax Court to resolve and that court has given a fair answer, every consideration which led to the pronouncement in the *Dobson* case should preclude independent reexamination of the Tax Court's disposition. Regardless of what the question may be termed for purposes of review, the Tax Court's determination should be accorded finality. That the Tax Court has expressed an allowable opinion as to the meaning and application of a tax provision, here § 121 (a) of the 1942 Revenue Act, should suffice to reinstate its decision, without opening the sluices to independent review by the Circuit Courts of Appeals and this Court of multitudinous tax questions. Such is the principle or rule of judicial administration which should guide review of Tax Court determinations.

MR. JUSTICE ROBERTS and MR. JUSTICE JACKSON join in this concurring opinion.

AMERICAN POWER & LIGHT CO. *v.* SECURITIES & EXCHANGE COMMISSION.

NO. 470. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.*

Argued April 26, 1945.—Decided June 4, 1945.

1. Under § 24 (a) of the Public Utility Holding Company Act, which grants a right of review to "any person or party aggrieved" by an order issued by the Securities & Exchange Commission under the Act, a stockholder having a substantial financial or economic interest distinct from that of the corporation, which is directly and adversely affected by an order of the Commission, is a "person aggrieved." P. 388.
2. A sole stockholder of a company ordered by the Securities & Exchange Commission under the Public Utility Holding Company Act to make certain accounting entries which would affect adversely the stockholder's right to dividends, *held* entitled under § 24 (a) to a review of the order as a "person aggrieved." *Pittsburgh & West Virginia R. Co.* v. *United States,* 281 U. S. 479, distinguished. P. 389.
3. Where review of an order issued by the Securities & Exchange Commission under the Public Utility Holding Company Act is applied for in more than one circuit court of appeals, that one in which the Commission under § 24 (a) files a transcript of its proceedings thereupon has exclusive jurisdiction. P. 391.
4. A stockholder owning 9,000 out of a total of some 5,250,000 shares of stock of a corporation, charging illegality and fraud in a refinancing transaction between the corporation and a subsidiary which would reduce the value of his stock by reducing the interest income of his corporation, *held* entitled, under § 24 (a), as a "person aggrieved," to a review of an order of the Commission approving the transaction. Pp. 387, 392.
5. It is not essential to the stockholder's right to a review in such case that the proceeding have the character of a derivative suit. P. 392.

143 F. 2d 250, reversed.

143 F. 2d 945, affirmed.

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*Together with No. 815, *Securities & Exchange Commission* v. *Okin,* on certiorari to the Circuit Court of Appeals for the Second Circuit.

CERTIORARI, 323 U. S. 701, 324 U. S. 835, to review, in No. 470, the dismissal of a petition for review of an order of the Commission; and, in No. 815, denials of motions to dismiss (and to dismiss or affirm) a petition for review of an order of the Commission.

Mr. R. A. Henderson, with whom *Mr. A. J. G. Priest* was on the brief, for petitioner in No. 470.

Mr. Roger S. Foster, with whom *Solicitor General Fahy* and *Mr. Milton V. Freeman* were on the briefs, for the Securities & Exchange Commission.

Mr. Samuel Okin for respondent in No. 815.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

We granted certiorari in these cases because of an apparent conflict in the decisions below [1] concerning the application of § 24 (a) of the Public Utility Holding Company Act,[2] which provides that "any person or party aggrieved by an order issued by the Commission" under the Act may obtain a review of the order by the Circuit Court of Appeals of the circuit of his residence or principal place of business. The difference of view is as to the scope of the phrase "person or party aggrieved."

In No. 470 it appears that the petitioner is a registered holding company and owns all the common stock of the Florida Power & Light Company. The paragraphs of the order in controversy require Florida to make certain accounting entries which will result in taking out of surplus moneys which would otherwise be available to pay

[1] *American Power & Light Co.* v. *Securities & Exchange Commission,* 143 F. 2d 250; *Okin* v. *Securities & Exchange Commission,* 143 F. 2d 945.

[2] 15 U. S. C. 79 x.

dividends to petitioner. The order including these paragraphs was made as the result of proceedings before the Commission to which American and Florida were parties, and in which American participated; and the provisions in controversy appear to have been drawn with a view that they might be contested apart from other matters before the Commission, and to have included statements to the effect that they were made without prejudice to the rights of American and Florida to contest them.

American petitioned the court below to set aside the order. Later Florida petitioned another Circuit Court of Appeals to set aside the same paragraph attacked by American. The Commission moved to dismiss American's petition, reciting the fact that Florida had instituted a similar proceeding, and asserting that American, as sole stockholder, had no standing to seek review of the order.

In No. 815 it appears that Electric Bond & Share Company, a registered holding company, loaned $35,000,000 to a subsidiary, American and Foreign Power Company, which is also a registered holding company, and that the question of how this loan should be refinanced became the subject of a proceeding before the Commission.

The respondent, Okin, as the owner of 9,000 out of a total of some 5,250,000 common shares of Electric Bond and Share, was allowed to participate in the proceeding, and opposed a proposition which the two companies submitted for a method of refinancing the loan. The Commission made an order approving the proposal; and Okin thereupon petitioned the court below to review the order. The gist of his complaint was that the refinancing as approved would reduce the value of his stock by reducing the interest income of Electric Bond and Share.

The Commission, before filing a certified copy of the transcript of the record upon which the order complained of was entered, moved to dismiss Okin's petition upon two grounds. The first was that, within the meaning of § 24 (a), Okin was not a person or party aggrieved. The second was that his objection to the order was frivolous. In response to this the court held that, while it might well be that Okin's attack lacked merit, if it did the result should be an affirmance of the order rather than a dismissal of the proceeding, and that jurisdiction to consider the merits was lacking in the absence of a transcript of the proceedings before the Commission. The motion was accordingly denied.

The Commission alleges that subsequently it filed a motion to dismiss or affirm, after having filed an abbreviated transcript containing so much of the record as was relied on for the purposes of the motion, and that this motion was denied without opinion. The record shows that a motion to dismiss or affirm was denied without opinion.

The Commission asks us to review both denials. The respondent insists we lack jurisdiction so to do, for the reason that neither order is final.

First. We hold that a stockholder having a substantial financial or economic interest distinct from that of the corporation which is directly and adversely affected by an order of the Commission, irrespective of any effect the order may have on the corporation, is a "person aggrieved" within the meaning of § 24 (a).

The Commission does not question that American, as sole stockholder of Florida, has a substantial economic interest which is affected by the order; nor does it maintain that the term "person aggrieved" is not broad enough to include one whose economic interest is affected by an order affecting his company under circumstances which make it inequitable that he be bound by the action or

inaction of the management. It insists, however, that American's application for review in the court below was in the nature of a derivative action, commonly designated a stockholder's suit, to redress a wrong to his corporation. In this view, the Commission urges that, as Florida has itself sought a review of the order, it must be presumed that Florida will endeavor to protect the interest of its sole stockholder, American, and that American has consequently failed to show any necessity for its representing the interests of Florida.

The difficulty with this contention is that the action of the Commission in ordering the transfer of an item from surplus account to another account where the item will not be available for the payment of dividends does not deprive the corporation of any asset or adversely affect the conduct of its business in the manner it affects the petitioner, whereas the order has a direct adverse effect upon American as a stockholder entitled to dividends. It was because the court below overlooked this difference that it found support for its decision in *Pittsburgh & West Virginia R. Co.* v. *United States,* 281 U. S. 479. That was a suit brought under the Urgent Deficiencies Act to set aside an order of the Interstate Commerce Commission addressed to a carrier other than the plaintiff in the suit. The plaintiff was a minority stockholder of the carrier affected. This court pointed out that, under the accepted doctrine, the plaintiff had no standing to sue since in attempting to do so it was merely seeking, in a derivative capacity, to vindicate the rights of the corporation.

In awarding a review of an administrative proceeding, Congress has power to formulate the conditions under which resort to the courts may be had.[3] The persons ac-

[3] *Federal Power Comm'n* v. *Pacific Power & Light Co.,* 307 U. S. 156, 159.

corded a right to obtain review are, therefore, to be ascertained from the terms of the statute. Congress might here have provided that only parties to the administrative proceeding should have standing to obtain court review. When the bill which became the Public Utility Holding Company Act was introduced in the houses of Congress it provided that "any person aggrieved by an order issued by the Commission in a proceeding under this title *to which such person is a party* may obtain a review of such order."[4] The provision was altered so as to read as it is now found in the statute. There seems to be no reason not to accord the statutory language its natural meaning in a case such as this, where the considerations which would move the corporation to seek review differ from those which may be relevant to the stockholder's interests. There may be situations in which the two interests are the same and where consequently the grievance ought not to support two proceedings identical in character. This, however, is not such a case; for it is possible that without any legal wrong to stockholders the corporation may elect not to prosecute, or to abandon, a proceeding for review.

This court has not allowed the usual criteria of standing to sue to deny persons who, in analogous cases under that doctrine, would ordinarily not be permitted to invoke court review, the benefit of such review under statutes embodying the same language as § 24 (a).[5] The same is true of the lower federal courts.[6] In these instances

[4] Senate Bill No. 1725, 74th Cong., 1st Sess., § 24 (a); House Resolution No. 5423, 74th Cong., 1st Sess., § 23 (a).

[5] *Interstate Commerce Commission* v. *Oregon-Washington R. & N. Co.,* 288 U. S. 14 (the Interstate Commerce Act); *Federal Communications Comm'n* v. *Sanders Bros. Radio Station,* 309 U. S. 470 (Communications Act); cf. *L. Singer & Sons* v. *Union Pacific R. Co.,* 311 U. S. 295.

[6] *Associated Industries* v. *Ickes,* 134 F. 2d 694 (the Bituminous Coal Act).

the extension of the privilege to persons aggrieved was held to extend it to those not technically parties, and, therefore, not entitled, without the statutory provision, to initiate litigation in a court.

While the matter was not specifically mooted, it would seem that, until the instant cases, both the Commission and the courts have been of the view that persons situated as are the stockholders in these cases were given the statutory right to apply for review of a Commission order. In Circuit Courts of Appeals, and in this court, stockholders have been heard upon the merits of orders made against corporations by the Securities and Exchange Commission.[7]

The further suggestion is made that to permit stockholders to resort to court review would create unnecessary inconvenience and expense since a stockholder entitled to apply to a court may go to the Circuit Court of Appeals of the circuit in which he resides or has his principal place of business. Thus, it is urged, the Commission might be called upon to answer suits in various circuits. But § 24 (a) provides that the Commission may file a transcript of its proceedings in any circuit in which a proceeding has been initiated and thereupon the court in which the transcript is filed shall have exclusive jurisdiction. Thus, if the Commission had here elected to file a transcript in the Circuit Court of Appeals where Florida applied for review, the Circuit Court of Appeals for the First Circuit, in which American's petition was filed, should have transferred that petition to the other court and all the complaints would have been heard by a single court and on the same record.[8]

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[7] *Lawless* v. *Securities & Exchange Commission,* 105 F. 2d 574; *Todd* v. *Securities & Exchange Commission,* 137 F. 2d 475; cf. *Northwestern Electric Co.* v. *Federal Power Commission,* 321 U. S. 119.

[8] *L. J. Marquis & Co.* v. *Securities & Exchange Commission,* 134 F. 2d 335; *L. J. Marquis & Co.* v. *Securities & Exchange Commission,* 134 F. 2d 822.

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Second. In No. 815, the court below held the respondent had standing to maintain the proceeding for review of the Commission's order. In this case, Okin, as a stockholder, attacked the transaction made by his company with its subsidiary on the grounds that it was both illegal and fraudulent. His corporation urged that the Commission approve the transaction, thus taking a position adverse to him. His application for review of the Commission's order approving the settlement was, therefore, in the nature of a derivative or stockholder's action. Inasmuch as he charged illegality and fraud, it is evident that application to the Board of Directors would have been futile. Under the Commission's own view, therefore, the Circuit Court of Appeals was right in denying a dismissal of the proceeding for lack of standing on the part of Okin to initiate it. But, as above stated in the decision of No. 470, we do not deem it essential that the proceeding have the character of a derivative suit.

The Commission urges us to hold that the petition on its face presents only frivolous contentions. The court below was unwilling to dismiss on this ground, holding that a more appropriate order would be one of affirmance. It required that the record be filed, as required by the Act, as a condition of consideration of this matter. Apparently it was not satisfied that the filing of an abbreviated transcript furnished a basis for affirmance. The Commission, without inordinate delay or additional expense, might have filed the full transcript of the proceedings before it and obtained the judgment of the court on the adequacy of the petition. We think we are not called upon to examine the merits of the Commission's contentions or to reverse the decision denying the motion to dismiss, or that denying the motion to dismiss or affirm. The court below has discretion to deal with the problem of the necessity of a record, and the extent thereof, in con-

nection with a motion to dismiss or affirm on the ground that the petition for review is frivolous.

In No. 470 the judgment is reversed.

In No. 815 the judgment is affirmed.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of these cases.

MR. JUSTICE BLACK and MR. JUSTICE REED concur in the result in No. 815.

MR. JUSTICE MURPHY, dissenting.

Fifteen years ago this Court was confronted with an attempt by a corporate stockholder to set aside an order of the Interstate Commerce Commission on the claim that the order threatened the financial stability of the corporation to which it was directed as well as the "appellant's financial interest as a minority stockholder." The Court, speaking through Mr. Justice Brandeis, held that the stockholder had no standing to maintain the suit since "the order under attack does not deal with the interests of investors" and the only injury feared "is the indirect harm which may result to every stockholder from harm to the corporation." *Pittsburgh & West Virginia R. Co.* v. *United States,* 281 U. S. 479, 487. That holding, in my estimation, disposes of this attempt by the American Power & Light Company to obtain an independent judicial review of an order of the Securities and Exchange Commission directed at a company in which it is the sole stockholder.

Section 24 (a) of the Public Utility Holding Company Act allows "any person or party aggrieved by an order issued by the Commission" to obtain a review of such order in an appropriate Circuit Court of Appeals. The test, then, is whether American was "aggrieved" by the Commission's order in this instance. Since the term "person or party aggrieved" is not defined in the Act we can

only assume that its meaning is to be drawn from traditional legal principles and from any relevant statutory policies.

Only two paragraphs of the Commission's order are in issue. They are directed solely to the Florida Power & Light Company, all of whose securities are owned by American. These paragraphs fail even to mention American; they neither require nor prohibit any action by it. Nor do they in any way affect American's rights as a stockholder. They simply require Florida to make certain accounting adjustments in the form of charges to earned surplus. Since dividends are paid from earned surplus and since these requirements will decrease the earned surplus account, the Court reasons that "the order has a direct adverse effect upon American as a stockholder entitled to dividends." From this it is concluded that American is "aggrieved" by the order. To that reasoning and conclusion I cannot agree.

1. There is no evidence in the record to justify the assumption that the items to be charged to surplus would necessarily have been available for distribution as dividends to American or that the surplus was otherwise inadequate to pay the normal amount of dividends. Florida might well have retained these items for reinvestment in the business, thus making them unavailable for dividend distribution. Moreover, to the extent that Florida retains these items in its capital structure, American's ultimate equity in the organization is increased. It cannot be said, therefore, that American has been adversely and permanently affected by this order.

2. But even if it were clear that the order would necessarily restrict dividend payments it does not follow that the restraint so directly affects American as to entitle it to challenge the order as a person "aggrieved." It has long been established that ordinarily the mere accumulation of an adequate surplus does not entitle a stockholder

to dividends until the directors, in their discretion, declare them. *Southern Pacific Co.* v. *Lowe,* 247 U. S. 330. And until such a declaration is made the directors are free to deal with that surplus in good faith as they may see fit in the exercise of their business judgment, the stockholders not having sufficient interest in undeclared or potential dividends to challenge such action. See *Wabash R. Co.* v. *Barclay,* 280 U. S. 197. The stockholders' interest in such matters, in other words, is indistinct from that of the corporation prior to an actual declaration. Thus if the Florida management had made the same accounting adjustments as those ordered by the Commission in this case American would not be sufficiently "aggrieved" to attempt to prevent Florida from making such adjustments, even though dividend payments might be adversely affected. No adequate reason is evident from the facts or from the opinion of this Court as to why American is any more directly or adversely "aggrieved" when the accounting adjustments are ordered by the Commission rather than by Florida's management or as to why any different results should follow. The impact of the adjustments in either instance is presumably to strengthen the financial structure of Florida; that they may have the incidental effect of decreasing dividends temporarily has never heretofore been sufficient to entitle a stockholder to challenge the adjustments.

3. The fact that American is trying to appeal an administrative order rather than to institute an original action against Florida's management is irrelevant under the circumstances. The Commission's order does not deal with the rights of stockholders as such, in which case a stockholder clearly could appeal from the order. *Securities & Exchange Commission* v. *Chenery Corp.,* 318 U. S. 80; *Lawless* v. *Securities & Exchange Commission,* 105 F. 2d 574; *New York Trust Co.* v. *Securities & Exchange Commission,* 131 F. 2d 274; *City National Bank & Trust*

Co. v. *Securities & Exchange Commission,* 134 F. 2d 65. See also *Otis & Co.* v. *Securities & Exchange Commission,* 323 U. S. 624. Nor is there any charge of fraud or breach of duty on the part of Florida, from which it could be argued that American should be given the right to appeal since Florida might not act to protect American's legitimate interests. Indeed, such a possibility is expressly negatived by the fact that Florida has already appealed the Commission's order to another court and is urging precisely the same considerations that American seeks to present in this proceeding. In view of American's complete control of Florida through stock ownership there is no danger of conflicting interests arising between the two companies in the other proceeding. There is thus no basis for concluding that the economic interest asserted by American cannot or will not be adequately protected by Florida. Cf. *Federal Communications Commission* v. *Sanders Bros. Radio Station,* 309 U. S. 470; *Associated Industries* v. *Ickes,* 134 F. 2d 694, dismissed as moot, 320 U. S. 707. The inevitable logic of the facts of this case leads straight back to the conclusion that American's grievance is only "the indirect harm which may result to every stockholder from harm to the corporation." *Pittsburgh & West Virginia R. Co.* v. *United States, supra,* 487. That conclusion calls for a dismissal of American's attempted appeal from the Commission's order just as it would call for a dismissal of any suit brought by American against Florida on these facts.

4. The Court's conclusion here leads only to unfortunate consequences in the judicial review of administrative orders. If the remote economic interest asserted by American is sufficient to institute a review proceeding such as this there is no limit to which minority stockholders may harass the Commission and their respective corporations by challenging orders of the Commission directed to the corporations. It is no answer that

§ 24 (a) gives exclusive jurisdiction to the court in which the Commission files the transcript of a particular proceeding. That provision clearly envisages two or more appeals in different courts by persons who are legally "aggrieved" by a Commission order and who can obtain adequate relief only by individual appeals. But under this decision stockholders are now free, whenever they feel that their potential dividends are affected by Commission action directed to the corporation's accounting entries against which dividends are charged, to appeal regardless of the management's wishes in the matter and regardless of the management's ability to protect their interests fully and fairly. Stockholders in effect supplant the management in deciding whether to appeal from administrative action affecting such internal accounting procedure of the corporation, a problem which until now was exclusively and properly within the domain of the corporate directors and officers. Many stockholders are not in a position to know the intricacies of modern corporate accounting or the proper attitude to take, from the corporation's point of view, as to the challenged administrative action. But now they have been given *carte blanche* to proceed as they desire. It is difficult to believe that Congress intended such consequences to flow from its use of the word "aggrieved" in § 24 (a).

Finally, I dissent from the Court's disposition of the writ in the *Okin* case. It is no doubt true, as the Court states, that an assertion that a transaction approved by the Commission was fraudulently entered into by the corporation is sufficient to entitle the stockholder to an independent review of the Commission's action. But it does not follow that the mere cry of "fraud" is sufficient. There must be some bona fide basis appearing on the face of so serious a charge. Here, however, Okin merely charges that (1) a Maine corporation is not subject to the Commission's jurisdiction because its subsidiaries operate

outside the United States; (2) the particular transaction in issue is detrimental to Okin's interests as a stockholder inasmuch as the management extended a note of a subsidiary at a reduced interest rate; (3) various corporate officers held conversations with each other and with members of the Commission's staff; (4) his constitutional rights have been invaded; and (5) the transaction is void for failure to comply with § 20 of the New York Stock Corporation Law. Such frivolous claims of fraud are insufficient to warrant making an exception to the general rule that a stockholder cannot appeal an administrative order which involves only the corporation as such.

MR. JUSTICE BLACK and MR. JUSTICE REED join in that part of this dissent dealing with No. 470, the *American Power & Light Co.* case.

AKINS *v.* TEXAS.

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 853. Argued April 30, May 1, 1945.—Decided June 4, 1945.

1. The manner in which the court which convicted the petitioner was organized—assignment of a judge pursuant to a statute the validity of which under the state constitution was upheld by the highest court of the State—violated no fundamental principle of justice and denied no right of the petitioner under the Federal Constitution. P. 399, n. 1.
2. Although there was but one Negro on the grand jury which indicted the Negro petitioner, the record in this case fails to establish that the jury commissioners deliberately and intentionally limited the number of Negroes on the panel, or that there was discrimination on account of race in the selection of the grand jury, in violation of the due process and equal protection clauses of the Fourteenth Amendment of the Federal Constitution. Pp. 403, 407.
3. It is unnecessary here to consider whether purposeful limitation of jurors by race to the approximate proportion that the eligible jurymen of the race so limited bears to the total eligibles would be invalid under the Fourteenth Amendment. P. 407.

182 S. W. 2d 723, affirmed.

Certiorari, 324 U. S. 836, to review a judgment which affirmed a sentence of death upon a conviction of murder.

Messrs. A. S. Baskett and *W. J. Durham* for petitioner.

Benjamin T. Woodall, Assistant Attorney General of Texas, with whom *Grover Sellers,* Attorney General, was on the brief, for respondent.

Mr. Justice Reed delivered the opinion of the Court.

This certiorari brings here for review a judgment of the Criminal District Court of Dallas County, Texas, sentencing petitioner to execution on a jury verdict which found petitioner guilty of murder with malice and assessed the penalty at death.

Certiorari was sought to the Court of Criminal Appeals of the State of Texas, which had affirmed the judgment, on a petition which claimed discrimination on account of his race, against the petitioner, who is a Negro, under the equal protection and due process clauses of the Fourteenth Amendment of the Constitution of the United States.[1]

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[1] Certiorari was allowed also for alleged denial of due process under the Fourteenth Amendment because of the manner in which the trial judge was designated to conduct the trial court. He acted by assignment of the presiding judge of the First Administrative Judicial District of Texas under General and Special Laws, 48th Leg. Reg. Sess., p. 25 (Vernon's Annotated Civil Statutes, Texas, Art. 200a, § 5) instead of by appointment by the Governor under § 28, Article 5, of the Constitution of Texas, to fill the vacancy caused by the death of the regularly chosen occupant.

The legality of the assignment depends upon the validity of the provisions of the state statute as tested by the Texas Constitution. The constitutional requirement is that vacancies in the office of judges shall be filled by the Governor. The Texas statute provided for assignment of other judges for the work of the court. This statute was interpreted by the Court of Criminal Appeals to provide merely for the functioning of courts under assigned judges, who did not qualify as successors to decedent judges, until the vacancy was filled by appointment or election. The court upheld the constitutionality of

Certiorari was allowed because of the importance in the administration of criminal justice of the alleged racial discrimination which was relied upon to support the claim of violation of constitutional rights. 324 U. S. 836. This discrimination was said to consist of an arbitrary and purposeful limitation by the Grand Jury Commissioners of the number of Negroes to one who was to be placed upon the grand jury panel of sixteen for the term of court at which the indictment against petitioner was found. This is petitioner's only complaint as to racial discrimination. No other errors in the proceedings are pointed out.

The Fourteenth Amendment forbids any discrimination against a race in the selection of a grand jury.[2] *Neal* v. *Delaware,* 103 U. S. 370, 394; *Pierre* v. *Louisiana,* 306 U. S. 354, 356; *Smith* v. *Texas,* 311 U. S. 128; *Hill* v. *Texas,* 316 U. S. 400. The burden is, of course, upon the defendant to establish the discrimination. *Tarrance* v. *Florida,* 188 U. S. 519, 520; *Martin* v. *Texas,* 200 U. S. 316; *Norris* v. *Alabama,* 294 U. S. 587, 590. An allegation of discriminatory practices in selecting a grand jury panel challenges an essential element of proper judicial procedure—the re-

the statute. *Pierson* v. *State,* 177 S. W. 2d 975; *Fuller* v. *State,* 180 S. W. 2d 361; *Jones* v. *State,* 181 S. W. 2d 75; *Brown* v. *State,* 181 S. W. 2d 93; *Akins* v. *State,* 182 S. W. 2d 723. Whether the state rule is expressed in constitution, statute or decision, or partly in one and partly in another, the state's power is to be viewed as a totality. In the absence of a violation of fundamental principle of justice, a state's determination is conclusive upon the federal courts as to the meaning of the state law, so far as any federal question is concerned. *Hebert* v. *Louisiana,* 272 U. S. 312, 316; *Gregg Dyeing Co.* v. *Query,* 286 U. S. 472, 479–80; *United Gas Co.* v. *Texas,* 303 U. S. 123, 141–42. We find no violation of any of petitioner's federal rights in Texas' decision upon the legality of the organization of the court which tried petitioner.

[2] Constitution, Fourteenth Amendment, § 1: ". . . 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."

quirement of fairness on the part of the judicial arm of government in dealing with persons charged with criminal offenses. It cannot lightly be concluded that officers of the courts disregard this accepted standard of justice.

The order overruling the motion to quash the indictment was made after evidence and without opinion. That motion set out the alleged purposeful limitation on racial representation which is pressed here. The Court of Criminal Appeals, however, without a written analysis of the testimony, said in an opinion that it failed "to find any evidence of discrimination. On the contrary, the evidence shows an effort on the part of the authorities to comply with the holding of this court and of the Supreme Court of the United States upon the question of discrimination." *Akins* v. *State,* 182 S. W. 2d 723. This reference to the holdings of the state and federal courts was to *Akens* v. *State,* 145 Tex. Cr. R. 289, 167 S. W. 2d 758, which reversed a previous conviction of petitioner on the authority of *Hill* v. *Texas, supra.* Although this opinion of the Court of Criminal Appeals does not refer to proportional racial representation on juries, recent decisions of that court had previously disapproved that procedure. *Hamilton* v. *State,* 141 Tex. Cr. R. 614, 150 S. W. 2d 395, 400, r. c.; *Hill* v. *State,* 144 Tex. Cr. R. 415, 157 S. W. 2d 369, 373, l. c., reversed on other grounds, 316 U. S. 400. We think, therefore, that the conclusions of the state courts show that in their judgment there was no proven racial discrimination by limitation in this case. Otherwise there would have been a reversal by the Court of Criminal Appeals.

As will presently appear, the transcript of the evidence presents certain inconsistencies and conflicts of testimony in regard to limiting the number of Negroes on the grand jury. Therefore, the trier of fact who heard the witnesses in full and observed their demeanor on the stand has a better opportunity than a reviewing court to reach a correct conclusion as to the existence of that type of discrimination. While our duty, in reviewing a conviction upon

a complaint that the procedure through which it was obtained violates due process and equal protection under the Fourteenth Amendment, calls for our examination of evidence to determine for ourselves whether a federal constitutional right has been denied, expressly or in substance and effect, *Norris* v. *Alabama,* 294 U. S. 587, 589–90; *Smith* v. *Texas,* 311 U. S. 128, 130, we accord in that examination great respect to the conclusions of the state judiciary, *Pierre* v. *Louisiana,* 306 U. S. 354, 358. That respect leads us to accept the conclusion of the trier on disputed issues "unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process," *Lisenba* v. *California,* 314 U. S. 219, 238, or equal protection. Cf. *Ashcraft* v. *Tennessee,* 322 U. S. 143, 152, 153; *Malinski* v. *New York,* 324 U. S. 401, 404.

The regular statutory practice for the selection of grand jurors was followed in this case. Under the Texas statutes jury commissioners appointed by the judge of the trial court select a list of sixteen grand-jurymen from which list twelve are chosen as a grand jury. Texas Code of Criminal Procedure, Articles 333, 337. Qualifications for grand-jurymen are set out in Article 339.[3] The Commissioners

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[3] Art. 339. "No person shall be selected or serve as a grand juror who does not possess the following qualifications:

"1. He must be a citizen of the State, and of the county in which he is to serve, and qualified under the Constitution and laws to vote in said county; but, whenever it shall be made to appear to the court that the requisite number of jurors who have paid their poll taxes can not be found within the county, the court shall not regard the payment of poll taxes as a qualification for service as a juror.

"2. He must be a freeholder within the State, or a householder within the county.

"3. He must be of sound mind and good moral character.

"4. He must be able to read and write.

"5. He must not have been convicted of any felony.

"6. He must not be under indictment or other legal accusation for theft or of any felony."

are instructed by the court as to their duties. Art. 366. This method of selection leaves a wide range of choice to the commissioners. Its validity, however, has been accepted by this Court. *Smith* v. *Texas,* 311 U. S. 128, 130. Petitioner does not attack it now. Its alternative would be a list composed of all eligibles within the trial court's jurisdiction and selection of the panel by lot.

Petitioner's sole objection to the grand jury is that the "commissioners deliberately, intentionally and purposely limited the number of the Negro race that should be selected on said grand jury panel to one member." Fairness in selection has never been held to require proportional representation of races upon a jury. *Virginia* v. *Rives,* 100 U. S. 313, 322–23; *Thomas* v. *Texas,* 212 U. S. 278, 282. Purposeful discrimination is not sustained by a showing that on a single grand jury the number of members of one race is less than that race's proportion of the eligible individuals. The number of our races and nationalities stands in the way of evolution of such a conception of due process or equal protection. Defendants under our criminal statutes are not entitled to demand representatives of their racial inheritance upon juries before whom they are tried. But such defendants are entitled to require that those who are trusted with jury selection shall not pursue a course of conduct which results in discrimination "in the selection of jurors on racial grounds." *Hill* v. *Texas, supra,* 404. Our directions that indictments be quashed when Negroes, although numerous in the community, were excluded from grand jury lists have been based on the theory that their continual exclusion indicated discrimination and not on the theory that racial groups must be recognized. *Norris* v. *Alabama, supra; Hill* v. *Texas, supra; Smith* v. *Texas, supra.* The mere fact of inequality in the number selected does not in itself show discrimination. A purpose to discriminate must be present which may be proven by systematic

exclusion of eligible jurymen of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination. Cf. *Snowden* v. *Hughes,* 321 U. S. 1, 8. Any such discrimination which affects an accused will make his conviction unlawful.

The history and record of this case gives evidence that the courts of Texas which are charged with the trial of petitioner endeavored to comply with the federal constitutional requirements as to the selection of grand juries, according to the interpretation of this Court in *Hill* v. *Texas, supra.* Not only did the Court of Criminal Appeals reverse a former conviction of petitioner on its authority but the judge, now deceased, of the criminal district court of Dallas instructed the three jury commissioners, who selected this grand jury list, as testified to by each of them, that there should be no discrimination against anyone because of his color.[4]

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[4] Commissioner Wells: "In the selection of our panel of sixteen for the grand jury the way we determined whom we would put on that list was, we were advised by Judge Grover Adams that the Supreme Court had ruled that we could not discriminate against any one because of his color, as I recall, they had not been discriminating for selection on the grand jury panel; and in turn they said there were sixteen, and it would be further evident if we placed one among the twelve so as to make it clear."

Commissioner Tennant: "When the grand jury commissioners were appointed by Judge Adams the only thing I remember he said is that we could not discriminate against the negro population being represented on the grand jury. No, he just outlined if he could qualify as a grand juror. In this particular instance we selected one negro on this panel; so far as I am concerned, I read in the paper that the Supreme Court of the United States stated that a negro could sit on the grand jury. . . . Judge Adams never mentioned to us about putting one negro on the grand jury, or five or ten. Yes, that there must be representation for the race."

Commissioner Douglas: "At that time Judge Adams, the judge of this court made some reference or instructions about how to select the grand jury. He thought it well to select negroes on the grand jury. He said he thought it would be well to select a negro on the

Hill v. *Texas, supra,* was decided June 1, 1942. The trial court has four terms a year—January, April, July and October. After the *Hill* decision, the jury commissioners who were appointed at the July 1942 term to select grand jurors for the October 1942 term, Texas Code of Criminal Procedure, Arts. 333 and 338, placed a Negro on the grand jury list although he did not serve. Under the instructions of the judge as just detailed, the commissioners for the January 1943 term, at which petitioner was indicted, placed a Negro on the list and he served as a grand juror. Prior to the decision in the *Hill* case, it does not appear that any colored person had ever served on a grand jury in Dallas County.

On the precise act of discrimination by the jury commissioners which is asserted by petitioner, that is the deliberate, intentional and purposeful limitation to one of the number of Negroes on the grand jury panel, the record shows as follows. About fifteen and one-half per cent of the population of Dallas County, Texas, is negro. A substantial percentage of them are qualified to serve as grand jurors. No exact comparison can be made between the white and negro citizens as to the percentage of each race which is eligible. On the strictly mathematical basis of population, a grand jury of twelve would have 1.8552 negro members on the average. Of course, the qualifications for grand jury service, note 3 *supra,* would affect the proportion of eligibles from the two races. As one member of the Negro race served upon the grand jury which indicted petitioner and one had appeared upon the other grand jury list which had been selected after the decision in *Hill* v. *Texas,* we cannot say that the omission from each of the two lists of all but one of the members of a race

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grand jury. There was no further discussion about that. We did select a negro on the grand jury. All three of us went out there to see him. We all went and talked to just one negro and that is the one we selected."

which composed some fifteen per cent of the population alone proved racial discrimination.

In connection with that fact of omission, we must appraise the testimony offered to show the intentional limitation. Besides the language quoted in note 4 *supra*, which relates particularly to the court's instructions, other relevant evidence of such intention is found only in the testimony of the commissioners. They made these statements as to their intentions:

> Commissioner Wells: "There was nothing said about the number and nothing was said about the number on the panel. . . . We had no intention of placing more than one negro on the panel. When we did that we had finished with the negro. That was the suggestion of the others and what Judge Adams thought about the selection of the grand jury. . . . Judge Adams did not tell us to put one negro or five negroes on the grand jury. Yes, we just understood to see that negroes had representation on the grand jury, and we went out to see this particular one because we did not know him. . . . Among the white people whose names might go on the grand jury, unless I knew them personally and knew their qualifications, we went out and talked to them. No, we did not discriminate against a white man or a negro. I attempted not to."
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> Commissioner Tennant: "We three did not go to see any other negroes, that is the only one. I did not have any intention of putting more than one on the list; I could not think of anybody; I would have if I could have thought of another one, and putting one on."
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> Commissioner Douglas: "Yes, sir, there were other negroes' names mentioned besides the one we selected; we did not go talk to them; we liked this one, and our intentions were to get just one negro on the grand jury; that is right. No, I did not have any intention of placing more than one negro on the grand jury. . . . We never agreed to select any certain number, but when we found one with all the

qualifications of a grand juror we felt like that was satisfactory representation. . . . No, sir, we did not have in mind to put any set number of representatives of the various races. . . . We did not agree to put eleven negroes and one white man on, no. That is right, all that we were endeavoring to get a fair and impartial grand jury without any discrimination against any race on earth. We did not have in mind, or the other commissioners, to put any set number on of any race, white, yellow or what-not."

A careful examination of these statements in connection with all the other evidence leaves us unconvinced that the commissioners deliberately and intentionally limited the number of Negroes on the grand jury list. The judge who heard the witnesses on the motion to quash did not find that type of discrimination. The law of their state, the instructions of the judge, their oath of office required them to choose prospective jurors on their statutory qualifications and without regard to their color or the number of representatives of various races who might appear upon the list. We cannot say the commissioners violated these obligations.

This conclusion makes it unnecessary to decide whether a purposeful limitation of jurors by race to the approximate proportion that the eligible jurymen of the race so limited bears to the total eligibles is invalid under the Fourteenth Amendment.

The judgment is

Affirmed.

Mr. Justice Rutledge concurs in the result.

The Chief Justice and Mr. Justice Black dissent.

Mr. Justice Murphy, dissenting.

The equal protection clause of the Fourteenth Amendment entitles every person, whose life, liberty or property is in issue, to the benefits of grand and petit juries chosen

without regard to race, color or creed. This constitutional principle is a fundamental tenet of the American faith in the jury system. The absence of such a principle would give free rein to those who wittingly or otherwise act to undermine the very foundations of this system and would make juries ready weapons for officials to oppress those accused individuals who by chance are numbered among unpopular or inarticulate minorities.

The State of Texas in this instance appears to have made a sincere effort to obey this constitutional mandate in selecting the grand jury which indicted the Negro petitioner. Until this Court's decision in 1942 in *Hill* v. *Texas*, 316 U. S. 400, no Negro ever served on a grand jury in Dallas County, Texas, where this case arose. In an attempt to comply with that decision the three jury commissioners were careful here to appoint one Negro to the sixteen-member grand jury panel; he qualified and served on the twelve-man jury. Thus it cannot be said that Texas has systematically and completely excluded Negroes from the grand jury. Cf. *Norris* v. *Alabama*, 294 U. S. 587; *Pierre* v. *Louisiana*, 306 U. S. 354; *Smith* v. *Texas*, 311 U. S. 128; *Hill* v. *Texas*, *supra*. But that fact alone does not guarantee compliance with the Fourteenth Amendment, however commendable may be the attempt. Racial limitation no less than racial exclusion in the formation of juries is an evil condemned by the equal protection clause. "The Amendment nullifies sophisticated as well as simple-minded modes of discrimination." *Lane* v. *Wilson*, 307 U. S. 268, 275. This case must therefore be reviewed with that in mind.

Petitioner, as a Negro, "cannot claim, as matter of right, that his race shall have a representation on the jury," *Neal* v. *Delaware*, 103 U. S. 370, 394, inasmuch as "a mixed jury in a particular case is not essential to the equal protection of the laws," *Virginia* v. *Rives*, 100 U. S. 313, 323. But petitioner, as a human being endowed with all the

rights specified in the Constitution, can claim that no racial or religious exclusion, limitation or other form of discrimination shall enter into the selection of any jury which indicts or tries him.

It follows that the State of Texas, in insisting upon one Negro representative on the grand jury panel, has respected no right belonging to petitioner. On the contrary, to the extent that this insistence amounts to a definite limitation of Negro grand jurors, a clear constitutional right has been directly invaded. The equal protection clause guarantees petitioner not only the right to have Negroes considered as prospective veniremen but also the right to have them considered without numerical or proportional limitation. If a jury is to be fairly chosen from a cross section of the community it must be done without limiting the number of persons of a particular color, racial background or faith—all of which are irrelevant factors in setting qualifications for jury service. This may in a particular instance result in the selection of one, six, twelve or even no Negroes on a jury panel. The important point, however, is that the selections must in no way be limited or restricted by such irrelevant factors.

In this case the State of Texas has candidly admitted before us "that none of the three [jury commissioners] intended to place more than one Negro upon the grand jury drawn by them." Commissioner Wells testified that "We had no intention of placing more than one Negro on the panel. When we did that we had finished with the Negro." In the words of Commissioner Tennant, "We three did not go to see any other Negroes, that is the only one. I did not have any intention of putting more than one on the list." Finally, as Commissioner Douglas stated, "Yes, sir, there were other Negroes' names mentioned besides the one we selected; we did not go talk to them; we liked this one, and our intentions were to get just one Negro on the grand jury; that is right. No, I

did not have any intention of placing more than one Negro on the grand jury."

Clearer proof of intentional and deliberate limitation on the basis of color would be difficult to produce. The commissioners' declarations that they did not intend to discriminate and their other inconsistent statements cited by the Court fade into insignificance beside the admitted and obvious fact that they intended to and did limit the number of Negroes on the jury panel. By limiting the number to one they thereby excluded the possibility that two or more Negroes might be among the persons qualified to serve. All those except the one Negro were required to be of white color. At the same time, by insisting upon one Negro, they foreclosed the possibility of choosing sixteen white men on the panel. They refused, in brief, to disregard the factor of color in selecting the jury personnel. To that extent they have disregarded petitioner's right to the equal protection of the laws. To that extent they have ignored the ideals of the jury system. Our affirmance of this judgment thus tarnishes the fact that we of this nation are one people undivided in ability or freedom by differences in race, color or creed.

BOWLES, PRICE ADMINISTRATOR, *v.* SEMINOLE ROCK & SAND CO.

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

No. 914. Argued April 26, 27, 1945.—Decided June 4, 1945.

1. Under Rule (i) of § 1499.163 (a) (2) of Maximum Price Regulation No. 188, issued by the Administrator of the Office of Price Administration under § 2 (a) of the Emergency Price Control Act of 1942, a seller's ceiling price for an article which was actually delivered during March 1942 is the highest price charged for the article so delivered, regardless of when the sale or charge was made. P. 416.

2. In interpreting an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation. Pp. 413–414.
3. This Court does not here determine the constitutionality or statutory validity of the regulation as so construed (matters determinable in the first instance by the Emergency Court of Appeals); nor any question of hardship of enforcement of such ceiling price (the procedure for relief therefrom being prescribed by § 2 (c) of the Act and § 1499.161 of the Regulation). P. 418.

145 F. 2d 482, reversed.

Certiorari, 324 U. S. 835, to review a judgment affirming the dismissal of a suit by the Price Administrator to enjoin the respondent from violation of the Emergency Price Control Act of 1942 and Regulations issued pursuant thereto.

Mr. Henry M. Hart, Jr., pro hac vice, with whom *Solicitor General Fahy, Messrs. Robert L. Stern* and *David London* were on the brief, for petitioner.

Mr. Robert H. Anderson, with whom *Messrs. Robert Ruark, Bennett H. Perry* and *J. M. Hemphill* were on the brief, for respondent.

Mr. Justice Murphy delivered the opinion of the Court.

Our consideration here is directed to the proper interpretation and application of certain provisions of Maximum Price Regulation No. 188,[1] issued by the Administrator of the Office of Price Administration under Section 2 (a) of the Emergency Price Control Act of 1942.[2]

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[1] 7 Fed. Reg. 5872, 7967, 8943.

[2] 56 Stat. 23, 24.

Respondent is a manufacturer of crushed stone, a commodity subject to Maximum Price Regulation No. 188. In October, 1941, respondent contracted to furnish the Seaboard Air Line Railway crushed stone on demand at 60 cents per ton, to be delivered when called for by Seaboard. This stone was actually delivered to Seaboard in March, 1942.

In January, 1942, respondent had contracted to sell crushed stone to V. P. Loftis Co., a government contractor engaged in the construction of a government dam, for $1.50 a ton.[3] This stone was to be delivered by respondent by barge when needed at the dam site. A small portion of stone of a different grade than that sold to Seaboard was delivered to Loftis Co. during January pursuant to this contract. For some time thereafter, however, Loftis Co. was unable to pour concrete or to store crushed stone at the dam site. Respondent thus made no further deliveries under this contract until August, 1942, at which time stone of the same grade as received by Seaboard was delivered to Loftis Co. at the $1.50 rate.

Subsequently, and after the effective date of Maximum Price Regulation No. 188, respondent made new contracts to sell crushed stone to Seaboard at 85 cents and $1.00 per ton. Alleging that the highest price at which respondent could lawfully sell crushed stone of the kind sold to Seaboard was 60 cents a ton, since that was asserted to be the highest price charged by respondent during the crucial month of March, 1942, the Administrator of the Office of Price Administration brought this action to enjoin respondent from violating the Act and Maximum Price Regulation No. 188.[4] The District Court dismissed the action

[3] The contract actually spoke in terms of $1.50 per cubic yard, but there is no appreciable difference between a cubic yard of crushed stone and a ton of crushed stone.

[4] The Administrator also sought to recover from respondent a judgment under § 205 (e) of the Act for three times the amount by which

on the ground that $1.50 a ton was the highest price charged by respondent during March, 1942, and that this ceiling price had not been exceeded. The Fifth Circuit Court of Appeals affirmed the judgment. 145 F. 2d 482. We granted certiorari because of the importance of the problem in the administration of the emergency price control and stabilization laws.

In his efforts to combat wartime inflation, the Administrator originally adopted a policy of piecemeal price control, only certain specified articles being subject to price regulation. On April 28, 1942, however, he issued the General Maximum Price Regulation.[5] This brought the entire economy of the nation under price control with certain minor exceptions. The core of the regulation was the requirement that each seller shall charge no more than the prices which he charged during the selected base period of March 1 to 31, 1942. While still applying this general price "freeze" as of March, 1942, numerous specialized regulations relating to particular groups of commodities subsequently have made certain refinements and modifications of the general regulation. Maximum Price Regulation No. 188, covering specified building materials and consumers' goods, is of this number.

The problem in this case is to determine the highest price respondent charged for crushed stone during March, 1942, within the meaning of Maximum Price Regulation No. 188. Since this involves an interpretation of an adminis-

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the sales price of the crushed stone sold by the respondent to Seaboard after the effective date of Maximum Price Regulation No. 188 exceeded 60 cents per ton. The District Court held that the purchaser rather than the Administrator was vested with whatever cause of action existed to recover a judgment under § 205 (e). The Circuit Court of Appeals, however, held that § 205 (e), as amended by § 108 (b) of the Stabilization Extension Act of 1944, 58 Stat. 640, entitled the Administrator rather than the purchaser to bring suit under the circumstances of this case. This aspect of the case is not now before us.

[5] 7 Fed. Reg. 3156.

trative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation. The legality of the result reached by this process, of course, is quite a different matter. In this case the only problem is to discover the meaning of certain portions of Maximum Price Regulation No. 188. Our only tools, therefore, are the plain words of the regulation and any relevant interpretations of the Administrator.

Section 1499.153 (a) of Maximum Price Regulation No. 188 provides that "the maximum price for any article which was delivered or offered for delivery in March, 1942, by the manufacturer, shall be the highest price charged by the manufacturer during March, 1942 (as defined in § 1499.163) for the article." Section 1499.163 (a) (2)[6] in turn provides that for purposes of this regulation the term:

" 'Highest price charged during March, 1942' means

"(i) The highest price which the seller charged to a purchaser of the same class for delivery of the article or material during March, 1942; or

"(ii) If the seller made no such delivery during March, 1942, such seller's highest offering price to a purchaser of the same class for delivery of the article or material during that month; or

"(iii) If the seller made no such delivery and had no such offering price to a purchaser of the same class during March, 1942, the highest price charged by the seller during March, 1942, to a purchaser of a different class, ad-

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[6] 7 Fed. Reg. 7968–7969.

justed to reflect the seller's customary differential between the two classes of purchasers . . ."

It is thus evident that the regulation establishes three mutually exclusive rules for determining the highest price charged by a seller during March, 1942. The facts of each case must first be tested by rule (i); only if that rule is inapplicable may rule (ii) be utilized; and only if both rules (i) and (ii) are inapplicable is rule (iii) controlling.

The dispute in this instance centers about the meaning and applicability of rule (i). The Administrator claims that the rule is satisfied and therefore is controlling whenever there has been an actual delivery of articles in the month of March, 1942, such as occurred when respondent delivered the crushed rock to Seaboard at the 60-cent rate. The respondent, on the other hand, argues that there must be both a charge and a delivery during March, 1942, in order to fix the ceiling price according to rule (i). Since the charge or sale to Seaboard occurred several months prior to March, it is asserted that rule (i) becomes inapplicable and that rule (ii) must be used. Inasmuch as there was an outstanding offering price of $1.50 per ton for delivery of crushed stone to Loftis Co. during the month of March, 1942, although the stone was not actually delivered at that time, respondent concludes that the requirements of rule (ii) have been met and that the ceiling price is $1.50 per ton.

As we read the regulation, however, rule (i) clearly applies to the facts of this case, making 60 cents per ton the ceiling price for respondent's crushed stone. The regulation recognizes the fact that more than one meaning may be attached to the phrase "highest price charged during March, 1942." The phrase might be construed to mean only the actual charges or sales made during March, regardless of the delivery dates. Or it might refer only to the charges made for actual delivery in March. Whatever may be the variety of meanings, however, rule

(i) adopts the highest price which the seller "charged . . . for delivery" of an article during March, 1942. The essential element bringing the rule into operation is thus the fact of delivery during March. If delivery occurs during that period the highest price charged for such delivery becomes the ceiling price. Nothing is said concerning the time when the charge or sale[7] giving rise to the delivery occurs. One may make a sale or charge in October relative to an article which is actually delivered in March and still be said to have "charged . . . for delivery . . . during March." We can only conclude, therefore, that for purposes of rule (i) the highest price charged for an article delivered during March, 1942, is the seller's ceiling price regardless of the time when the sale or charge was made.

This conclusion is further borne out by the fact that rule (ii) becomes applicable only where "the seller made no such delivery during March, 1942," as contemplated by rule (i). The absence of delivery, rather than the absence of both a charge and a delivery during March, is necessary to make rule (i) ineffective, thereby indicating that the factor of delivery is the essence of rule (i). It is apparent, moreover, that the delivery must be an actual instead of a constructive one. Section 1499.20 (d) of General Maximum Price Regulation, incorporated by reference into Maximum Price Regulation No. 188 by § 1499.151, defines the word "delivered" as meaning "received by the purchaser or by any carrier . . . for shipment to the purchaser" during March, 1942. Thus an article is not

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[7] Respondent points to the provision in § 302 (a) of the Act, 56 Stat. 36, to the effect that the term "sale" as used in the Act includes "sales, dispositions, exchanges, leases, and other transfers, and contracts and offers to do any of the foregoing," as well as to a similar provision in § 1499.20 (r) of the General Maximum Price Regulation. But such a definition is of no assistance in determining the meaning of the Administrator's use of the phrase "charged . . . for delivery" during March, 1942.

"delivered" to a purchaser during March because of the existence of an executory contract under which no shipments are actually made to him during that month. In short, the Administrator in rule (i) was concerned with what actually was delivered, not with what might have been delivered.

Any doubts concerning this interpretation of rule (i) are removed by reference to the administrative construction of this method of computing the ceiling price. Thus in a bulletin issued by the Administrator concurrently with the General Maximum Price Regulation entitled "What Every Retailer Should Know About the General Maximum Price Regulation,"[8] which was made available to manufacturers as well as to wholesalers and retailers, the Administrator stated (p. 3): "The highest price charged during March 1942 means the highest price which the retailer charged for an article *actually delivered* during that month or, if he did not make any delivery of that article during March, then his *highest offering price* for delivery of that article during March." He also stated (p. 4) that "It should be carefully noted that *actual delivery* during March, rather than the making of a sale during March, is controlling." In his First Quarterly Report to Congress, the Administrator further remarked (p. 40) that "'Highest price charged' means one of two things: (1) It means the top price for which an article was delivered during March 1942, in completion of a sale to a purchaser of the same class . . . (2) If there was no actual delivery of a particular article during March, the seller may establish as his maximum price the highest price at which he offered the article for sale during that month." Finally, the Administrator has stated that this position has uniformly been taken by the Office of Price Administration

[8] General Maximum Price Regulation, Bulletin No. 2 (May, 1942). Maximum Price Regulation No. 188 established prices "at the identical level of the General Maximum Price Regulation" for articles dealt in during March, 1942. 7 Fed. Reg. 5873.

in the countless explanations and interpretations given to inquirers affected by this type of maximum price determination.

Our reading of the language of § 1499.163 (a) (2) of Maximum Price Regulation No. 188 and the consistent administrative interpretation [9] of the phrase "highest price charged during March, 1942" thus compel the conclusion that respondent's highest price charged during March for crushed stone was 60 cents per ton, since that was the highest price charged for stone actually delivered during that month. The two courts below erred in their interpretation of this regulation and the judgment below must accordingly be reversed.

We do not, of course, reach any question here as to the constitutionality or statutory validity of the regulation as

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[9] Respondent points to two allegedly inconsistent interpretations made by the Administrator:

1. On August 20, 1942 (O. P. A. Press Release No. 564), he made certain statements with reference to Amendment 23 to the General Maximum Price Regulation, 7 Fed. Reg. 6615, allowing a different method of maximum price computation where general price increases were announced prior to April 1, 1942, and deliveries at lower prices were made in March under previous contracts. The provisions and applicability of this amendment are not in issue in this case and statements interpreting that amendment have no bearing here.

2. On December 5, 1942 (O. P. A. Press Release No. 1223), he issued a statement interpreting Amendment 38 to the General Maximum Price Regulation and Amendment 3 to Maximum Price Regulation No. 188, 7 Fed. Reg. 10155. These amendments authorized sellers who made general price increases prior to April 1, 1942, to apply the increases to ceiling prices for goods and services delivered during March under long-term contracts. The Administrator's explanation of these amendments, which are not presently before us, is likewise irrelevant in this case.

Indeed, the fact that the Administrator found it necessary to make such amendments is some evidence that under the rules here in issue the price established under a previous contract is the maximum price if that was the highest price for goods actually delivered during March, 1942.

we have construed it, matters that must in the first instance be presented to the Emergency Court of Appeals. *Lockerty* v. *Phillips*, 319 U. S. 182; *Yakus* v. *United States*, 321 U. S. 414, 427–431. Nor are we here concerned with any possible hardship that the enforcement of the 60-cent price ceiling may impose on respondent. Adequate avenues for relief from hardship are open to respondent through the provisions of § 2 (c) of the Act and § 1499.161 of the regulation.

Reversed.

MR. JUSTICE ROBERTS thinks the judgment should be affirmed for the reasons given in the opinion of the Circuit Court of Appeals, 145 F. 2d 482.

WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, U. S. DEPARTMENT OF LABOR, v. YOUNGERMAN-REYNOLDS HARDWOOD CO., INC.

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

No. 955. Argued May 1, 1945.—Decided June 4, 1945.

1. In a proceeding brought by the Administrator to enjoin alleged violations of the Fair Labor Standards Act, the District Court did not abuse its discretion in refusing to enjoin the employer's use of a method of wage payments which the employer had abandoned on the day before the trial—where the court found no evidence of intent to resume use of such method of payments, nor of willful violation of the Act, nor of intent to violate the Act in future. P. 421.
2. The regular rate contemplated by § 7 (a) of the Fair Labor Standards Act refers to the hourly rate actually paid the employee for the normal, non-overtime workweek for which he is employed. In the case of piece work wages, this regular rate is the quotient of the amount received during the week divided by the number of hours worked. P. 424.

3. The regular rate by its very nature must reflect all payments which the parties have agreed shall be received regularly during the workweek, exclusive of overtime payments. The determination of this rate is a matter of mathematical calculation and is unaffected by any designation of a contrary "regular rate" in the wage contracts. P. 424.
4. Wage agreements between a lumber manufacturer and employees engaged as stackers provided for compensation at a "regular rate" of 35 cents per hour and one and one-half times that rate for overtime, with a guaranty of 70 cents per 1,000 board feet of lumber ricked and 80 cents stacked. The guaranteed piece rate would result in an average hourly rate of 59 cents for a normal, non-overtime workweek. *Held* that the wage agreements, so far as they failed to provide for overtime compensation of one and one-half times the regular rate actually received, which in this instance would equal the average hourly rate of 59 cents, violated § 7 (a) of the Fair Labor Standards Act. P. 425.

   The individual regular rate which must be used will depend upon the number of hours worked and the wages received by each stacker during the particular workweek in question; but such a rate is the one that must enter into any calculations of overtime payments due under § 7 (a).
5. *Walling* v. *Belo Corp.*, 316 U. S. 624, is not authority for fixing by contract a "regular rate" wholly unrelated to payments which the employees actually and normally receive each week. P. 426.

145 F. 2d 349, reversed.

CERTIORARI, 324 U. S. 837, to review the affirmance of a judgment dismissing a suit by the Administrator to enjoin alleged violations of the Fair Labor Standards Act.

Mr. Douglas B. Maggs, with whom *Assistant Solicitor General Hugh B. Cox, Messrs. Irving J. Levy, Ralph F. Fuchs* and *Archibald Cox* were on the brief, for petitioner.

Mr. Fred S. Ball, Jr. for respondent.

MR. JUSTICE MURPHY delivered the opinion of the Court.

The respondent corporation manufactures lumber for shipment in interstate commerce, employing various men

to pick up and stack boards. Prior to the trial in this case these stackers were compensated at agreed piece rates per thousand board feet ricked or stacked. The Administrator of the Wage and Hour Division of the Department of Labor brought suit to enjoin alleged violations of the overtime and record-keeping provisions of the Fair Labor Standards Act of 1938[1] in connection with these stackers. On the day before the commencement of the trial in the District Court the respondent ceased to use the allegedly illegal mode of piece rate compensation and entered into new and more elaborate wage agreements with the stackers. Following the trial the District Court dismissed the complaint and the Fifth Circuit Court of Appeals affirmed the judgment. 145 F. 2d 349. We granted certiorari because of important questions as to whether the new wage agreements comply with the requirements of § 7 (a) of the Act.

First. The District Court found that even though the former piece rate agreements be considered unlawful the respondent had no apparent intention of resuming their use. It also found no willful intention on the part of the respondent to violate the Act and no evidence of any intention of future violations. It therefore felt that there was no necessity for an injunction. While "voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power," *Walling* v. *Helmerich & Payne*, 323 U. S. 37, 43, it may justify a court's refusal to enjoin future activity of this nature when it is combined with a bona fide intention to comply with the law and not to resume the wrongful acts. Cf. *United States* v. *United States Steel Corp.*, 251 U. S. 417, 445. We cannot say, therefore, that the District Court abused its discretion in refusing to enjoin the abandoned method of wage payments.

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[1] 52 Stat. 1060, 29 U. S. C. § 201 *et seq.*

At the same time, however, the validity of the new wage agreements was also at stake. These agreements on their face contemplated future hourly payments at regular and overtime rates as well as additional piece rate payments. Since the Administrator's complaint alleged generally that the respondent was violating §§ 7 and 15 (a) (2) by employing its stackers on a piece work basis for more than 40 hours a week without compensating them for overtime at one and one-half times the regular rate, the question as to whether the new contracts satisfied § 7 (a) was properly in issue. Upon proof that these new provisions did not comply with § 7 (a) the Administrator was therefore entitled to an injunction absent any recognized mitigating factor. Evidence on this matter was introduced at the trial and the two courts below considered the contracts thoroughly, predicating their judgments in part upon the belief that the agreements did comply with § 7 (a). We accordingly turn to a consideration of that question.

Second. For approximately six months immediately preceding the trial the stackers were paid piece rates of 60 cents per thousand board feet ricked and 70 cents per thousand board feet stacked. During this period they earned at these rates an average of 51 cents an hour. Under the new contracts made on the day before the trial, however, they were compensated according to the following provisions:

"The basic or regular rate of pay is 35 cents per hour for the first forty hours each week and for time over forty hours each week the pay shall not be less than one and one-half times such basic or regular rate above mentioned with a guaranty that the employee shall receive weekly for regular time and for such overtime as the employee may work a sum arrived at as follows:

"The amount of stacking done by said employee shall be figured on the basis of 80 cents per thousand board

feet of lumber for flat stacking and 70 cents per thousand board feet of lumber ricked."

Using by way of illustration the labor performed and the hours worked during the six-month period preceding the trial, the Administrator points out that under the new guaranteed piece rates of 70 and 80 cents per thousand the stackers would earn an average of about 59 cents an hour for all hours actually worked, including those in excess of the statutory maximum. On the basis of the contract "regular rate" of 35 cents an hour,[2] on the other hand, the excess hours would yield the stackers only 52½ cents hourly. It is thus apparent that the guaranteed piece rates would yield greater returns on an hourly basis for both regular and overtime work and that they would actually be the rates paid.

The respondent argues that these contract provisions satisfy § 7 (a) since they provide for a "regular rate" of 35 cents an hour and for payment of one and one-half times that rate, or 52½ cents, for all overtime hours. Inasmuch as the Act does not forbid incentive pay or compensation above and beyond the statutory requirements it is urged that the additional payments resulting from the operation of the guaranteed piece rates are unaffected in any way by § 7 (a). We cannot agree, however, that this scheme of compensation is obedient to this statutory mandate.

Under § 7 (a) an employer is required to compensate his employees for all hours in excess of 40 at not less than one and one-half times the regular rate at which they are employed. Thus by increasing the employer's labor costs by 50% at the end of the 40-hour week and by giving the employees a 50% premium for all excess hours, § 7 (a) achieves its dual purpose of inducing the employer

[2] At the time these contracts were made the minimum wage for the timber products industry had been fixed at 35 cents an hour in an order issued by the Administrator.

to reduce the hours of work and to employ more men and of compensating the employees for the burden of a long workweek. *Overnight Motor Co.* v. *Missel,* 316 U. S. 572, 577–578; *Walling* v. *Helmerich & Payne, supra,* 40; *Jewell Ridge Coal Corp.* v. *Local No. 6167, ante,* pp. 161, 167.

The keystone of § 7 (a) is the regular rate of compensation. On that depends the amount of overtime payments which are necessary to effectuate the statutory purposes. The proper determination of that rate is therefore of prime importance.

As we have previously noted, the regular rate refers to the hourly rate actually paid the employee for the normal, non-overtime workweek for which he is employed. *Walling* v. *Helmerich & Payne, supra,* 40; *United States* v. *Rosenwasser,* 323 U. S. 360, 363. In the case of piece work wages, this regular rate coincides with the hourly rate actually received for all hours worked during the particular workweek, such rate being the quotient of the amount received during the week divided by the number of hours worked. See *Overnight Motor Co.* v. *Missel, supra,* 580. As long as the minimum hourly rates established by § 6 are respected, the employer and employee are free to establish this regular rate at any point and in any manner they see fit. They may agree to pay compensation according to any time or work measurement they desire. *United States* v. *Rosenwasser, supra.* "But this freedom of contract does not include the right to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes." *Walling* v. *Helmerich & Payne, supra,* 42. The regular rate by its very nature must reflect all payments which the parties have agreed shall be received regularly during the workweek, exclusive of overtime payments. It is not an arbitrary label chosen by the parties; it is an actual fact. Once the parties have decided upon the amount of

wages and the mode of payment the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary "regular rate" in the wage contracts.

Here it is established that under the new wage agreements the stackers will receive 70 or 80 cents per thousand board feet ricked or stacked. Translated to an hourly basis this means that they will receive approximately 59 cents per hour for both regular and overtime hours.[3] That amount is guaranteed them under the terms of the contracts and accurately mirrors all payments that they normally will receive from the respondent during the workweek. This 59-cent figure is therefore the average regular rate at which the stackers are employed. The individual regular rate which must be used depends, of course, upon the number of hours worked and the wages received by each stacker during the particular workweek in question. But such a rate is the one that must enter into any calculations of overtime payments due under § 7 (a). Insofar as the wage agreements failed to provide for the payment of one and one-half times this regular rate for all overtime hours, they plainly violated the requirements of § 7 (a).

The 35-cent per hour "regular rate" fixed by the contracts is obviously an artificial one, however bona fide it may have been in origin. Except in the extremely unlikely situation of the piece work wages falling below a 35-cent per hour figure, this "regular rate" is never actually paid. In the normal case where the stackers earn more than 35 cents per hour on the piece rate basis during non-overtime hours, they are guaranteed this higher figure and are actually so compensated. And even when the

[3] This 59 cents an hour average is based upon a six-month study of work actually done by the stackers and there is no substantial basis for assuming that it is incorrect or that the average is likely to vary appreciably in the future.

stackers work overtime they actually receive at the present time an average of 59 cents an hour under the guaranteed piece rate system rather than one and one-half times the 35-cent "regular rate."

The 35-cent figure thus does not constitute the hourly rate actually paid for the normal, non-overtime workweek. Nor is it used as the basis for calculating the compensation received for overtime labor. It is not in fact the regular rate under any normal circumstances. And reliance upon it to prove compliance with § 7 (a) only allows respondent to escape completely the burden of a 50% premium for the hours so worked and prevents the stackers from receiving the benefits of such a premium as Congress intended. Thus by a mere label respondent would be enabled to nullify all the purposes for which § 7 (a) was created. We are unable to perceive any reason for sanctioning that result.

This Court's decision in *Walling* v. *Belo Corp.*, 316 U. S. 624, lends no support to respondent's position. The particular wage agreements there involved were upheld because it was felt that in fixing a rate of 67 cents an hour the contracts did in fact set the actual regular rate at which the workers were employed. The case is no authority, however, for the proposition that the regular rate may be fixed by contract at a point completely unrelated to the payments actually and normally received each week by the employees.

The judgment of the court below is reversed with directions to remand the case to the District Court for further proceedings consistent with this opinion.

Reversed.

For opinions of MR. JUSTICE FRANKFURTER, concurring, see *post*, p. 433; and MR. CHIEF JUSTICE STONE, dissenting, see *post*, p. 434.

WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, U. S. DEPARTMENT OF LABOR, *v.* HARNISCHFEGER CORPORATION.

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

No. 956. Argued May 1, 1945.—Decided June 4, 1945.

A wage agreement, arrived at by collective bargaining, provided for compensation at a specified base rate or "regular rate." On "time studied" jobs, "incentive bonuses" or "piecework earnings" normally resulted in employees receiving compensation, exclusive of overtime payments, at a rate higher than the base rate. The hourly rate actually paid on many jobs not "time studied" was at least 20% higher than the base. *Held:*

1. As to employees who received hourly rates higher than the base rate, the computation of overtime on the basis of such rate rather than on the rate actually received violated §7 (a) of the Fair Labor Standards Act. P. 430.

2. As to employees who received incentive bonuses, such payments must enter into the computation of the statutory regular rate for purposes of the overtime provisions of § 7 (a), regardless of any contract provision to the contrary. P. 431.

3. Where, as here, the facts do not permit it, the Court cannot arbitrarily divide bonuses or piece-work wages into regular and overtime segments, thereby creating artificial compliance with § 7 (a). P. 432.

4. It is not sufficient that the employer pays for overtime a premium which makes the overtime rate somewhat higher than the piece-work earnings per hour; section 7 (a) requires that that premium be not less than 50% of the actual hourly rate received from all regular sources. P. 432.

5. Where the correct overtime compensation cannot be determined until after the regular payday, § 7 (a) requires only that the employee receive such compensation as soon as convenient or practicable under the circumstances. P. 432.

145 F. 2d 589, reversed.

CERTIORARI, 324 U. S. 837, to review the reversal of an order of the District Court, 54 F. Supp. 326, enjoining violations of the Fair Labor Standards Act.

Mr. Irving J. Levy, with whom *Assistant Solicitor Hugh B. Cox, Messrs. Ralph F. Fuchs, Douglas B. Maggs* and *Archibald Cox* were on the brief, for petitioner.

Mr. Leo Mann, with whom *Messrs. Louis Quarles* and *Maxwell H. Herriott* were on the brief, for respondent.

MR. JUSTICE MURPHY delivered the opinion of the Court.

Here, as in *Walling* v. *Youngerman-Reynolds Hardwood Co., ante,* p. 419, we are concerned with the problem of whether a particular type of wage agreement meets the requirements of Section 7 (a) of the Fair Labor Standards Act of 1938.[1]

Respondent is a Wisconsin corporation engaged in producing electrical products for interstate commerce. About one-half of respondent's production employees, called incentive or piece workers, are involved in this case.

As a result of collective bargaining by their union, these employees entered into a collective agreement with respondent whereby they are each paid a basic hourly rate plus an "incentive bonus" or "piecework earnings." The various jobs performed by these incentive workers are "time studied" by the management. The time which the job is shown to consume is multiplied by a "standard earning rate"[2] per unit of time. The amount so obtained is known as the "price" placed on that job. When an employee is given work on a job that has been so priced, he receives a job card bearing the price.

The worker is paid his agreed base or hourly rate (ranging from 55 cents to $1.05 per hour) for the time which

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[1] 52 Stat. 1060, 29 U. S. C. § 201 *et seq.*

[2] The "standard earning rate" is the hourly rate of pay which workers in the Milwaukee, Wisconsin, district receive for that type of work. This "standard earning rate" is not the base rate of any worker in respondent's plant, nor is it the average hourly earned rate of any worker.

he takes to perform the job. If the job price exceeds this base pay, he ultimately receives the difference between the two amounts. The excess of the job price over the hourly earnings is known as an "incentive bonus" or "piecework earnings." Thus the sooner a job is completed the greater will be this incentive bonus. When the job price is smaller than the hourly earnings the employee receives only the hourly rate for the time worked, being assured of that rate regardless of his efficiency or speed. About 98.5% of the incentive workers, however, work with sufficient efficiency and speed to earn compensation over and above their base pay. These incentive bonuses were found by the District Court to form about 22% of the total compensation received each pay-day by these workers, exclusive of overtime payments, although respondent claims that the bonuses vary from 5% to 29% of each payroll.

On many jobs which have not been "time studied" the respondent has agreed to pay, and does pay, each incentive worker an hourly rate at least 20% higher than his basic hourly rate. And when an incentive worker is temporarily assigned to "non-incentive" work he is paid at least 20% more than his basic hourly rate. Moreover, vacation pay is based on an employee's average hourly straight time earnings over a three-month period and not on his base rate.

These incentive workers frequently work in excess of the statutory maximum workweek. For these extra hours they receive a premium of 50% of the basic hourly rate, which does not reflect the incentive bonuses received. Likewise, when incentive workers are working on jobs that have not been "time studied" or are temporarily doing "non-incentive" work they receive overtime pay on the basis of their basic hourly rates rather than on the 20% higher hourly rates actually paid them during the non-overtime hours.

The Administrator of the Wage and Hour Division of the Department of Labor brought this action to compel

the respondent to comply with the provisions of § 7 (a) of the Act. In defense, respondent pointed to the provision in the collective contract to the effect that "the parties agree that, for all purposes, the regular rate of pay at which each employee who participates in an incentive plan is employed, is the base rate of each such employee." The District Court held that the respondent was violating the Act by excluding from the computation of overtime the piece rate actually paid. 54 F. Supp. 326. The Seventh Circuit Court of Appeals reversed that judgment by a divided vote. 145 F. 2d 589.

Our attention here is focused upon a determination of the regular rate of compensation at which the incentive workers are employed. To discover that rate, as in the *Youngerman-Reynolds* case, we look not to contract nomenclature but to the actual payments, exclusive of those paid for overtime, which the parties have agreed shall be paid during each workweek.

It is evident that all the incentive workers receive a guaranteed basic hourly pay as a minimum. As to those who receive no regular additional payments during their non-overtime hours the respondent complies fully with § 7 (a) by paying them one and one-half times the basic hourly rate for all overtime hours. But the vast majority of the employees do receive regular though fluctuating amounts for work done during their non-overtime hours in addition to their basic hourly pay.

(1) Those who receive hourly rates at least 20% higher than their guaranteed base rates clearly are paid a regular rate identical with the higher rate and the failure of respondent to pay them for overtime labor on the basis of such a rate is a plain violation of the terms and spirit of § 7 (a). No contract designation of the base rate as the "regular rate" can negative the fact that these employees do in fact regularly receive the higher rate. To compute overtime compensation from the lower and unreceived rate

is not only unrealistic but is destructive of the legislative intent. A full 50% increase in labor costs and a full 50% wage premium, which were meant to flow from the operation of § 7 (a), are impossible of achievement under such a computation.

(2) Those who receive incentive bonuses in addition to their guaranteed base pay clearly receive a greater regular rate than the minimum base rate.[3] If they received only piece work wages it is indisputable that the regular rate would be the equivalent of the translation of those wages into an hourly rate. *United States* v. *Rosenwasser,* 323 U. S. 360. It follows that piece work wages forming only a part of the normal weekly income must also be an ingredient of the statutory regular rate. Piece work wages do not escape the force of § 7 (a) merely because they are paid in addition to a minimum hourly pay guaranteed by contract. Indeed, from another viewpoint, the incentive employees so compensated are in fact paid entirely on a piece work basis with a minimum hourly guaranty.[4] The conclusion that only the minimum hourly rate constitutes the regular rate opens an easy path for evading the plain

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[3] This is shown by the following example. An incentive worker is assigned a basic rate of $1 an hour and works 50 hours a week on 15 "time studied" jobs that have each been given a "price" of $5. He completes the 15 jobs in the 50 hours. He receives $50 basic pay plus $25 incentive pay (the difference between the base pay and 15 job prices). In addition, the worker receives $5 extra for the 10 overtime hours. This is computed on the basis of 50% of the $1 base rate, or 50 cents an hour premium. Actually, however, this worker receives compensation during the week at the actual rate of $1.50 an hour ($75 divided by 50 hours) and the overtime premium should be computed on that basis, giving the worker a premium of 75 cents an hour or $7.50 for the 10 overtime hours.

[4] Thus, in the example given in footnote 3, the worker earns $75 during the week exclusive of the overtime premium. This $75 may be considered either (1) the amount received for completing the 15 "priced" jobs with a $50 minimum guaranty or (2) the sum of the $50 hourly pay and the $25 piece work pay.

design of § 7 (a). We cannot sanction such a patent disregard of statutory duties.

In this instance 98.5% of the incentive employees receive incentive bonuses in addition to their guaranteed hourly wages, demonstrating that such bonuses are a normal and regular part of their income. Once the parties agree that these employees should receive such piece work wages, those wages automatically enter into the computation of the regular rate for purposes of § 7 (a) regardless of any contract provision to the contrary. Moreover, where the facts do not permit it, we cannot arbitrarily divide bonuses or piece work wages into regular and overtime segments, thereby creating an artificial compliance with § 7 (a).

It matters not how significant the basic hourly rates may be in determining the compensation in situations where incentive bonuses are not paid. When employees do earn more than the basic hourly rates because of the operation of the incentive bonus plan the basic rates lose their significance in determining the actual rate of compensation. Nor is it of controlling importance that the respondent now pays a premium for overtime employment so as to make the overtime rate somewhat above the piece work earnings per hour.[5] Until that premium is 50% of the actual hourly rate received from all regular sources, § 7 (a) has not been satisfied.

Respondent also points to the fact that the incentive bonuses are often not determined or paid until weeks or even months after the semi-monthly pay-days, due to the nature of the "priced" jobs. But § 7 (a) does not require the impossible. If the correct overtime compensation cannot be determined until some time after the regular pay period, the employer is not thereby excused from making the proper computation and payment. Section 7 (a)

[5] The overtime rate now paid amounts to about one and one-third or one and one-fourth the regular hourly rate of actual earnings.

requires only that the employees receive a 50% premium as soon as convenient or practicable under the circumstances.

The judgment of the court below is reversed and that of the District Court is affirmed.

Reversed.

MR. JUSTICE FRANKFURTER, concurring.

The Fair Labor Standards Act, 52 Stat. 1060, 29 U. S. C. § 201 *et seq.*, does not prohibit employment at piece-work rates. It merely requires that piece-work earnings be converted to an hourly basis for determining the minimum and overtime requirements of that Act. *United States* v. *Rosenwasser,* 323 U. S. 360. Nor does the Act bar an agreement establishing an hourly "regular rate" that does not fall short of the statutory minimum even though it be complicated by a guaranteed weekly lump sum wage adapted to the circumstances of a particular employment, provided it is not a mere artifice unrelated to wage-earning actualities. *Walling* v. *Belo Corp.,* 316 U. S. 624; *Walling* v. *Helmerich & Payne,* 323 U. S. 37. Accordingly, the Fair Labor Standards Act does not preclude a wage agreement whereby piece-rate payments are related, fairly and not evasively, partly to regular hours of work and partly to overtime. Piece rates need not necessarily be so adjusted that they cannot fairly be designed as part of the overtime but must necessarily help "load" the regular hourly wage.

But a properly apportioned overtime function for piece work should be clearly indicated as such in the employment contract. No doubt a law which, while covering piece rates, speaks in terms of hourly rates presents difficulties both for those charged with the law's enforcement and for those under duty to obey it. But if a wage agreement is to escape the obvious arithmetic way of calculating hourly rates based on piece-work rates, by dividing

the total earnings by the hours worked, it is not too much to require that the function of piece rates as an overtime factor, if such they be, be clearly formulated. The contract should leave no such dubiety as to the role of the piece rate to the regular hourly rate as the two arrangements before us. It should not be left to courts to work out a hypothetical mathematical interpretation which, if it corresponded with the actual arrangement, could satisfy the statute.

MR. CHIEF JUSTICE STONE, dissenting.

I think the judgment in both these cases should be affirmed as to all piece work employees and in No. 956 the judgment should be reversed only as to employees working exclusively on the hourly wage basis.

The respondent in each of these cases has entered into a wage contract with its employees, which places in their pay envelopes a weekly wage in excess of the minimum hourly wage rate which the Fair Labor Standards Act prescribes for the work week of forty hours and the additional overtime hours which they work in each week. There is no contention that the contracts were not entered into fairly and in a good faith effort to satisfy all the requirements of the law and to provide the employees with a wage higher than the prevailing rate of pay for like hours of work, with time and a half for overtime. The contract involved in No. 956 was the result of collective bargaining between the respondent employer and the C. I. O. Union of its employees. Both employers and employees desire to continue the contracts, the employers because the employees are satisfied and labor disputes will consequently be avoided, the employees because they receive a larger wage than if they worked at prevailing hourly rates of pay with time and a half for overtime as the statute prescribes.

Under each contract the employees receive for the first forty hours of the work week a guaranteed minimum

hourly wage which is equal to or greater than the minimum wage prescribed by the statute. For overtime they receive one and one-half times the hourly wage and in addition a bonus, the amount of which is dependent upon the amount of piece work which they do during the work week. The bonus constitutes an addition to the hourly wage, both regular and overtime, so that in fact the compensation both for time and overtime is greater than the statute requires. The only question involved in either case is whether there is anything in the Fair Labor Standards Act which compels the bonus payment to be added to the stipulated time and overtime hourly wage in any different proportions than the wage itself is distributed.

The Government concedes that the statute does not require respondents to put their piece workers on hourly wage rates and that they may continue to pay piece work rates and comply with § 7 of the Fair Labor Standards Act, provided only that piece work earnings be "translated or reduced by computation to an hourly basis for the sole purpose of determining whether the statutory requirements have been fulfilled." Such is the effect of our decision in *United States* v. *Rosenwasser,* 323 U. S. 360, 364.

The method of translation urged by the Government and adopted by the Court is to ascertain the average hourly rate of pay by dividing the total weekly piece work wage by the number of hours worked. The hourly rate thus obtained, multiplied by the total number of hours worked per week, plus one-half of the hourly rate multiplied by the number of work hours in excess of forty will, it is said, give the weekly wage which the Fair Labor Standards Act requires respondents to pay to their piece work employees. The adoption of this method in the present cases requires the payment of an additional amount as overtime compensation which, according to the Court's theory, is not compensated by the weekly piece work wage, however high it may be.

This conclusion is based on two mistaken assumptions. One is that the weekly piece work wage, however high, cannot be taken to include any of the wage differential which the Act requires to be paid for overtime hours. The other is that the statute requires that the employer, who pays to his piece time employees a lump sum weekly wage more than enough to pay the hourly minimum rate plus time and a half for overtime, must nevertheless treat the total wage as comprising only the hourly wage paid for all the hours worked, without including anything for overtime. In short, the contention is that the statute requires the distribution of the piece work bonus between the first forty hours worked and the overtime hours in such proportions as would violate the statutory requirement for the payment of an increased rate for the overtime hours. It thus excludes the possibility that the bonus could be distributed in proportions which would compensate the first forty hours at any hourly wage above the minimum statutory requirement and compensate for the overtime hours at one and one-half times that rate.

To ascertain whether the piece work rate can be lawful compensation for time and overtime for which it is paid, the Court, like the Government, starts with the assumption that it is unlawful, not because it is inadequate in amount but because the bonus was either not intended to be or cannot be taken to be an appropriate increase in the guaranteed overtime compensation, as well as an increase in the guaranteed, regular hourly rate of pay. By assuming that a wage, ample to satisfy minimum demands of the statute for time and overtime, is nevertheless intended to violate the statute by adding all of the bonus to the average hourly wage alone, the conclusion is reached that no increase in overtime compensation has been paid from the bonus. The wage must therefore be correspondingly increased in order to give added compensation for overtime.

Undoubtedly one could translate a piece work wage into an hourly rate which would violate the statute by treating the piece work wage as compensating for the hourly rate without time and a half for overtime. But that has not been done by the parties here. Such is not the necessary effect of the bonus payment, and there is no ground for assuming that such was intended. The fact that the bonus is to be added to a guaranteed minimum hourly rate for both time and overtime would seem to establish the contrary. Certainly no employee under such a contract could doubt that its purpose and function is to pay him for time and overtime at a rate above the statutory minimum. Even though the bonus payments were not thus labeled, where a lawful end may be attained by a lawful means we are not free to assume that it was attained by unlawful means.

The purpose of the Fair Labor Standards Act was to insure to every worker to whom it applies a minimum hourly wage and a fifty percent higher wage for his overtime hours. It was not to force increases in wages paid for time and overtime which are already above the statutory minimum. One may search the statute and its legislative history in vain for any hint that employers who, like respondents, are paying in excess of the statutory minimum wage for time and overtime, are compelled to increase the wage merely because they have failed to label the pay envelope as containing the wage for both time and overtime.

The fallacy of the position now taken becomes apparent at once upon comparison of the following examples, in each of which the employee works fifty hours a week, ten of which being overtime must under the statute be compensated at an hourly wage rate of one and a half times that paid for the first forty hours.

Example 1: The employee works upon an hourly basis at the rate of $1.00 per hour. His wage, as the statute

commands, would be $40.00 for the first forty hours of his employment and $15.00 for the ten hours of overtime at the statutory rate of one and one-half times the agreed hourly rate, making a total weekly wage of $55.00.

Example 2: The employment contract, as in the present cases, provides that the employer guarantee the payment of a fixed minimum hourly rate of pay equal to or greater than the statutory minimum plus one and a half times that rate for overtime, plus such additional amount as the employee may earn on a piece work rate. If the guaranteed hourly rate were $1.00 an hour, and the employee's earnings at the piece work rate were $66.00, his wage would be the weekly guaranteed minimum of $55.00 plus the $11.00 piece work bonus at the piece work rate, or $66.00 in all. His weekly wage on the hourly basis would be calculated as follows:

Minimum $1.00 per hour for forty hours........	$40.00
Bonus addition 20¢ per hour for forty hours....	8.00
Guaranteed minimum overtime $1.50, ten hours.	15.00
Bonus addition for overtime 30¢ an hour for ten hours....................................	3.00
Total....................................	$66.00 [1]

It will be noted from Example 2 that the weekly piece work wage is sufficient in amount when "translated or reduced by computation" to pay an hourly rate of $1.20 an hour for the first forty hours of work and $1.80 an hour for the remaining ten hours of overtime. The statute, see § 7, requires no more.

In Example 2, the guaranteed rate of $1.00 per hour and $1.50 per hour for overtime would satisfy every statu-

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[1] If a equals the hourly rate the following formula would apply to the fifty hour week in which the piece work wage is $66.00:

$$40a + (1\tfrac{1}{2}a \times 10) = \$66.00$$
$$55a = 66.00$$
$$a = \$1.20, \text{ the hourly rate for forty hours.}$$
$$1\tfrac{1}{2}a = \$1.80, \text{ the hourly rate for overtime hours.}$$

tory requirement, even though no bonus were added to the weekly wage. It seems plain that the addition of the bonus does not involve the payment of an unlawful wage or any omission to pay the lawful wage. If the employer and employee can lawfully agree to work for $1.20 an hour for the first forty hours and for $1.80 per hour for the additional ten overtime hours, making $66.00, the weekly piece work rate, I can find nothing in the Fair Labor Standards Act or in the principles of fair dealing and common sense to forbid a contract by which the employee is paid the sum of $66.00 for a week's work of fifty hours, or any larger amount, for piece work done in the period of fifty hours.

No basis is suggested for saying that the employer in satisfying the overtime requirements of the statute must distribute a lump sum weekly piece work wage between the wage payable for the first forty hours and that paid for overtime in such proportions as to render the wage contract illegal rather than in proportions which express the required statutory time and overtime wage relationship of one to one and one-half. There is nothing in the statute requiring the wage contract, the pay envelope, or the pay roll to designate separately the part of the weekly wage which is for the forty hours regular time and that portion which is paid for the additional hours of overtime. It is enough that the weekly wage is that mutually agreed upon in good faith, that it is intended to pay for time and overtime, and that it is sufficient in amount to pay for the first forty hours at a rate above the minimum wage prescribed by the statute and to pay for the overtime at one and one-half times that rate.

When, as here, the wage contract guarantees an hourly wage with one and a half times that rate for overtime, it is obviously just and reasonable and in conformity to the statute to divide the piece work bonus between the regular hours of work and the overtime hours in the same pro-

portions. Under the formula adopted by the Court the employer could pay no piece work rate high enough to dispense with what is thought to be the requirement to increase the weekly wage in order to pay the wage differential for overtime for which, by hypothesis, no piece work rate of pay compensates. Thus a piece work rate which would pay to the employee a weekly wage sufficient to pay several times the minimum hourly rate prescribed by the statute for time and overtime would not be lawful without a wage increase to compensate for the overtime. Despite the Government's assurance that the statute does not preclude employment on piece work rates, and our decision to that effect in the *Rosenwasser* case, *supra*, the goal of lawfulness could never be attained by the adoption of such a rate of compensation, since the piece work wage, however great, can never be regarded as including the wage differential for overtime even though the parties so agree.

All this is in flat contradiction to *Walling* v. *Belo Corporation*, 316 U. S. 624, in which we held that nothing in the Fair Labor Standards Act bars an employer from contracting to pay his employees minimum hourly rates for time plus one and a half times those rates for overtime in excess of the minimum statutory rates, with a lump sum weekly guaranty which in some weeks exceeds the wage at the stipulated hourly rate. There we held that the guaranteed weekly wage was compensation for overtime as well as for regular time. We decided that the contract contemplated that the excess of the guaranteed weekly wage over the stipulated minimum at the hourly rate was to be so distributed as to recognize the wage differential for overtime, in such a way as to satisfy the statutory requirements, even though the wage contract did not explicitly so declare. 316 U. S. at 632. That case is controlling here. In the present case the "regular rate," within the meaning of § 7 (a) (3) of the Act, is, as in Ex-

ample 2, the stipulated minimum hourly rate plus a part of the bonus, and the bonus is, as the wage contracts have treated it, an addition both to the regular rate and the overtime rate, which the statute permits.

Neither *Overnight Motor Co.* v. *Missel,* 316 U. S. 572, nor *Walling* v. *Helmerich & Payne,* 323 U. S. 37, is applicable here. In the *Missel* case "there was no contractual limit upon the hours" which the employer could require the employee to work for the agreed weekly wage, and "no provision for additional pay in the event the hours worked required minimum compensation greater than the fixed wage," 316 U. S. at 581. Hence the court was unable to say that the fixed weekly wage was intended by the parties to cover both base pay and fifty percent additional for the hours actually worked over the statutory maximum. In the *Helmerich* case, *supra,* no attempt was made by the employer to apply the asserted regular hourly rate to the first forty hours of the work week, the actual wage paid being greater. In consequence the overtime wage was less than one and one-half times the hourly wage in fact paid during the first forty hours of the work week. This was an obvious failure to comply with the overtime pay requirements of the statute.

Even though Congress could have compelled an increase in wages above the statutory minimum for time and overtime in the case of all employers who pay wages on the piece work basis, Congress has not done so by the Fair Labor Standards Act or adopted any policy penalizing employers who are so misguided as to add a bonus to a guaranteed lawful minimum hourly wage for time and overtime. It is not our function to prescribe wage standards or policies which Congress has not adopted.

MR. JUSTICE ROBERTS joins in this opinion.

COMMISSIONER OF INTERNAL REVENUE *v.* DISSTON.

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

No. 589. Argued April 24, 1945.—Decided June 4, 1945.

1. Irrevocable trusts for the benefit of minors provided for accumulation of the income from each beneficiary's share until he reached the age of 21; for payment of the income thereafter during his lifetime; and for ultimate distribution of the corpus contingently. The trustees were authorized to apply, during the minority of any beneficiary, so much of the income from his share "as may be necessary" for his support, education and comfort; and to expend up to 10% of the corpus in an "emergency." *Held* that gifts to the trusts were of "future interests," within the meaning of § 504 (b) of the Revenue Act of 1932 and applicable Treasury Regulations, so that in computing the gift tax the $5,000 exclusion prescribed by that section was not allowable. *Fondren* v. *Commissioner,* 324 U. S. 18. P. 447.
2. A taxpayer claiming benefit of the $5,000 exclusion in computing a gift tax under § 504 (b) of the Revenue Act of 1932 has the burden of showing that the gift to which the claim relates was not of a "future interest." P. 449.
3. In computing the gift tax pursuant to the formula prescribed by § 502 of the Revenue Act of 1932, an adjustment may be made in the net gift figure for an earlier year, even though assessment and collection of a gift tax for such earlier year be barred by limitations. P. 449.

144 F. 2d 115, reversed.

CERTIORARI, 324 U. S. 832, to review the reversal of a decision of the Tax Court which sustained the Commissioner's determination of deficiencies in gift taxes.

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

Mr. Harold Evans for respondent.

Mr. Justice Rutledge delivered the opinion of the Court.

This case, like *Fondren* v. *Commissioner,* 324 U. S. 18, presents questions whether certain gifts to minors are gifts of "future interests in property," within the meaning of the Revenue Act of 1932, c. 209, 47 Stat. 169.

In 1936 the respondent, William D. Disston, created a trust for the benefit of each of his five children, three of whom were then minors. The total of his gifts that year was $71,952. The Commissioner allowed an exemption of $5,000 on each gift for the children and on one to his wife. The taxpayer also was allowed the specific exemption of $40,000 provided by § 505 of the Revenue Act of 1932, as amended by § 301 (b) of the Revenue Act of 1935. The net gifts for 1936 accordingly were computed to be $1,952, upon which a tax was assessed and paid.

In 1937 the taxpayer added to the corpus of the trust securities valued at $25,000, of which $5,000 was allocated to each child's interest, including the three who were still minors. In 1938 he created another trust for his five children, the corpus consisting of undeveloped land worth $38,581. Two of the children still were minors.

The two trusts were identical in all respects now material. The principal was divided into five equal shares, one for each child. The trusts were of the spendthrift variety. All shares of the corpus and income were to be free from "anticipation, assignment, pledge, or obligations of beneficiaries," as well as execution or attachment. The shares of the minors alone are now involved. Hence the nature of the trust as applicable to them only need be considered.

The taxpayer's son, William L. Disston, was nineteen in 1936 when the first trust was created. As to his share the trustees were directed, in the Second Article, "to accumulate the net income therefrom for the benefit of William L. Disston until he reaches the age of twenty-one years, at which time to pay over to him all accumulated income,

and thereafter to pay over to him in not less than quarterly instalments the entire net income derived therefrom during his lifetime; provided, however, that upon his reaching the age of forty-five years one-half of the principal of his share shall be paid over to him free and discharged of all trusts; and upon further trust upon his death whether before or after reaching the age of forty-five years, to divide the principal of his share, or such portion thereof as is then held by the Trustees, among his then living descendants . . . in such amounts as he shall by will appoint, and in default of such appointment, to divide the same equally per stirpes," with provision for division among the taxpayer's other children and their descendants if no descendant of the beneficiary should then be living. The Article contains a proviso that if the taxpayer's son should die before reaching forty-five, the son may appoint to his spouse for a period no longer than her life not more than one-half of the income from his share of the corpus.

Identical provisions were made for the two minor daughters, except that they were to obtain only one-third of the corpus at age forty-five and could appoint to their spouses only one-third of the income.

A subsequent paragraph provided that the trustees should hold the minors' shares during their respective minorities, "and during such time shall apply such income therefrom as may be necessary for the education, comfort and support of the respective minors, and shall accumulate for each minor until he or she reaches the age of twenty-one years, all income not so needed. The foregoing clause shall apply to minor children of the Settlor irrespective of the direction heretofore set forth to accumulate all income for such minors."

In addition the Fourth Article, which defined the trustees' powers, authorized them "to apply the income to which any beneficiary shall be entitled hereunder for the

maintenance, education, and support of such beneficiary should he or she by reason of age, illness, or any other cause in the opinion of the Trustees be incapable of dispensing it. Payment by the Trustees to the parent of any minor . . . shall be sufficient acquittance and discharge to the Trustees for such payment or payments."

Finally, the trustees were authorized to invade the corpus in an emergency: "To expend out of the share of principal from which any beneficiary may be receiving income under this deed of trust such sums as Trustees may consider to be for the best interests of such beneficiaries during illness or emergency of any kind; provided, however, that in no case shall such expenditures of principal exceed in the aggregate ten percent (10%) of the value of such share of principal . . ."

In operation the 1938 trust of unimproved realty had produced no net income to the time the case came before the Tax Court. Most of the 1936 income of the first trust, $288 for each minor, was paid to the mother of the beneficiaries. In 1937 partial payments of income, $94 per minor child, were made. The beneficiaries' mother returned other checks to the corporate trustee in 1937, and one of the individual trustees, an adult child of the taxpayer, directed the corporate trustee thereafter to accumulate the income of the minors. No further payments of income were made to any child prior to his becoming of age.

In determining the taxpayer's gift tax for 1937 the Commissioner disallowed three $5,000 exclusions from the net gifts for that year on the ground that the gifts to the three minor children were gifts of future interests. For 1938 the Commissioner disallowed two $5,000 exclusions on the ground that the gifts made that year to the two children who were still minors were gifts of future interests.

In computing the gift tax for 1937 and 1938 it was necessary for the Commissioner to compute the aggregate

sum of the net gifts for the preceding years.[1] The Commissioner, in determining the net gifts made for this purpose by the 1936 trust, adjusted the exclusions which he had allowed in 1936 to the extent of $5,000 for each of the three minors. The period of limitations for assessment and collection of 1936 gift taxes had run.[2]

The Tax Court upheld the Commissioner, but the Court of Appeals reversed, holding no future interests arose as a result of the gifts to the minors. Consequently it was unnecessary for the Court of Appeals to consider whether the statute of limitations barred readjustment of the net gift figure for 1936 or simply barred collection of any further gift taxes for that year.

The guiding principles were outlined recently in *Fondren* v. *Commissioner*, 324 U. S. 18. Gifts of "future interests," within the meaning of § 504 (b), to any person are not excluded from the computation of net gifts to the extent of the first $5,000 in value, as are present interests. Treasury Regulations 79 (1936 ed.), Article 11, defines "future interests" as interests "limited to commence in use, possession, or enjoyment at some future date or time. . . ." The definition has been approved repeatedly. Cf. *Ryerson* v. *United States*, 312 U. S. 405; *United States* v. *Pelzer*, 312 U. S. 399; *Fondren* v. *Commissioner*, 324 U. S. 18.

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[1] The formula results in a progressive rate of gift taxation, not limited to progression within the calendar year, but extending over the life of the donor. The computation formula is set forth in § 502 of the Revenue Act of 1932:

"The tax for each calendar year shall be an amount equal to the excess of—

"(1) a tax, computed in accordance with the Rate Schedule hereinafter set forth, on the aggregate sum of the net gifts for such calendar year and for each of the preceding calendar years, over

"(2) a tax, computed in accordance with the Rate Schedule, on the aggregate sum of the net gifts for each of the preceding calendar years."

[2] See § 517 (a) of the Revenue Act of 1932.

Clearly the corpus of the trusts falls within the definition. Distribution to William L. Disston, for example, has no relation to his reaching his majority, which he has now attained. He must live to attain the age of forty-five to enable him to receive one-half of the corpus. If he does not reach that age, his estate receives no part of the principal. The recipients are an undetermined group designated in the trust provision, among whom the beneficiary has a limited power of appointment. At the time of the gifts in 1936–1938 it was unknown who in fact would receive this one-half interest. Obviously the enjoyment was postponed.

As to the other half in William L. Disston's share, it likewise was unknown who would enjoy the corpus. One thing only was known, that the named child could not enjoy it. He would continue to receive the income from it for his life, but the principal was not given to him. The possibility that in an emergency the trustees might invade the corpus to the extent of ten per cent for his benefit did not confer a present interest in that part of the principal. The emergency by definition was extraordinary, something that might or might not occur at some indefinite future time. No present, certain and continuous enjoyment was contemplated, nor did it materialize. What has been said of the one minor is true of the others.

The question must be determined whether the trusts provided for a present interest in the trust income, or some definable portion of it. The first direction of each trust is to accumulate the net income until the minor reaches twenty-one. If that were all, it would again be clear that a future interest was created by the postponement of enjoyment. A later paragraph directs the trustees, however, "to apply . . . such income therefrom as may be necessary for the education, comfort and support of the respective minors" and to accumulate the remainder.

Respondent urges that this case differs from the *Fondren* case in that there the trust instrument showed that it was not contemplated that the income would be needed for education and support; and the trustee was directed to accumulate the income unless no other funds were available for such purposes, whereas here there is nothing in the trust instrument to indicate such an intent. In fact, respondent argues, the trust instrument means that the trustees *must* apply an amount of the income sufficient to provide for education, comfort and support, even though the minor is amply cared for by his parents, his own efforts, or other sources of revenue, citing 1 Scott, Trusts, § 128.4 and other authorities. When faced with the fact that the history of the trust's administration shows a practical construction by the trustees that support money need not automatically be paid over, respondent urges that the terms of the trust and the nature of the interest granted cannot be varied by what was subsequently done in administration.

The language of the trust instruments directs that the income be accumulated during minority. The subsequent provision for payments for maintenance and support may be said to indicate a departure from the policy of accumulation only when necessary, in the reasonable discretion of the trustees. If that is the appropriate interpretation of the trust instruments, then little difference from the *Fondren* case is involved. Even in its practical working, the trustees did not find the necessary prerequisites for a steady application of all or any ascertainable part of the income for education, support and maintenance.

But, even though the trustees were under a duty to apply the income for support, irrespective of outside sources of revenue, there is always the question how much, if any, of the income can actually be applied for the permitted purposes. The existence of a duty so to apply the income gives no clue to the amount that will be

needed for that purpose, or the requirements for maintenance, education and support that were foreseeable at the time the gifts were made. In the absence of some indication from the face of the trust or surrounding circumstances that a steady flow of some ascertainable portion of income to the minor would be required, there is no basis for a conclusion that there is a gift of anything other than for the future. The taxpayer claiming the exclusion must assume the burden of showing that the value of what he claims is other than a future interest. Cf. *New Colonial Co.* v. *Helvering,* 292 U. S. 435. That burden has not been satisfied in this case.

The question remains whether the adjustment of net gifts for 1936 in computing 1937 and 1938 tax liability is barred by the statute of limitations. As has been noted, § 502 requires utilization of "the aggregate sum of the net gifts for each of the preceding calendar years" in the formula for computing gift tax liability. Section 517 (a) does not purport to bar adjustment of the net gift figure for that purpose, but simply prevents assessment and collection of a tax for a year barred by the statute. The statute does not purport to preclude an examination into events of prior years for the purpose of correctly determining gift tax liability for years which are still open. The Tax Court and Treasury Regulations have construed § 517 (a) as requiring determination of the true and correct aggregate of net gifts for previous years.[3] The construction is in accord with the statutory language.

Accordingly, the judgment is

Reversed.

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[3] The pertinent Treasury Regulations 79, Article 5 provides: ". . . By the words 'aggregate sum of the net gifts for each of the preceding calendar years' (aside from the amount of the specific exemption deductible) is meant the true and correct aggregate of such net gifts, not necessarily that returned for such years and in respect to which tax was paid. . . ." See also *Winterbotham* v. *Commissioner,* 46 B. T. A. 972; *Wallerstein* v. *Commissioner,* 2 T. C. 542; *Roberts* v. *Commissioner,* 2 T. C. 679.

ALABAMA STATE FEDERATION OF LABOR ET AL. v. McADORY ET AL.

CERTIORARI TO THE SUPREME COURT OF ALABAMA.

No. 588. Argued April 3, 4, 1945.—Decided June 11, 1945.

1. The Bradford Act (Alabama Laws of 1943, No. 298) is a comprehensive enactment regulating the activities and affairs of labor organizations having members who are employed in Alabama. Section 7 requires every labor organization "functioning" or "desiring to function" within the State to file a copy of the constitution and by-laws of its own and any parent organization, and to file annually a report giving prescribed information. The section makes it unlawful for any officer or agent to collect dues or other monies from any member while the labor organization is in default with respect to filing of the annual report. Section 15 makes it unlawful for any person or labor organization to collect, receive or demand any fee, assessment or money—other than initiation fees or dues—for a "work permit" or "as a condition for the privilege of work." Section 16 makes it unlawful for any "executive, administrative, professional, or supervisory employee to be a member in, or to be accepted for membership by, any labor organization" which admits to membership employees other than persons of these classes; but provides that the section is not to be construed "so as to interfere with or void any insurance contract now in existence and in force." Section 18 imposes civil liability and criminal penalties for violations of the Act. Petitioners (national and local labor organizations and an individual member) sought a declaratory judgment of unconstitutionality of §§ 7, 15 and 16. *Held:*

(A) The contention that the Act denies equal protection of the laws, in violation of the Federal Constitution, because its provisions, or some of them, do not apply to business corporations or associations or to labor organizations which are subject to the Railway Labor Act, is without substance. P. 471.

The State is not bound to regulate all types of organizations or none; it may begin with such as in its judgment most need regulation and may exclude those believed to be already appropriately regulated by either state or national legislation. P. 472.

(B) Other issues as to the constitutional validity of the Act, as presented by the record before this Court, are inappropriate for decision in a declaratory judgment proceeding. P. 472.

2. This Court can not say that §§ 7 and 18 could not be so construed and applied as not to deny the constitutional right of free speech and assembly; and, in the absence of any authoritative construction of the sections by the state courts, and upon a record which presents no concrete set of facts to which the Act is to be applied, the case in this aspect is plainly not one to be disposed of by the declaratory judgment procedure. P. 460.

(a) The requirements for a justiciable case or controversy are no less strict in a declaratory judgment proceeding than in any other type of suit. P. 461.

(b) It is the practice of this Court not to decide abstract, hypothetical or contingent questions; or to decide any constitutional question in advance of the necessity for its decision; or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied; or to decide any constitutional question except with reference to the particular facts to which it is to be applied. P. 461.

(c) The declaratory judgment procedure may be resorted to only in the sound discretion of the Court and where the interests of justice will be advanced and an adequate and effective judgment may be rendered. P. 462.

3. The record affords an inadequate factual basis for determining whether § 16 is applicable to any of petitioners' members, or if so whether as applied to them the Act would violate freedom of speech and assembly. P. 462.

4. Nor may the validity of § 16 be here determined, in view of the state court's construction of the section as inapplicable wherever it would otherwise "interfere with or void any insurance contract now in existence and in force," and since it does not appear from the record whether and to what extent the section can be deemed applicable to petitioners' members because of existing insurance arrangements. P. 463.

5. The constitutional validity of a statute may be attacked, in declaratory judgment proceedings as in any other, only by those to whom the statute applies and who are adversely affected by it. P. 463.

6. Uncertainty as to the construction of §§ 7 and 16, and uncertainty as to the facts to which they are to be applied, preclude an adjudication upon this record that these sections conflict with the National Labor Relations Act. Pp. 464, 467.

(a) As none of the petitioners are shown to function as bargaining representatives for employees in industries subject to the National Labor Relations Act, or, if they do so, to function exclu-

sively as representatives for such employees, it can not be said that §§ 7 and 16 could in no circumstances be validly applied to any of them; and the Court is bound to assume the existence of any state of facts which would sustain the sections when they are assailed as unconstitutional. P. 465.

(b) The Court can not assume that the failure to file reports will result in the exclusion of petitioners, or any of them, from functioning in the State, or will visit any consequences upon them other than the penalty for failure to file; nor say, in the absence of any showing to the contrary, that the filing of information returns will impose such burdens on any of petitioners as to interfere with the performance of their functions under the National Labor Relations Act in cases where that Act is applicable. P. 466.

(c) The validity of § 16 and whether it conflicts with the National Labor Relations Act can not be considered upon this record, in view of the ruling of the state court that the section is inapplicable wherever it would otherwise interfere with or render ineffective any existing contract of insurance, and in view of the failure of the petitioners to show to what extent § 16 as so construed can be taken to be applicable to any of them because of existing insurance arrangements. P. 466.

(d) A state statute may be voided as in conflict with federal legislation only if the conflict is clearly shown; and then only where the complainant shows that he is adversely affected by the alleged conflict. P. 467.

7. Since the record presents no concrete case in which § 15 has been applied, the Court can not say whether its application in circumstances not now presented would be so arbitrary and unreasonable as to deny due process. P. 468.

8. The contention that the requirement of § 7 as to the filing of information statements and reports is so burdensome on labor organizations as to deny due process of law is not supported by the facts of record. P. 469.

9. The objection that §§ 7 and 16 are unconstitutional as vague and uncertain can not appropriately be considered in a declaratory judgment proceeding in the federal courts, in advance of their authoritative construction by a state court. P. 470.

10. The extent to which the declaratory judgment procedure may be used in the federal courts to control state action lies in the sound discretion of the Court. It would be an abuse of discretion for this Court to make a pronouncement on the constitutionality of a state statute before it plainly appeared that the necessity for it had arisen, or when the Court is left in uncertainty, which it can

not authoritatively resolve, as to the meaning of the statute when applied to any particular state of facts. P. 471.

11. In the exercise of this Court's discretionary power to grant or withhold the declaratory judgment remedy it is of controlling significance that it is in the public interest to avoid the needless determination of constitutional questions and the needless obstruction to the domestic policy of the States by forestalling state action in construing and applying its own statutes. P. 471.

Writ dismissed.

CERTIORARI, 323 U. S. 703, to review a judgment, 246 Ala. 1, 18 So. 2d 810, upholding, in a declaratory judgment proceeding, the constitutionality of provisions of a state statute.

Messrs. Horace C. Wilkinson and *Joseph A. Padway*, with whom *Mr. Herbert S. Thatcher* was on the brief, for petitioners.

Messrs. James A. Simpson, John W. Lapsley and *John E. Adams*, with whom *William N. McQueen*, Acting Attorney General of Alabama, was on the brief, for respondents.

Briefs were filed by *Solicitor General Fahy, Messrs. Robert L. Stern, Alvin J. Rockwell, Miss Ruth Weyand* and *Mrs. Elizabeth W. Weston* on behalf of the United States; *Messrs. Arthur Garfield Hayes* and *Osmond K. Fraenkel* on behalf of the American Civil Liberties Union; and *Mr. Paul O'Dwyer* on behalf of the Workers Defense League, as *amici curiae*, in support of petitioners.

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

This case was brought in the state courts of Alabama for a declaratory judgment adjudicating the constitutional validity of certain sections of the Bradford Act, No. 298, Alabama Laws of 1943 (Code 1943, Tit. 26 §§ 376 *et seq.*). The principal question is whether petitioners' contentions are so related to any case or controversy presented by the

record that this Court may appropriately pass upon them in a declaratory judgment proceeding.

Petitioners are four affiliated, unincorporated labor organizations, the American Federation of Labor, and the United Brotherhood of Carpenters and Joiners of America, which are national labor organizations, and two Alabama labor organizations, and an individual who is a citizen of Alabama and a member of petitioner, Local Union No. 103, United Brotherhood of Carpenters and Joiners of America.

Petitioners brought the present suit in the Alabama Circuit Court for Jefferson County against respondents, officers of Jefferson County, charged with the duty of enforcing the Bradford Act. They prayed a declaratory judgment that the Act as a whole and specifically §§ 7, 15, and 16, among others, are unconstitutional and void under the federal and state constitutions.

After a trial upon a stipulated statement of facts, certain affidavits and the testimony of witnesses, the circuit court held the Act as a whole, and specifically § 7 of the Act, to be valid and constitutional. It declined as "inappropriate" to make declarations as to the validity of §§ 15 and 16. On appeal, petitioners assigning as error the circuit court's failure to pass upon the constitutionality of §§ 15 and 16, and to declare those sections and § 7 unconstitutional, the state supreme court held all three sections valid and constitutional. 246 Ala. 1, 18 So. 2d 810. We granted certiorari, 323 U. S. 703, upon a petition which presented the contentions [1] that §§ 7 and 16 impose a prior general restraint on petitioners' freedom of speech and assembly guaranteed by the First and Fourteenth Amendments to the Constitution and conflict with the National Labor Relations Act by depriving them of rights under

[1] Under the view we take of the case it is unnecessary to determine whether petitioners have properly raised in the state courts the federal questions which they urge here with respect to §§ 15 and 16.

it; that §§ 7, 15 and 16 are an arbitrary and unreasonable exercise of the state police power which denies petitioners due process and equal protection of the laws in violation of the Fourteenth Amendment; and that §§ 15 and 16 are so ambiguous and uncertain in their requirements as to deny petitioners due process of law.

The Bradford Act is a comprehensive enactment regulating labor unions having members who are employees working in the State of Alabama. It establishes a Department of Labor under the supervision and control of a director of labor; it sets up mediation machinery for the settlement of labor disputes. It requires all labor organizations within the provisions of the Act to file with the Department various reports and financial statements and to pay filing fees. It regulates some phases of the internal affairs and activities of labor organizations, and various aspects of picketing, boycotting and striking. It imposes civil liability and criminal penalties for violation of its provisions.

Section 7 provides that "Every labor organization functioning in Alabama shall within sixty days after the effective date of this chapter, and every labor organization hereafter desiring to function in Alabama shall, before doing so, file a copy of its constitution and its by-laws and a copy of the constitution and by-laws of the national or international union, if any, to which the labor organization belongs, with the department of labor . . . . All changes or amendments to the constitution or by-laws, local, national or international, adopted subsequent to their original filing must be filed with the department of labor within thirty days after" their adoption.

Section 7 further provides that "Every labor organization functioning in the State of Alabama and having twenty-five or more members," shall file annually with every member of the organization and with the Director of the Department of Labor a verified written report giving

detailed information as to its name, the location of its offices, the officers of the organization, their salaries, wages, bonuses, and other remuneration, the date of the election of officers, the number of its paid up members, and a complete financial statement showing all receipts and disbursements with the names of recipients and purpose thereof, and a complete statement of the money and property owned by the organization. Section 7 also declares, "It shall be unlawful for any fiscal or other officer or agent of any labor organization to collect or accept payment of any dues, fees, assessments, fines, or any other monies from any member while such labor organization is in default with respect to filing the annual report . . ."

Section 15 reads: "It shall be unlawful for any labor organization, any labor organizer, any officer, agent, representative or member of any labor organization, or any other person, to collect, receive or demand . . . from any person, any fee, assessment, or sum of money whatsoever, as a work permit or as a condition for the privilege of work; provided, however, this shall not prevent the collection of initiation fees or dues."

Section 16 prescribes: "It shall be unlawful for any executive, administrative, professional, or supervisory employee to be a member in, or to be accepted for membership by, any labor organization, the constitution and bylaws of which permit membership to employees other than those in executive, administrative, professional or supervisory capacities, or which is affiliated with any labor organization which permits membership to employees other than those in an executive, administrative, professional, or supervisory capacity. The provisions of this Section shall not be construed so as to interfere with or void any insurance contract now in existence and in force." Section 18 enacts, "If any labor organization violates any provision of this chapter, it shall be penalized civilly in a sum not exceeding one thousand dollars ($1,000.00) for each such

violation . . . The doing of any act forbidden or declared unlawful by the provisions of this chapter . . . shall constitute a misdemeanor, and shall be punishable by a fine . . . or by imprisonment."

Infringement of freedom of speech and assembly by sections 7 and 16.

Petitioners do not deny the authority of the state to regulate labor unions. They do not contend that all their practices shown by the record or all their activities required to be reported by § 7 are within the protection of the constitutional provisions preserving the right to free speech or assembly, or that the requirement of § 7 that petitioners file reports, of itself, infringes their right of free speech. But construing the words of § 7 which provide that labor organizations "functioning" in the state shall file the prescribed statements or reports, and the further requirement that every labor organization "desiring to function" in Alabama shall, before doing so, file certain prescribed documents, petitioners attack the section as a licensing provision and assail its validity on the ground that as such it is a restraint upon their freedom of speech and assembly.

No officer or representative of the state is empowered by the terms of the section to grant or withhold a license authorizing a labor organization to function within the state. The State Supreme Court so held in this case. The argument is that compliance with § 7 is made prerequisite to the functioning of any labor organization within the state, and that one of the functions of petitioners is the exercise of their right of freedom of speech and assembly to advance the interests of labor and labor organizations by winning public support for their program, through education and dissemination of information. They say that the requirement of a license, before a labor organization can function within the state, to be secured by filing the

requisite statements and reports, is an unconstitutional restraint on their right of free speech and assembly. Specifically they argue that if they fail to file any of the statements required by § 7 and afterwards function as a labor union within the state, by exercising their right of free speech and assembly, they may be subjected to the criminal penalties imposed by § 18, and may also be enjoined from so functioning by a civil suit in equity in the state courts.

In considering this objection to § 7 the Supreme Court of Alabama did not elaborate on the meaning of the terms "function" or "functioning" as used in the statute. It indicated that they embrace the conduct of the business activities of labor organizations within the state, such as the assessment and collection of fines and dues, the collection of monies and their disbursement, the management of their property, the election of their officers and the appointment of their agents, and the maintenance and defense of suits in the courts. And it added " 'Function,' as used in this Act, simply means a labor organization, whether incorporated or not, engaged in business in this State, and in the character of business thus indicated, for the promotion of the interests of its members. True, as a part of its functioning, and a part only, the assemblage of its members for discussion is had, but this is merely incidental."

This language may be taken to suggest that assemblies of labor organizations which are incidental to their business activities are within the reach of the Act. But we are left uninformed, and, without the application of the statute by the state courts to some concrete set of facts, we are unable to say, whether the statute is to be construed as meaning that "functioning" by a labor organization which has not complied with § 7 by filing the prescribed reports is itself a violation of the Act subjecting it to cumulative penalties under § 18.

On the face of the statute failure to file the required statements or reports entails a civil and possibly also a criminal penalty. The collection of dues after such a failure is by § 7 declared to be unlawful and is therefore by § 18 made a misdemeanor. But the statute nowhere in terms makes it an offense or unlawful for a labor organization to continue otherwise to function after failing to file the required report or statement. So far as appears the Supreme Court of Alabama has not construed the penal provisions of the statute or determined that the failure of a labor organization to file the documents specified in § 7 entails any consequences other than the specified penalty for the failure to file, with a further penalty if without filing the labor organization or its officers continue to collect dues. Neither of these sanctions is asserted or shown to operate as an injunction restraining freedom of speech or assembly. Nor does it appear that the Alabama courts have held that a labor organization failing to file may be enjoined from functioning.

Moreover if "functioning" after failure to file is itself a violation we do not know whether the statute will be interpreted as penalizing a union merely for engaging in those business activities which are not contended to be within the protection of the right to free speech or, on the other hand, for holding meetings which are wholly unrelated to its business activities. In any event we are not advised, nor has the state court said, what assemblies or meetings of a labor organization are so related to its business activities as to be deemed "incidental" to them so as to be within the reach of the statute.

Obviously no decision of the constitutional issues now posed could be made in this suit, and no opinion could be written, without considering all and deciding some at least of these questions of statutory interpretation. No state court has decided them, briefs and argument offer us little aid in their solution, and no solution which we could

tender would be controlling on the state courts. The record supplies us with no concrete state of facts to which the challenged sections, when construed, could be applied. For all that we know the only penalty to which petitioners may be subjected for violation of § 7 is a single penalty for failure to file the required statement or report, and their continued functioning in the state would subject them to no further penalty or restraint. And assuming that the penalties or threat of penalties of the statute may be so applied as to operate as a present restraint more than does the bare existence of the civil and criminal penalties for libel, it nowhere appears that the statutory penalties are being so threatened or applied.

It is not contended that the statute in any way restricts the freedom of assembly and speech of labor organizations after they comply with the filing requirements of the statute, and it nowhere appears that any of the petitioners are so situated that they could not comply with the statute within the period allowed by it for compliance, without incurring any penalty for noncompliance. The attack thus made on § 7 is as to the constitutionality of the section on its face, without reference to its application to any particular defined set of facts, other than those generally catalogued in the section itself. We cannot say that §§ 7 and 18 could not be so construed and applied as not to restrain petitioners' functioning in the state in the exercise of their constitutional right of free speech and assembly. We are thus invited to pass upon the constitutional validity of a state statute which has not yet been applied or threatened to be applied by the state courts to petitioners or others in the manner anticipated. Lacking any authoritative construction of the statute by the state courts, without which no constitutional question arises, and lacking the authority to give such a controlling construction ourselves, and with a record which presents no concrete set of facts to which the statute is to be ap-

plied, the case is plainly not one to be disposed of by the declaratory judgment procedure.

The requirements for a justiciable case or controversy are no less strict in a declaratory judgment proceeding than in any other type of suit. *Nashville, C. & St. L. R. Co.* v. *Wallace,* 288 U. S. 249; *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227; *Maryland Casualty Co.* v. *Pacific Co.,* 312 U. S. 270, 273; *Great Lakes Co.* v. *Huffman,* 319 U. S. 293, 299, 300; *Coffman* v. *Breeze Corps.,* 323 U. S. 316. This Court is without power to give advisory opinions. *Hayburn's Case,* 2 Dall. 409; *United States* v. *Evans,* 213 U. S. 297, 301; *Muskrat* v. *United States,* 219 U. S. 346; *Stearns* v. *Wood,* 236 U. S. 75; *Coffman* v. *Breeze Corps., supra.* It has long been its considered practice not to decide abstract, hypothetical or contingent questions, *Giles* v. *Harris,* 189 U. S. 475, 486; *District of Columbia* v. *Brooke,* 214 U. S. 138, 152; *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337, 355; *Electric Bond Co.* v. *Securities & Exchange Commission,* 303 U. S. 419; *United States* v. *Appalachian Power Co.,* 311 U. S. 377, 423, or to decide any constitutional question in advance of the necessity for its decision, *Charles River Bridge* v. *Warren Bridge,* 11 Pet. 420, 553; *Trade-Mark Cases,* 100 U. S. 82, 96; *Liverpool, N. Y. & P. S. S. Co.* v. *Emigration Comm'rs,* 113 U. S. 33, 39; *Burton* v. *United States,* 196 U. S. 283, 295; *Arkansas Oil Co.* v. *Louisiana,* 304 U. S. 197, 202, or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, *Liverpool, N. Y. & P. S. S. Co.* v. *Emigration Comm'rs, supra,* 39; *White* v. *Johnson,* 282 U. S. 367, 371; *Allen-Bradley Local* v. *Board,* 315 U. S. 740, 746–7, or to decide any constitutional question except with reference to the particular facts to which it is to be applied, *Hall* v. *Geiger-Jones Co.,* 242 U. S. 539, 554; *Corporation Comm'n* v. *Lowe,* 281 U. S. 431, 438; *Continental Baking Co.* v.

Woodring, 286 U. S. 352, 372; *Atlantic & Pacific Tea Co.* v. *Grosjean,* 301 U. S. 412, 429–30.

A law which is constitutional as applied in one manner may, it is true, violate the Constitution when applied in another. *Field* v. *Clark,* 143 U. S. 649, 694–7; *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282, 289; *Concordia Ins. Co.* v. *Illinois,* 292 U. S. 535; *Associated Press* v. *Labor Board,* 301 U. S. 103. But "Since all contingencies of attempted enforcement cannot be envisioned in advance of those applications" this Court has felt bound to delay passing on "the constitutionality of all the separate phases of a comprehensive statute until faced with cases involving particular provisions as specifically applied to persons who claim to be injured." *Watson* v. *Buck,* 313 U. S. 387, 402. All these considerations forbid our deciding here the constitutionality of a state statute of doubtful construction in advance of its application and construction by the state courts and without reference to some precise set of facts to which it is to be applied. The declaratory judgment procedure may be resorted to only in the sound discretion of the Court and where the interests of justice will be advanced and an adequate and effective judgment may be rendered. *Great Lakes Co.* v. *Huffman, supra; Coffman* v. *Breeze Corps., supra.*

Like objections are made and like questions raised with respect to § 16 which makes it unlawful for any "executive, administrative, professional, or supervisory employee to be a member in, or to be accepted for membership by, any labor organization" which admits to membership employees other than persons of these classes. The section does not define executive, administrative, professional or supervisory employees. No proceeding appears to have been brought in any state court for enforcement of the section, and we are without the aid of any authoritative construction of its provisions. The record discloses only general allegations in the words of the stat-

ute that petitioners admit to their membership both employees who are and employees who are not of those classes. The record gives no information as to the duties of such supervisory employees other than petitioner Jones. As to them the Court is thus asked to rule upon the constitutionality of a state statute which petitioners challenge as too vague and indefinite to satisfy constitutional requirements, which does not appear to have been applied or construed by the state court, upon a record which affords an inadequate factual basis for determining whether the statute is applicable to any of them, or if so whether as applied to them the statute would violate freedom of speech and assembly.

A further and conclusive ground for our declining to pass on the validity of § 16 is the ruling of the State Supreme Court that that section is inapplicable wherever it would otherwise "interfere with or void any insurance contract now in existence and in force." The record without disclosing the details shows that petitioners provide insurance benefits for their members as such, and that petitioner Jones is a member of petitioner United Brotherhood of Carpenters and Joiners of America, and as a member is entitled to such benefits. Whether and to what extent § 16 can be deemed applicable to the members of any of the other petitioners because of existing insurance arrangements does not appear. Only those to whom a statute applies and who are adversely affected by it can draw in question its constitutional validity in a declaratory judgment proceeding as in any other. *Marye* v. *Parsons,* 114 U. S. 325; *Tyler* v. *The Judges,* 179 U. S. 405; *Turpin* v. *Lemon,* 187 U. S. 51, 60, 61; *Arizona* v. *California,* 283 U. S. 423, 463, 464; *First National Bank* v. *Tax Comm'n,* 289 U. S. 60, 65; *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288; *Anderson Nat. Bank* v. *Luckett,* 321 U. S. 233, 242.

Conflict of sections 7 and 16 with the National Labor Relations Act.

Petitioners also urge that § 7 and § 16 conflict with the National Labor Relations Act, 49 Stat. 449, 29 U. S. C. § 151 *et seq.*, in that Alabama is likely to assert the power to enforce those sections by depriving petitioners of their right to function in the state as collective bargaining representatives under the National Labor Relations Act. They point out that the National Act, § 8 (5), unconditionally requires an employer to bargain with the representatives of his employees. They contend that § 7 thus conflicts with the National Act and that the enforcement of the former tends to hinder and interfere with the performance of petitioners' functions under the National Act.

Petitioners also urge that § 16 conflicts with the National Labor Relations Act in that under its provisions, as construed and administered by the National Labor Relations Board, employees in certain industries, who exercise supervisory functions, may join and be represented by unions which also admit to their membership nonsupervisory employees. Petitioners say that any labor organization which has failed to file the report as required by § 7, or which admits to its union a supervisory employee contrary to § 16, will be precluded from acting as a bargaining agent under the National Labor Relations Act.

Assuming as we do for present purposes that these contentions are sound, it does not follow that there is no constitutional scope for application of §§ 7 and 16. The National Labor Relations Act does not extend to all industries and all employees. It is only applicable to those employments in which strikes and labor disputes would affect interstate commerce and are found to be such by the National Labor Relations Board. *Labor Board* v. *Jones & Laughlin Corp.*, 301 U. S. 1, 38–40; *Labor Board* v. *Fainblatt*, 306 U. S. 601, 604; *Polish Alliance* v. *Labor Board*, 322 U. S. 643, 647.

The record contains evidence of only the most general character that there are industries located within the state whose employees are "within the jurisdiction of the Alabama State Federation of Labor and Local No. 103, or of the other A. F. of L. unions within the class for which the complaint has been filed, which are engaged . . . in interstate commerce." There is evidence generally as to the practice of the National Labor Relations Board in certifying unions as bargaining representatives. But it nowhere affirmatively appears that any of petitioners act as bargaining representatives of employees in industries within the state which are subject to the National Labor Relations Act.

What is more important for present purposes is that it does not appear that there are any of petitioners which do not represent employees in industries which are not subject to the National Labor Relations Act. To decide the question of the alleged conflict of §§ 7 and 16 with the National Labor Relations Act and the effect of it, it would be necessary to know whether petitioners or some of them represent employees in industries not subject to the National Labor Relations Act, and the extent to which for that reason they may be rightly subject to local regulation even though they also represent employees in other industries which are subject to the National Act. The record is silent as to which of petitioners represent the one, or the other, or both. Hence we have no state of facts before us which would enable us to determine the extent to which the several petitioners may be subject to local regulation which does not conflict with the National Act, and thus we are unable to say to what extent the challenged sections are valid or invalid under the National Act.

When a statute is assailed as unconstitutional we are bound to assume the existence of any state of facts which would sustain the statute in whole or in part. *Metropolitan Casualty Ins. Co.* v. *Brownell,* 294 U. S. 580, 584 and

cases cited; *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152, 153. Since petitioners or some of them are not shown to function exclusively as bargaining representatives for employees in industries subject to the National Labor Relations Act, we cannot say that §§ 7 and 16 could in no circumstances be validly applied to them. The extent to which in fact the sections are or may be so applied, and in what circumstances, does not appear. In this state of the record we are not called upon to say whether or to what extent they may be constitutionally applied.

Moreover, for reasons already stated in our discussion of the alleged infringement of freedom of speech and assembly, we cannot assume that the failure to file reports will result in the exclusion of petitioners, or any of them, from functioning in the state, or visit any consequences upon them other than the penalty for failure to file. We therefore have no question before us of a statute which has been construed to operate either by its penal sanctions or by the aid of injunction to prevent petitioners, or any of them, from functioning within the state for noncompliance with § 7. Compare *Hill* v. *Florida*, *post*, p. 538. Nor can we say in the absence of any showing to the contrary that the filing of information returns will impose such burdens on any of petitioners as to interfere with the performance of their functions under the National Labor Relations Act in cases where that Act is applicable.

And finally, as we have pointed out, a further ground for our not considering the validity of § 16 and whether it conflicts with the National Labor Relations Act is the ruling of the State Supreme Court that that section is inapplicable wherever it would otherwise interfere with or render ineffective any existing contract of insurance. In view of this holding, it is incumbent on petitioners to show, as they have failed to do, to what extent § 16 can be

taken to be applicable to any of them because of existing insurance arrangements with union members.

We can be asked to condemn a state statute as in conflict with national legislation only if the conflict is clearly shown, *Allen-Bradley Local* v. *Board, supra,* 749; *Townsend* v. *Yeomans,* 301 U. S. 441, 454, and cases cited, and only by those who show that they are adversely affected by the alleged conflict with national power. Each of the contentions which petitioners make with respect to the conflict of §§ 7 and 16 with the National Labor Relations Act could readily be adjudicated and disposed of in an adversary suit drawing in question their validity as applied to specific states of fact, in which respondents could both challenge the facts and the applicability to them of the statute. In the present suit we find that both the uncertainty as to the construction of the sections and the uncertainty as to the facts to which they are to be applied preclude the adjudication which the petitioners seek.

The validity of § 15 under the due process clause.

Section 15 makes it "unlawful for any labor organization, any labor organizer, any officer, agent, representative or member of any labor organization, or any other person, to collect, receive or demand, . . . from any person, any fee, assessment, or sum of money whatsoever, as a work permit or as a condition for the privilege of work." But it excludes from the operation of the Act the collection of "initiation fees or dues." Petitioners assert that the section applying as it does to every form of collection of money, other than initiation fees or dues, "as a work permit or as a condition for the privilege of work," prevents numerous legitimate and desirable labor union practices and hence is so harsh, arbitrary and unreasonable in its application as to infringe due process. A number of examples are given, such as union fees charged to non-union apprentices in return for their

"guidance and teaching" by union members, fees charged to non-union members for participation in the benefits of existing all-union collective bargaining contracts, fees charged for the transfer from one union to another pending admission to union membership in the latter, and the like.

Although it appears that the constitutions of petitioners, or some of them, contain a provision permitting them to charge a fee to union members working in a union "jurisdiction" outside that in which they live, it nowhere appears that such fees or any of the others specified by petitioners are being or will be charged, or that respondents or the courts have determined that they are unlawful as not being initiation fees or dues, or that any form of legal proceeding based on such a contention is contemplated. For these reasons the Supreme Court of Alabama declined to consider whether § 15 was applicable to petitioners, saying, "Whether or not certain practices to which counsel refer are to be construed as coming within the provisions of the Act are questions which will arise when the proper case is presented."

To say that the statute would be unconstitutional if applied to such exactions is not to say that the section cannot constitutionally apply to exactions which the legislature could have thought coercive, oppressive or otherwise unjust. It is not denied that labor organizations have indulged in such practices, and obviously we cannot assume in the face of the constitutional objections that they do not, or that the state could not make § 15 applicable to them. As the record presents no concrete case to which petitioners' contentions as to § 15 apply, we are unable to say whether its application in any given case not now before us would or would not be constitutional. *Liverpool, N. Y. & P. S. S. Co.* v. *Emigration Comm'rs, supra,* 39; *Barker Co.* v. *Painters Union,* 281 U. S. 462, 463, 464. Determination of these questions as well as

the proper construction of the section which is challenged as vague and indefinite must await its application to some specific state of facts.

Other contentions.

Only a word need be said as to various other objections not already disposed of, which have been raised but not seriously pressed. It is said that the requirement of § 7 to file information statements and reports is so burdensome on labor organizations as to deny due process of law. It is not denied but is affirmed that labor organizations are subject to regulation, *Allen-Bradley Local* v. *Board, supra,* and that in the interests of regulation the government may require information from those subject to it. *Thomas* v. *Collins,* 323 U. S. 516, 532; cf. *Northwestern Bell Tel. Co.* v. *Nebraska Comm'n,* 297 U. S. 471, 478; *Natural Gas Co.* v. *Slattery,* 302 U. S. 300, 306 and cases cited. It is said that in order to comply with the statute it would be necessary for each union, regardless of its size and finances, to hire public accountants or others with specialized knowledge of accounting practices and procedure, such as working men do not have, and that such a requirement is beyond constitutional power. But these assertions are unsupported by the record. It does not show to what extent the transactions of petitioners, or any of them, are complicated or detailed or other facts which would enable us to say that petitioners are unable to comply with the statute without expert assistance. Since petitioners' reliance is upon the burdensome operation of the statute on them, we are not bound to speculate upon the nature or extent of the burden. We can hardly make pronouncement on their contentions in a declaratory judgment proceeding where the record does not disclose the extent of the burden, if any. Whether the information demanded is so extensive, detailed, and therefore burdensome, as to pass the bounds of what the state may reasonably require

can be determined only in the light of the circumstances in which the statute is to be applied.

The objection that §§ 7 and 16 of the state statute are too vague and uncertain to meet constitutional requirements is one which cannot appropriately be considered in a declaratory judgment proceeding in the federal courts, in advance of their authoritative construction by a state court. As we have said, it is the duty of the federal courts to avoid the unnecessary decision of constitutional questions. *Siler* v. *Louisville & Nashville R. Co.,* 213 U. S. 175, 191; *Light* v. *United States,* 220 U. S. 523, 538; *Blair* v. *United States,* 250 U. S. 273, 279; *Crowell* v. *Benson,* 285 U. S. 22, 62, and cases cited. But the use of the declaratory judgment procedure to test the validity of a state statute for vagueness and uncertainty invites rather than avoids the unnecessary decision of the constitutional question.

Most courts conceive it to be their duty to construe a statute, whenever reasonably possible, so that it may be constitutional rather than unconstitutional. *Stephenson* v. *Binford,* 287 U. S. 251; *Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373, 379; *Screws* v. *United States, ante,* p. 91, and cases cited; cf. *Spector Motor Co.* v. *McLaughlin,* 323 U. S. 101; *Ex parte Endo,* 323 U. S. 283. And the Alabama courts adhere to that rule. *Mobile* v. *Board,* 180 Ala. 489, 501, 61 So. 368; cf. *Duncan* v. *Rudulph,* 245 Ala. 175, 176, 16 So. 2d 313; *Goodman* v. *Carroll,* 205 Ala. 305, 87 So. 368; *Cloverdale Homes* v. *Town of Cloverdale,* 182 Ala. 419, 62 So. 712. State courts, when given the opportunity by the presentation to them for decision of an actual case or controversy, may, and often do, construe state statutes so that in their application they are not open to constitutional objections which might otherwise be addressed to them. *Cox* v. *New Hampshire,* 312 U. S. 569, 575; compare *Schuylkill Trust Co.* v. *Pennsylvania,* 302 U. S. 506 with *Schuylkill Trust Co.* v. *Pennsylvania,* 296 U. S. 113. In advance of an authoritative construction of a state

statute, which the state court alone can make, this Court cannot know whether the state court, when called on to apply the statute to a defined case or controversy, may not construe the statute so as to avoid the constitutional question. For us to decide the constitutional question by anticipating such an authoritative construction of the state statute would be either to decide the question unnecessarily or rest our decision on the unstable foundation of our own construction of the state statute which the state court would not be bound to follow. *Spector Motor Co.* v. *McLaughlin, supra,* 105; see also *Vandenbark* v. *Owens-Illinois Co.,* 311 U. S. 538, 543; *Huddleston* v. *Dwyer,* 322 U. S. 232. Such is not the function of the declaratory judgment.

The extent to which the declaratory judgment procedure may be used in the federal courts to control state action lies in the sound discretion of the Court. See *Great Lakes Co.* v. *Huffman, supra.* It would be an abuse of discretion for this Court to make a pronouncement on the constitutionality of a state statute before it plainly appeared that the necessity for it had arisen, or when the Court is left in uncertainty, which it cannot authoritatively resolve, as to the meaning of the statute when applied to any particular state of facts. In any event the parties are free to litigate in the state courts the validity of the statute when actually applied to any definite state of facts, with the right of appellate review in this Court. In the exercise of this Court's discretionary power to grant or withhold the declaratory judgment remedy it is of controlling significance that it is in the public interest to avoid the needless determination of constitutional questions and the needless obstruction to the domestic policy of the states by forestalling state action in construing and applying its own statutes. See *Great Lakes Co.* v. *Huffman, supra,* 300, *et seq.*

The contention that the Act denies equal protection because its provisions, or some of them, have not been ex-

tended to business corporations or associations or to labor organizations which are subject to the Railway Labor Act, 45 U. S. C. § 151 *et seq.*, is without substance. The Constitution does not oblige a state to regulate or reform all types of associations and organizations, or none. It may begin with such as in its judgment most need regulation. *Carroll* v. *Greenwich Insurance Co.*, 199 U. S. 401, 411; *Keokee Coke Co.* v. *Taylor*, 234 U. S. 224, 227; *Bunting* v. *Oregon*, 243 U. S. 426; *Sproles* v. *Binford*, 286 U. S. 374, 396; cf. *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 400, and cases cited. And for this reason it may exclude from regulatory measures organizations which it has reason to believe are already appropriately regulated by either state or national legislation. *Ziffrin, Inc.* v. *Reeves*, 308 U. S. 132, 140; cf. *Union Bank & Trust Co.* v. *Phelps*, 288 U. S. 181, 186.

We would not have granted certiorari to review so unsubstantial a question, and all the other issues, as presented by the record now before us, are, for reasons which we have given, inappropriate for decision in a declaratory judgment proceeding. The writ of certiorari will therefore be

Dismissed.

CONGRESS OF INDUSTRIAL ORGANIZATIONS ET AL. *v.* McADORY ET AL.

CERTIORARI TO THE SUPREME COURT OF ALABAMA.

No. 855. Argued April 3, 4, 1945.—Decided June 11, 1945.

1. Decision in this case is controlled by the principles governing *Alabama State Federation of Labor* v. *McAdory*, *ante*, p. 450. P. 477.
2. This Court will not pass upon the constitutionality of legislation in a suit which is not adversary, or in which there is no actual antagonistic assertion of rights. P. 475.
3. The Court cannot say that the present proceeding is adversary as to § 7 of the Bradford Act (Alabama Laws of 1943, No. 298) in view of the agreement by respondents to refrain from enforcing that section until its validity is finally determined by this Court,

and in view of the decision in the *Alabama State Federation of Labor* case. P. 475.

4. In the absence of an authoritative construction of § 16 by the state courts, this Court cannot say whether that section will be interpreted so as to include within its scope employees which petitioners intend to admit to membership, and thus cannot pass on the constitutional validity of the section as applied to the future admission of members. P. 476.
5. The contention in this case that § 16 of the Bradford Act conflicts with the National Labor Relations Act does not appear to have been properly presented to the state courts, nor to have been passed upon by those courts, and this Court upon review is without jurisdiction to consider it in the first instance. P. 477.

Writ dismissed.

CERTIORARI, 324 U. S. 832, to review a judgment, 246 Ala. 198, 20 So. 2d 40, which affirmed a judgment sustaining in part the constitutionality of a state statute.

Mr. Lee Pressman, with whom *Messrs. Crampton Harris* and *Frank Donner* were on the brief, for petitioners.

Messrs. James A. Simpson, John W. Lapsley and *John E. Adams*, with whom *William N. McQueen*, Acting Attorney General of Alabama, was on the brief, for respondents.

Briefs were filed by *Solicitor General Fahy, Messrs. Robert L. Stern, Alvin J. Rockwell, Miss Ruth Weyand* and *Mrs. Elizabeth W. Weston* on behalf of the United States; *Messrs. Arthur Garfield Hayes* and *Osmond K. Fraenkel* on behalf of the American Civil Liberties Union; and *Mr. Paul O'Dwyer* on behalf of the Workers Defense League, as *amici curiae*, in support of petitioners.

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

This suit, brought in the state courts of Alabama for a declaratory judgment adjudicating the constitutional validity of the Bradford Act, No. 298 Alabama Laws of 1943, (Code 1943, Tit. 26, §§ 376, *et seq.*), and for an injunction,

is a companion case to *Alabama State Federation of Labor* v. *McAdory, ante,* p. 450.

Petitioners are the Congress of Industrial Organizations, a national labor organization, and certain affiliated labor organizations, whose members are employed within the State, and certain of their officers. Petitioners brought the present suit in the State Circuit Court against respondents who are county officers charged with the duty of enforcing the Act, praying a declaratory judgment that the Act as a whole and particularly §§ 7 and 16, among others, are unconstitutional under the Federal and State Constitutions, and are invalid because in conflict with the National Labor Relations Act, and praying that an injunction issue.

After a trial upon evidence the Circuit Court adjudged certain sections of the Act, not here in issue, to be invalid in whole or in part. In other respects it held the Act constitutional and valid. It found that the evidence disclosed no effort on the part of respondents to enforce the provisions of the Act declared to be invalid and accordingly denied an injunction. On appeal the Supreme Court of Alabama affirmed, 246 Ala. 198, 20 So. 2d 40, for the reasons stated in its opinion in the *Alabama State Federation of Labor* case.

We granted certiorari, 324 U. S. 832, on a petition which urged that §§ 7 and 16 of the Act deprive petitioners of their civil rights in violation of the constitutional guarantees of free speech and assembly; that §§ 7 and 16 conflict with the National Labor Relations Act, 49 Stat. 449, 29 U. S. C. § 151 *et seq.;* and that § 7 denies petitioners the equal protection of the laws guaranteed by the Fourteenth Amendment on the ground that its provisions have not been extended to employers' associations, and that the Act excludes from its operation labor organizations which are subject to the Railway Labor Act, 45 U. S. C. § 151 *et seq.*

The record shows that the respondents have agreed not to enforce § 7 of the Act until the final decision as to the section's validity by this Court in *Alabama State Federation of Labor* v. *McAdory, supra.* Since we have held in that case that it is inappropriate to pass upon the constitutional validity of § 7 on the record presented, we cannot say that the present proceeding is adversary as to § 7. The Court will not pass upon the constitutionality of legislation in a suit which is not adversary, *Bartemeyer* v. *Iowa,* 18 Wall. 129, 134–5; *Chicago & Grand Trunk R. Co.* v. *Wellman,* 143 U. S. 339; *Atherton Mills* v. *Johnston,* 259 U. S. 13, 15; *Coffman* v. *Breeze Corps.,* 323 U. S. 316, 324, or in which there is no actual antagonistic assertion of rights. *Cleveland* v. *Chamberlain,* 1 Black 419; *Swift & Co.* v. *Hocking Valley R. Co.,* 243 U. S. 281, 289; *Norton* v. *Vesta Coal Co.,* 291 U. S. 641; *United States* v. *Johnson,* 319 U. S. 302.

Upon an examination of the record in this case we find that it shows that petitioners or some of them have members who are employed in the State of Alabama in industries whose employees are subject to the National Labor Relations Act, and that they act in the State and are certified as bargaining representatives of such employees under the Act. But the extent to which they act in the State as bargaining representatives of employees in industries which are not subject to the National Labor Relations Act does not appear, and consequently the record affords no adequate basis for an adjudication of the extent to which for that reason the petitioners or some of them may be rightly subject to local regulation even though they also represent employees in other industries which are subject to the National Act.

The record does not show whether or not petitioners provide insurance benefits for their members. The State Supreme Court has construed § 16 as inapplicable whenever it would otherwise "interfere with or void any in-

surance contract now in existence and in force" and, as construed, has held it valid as applied to petitioners. On this state of the record we are unable to say to what extent § 16 can be deemed applicable to members of any of petitioners because of existing insurance arrangements. For this and the other reasons stated in our opinion in the *Alabama State Federation of Labor* case the record does not present a case calling for decision of the constitutional validity of § 16 as applied to any existing union members.

Petitioners nevertheless assert that they intend to admit such supervisory employees as members in the future, and that the Supreme Court of Alabama in the *Alabama State Federation of Labor* case has held that such future "executive, administrative, professional, or supervisory" employees are not excepted from the provisions of § 16 by reason of their acquisition as such employees of insurance benefits. Although there is evidence in the record indicating that some of petitioners who have non-supervisory members admit to membership employees whom they designate as "supervisory" in the words of the statute, and will continue to do so, there is also evidence that they do not admit supervisory employees who have the right to "hire and fire." The Supreme Court of Alabama did not in its opinion in this case or in the *Alabama State Federation of Labor* case define the statutory language "executive, administrative, professional, or supervisory employee." Thus on the basis of the record before us we do not know whether those employees which petitioners intend to admit to membership are such as are included in § 16. We do not know that § 16 will not be interpreted to embrace only those employees which have the authority to employ and discharge employees. And so it does not appear that the statute will be applied so as to raise the federal question which we are asked to decide.

Further, the contention that § 16 conflicts with the National Labor Relations Act, cf. *Hill* v. *Florida, post,* p. 538, was not passed on by the Circuit Court, was not raised by assignment of error in the Alabama Supreme Court, and that court did not pass on that question either in its opinion in this case or in its opinion in the *Alabama State Federation of Labor* case which it adopted as controlling. The Alabama Supreme Court will not consider errors which have not been assigned, *Rowland & Co.* v. *Plummer,* 50 Ala. 182, 197; *Pettibone-Taylor Co.* v. *Farmers Bank,* 156 Ala. 666, 46 So. 751; *Malaney* v. *Ladura Mines Co.,* 191 Ala. 655, 65 So. 666; *Nichols* v. *Hardegree,* 202 Ala. 132, 79 So. 598; *Halle* v. *Brooks,* 209 Ala. 486, 96 So. 341, or which have not been specifically and precisely raised in the assignments of error, *Kinnon* v. *Louisville & Nashville R. Co.,* 187 Ala. 480, 65 So. 397; *Carney* v. *Kiser Co.,* 200 Ala. 527, 76 So. 853; *Hall* v. *Pearce,* 209 Ala. 397, 399, 96 So. 608; *Jackson Lumber Co.* v. *Butler,* 244 Ala. 348, 13 So. 2d 294, 298. Since the State Supreme Court did not pass on the question now urged, and since it does not appear to have been properly presented to that court for decision, we are without jurisdiction to consider it in the first instance here. *Caperton* v. *Bowyer,* 14 Wall. 216, 236; *Hulbert* v. *Chicago,* 202 U. S. 275, 280, 281; *Dorrance* v. *Pennsylvania,* 287 U. S. 660; *Chandler* v. *Manifold,* 290 U. S. 665; see also *Flournoy* v. *Wiener,* 321 U. S. 253; *Charleston Assn.* v. *Alderson,* 324 U. S. 182, 185, and cases cited.

We find no other factual differences calling for comment between the case presented by the record here and that presented in the *Alabama State Federation of Labor* case. Our decision here is therefore controlled by our decision in that case. The question raised as to the equal protection of the laws is too unsubstantial to merit review. The other issues, as presented by the record now before us, are, for reasons stated at length in our opinion in the *Alabama State Federation of Labor* case, inappropriate for decision

in a declaratory judgment proceeding. The writ of certiorari is accordingly

Dismissed.

KEEGAN *v.* UNITED STATES.

NO. 39. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.*

Argued November 9, 10, 1944.—Decided June 11, 1945.

1. The evidence in this case was insufficient to sustain conviction of the petitioners, members of the German-American Bund, for conspiracy knowingly to counsel others to evade service in the armed forces of the United States, in violation of § 11 of the Selective Training and Service Act of 1940. Pp. 488, 494.

Opinion of ROBERTS, J., in which FRANKFURTER and MURPHY, JJ., concur:

2. Promulgation and communication of Bund Command No. 37 was not in itself a counsel to evade; evidence of the general disposition of the petitioners either towards the Government of the United States or towards the Selective Service Act did not make the Command a counsel to evade; and the evidence and oral statements of the various petitioners at committee meetings and unit meetings of the Bund did not supply the basis for a finding, beyond a reasonable doubt, of counselling, or intending to counsel, or conspiring to counsel, evasion of military service within the meaning of § 11 of the Act. P. 494.

BLACK and RUTLEDGE, JJ., concur in separate opinions, pp. 495, 498.

141 F. 2d 248, reversed.

CERTIORARI, 322 U. S. 719, to review a judgment affirming convictions of conspiracy in violation of § 11 of the Selective Training and Service Act of 1940.

Messrs. John F. X. Finn and *Harold W. Hastings* and *Mr. William H. Timbers, pro hac vice,* with whom *Messrs.*

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*Together with No. 44, *Kunze et al.* v. *United States,* also on certiorari to the Circuit Court of Appeals for the Second Circuit.

Leo C. Fennelly, George S. Leisure, Joab H. Banton and *George C. Norton* were on the brief, for petitioners in No. 44. *Carl Frederick Berg, Ernest Martin Christoph, John C. Fitting, William C. Kunz, William Ottersbach, Max Rapp* and *Louis Schatz,* petitioners in No. 44, submitted *pro se. Wilbur V. Keegan,* petitioner in No. 39, submitted *pro se.*

Mr. James M. McInerney, with whom *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl, Ralph F. Fuchs, William Strong, Irving S. Shapiro* and *Peter J. Donoghue* were on the brief, for the United States.

Mr. John F. X. Finn filed a brief, as *amicus curiae,* urging reversal.

MR. JUSTICE ROBERTS announced the judgment of the Court and delivered the following opinion, in which MR. JUSTICE FRANKFURTER and MR. JUSTICE MURPHY concur.

Two indictments, one returned July 7, 1942, the other returned August 26, 1942, charged a conspiracy beginning January 1, 1940, and ending at the dates the indictments were found. The evident purpose of the second was to include several additional defendants as alleged conspirators. We shall treat them as one.

The conspiracy charged was to counsel divers persons to *evade, resist,* and *refuse service* in the land and naval forces of the United States in violation of § 11 of the Selective Training and Service Act of 1940, 50 U. S. C. App. 311. The Act defines the crime as conspiracy *"knowingly"* to counsel "another to *evade registration or service* in the land or naval forces . . ."

The proofs would not sustain, and the indictment does not contain, any charge of conspiracy to counsel evasion of registration.

In certain paragraphs of the indictment it is charged

(1) That it was part of the conspiracy that each was and would remain a member of the German-American Bund; that each was a responsible leader of the Bund.

(2) That some prepared German articles called Bund Commands and others distributed and caused them to be distributed to units of the Bund.

(3) That the commands were read at meetings.

(4) That Command 37 counselled, directed, and urged those to whom its contents were communicated to *evade, resist,* and *refuse* service in the land and naval forces.

(5) That articles in the newspaper "The Free American," published by the Bund, which were distributed, urged German-American citizens and others to *resist, refuse* and *evade* such service.

(6) That the defendants otherwise urged German-American citizens and others to *resist* the provisions of the Act of 1940 and to *evade* service.

The 25 defendants were tried together. One was acquitted. The Government called 68 witnesses and the trial lasted from September 17th to October 19th, 1942. The printed transcript of testimony furnished this court covers just short of 800 pages, and the exhibits offered in evidence run to over 350, some of them containing over 50 pages. The defendants were represented at the trial by appointed counsel as they were not able to employ counsel.

The Government correctly states that the evidence offered by the prosecutor falls into two classes: (1) that touching the German-American Bund and its purposes, which was offered to indicate the motives and purposes for the defendants' statements and actions; and (2) evidence touching specific actions, conduct, and statements tending to show the existence of a conspiracy and the steps taken pursuant to it. The evidence in the first category is overwhelmingly greater in volume than that in the second. Indeed a question arises whether it was not an abuse

of discretion to permit the Government to go, at such inordinate length, into evidence concerning the Bund and its predecessor, the Friends of New Germany, during a period of seven years prior to the inception of the alleged conspiracy; and concerning Bund uniforms and paraphernalia, and pictures and literature in the possession of various defendants.

What we shall characterize as the background evidence may be summarized. The proofs disclose that there existed from some time in the early 1930's a society known as the Friends of New Germany. About 1935 the name was changed to the German-American Bund. After Fritz Kuhn, the leader of the organization, had been arrested and convicted of certain offenses irrelevant to the present case, Kunze, one of the petitioners, became president. At the convention of 1940 a new constitution was adopted; and at some time within the dates specified as covering the conspiracy a synopsis of the structure of the Bund was promulgated. Minutes of the convention of 1940 also were in evidence.

From these documents a conception of the nature and, to some extent, the purposes of the association may be obtained. It was organized on the fuehrer or leadership principle. The president was the leader, and was amenable only to the association in convention assembled. His orders were law unless and until modified or abrogated by a convention. Members were expected to obey his orders. Disobedience involved discipline, or expulsion from the organization. The entire hierarchy of constituent organizations and of officials, national and local, was created by him; and all officials, high and low, held office subject to his pleasure. The constituent organizations consisted of local units, each of which had its leader, and of collateral organizations within a unit, such as an OD division, whose function was to drill in uniform, to police

meetings of members, and perform other similar duties; a youth organization, etc.

The professed purpose of the Bund was to keep alive the German spirit among persons of German blood in the United States. Speeches and literature justify the inference that the Bund endorsed the Nazi movement in Germany and, if it did not actually advocate some such form of government in this country, at least essayed to create public opinion favorable to the Hitler regime and to the German National Socialist State. The Bund was also anti-British and opposed our entering the war on the side of the British; its aim was to keep us neutral and friendly to the new Germany. There is much in literature put out or approved by the Bund concerning "discrimination" against American citizens of German blood and the fight which must be waged against it. There is also much to the effect that the Bund is pursuing lawful aims within the constitutional rights of its members, and that its activities need not be hidden from governmental agencies. There is basis for suspicion of subversive conduct; there is matter offensive to one's sense of loyalty to our Government's policies. There may well be doubt of the organization's hearty support of those policies, but if the Bund and its membership were, prior or subsequent to January 1, 1940, engaged in illegal activities, other than those claimed to prove the charge laid in the indictment, the record is bare of evidence of any such.

The Draft Act was introduced in Congress in June, 1940, was amended September 7 by adding § 8 (i) and as so amended became law September 16, 1940. Prior to September 7 there seems to have been no suggestion by the Bund or its officers that, if passed, the law would not be binding on all and ought not to be obeyed. The oral evidence respecting this period is almost entirely that of Luedtke, former secretary of the Bund, who was a defendant and turned state's evidence.

He states that the Bund and its members always favored a compulsory selective service act. But, he said, they were opposed to the principle of using a draft army to fight against Germany. The Bund feared that the President might use a conscript army by sending it abroad to fight with England, against Germany. The Bund desired this country to maintain neutrality by not having our soldiers go to foreign shores. These views were then shared by many loyal citizens, and some of them were enacted into law by Congress. (See § 3 (e) of the Selective Training and Service Act.)

There is no documentary evidence to contradict this testimony. Nothing appears in the minutes of the national convention held August 31–September 2, 1940, or in the testimony as to its proceedings, with reference to selective service. It is true Luedtke says there was some talk about it, and the stenographer was instructed to omit this from the record; but he does not say that such talk was in any way inconsistent with what he had testified as to the Bund's attitude.

On September 7, while the bill was pending in the House, an amendment was offered, was adopted as offered, and remained in the bill when signed by the President. It is

"8 (i) It is the expressed policy of the Congress that whenever a vacancy is caused in the employment rolls of any business or industry by reason of induction into the service of the United States of an employee pursuant to the provisions of this Act such vacancy shall not be filled by any person who is a member of the Communist Party or the German-American Bund" (50 U. S. C. App. 308 (i)).

Admittedly Kunze, probably with the approval of other defendants, protested by letter and telegram to members of Congress against the passage of the bill thus amended and to the President against signing it. The Act became

law September 16th. Shortly thereafter Kunze called a meeting of unit leaders, at which many of the defendants were present, including Keegan, the counsel of the Bund. Keegan addressed the meeting and said that there was a constitutional question involved, that members of the Bund had been discriminated against (it is plain this statement applies to § 8 (i)); and they had a right to go to court to establish their rights. Kunze recited his efforts to prevent passage of the bill, said an article was to appear in "Free American" entitled "No rights, no duties" and that the Bund was going to fight the discrimination. He explained that the article would make clear that if American citizens were deprived of their right to work they should not be saddled with the burden of military service. He said the Bund intended to fight this discrimination by a test in court. Neither Keegan nor Kunze suggested that Bund members should resist military service irrespective of what happened in the test case. Luedtke, who is the principal witness as to what occurred at this meeting, said he never heard Keegan, Kunze, or any national leader advise anyone to resist military service, irrespective of the outcome of the test case; that it was the policy of the Bund to get this provision (§ 8 (i)) out of the Act.

The sequel to this meeting was the issue of Bund Command No. 37 on October 1, 1940. (Some 49 such commands were offered in evidence, though none but No. 37 is relied on as containing any statement relevant to the charge.) In this command, one of several subjects dealt with was that of military service. The whole of this section is, according to the translation submitted by the Government:

"4. *Military Service:* On October 16, of this year, all citizens and non-citizens (male) who are of age, but who have not passed their 36th year, must register with the military authorities. This order must be complied with unhesitatingly.

"We represent the standpoint, however, that AN INDUCTION into the MILITARY SERVICE is NOT justified, in as far it concerns Bund members and American Germans, *for in the Selective Service Law the citizenship rights of Bund members and the defenders of Germandom are unconstitutionally severed!*

"EVERY MAN, if he can, will REFUSE *to do military duty until this law and all other laws of the country or the states which confine the citizenship rights of Bund members* ARE REVOKED!

"We will fight to establish a precedent in this servile matter!" [Emphasis as in original.]

Warner, the translator, a government witness, testified that the German word "präzedenfall," here translated "precedent," means "a test case in the legal sense," "a case which they refer to as a precedent." He further testified that the German words translated above simply as the English "if he can" may be fairly taken to mean "if he can properly do so" or "if he can possibly do so." And he further agreed that the word "Jeder," which he translated as "every," might properly be translated as "each."

Thus altered, the phrase would read: "Each man if he properly can . . . will *refuse* to do military service . . . until this law etc."

As will be seen from what follows, the Government's case is really pitched on this command, which it construes as a counsel to *evade* military service. The proof went to great lengths to show that it reached various unit leaders, and that they read it or made it available to the members of their units. The evidence is that each of the defendants who was a unit leader either read it to some members of his unit or made it available to them, except only Schneller.

The Bund held a convention in 1941 but there is no evidence that selective service was there discussed. It disbanded in December 1941. There is evidence that the

leaders advised the members to keep together, to meet for singing and social purposes; but no evidence that anything was said about selective service or military service.

If the promulgation or imparting of the contents of Command No. 37, and concurrence in its purpose, is evidence of an intent to counsel *evasion* of military service, the conviction of all the defendants, save Schneller, was justified. But the Government evidently felt that a counsel to register for the draft, thus making one's liability to service, his address, etc., matters of public record, and then, if possible, to *refuse* service, if a supposed discrimination remained effective, could hardly be claimed to be a counsel to *evade*.

This becomes the clearer if we analyze the provisions of § 11 of the Act (50 U. S. C. App. § 311).

It subjects to punishment any person:

(1) who shall knowingly make or be a party to making any *false* registration;

(2) who shall knowingly make or be a party to making any *false* statement as to his or another's fitness or liability for service;

(3) who knowingly *counsels*, aids, or abets another to *evade* registration or service;

(4) who in any manner shall knowingly *fail or neglect to perform any duty required of him by the Act;*

(5) who shall knowingly *hinder or interfere by force or violence* with the administration of the Act;

(6) who shall conspire so to do.

It will be noted that resistance or refusal are nowhere mentioned, except as such refusal would constitute a neglect to perform a duty enjoined by the Act (4) or were accompanied by force or violence (5). On the other hand, there appear in collocation descriptions of two sorts of evasion, false entries (1) and false statements (2) imme-

diately followed by the denunciation of counselling "evasion" (3). Plainly enough the Act distinguishes evasion, a species of fraudulent conduct, from mere neglect of duty and from forcible and violent interference or resistance.

The classification so made corresponds with what "evade" means to the common understanding, and the effort of the draughtsman of the indictment to make evasion the equivalent of refusal or resistance, does violence to such usage as well as to the statute.

"Evade" is defined as, "To escape; to slip away; to take refuge in evasion; to use artifice in avoidance."

"Resist" is defined as, "To withstand; to oppose by physical, mental, or moral power."

"Refuse" is defined as, "To decline to accept; to reject; to decline to submit to or undergo."

Now the surest way of rendering oneself incapable of evading military service, of slipping away or escaping it, is to register. And the Bund command which is at the core of the Government's case enjoins registration in the strongest terms. That accomplished, a refusal to serve may follow when the registrant is to be inducted. But to counsel merely refusal is not made criminal by the Act.

The provisions of § 8 (i) of the Act hardly need animadversion. They speak for themselves. Can it be that criticism, that an effort to eliminate them from the Act, or forthright advice to those discriminated against by those provisions, to register but not, if it can be avoided, to serve, unless those provisions have been sustained by the courts as legal, amount to counselling evasion of service? The belief that validity of the other provisions of the Act depends on the validity of that section may seem foolish to us, but can we say that the other defendants did not believe what the Bund's lawyer told them about that?

Thus the Government, recognizing that the issue and communication of Command No. 37 did not, in itself,

constitute a counselling to evade military service, sought to prove a sinister and undisclosed intent in connection with it to counsel evasion. For this purpose it relied first on the so-called un-American sentiments and statements of the Bund; on articles which appeared in the "Free American" and on proceedings had and speeches made at the 1940 convention. But these evinced nothing bearing on the charge laid in the indictment. At most they were evidence that the defendants, or some of them, were the kind of men who might be inclined to counsel evasion of military service.

In addition, the Government introduced evidence as to statements made by one or other of the defendants at unit meetings or other gatherings of Bund members. It must, in final analysis, sustain the judgment by this evidence.

We think the evidence insufficient to overcome the innocent purport of Command No. 37 and to fasten on those who imparted that command a covert purpose knowingly to counsel evasion of military service. The testimony has been carefully examined. It cannot be quoted *in extenso*. A summary must suffice.

Most, though not all, of the testimony as to oral statements by the defendants refers to occasions between September 16, 1940, the date of the Draft Act, and July 9, 1941. There is nothing of significance after the latter date except what is hereinafter noted. During the period mentioned Command No. 37 was read or made available to members by unit leaders, was to some extent discussed; and, during that period, Kunze, accompanied by some of the national leaders, visited various units and discussed the Act before groups. The testimony, in the main, is directed to what Kunze, Keegan, and unit leaders said on these occasions.

Most of it amounts to this: It was stated that the Act was unfair and discriminatory; that Bund members ought not at the same time be deprived of civil rights and asked

to serve in the armed forces; that they should not be called into the army until the discrimination was abolished; that the Bund would fight the discrimination; that the Bund would take steps to correct the unfairness of the Act; that a lawyer would take care of it; that the Bund would bring a test case if means could be devised to that end; that those who could afford it should refuse military service until the discrimination was removed; that the Bund would try to get this provision out of the Act; that § 8 (i) was unconstitutional; that the members had to register but that it was not thought right to ask them to do so while the discrimination continued, but that they should enlist more or less under protest and wait until their rights were restored to them. One witness testified that Kunze once stated that if the members were not treated right they did not have to bear arms and that the Bund was going to make a test case of this.

Reference should be made to certain specific portions of the testimony. A mail carrier testified that shortly after the Act went into effect he spoke to the defendant Belohlavek at the latter's office in Cleveland. Over objection that the evidence did not go to prove any conspiracy, the court admitted it. The witness stated that he said to Belohlavek:

"Joe, you are in the draft aren't you? He said, 'Yes.' I said, 'What are you going to do if they send you to the other side?' So he said, 'Well,'—it was a vulgar word—'I will run to the other side and fight against them'."

A witness testified that, at a meeting of a German Hiking Club in Buffalo early in 1942, Keegan referred to the fact that two of his sons were in the Army, said he felt sorry about them and, referring to those present, said: "You boys are lucky in a way, you might evade military service because you are foreign-born." When someone asked how and why, Keegan explained: "By claiming being a conscientious objector." The witness went to Kee-

gan afterwards, spoke to him privately and said: "Supposing what would happen to me as a naturalized American citizen if I had tried to evade military service by claiming being a conscientious objector? Well, then, he said, 'You would lose your citizenship.' Well, then, I said, 'Of course, to hell with that'." The witness was inducted into the United States Army.

Throughout the entire testimony this is the only evidence that any defendant, in speaking of the draft or military service, ever by the use of the word "evade," or otherwise, gave any indication of a counselling to anyone to escape military service. Under cross-examination the witness testified that, in answering questions, Keegan had said that the only way anyone could avoid serving was by claiming and proving that he was a conscientious objector.

There is evidence that, at a meeting held before the Act was passed, Klapprott said he would not fight against Germany and also that "the Draft Act would build up an army that would be used against Germany" and that he "would do everything" to prevent the passage of such an Act.

As respects the defendant Knupfer, a witness testified:

"Well, Mr. Knupfer explained that a lot of German people lose their jobs, and in a case like that we should refuse to fight."

But, on cross-examination, the witness qualified his testimony to the following effect:

"Q. And I believe you said something about that if they were not allowed to have jobs then they should not be called upon to fight, is that right? A. That is right.

"Q. And that is really the substance of what he said to you at that meeting, is it not? A. Yes.

. . . . .

"Q. Did you ever hear Mr. Knupfer suggest to you, or to anyone else in that meeting in your membership group,

that you should not register or that you should evade the Selective Service Act in any way? A. He did not say exactly that we should not, but he came out with the point that on account of the people losing jobs, if we not able to work in this country we should not fight in this country."

The following testimony concerns statements attributed to Kunze:

"Q. Well, now, with particular reference to the subject of Selective Service, did he have anything further to say? A. Well, he said one can always be a conscientious objector.

. . . . .

"Q. And he told all of you that he was going to be a conscientious objector? A. I did not say that he was going to be but he said that it would be wise to be. He said 'You always can become a conscientious objector.' That was his wording.

"Q. Then do I understand now that Mr. Kunze never said that he was going to be a conscientious objector, is that so? A. I cannot recall the exact words that he said, but he used that phraseology of conscientious objector."

Again, with respect to a statement of Kunze, it was testified:

"He said that we were discriminated against, the German-Americans, and therefore we should not sign up for the selective service draft, and he also meant that he wanted to make a test case, but he did not say what kind of a test case . . . I asked him what would happen if I would not sign up for a draft. . . . He said he did not know himself, but he is going to make a test case in the East, you see. So I asked him what I should do. He said it was up to the individual if he wants to sign up for the draft."

With respect to the defendant Streuer, a witness testified that he "mentioned" that if "anybody has chances to stay away from it [military service] which naturally

sometimes happens to some people, it is all right for them . . ." The same witness testified that Streuer never told anybody to resist the draft or not to register.

Except for the so-called background evidence pertaining to the general attitude and state of mind of the defendants this is all the significant testimony with respect to any counselling to evade military service. It should be added that practically every witness who testified to statements made at meetings, and to conversations of the various defendants, when asked whether he heard the defendant as to whom he was testifying advocate resistance to military service or evasion of military service, answered that he had never heard any such advice given by the defendant in question.

When it is borne in mind that most of the defendants were so-called unit leaders of small groups scattered from the Atlantic to the Pacific coast, whose contacts with the Bund and national officers consisted in attending annual conventions, reading Bund commands to members of the unit, and attending meetings to which Kunze or other national officers came, it becomes plain how little evidence there is in the record to convict them of a nation-wide conspiracy to counsel evasion of the draft. In essence, the case made by the Government amounts to this: That these men were partisans of Germany; were against our going to war with Germany, and might be disposed, therefore, to counsel evasion of military service, and were all familiar with Bund Command No. 37.

That the Government, in the last analysis, relied, to make its case, upon the promulgation of Bund Command No. 37, and that the trial judge so understood, seems plain from his charge to the jury, to which exception was taken and which was assigned as error. In that he said:

"There have been numerous references in the evidence and in the arguments of counsel to a test case said to have been proposed by the defendants or some of them to de-

termine the validity of Section 308 (i) of the Selective Service and Training Act which states amongst other things that it is the policy of Congress that Bund members be not employed to fill vacancies created by men in employment being drafted into the armed service. I charge you that if you should believe from the evidence that the defendants, *or any of them,* proposed to test this law by conspiring to counsel someone to *violate* the law, then the fact that their purpose was to make a test case is no defense to the charge here presented against them. I repeat that the offense with which these defendants are charged is a conspiracy to counsel others to evade service in the armed forces of the United States, and such an offense would be complete, if as a fact the defendants did unlawfully and knowingly conspire, combine or confederate together to counsel others to evade such service, and this is true even if defendants had a bona fide honest intent to make a test case. For if there was a *conspiracy amongst these defendants, or any of them, having as its object the violation* of the Selective Service Law, knowingly, the reason for such violation is immaterial to you in your consideration of the question of their guilt or innocence." (Italics supplied.)

Here the honesty and the bona fides of the defendants is said to be immaterial; the fact that they desired to test the constitutionality of the law is said to be immaterial. Nowhere is it stated that Bund Command No. 37, without more, does not amount to counselling to evade military service. Mingled with instructions that innocent motives were no excuse, and the intention to test the constitutionality of the law was no excuse, are statements that these are not excuses where there is a conspiracy knowingly to *counsel evasion* of military service. The statements are mutually contradictory. One with innocent motives, who honestly believes a law is unconstitutional and, therefore, not obligatory, may well counsel

that the law shall not be obeyed; that its command shall be resisted until a court shall have held it valid, but this is not knowingly counselling, stealthily and by guile, to evade its command. Thus having charged that innocent motives and a desire to test the validity of the law were not a defense, the court added:

"In regard to the matter of a test case, I call your attention to the fact that no test case was ever made, nor is there any evidence that any legal action was ever prepared, and the further fact that Bund Order No. 37, by its very language, opposes military service until this and all other laws, State and national, which the Bund considered discriminatory, were repealed.

"Of course, if you believe beyond a reasonable doubt that the defendants, or any of them, knowingly and unlawfully conspired to counsel evasion of the Selective Service Law, and the matter of a test case was merely a subterfuge to divert attention from their real purpose, you should find such defendants guilty as charged."

This final statement seems to mean nothing short of this, when taken in connection with what just preceded it: If defendants had innocent motives they are nonetheless guilty; if they had guilty motives they, of course, are guilty. It is somewhat difficult to see how the jury could reach any other than a verdict of guilty.

From what has been said above it will be seen that we are of opinion, first, that the promulgation and communication of Bund Command No. 37 was not in itself a counsel to evade; second, that the evidence of the general disposition of the petitioners either towards the Government of the United States or towards the Selective Service Act did not make the Command such; third, that the evidence and oral statements of the various petitioners at committee meetings and unit meetings of the Bund did not supply the basis for a finding, beyond a reasonable doubt, of counselling, or intending to counsel, or con-

spiring to counsel, evasion of military service within the meaning of § 11 of the statute. We are of the view, therefore, that, on the case made by the Government, the defendants were entitled to the direction of acquittal, for which they moved.

Other errors in the admission of evidence and in the charge of the court are assigned by the petitioners. The views we have expressed make it unnecessary to pass upon these alleged errors.

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

MR. JUSTICE BLACK, concurring.

I wish to add a few words emphasizing certain reasons, among others, which prompt me to concur in the Court's reversal of these judgments on the ground that the evidence was insufficient to support conviction of the defendants.

The prosecution tried to prove that the defendants counseled the members of the Bund to evade the Selective Service Act. Its case necessarily rested upon the assumption that members of the Bund were subject to the draft under that Act. It follows that if Bund members were not lawfully subject to draft under the Act, no person could be convicted for advising Bund members to this effect. Bund Command No. 37, an indispensable element in the government's case, took the position that Bund members were not subject to draft because "in the Selective Service Law the citizenship rights of the Bund members . . . are unconstitutionally severed." This same crucial question was seasonably raised and urged in the courts below, and is argued here. Since I think the evidence inadequate to support the judgments, I am not compelled to pass on this grave constitutional challenge.

Nevertheless, these defendants' conduct cannot fairly be appraised without an understanding of the statutory provisions against which they vehemently protested. For testimony as to these protests was a vital part of the evidence against them—without that part of the evidence they could not possibly have been convicted. It is necessary to distinguish between honest objections directed at legitimate wrongs, and sham protests which only obscure the real purpose. Language and actions of these defendants which is crucial to their convictions must be judged in the light of the fact that it followed passage of the Selective Service Act which contained the following provisions.

Sections 8 (a) (b) of the Selective Service Act, 54 Stat. 885, 890, provides that persons who have been drafted into and honorably discharged from military and naval service shall be accorded high preferential rights in regard to their reemployment by public or by private employers. Congress declared in these sections that such an ex-service man must be restored to his former position as though he had "been on furlough or leave of absence during his period of training and service in the land or naval forces," and that he should be so restored to his former job without loss of seniority or other privileges accorded regular employees. Section 308 (i) of the Act, however, declared that

"It is the expressed policy of the Congress that whenever a vacancy is caused in the employment rolls of any business or industry by reason of induction into the service of the United States of an employee pursuant to the provisions of this Act such vacancy shall not be filled by any person who is a member of the Communist Party or the German-American Bund."

After the passage of this Act, these defendants found themselves in this position. It was announced that Bund members were subject to draft to serve on the battlefront

where they might be seriously injured or lose their lives. They found that the law under which they were said to be subject to draft, commanded employers to reemploy other citizens who had been honorably discharged from the service, but the same law provided that when a Bund member came back after an honorable service, with an honorable discharge, no person anywhere could give him reemployment without violating the express policy of Congress.

It has been argued that these defendants had no legitimate reason to protest against these provisions because they were obviously unconstitutional and amounted to no more than an admonition; but they were an admonition sounded by the highest legislative body of the nation. It has also been suggested that these defendants should have known both that the protested proscriptive provision of the Act was unconstitutional and that Courts would sever it from other parts of the Act leaving Bund members constitutionally subject to draft. But this Court has said that

"The legislature could not thus impose upon laymen, at the peril of criminal prosecution, the duty of severing the statutory provisions and of thus resolving important constitutional questions with respect to the scope of a field of regulation as to which even courts are not yet in accord." *Smith* v. *Cahoon,* 283 U. S. 553, 564.

When we view the conduct of these defendants in all of this setting, their vigorous language appears to have been little, if any, more condemnatory of the discriminatory section of the Selective Service Act than language previously used by this Court with reference to legislation of a similar pattern. The whole tone of their protest was sounded graphically by their expression:

"No Civil Rights—No Military Duty! Draft Exempts Bund Members!" Cf. *Inglis* v. *Trustees of the Sailors*

Snug Harbour, 3 Pet. 99, 125, 168, 169. As to legislation having a similar setting, this Court has said:

". . . in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and . . . in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined. . . . A bill of attainder is a legislative act which inflicts punishment without a judicial trial. . . . These bills are generally directed against individuals by name; but they may be directed against a whole class." *Cummings* v. *Missouri,* 4 Wall. 277, 321–323. See also *Ex parte Garland,* 4 Wall. 333.

I cannot agree that the convictions of these defendants can be sustained on the basis of the evidence presented by the prosecution, weighed along with that section of the Selective Service Act which would stigmatize honorably discharged soldiers as unworthy to hold a job and earn a living.

MR. JUSTICE RUTLEDGE.

I concur in the Court's judgment and in the opinion to the effect that the evidence is insufficient to sustain the conviction. I think that is true whether "evade," as used in § 11 of the Selective Training and Service Act of 1940, means a species of fraudulent conduct or willful refusal or resistance of induction. Without Command No. 37 the case collapses. But one sentence in it bears any possibility of construction as counseling evasion, whether in the sense of refusal or of artifice or fraud. That sentence is conditional, not absolute. The whole command, in my judgment, is no more than vehement protest against § 8 (i), sheer political discussion. More than this is necessary.

MR. CHIEF JUSTICE STONE, dissenting.

MR. JUSTICE REED, MR. JUSTICE DOUGLAS, MR. JUSTICE JACKSON and I think the judgment should be affirmed as

to all the petitioners other than Schneller who is not shown to have participated in the conspiracy.

Petitioners were national and local leaders of the German American Bund, whose membership was made up of persons of German nationality or descent. They have been convicted of a conspiracy to violate § 11 of the Selective Service Act of 1940, 54 Stat. 885, which imposes a criminal penalty on any person "who knowingly counsels, aids, or abets another to evade registration or service in the land or naval forces."

The indictments charge that petitioners and others conspired to distribute among the members of the Bund throughout the country a document known as Bund Order No. 37 "which would counsel, direct and urge those to whom the contents were made known that they should evade, resist, and refuse service in the land or naval forces of the United States." Order No. 37 was ostensibly published as a protest of the Bund against the adoption by Congress of § 8 (i) as an amendment to the Selective Service Act, which declared:

"It is the expressed policy of the Congress that whenever a vacancy is caused in the employment rolls of any business or industry by reason of induction into the service of the United States of an employee pursuant to the provisions of this Act such vacancy shall not be filled by any person who is a member of the Communist Party or the German-American Bund."

Order No. 37 was printed in the German language, and an English translation of it was submitted to the jury. After calling attention to the fact that all citizens who have not passed their thirty-sixth year were required by the Selective Service Act to register, it continued, "This order must be complied with unhesitatingly" and added:

"An induction into the military service is not justified, in as far as it concerns Bund members and American Ger-

mans, for in the Selective Service Law the citizenship rights of Bund members and the defenders of Germandom are unconstitutionally severed!"

It concluded:

"Every man, if he can, will refuse to do military duty until this law and all other laws of the country or the States which confine the citizenship rights of Bund members are revoked!

"We will fight to establish a precedent in this servile matter!"

The only substantial questions for our decision are whether the jury could rightly find from the evidence that Bund Order No. 37 did in fact counsel "another to evade registration or service in the land or naval forces," and whether petitioners' conspiracy to give such advice was in the circumstances unlawful. The contentions are that the conviction cannot be sustained because the advice in Bund Order No. 37, that "every man if he can will refuse to do military duty" until the law offensive to the Bund was repealed, cannot be taken to counsel the evasion of service in the military forces and because the alleged conspiracy was not unlawful since the Bund Order only counselled refusal to do military duty as a means of initiating a case to test the validity of § 8 (i) of the Selective Service Act, which is a lawful purpose.

There is abundant evidence showing a consistent purpose of the Bund and Bund members to promote in the United States the interests of Nazi Germany. It is not denied, and could not be, that there is ample evidence from which the jury could have found that the Bund members, and petitioners in particular, were opposed to war with Germany and hostile to the Selective Service legislation of 1940 because they wished to prevent the raising of an army for a war against Germany. It was the theory of the Government, in presenting its case, that respondents seized upon the proposed legislation, which

became § 8 (i) of the Selective Service Act of 1940, as the ready implement of propaganda and agitation among Bund members and their friends, as a means of hindering and delaying the drafting of an army to fight against Germany. The Government's position is that Bund Order No. 37, which petitioners diligently circulated among Bund members, was the product of the conspiracy, and the means by which petitioners counselled members to evade service in the armed forces.

It seems to be admitted, and indeed it cannot be denied, that the evidence gives support to the Government's contention that petitioners had the inclination and the purpose to persuade Bund members to obstruct the operation of the Selective Service Act, and that Bund Order No. 37 was their chosen means to accomplish that end. But it is insisted that the advice to "refuse to do military duty," given by the distribution of Bund Order No. 37 among Bund members of draft age, was not an incitement to "evade" military service which the statute proscribes. Appealing to the dictionary as the ultimate arbiter of the statutory construction, it is said that "evade" connotes conduct which is fraudulent or characterized by artifice or craft, and suggests the idea of "escaping or slipping away from" as opposed to resistance to or refusal to do military duty, which the Bund order counselled.

If the meaning which the dictionary ascribes to a word standing in isolation is to be deemed controlling in the construction of a statute in which the word appears, it would seem to be of some importance to refer to the Latin derivation of the word "evade" as meaning to go or proceed away from, and to its modern usage, also recognized by the dictionaries, as the synonym of "avoid," or "escape" by effort or by force or by any other means, as well as by artifice, craft or dexterity.[1] As the draftsmen

[1] The following are dictionary definitions of the word "evade": Funk & Wagnalls: "To avoid by artifice; elude or get away from by

of statutes do not usually limit the application of the chosen word to only some of its common meanings without indicating their purpose to do so, the word, read in its context in the statute, is far more revealing of the legislative purpose than the arbitrary selection of one of its dictionary meanings to the exclusion of others which are equally applicable.

Here the statute shows on its face that the word "evade" is used in § 11 as meaning avoidance of or escape from military service either by the failure or the refusal to perform a duty which would otherwise result in the performance of the service, or by means of fraud, craft, or artifice, in meeting the requirements of the Selective Service Act. Section 11 imposes criminal penalties upon any person "charged . . . with the duty of carrying out any of the provisions of this Act . . . who shall knowingly fail or neglect to perform such duty." But it also imposes penalties upon any such person "who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification . . . and any person who shall knowingly make, or be a party to the making of, any false statement or certificate . . ." It then provides for a like application of the Act to any person "who *otherwise evades* registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or abets another to evade registration or service in the land or naval

craft or force; save oneself from, as an impending evil; as, to evade an argument or a crisis." Webster: "To escape; to slip away . . . to get away from by artifice; to avoid by dexterity, subterfuge or ingenuity . . . to escape or avoid, often by the use of skill, dexterity, or contrivance." Oxford: "To escape by contrivance or artifice from . . . to avoid, save oneself from . . . to elude. Nonce-use: 'go out of. Opposed to invade.'" Century: "To avoid by effort or contrivance; escape from or elude in any way, as by dexterity, artifice, stratagem or address; slip away from; get out of the way of . . . to escape; slip away."

forces or any of the requirements of this Act." (Italics supplied.)

The implication from the use of the phrase "otherwise evades" is plain that the acts of omission or refusal to perform the prescribed duty and acts of ostensible performance by false statements and the like are equally recognized by the statute as modes of evasion of military service or of other requirements of the Act. It is thus clear that the phrase "otherwise evades" was intended to include both types of evasion whether effected by breaches of duty or by false, fraudulent and deceptive acts, either of which, if successful, would result in avoidance of or escape from military service. In addition to all these modes of evasion § 11 penalizes one who otherwise (by any other mode) evades (avoids) service. Thus, on the face of the statute there is no basis for saying that respondents can elude its penalties because they counselled Bund members to evade, i. e., escape or avoid, military service by refusing to perform military duty rather than by false statements, artifices, or stratagem. There is no occasion for giving the word "evade," as used in the statute, a more strained or a narrower meaning than is recognized in its context in § 11, which is also identical with the dictionary definitions.

Such legislative history as there is supports this conclusion. Senator Burke, one of the authors of the bill which became the Selective Service Act of 1940, at the hearings on the bill before the Senate Committee on Military Affairs, stated that the provision of § 11 prohibiting the counselling of evasion, applied "where one urged another not to seek repeal of the law but to refuse to obey it while it remained the law." Hearings, Senate Committee on Military Affairs, 76th Cong., 3rd Sess., p. 156. Section 11 was derived from § 6 of the Selective Draft Act of 1917, 40 Stat. 80, which penalized any person who "evades or aids another to evade the requirements of this Act." In

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Fraina v. *United States,* 255 F. 28, Fraina was indicted under §§ 37 and 332 of the Criminal Code and of § 6 of the Selective Service Act of 1917 for conspiracy with others to "counsel . . . induce . . . divers persons . . . to evade . . . the requirements of" the Selective Service Act. The Court affirmed a conviction where the jury found that the accused made a speech in order to counsel and induce certain "conscientious objectors" "to refuse to be bound, or refuse to act or accept the law, and refuse to do their duty which is required by this law." Thus, before the adoption of the present Selective Service Act, it was judicially determined that one who refuses to comply with the requirements of the law "evades" the law, and that one who counsels another to refuse to accept the law or to do his duty which is required by the law can be found guilty of inducing him to evade it. We must take it that Congress, in adopting the term "evade" from § 6 of the earlier draft act, and using it in like context in § 11 of the 1940 Act, adopted and confirmed the judicial construction of the term as it appeared in the 1917 Act. *Sessions* v. *Romadka,* 145 U. S. 29, 41–42; *Manhattan Properties* v. *Irving Trust Co.,* 291 U. S. 320, 336; *United States* v. *Elgin, J. & E. R. Co.,* 298 U. S. 492, 500; *Missouri* v. *Ross,* 299 U. S. 72, 75; *Electric Battery Co.* v. *Shimadzu,* 307 U. S. 5, 14.

The conclusion seems inescapable that petitioners, by counselling Bund members to refuse to do military duty, counselled evasion of military service, and that the jury's verdict of violation of § 11 is therefore sustained by the evidence. This is not any the less so because the Bund order counselled members of the Bund to refuse to do military service until § 8 (i) was repealed. Bund Order No. 37 was published and distributed by petitioners after the enactment of § 8 (i) of the Act. Its counsel therefore was to violate the statute by evading military service, notwithstanding the order's suggestion that the refusal to do military duty might cease whenever repeal occurred.

The trial judge instructed the jury, rightly we think, that "bona fide honest intent to make a test case is no defense," saying: "If there was a conspiracy amongst these defendants, or any of them, having as its object the violation of the Selective Service Law, knowingly, the reason for such violation is immaterial to you in your consideration of the question of their guilt or innocence." Plainly one who would assail the validity of a statute in a test case can do so only by violating its provisions, here by knowingly counselling another to evade registration or service in the armed forces. One who thus evaded or counselled evasion of military service could not defend on the ground that he violated the Act in order to test its constitutionality. He nevertheless does the act which the statute prohibits and nonetheless intended to do it even though his purpose was to establish that the statutory prohibition is unconstitutional. There is no freedom to conspire to violate a statute with impunity merely because its constitutionality is doubted. The prohibition of the statute is infringed by the intended act in any case, and the law imposes its sanctions unless the doubt proves to be well founded.

Here petitioners laid no foundation for assailing the validity of § 11 by reason of their doubts of the constitutionality of § 8 (i). No one can urge the unconstitutionality of a statute until he shows that it is applicable to him and that he is injured by it. *Marye* v. *Parsons,* 114 U. S. 325; *Tyler* v. *The Judges,* 179 U. S. 405; *Collins* v. *Texas,* 223 U. S. 288; *Roberts & Schaefer Co.* v. *Emmerson,* 271 U. S. 50, 54, 55; *Utah Power Co.* v. *Pfost,* 286 U. S. 165; *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 324; *Voeller* v. *Neilston Co.,* 311 U. S. 531, 537; *Alabama State Federation of Labor* v. *McAdory, ante,* p. 450. Petitioners introduced no evidence. It does not appear that any of them ever gave up any employment because of their induction into the service of the United States pur-

suant to the Selective Service Act, or that they were ever refused or threatened with refusal of any employment because of their membership in the Bund or the Communist Party. And even though § 8 (i) were to be deemed unconstitutional as applied to petitioners, that would not affect the constitutionality of § 11 or relieve petitioners from the consequences of their violation of § 11. For § 14 (b) of the Act provides "If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby."

The doctrine of *People* v. *Powell,* 63 N. Y. 88, on which petitioners rely, that a criminal conspiracy to do an act "innocent in itself" not known by the conspirators to be prohibited must be actuated by some corrupt motive other than the intention to do the act which is prohibited and which is the object of the conspiracy, has never been accepted by this Court. To establish violation of § 11 nothing more need be proved than that respondents had in contemplation all the elements of the offense which they conspired to commit. *United States* v. *Mack,* 112 F. 2d 290, 292; cf. *Hamburg-American Steam Packet Co.* v. *United States,* 250 F. 747, 759; *Chadwick* v. *United States,* 141 F. 225, 243. There is no contention that petitioners did not know that the Selective Service Act required those subject to it to do military service. And *People* v. *Powell, supra,* was careful to point out that where the conspiracy is to do an act which is not "innocent in itself" the offense is "complete when the act is intentionally done," irrespective of any actual intention to violate the law. Here the act prohibited was hardly "innocent in itself." The facts found by the jury under instructions of the court constitute plain violation of § 11, and the jury's verdict is supported by the evidence.

NORTH CAROLINA ET AL. v. UNITED STATES ET AL.

NO. 560. APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.*

Argued April 23, 24, 1945.—Decided June 11, 1945.

1. An order of the Interstate Commerce Commission, under § 13 (4) of the Interstate Commerce Act, authorized railroads in North Carolina to establish and maintain intrastate passenger coach fares at levels not lower than interstate fares, which in effect increased the state-prescribed basic fare of 1.65 cents per mile to the interstate level of 2.2 cents per mile. *Held* that the order was not based on adequate findings supported by evidence, and that the District Court should have enjoined its enforcement. Pp. 509, 520.
2. The Interstate Commerce Commission is empowered to nullify a state-prescribed intrastate rate only when the Commission, after full hearing, finds that such rate causes (1) undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate commerce on the other, or (2) undue, unreasonable, or unjust discrimination against interstate commerce; and the Commission is without authority to set aside a state-prescribed intrastate rate unless there are clear findings, supported by evidence, of each element essential to its exercise of that power. Pp. 510, 511.
3. A mere finding that interstate passengers paid higher fares than intrastate passengers for the same service does not adequately support a statewide order nullifying a state-prescribed rate as unduly prejudicial to interstate passengers and requiring all intrastate passengers to pay the higher intrastate rate. Pp. 512, 514.
4. The findings of the Commission that the 2.2 cents interstate rate was just and reasonable; that the same trains in general carried both interstate and intrastate passengers; and that the railroads affected would have received $525,000 more annual income from the passengers they carried had the 2.2 cents rate been applied, did not support the conclusion that the intrastate traffic was not con-

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*Together with No. 561, *Davis, Economic Stabilization Director, by Bowles, Price Administrator,* v. *United States et al.*, also on appeal from the District Court of the United States for the Eastern District of North Carolina.

tributing its fair share of the revenue required to enable the railroads to render adequate and efficient transportation service, and did not support the order on the ground that the intrastate rates discriminated against interstate commerce. P. 514.

5. The power of the Commission to require a State to raise intrastate rates depends on whether the intrastate traffic is contributing its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return on the value of property directed to the transportation service, both interstate and intrastate. P. 520.
6. The Commission can not require intrastate rates to be raised above a reasonable level. P. 520.
7. Where, as here, there is evidence from which the Commission could have found that a rate of 2.2 cents was far above a reasonable rate level for the intrastate coach traffic of the railroads, the Commission must make findings on that issue, which findings are supported by evidence, before entering an order supplanting the state authority. Without such findings supported by evidence, the Commission was not authorized to find that the intrastate rates discriminated against interstate commerce. P. 520.

56 F. Supp. 606, reversed.

APPEALS from a decree of a district court of three judges denying an injunction and dismissing the complaint in a suit to enjoin and set aside an order of the Interstate Commerce Commission.

Messrs. J. C. B. Ehringhaus and *F. C. Hillyer* for appellants in No. 560. *Messrs. Richard H. Field, David F. Cavers* and *Malcolm D. Miller* submitted for appellants is No. 561.

Mr. J. Stanley Payne, with whom *Mr. Daniel W. Knowlton* was on the brief, for the Interstate Commerce Commission, and *Mr. Charles Clark,* with whom *Mr. Frank W. Gwathmey* was on the brief, for the Aberdeen & Rockfish Railroad Co. et al., appellees.

MR. JUSTICE BLACK delivered the opinion of the Court.

The North Carolina State Utilities Commission brought suit to enjoin enforcement of an order of the Interstate

Commerce Commission. 258 I. C. C. 133. The Federal Economic Stabilization Director acting through the Price Administrator sought and was granted the right to intervene as a party plaintiff. A federal district court of three judges denied the injunction, 56 F. Supp. 606, and the case is here on direct appeal under § 210 of the Judicial Code.

This clash between state and federal agencies came about because the State Commission and the Interstate Commerce Commission each claimed the paramount power to fix railroad rates in North Carolina. The North Carolina Commission ordered railroads doing business in the state to charge no more than 1.65 cents per mile for carrying intrastate coach passengers from one point in the state to another. Despite this State Commission order, the Interstate Commerce Commission authorized the same railroads to charge 2.2 cents per mile for the same type of carriage.[1]

The Interstate Commerce Commission asserted its power to prescribe these purely intrastate rates under § 13 (4) of the Interstate Commerce Act. 49 U. S. C. § 13 (4). That section, which is set forth below,[2] empow-

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[1] There is a corresponding conflict which involves round trip coach rates. The questions presented are the same with regard to one way and round trip rates, and we shall therefore consider both of them by reference to the one way rate.

[2] "Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed

ers the Interstate Commerce Commission to prescribe intrastate railroad rates under certain conditions, despite conflicting state orders as to the same rates. The conditions that Congress imposed as a prerequisite to Commission action are that the Commission shall hold a "full hearing" and find that the state-prescribed rates either caused (1) undue or unreasonable advantage, preference, or prejudice, as between persons or localities in intrastate commerce on the one hand, and interstate commerce on the other hand, or (2) undue, unreasonable, or unjust discrimination against interstate commerce. The Commission held hearings which are challenged on various grounds as falling short of "full" hearings. It made findings and concluded that the 1.65 state rate was unduly prejudicial to interstate passengers, and that the state rate constituted an undue and unjust discrimination against interstate commerce. These conclusions are attacked on the ground that they are supported neither by findings nor evidence. The crucial question involved in all these contentions is whether the indispensable prerequisites to the exercise of the Federal Commission's power over intrastate rates have been shown to exist with sufficient certainty. Before making any detailed reference to the hearings, findings or evidence, it would be helpful to set out certain guiding principles which lead us to a resolution of the crucial question.

Section 13 (4) does not relate to the Commission's power to regulate interstate transportation as such. As to interstate regulation, the Commission is granted the broadest powers to prescribe rates and other transportation details. See *United States* v. *Pennsylvania R. Co.*, 323 U. S. 612. No such breadth of authority is granted to the Commission over purely intrastate rates. Neither § 13

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while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding." 49 U. S. C. § 13 (4).

(4), nor any other Congressional legislation, indicates a purpose to attempt wholly to deprive the states of their primary authority to regulate intrastate rates. Since the enactment of § 13 (4), as before its enactment, a state's power over intrastate rates is exclusive up to the point where its action would bring about the prejudice or discrimination prohibited by that section. When this point—not always easy to mark—is reached, and not until then, can the Interstate Commerce Commission nullify a state-prescribed rate.

Intrastate transportation is primarily the concern of the state. The power of the Interstate Commerce Commission with reference to such intrastate rates is dominant only so far as necessary to alter rates which injuriously affect interstate transportation. *American Express Co.* v. *South Dakota,* 244 U. S. 617, 625. A scrupulous regard for maintaining the power of the state in this field has caused this Court to require that Interstate Commerce Commission orders giving precedence to federal rates must meet "a high standard of certainty." *Illinois Central R. Co.* v. *Public Utilities Commission,* 245 U. S. 493, 510. Before the Commission can nullify a state rate, justification for the "exercise of the federal power must clearly appear." *Florida* v. *United States,* 282 U. S. 194, 211–212. See also *Yonkers* v. *United States,* 320 U. S. 685. And the intention to interfere with the state's rate-making function is not to be presumed, *Arkansas Commission* v. *Chicago, R. I. & P. R. Co.,* 274 U. S. 597, 603; nor must its intention in this respect be left in serious doubt. *Illinois Commerce Comm'n* v. *Thomson,* 318 U. S. 675, 684–685. The foregoing cases also stand for the principle that the Interstate Commerce Commission is without authority to supplant a state-prescribed intrastate rate unless there are clear findings, supported by evidence, of each element essential to the exercise of that power by the Commission. We shall now take up the two grounds upon which the Commission set aside the state order.

Prejudice Against Interstate Passengers. On this aspect of the case the Commission's findings were that the interstate 2.2 cents rate was just and reasonable; that the accommodations afforded interstate and intrastate passengers in North Carolina were "substantially similar"; that in general these passengers traveled in the same trains and in the same cars; and from these, it concluded that since interstate passengers were forced to pay higher fares than intrastate passengers, there was an undue and unreasonable disadvantage and prejudice of interstate passengers. On these findings it issued the statewide order requiring all intrastate passengers to pay 2.2 cents per mile. We think these findings failed to give adequate support to the order.

In effect, the Commission's holding was, and its argument is here, that § 13 (4) automatically requires complete uniformity in intrastate and interstate rates. That argument is in short that under our national transportation system interstate travelers and intrastate travelers use the same trains; for a state to fix a lower intrastate rate than the interstate rate is therefore an undue advantage to the intrastate passengers and an unfair discrimination against the interstate passengers. If Congress intended to permit such an oversimplified form of proof to establish "unjust discrimination," then its requirement of a "full hearing" was mere surplusage. In fact, it need have provided for no hearing at all since it could have easily stated in its legislation that intrastate rates shall never be lower than interstate rates. The argument of the Commission in this regard runs counter to the language of § 13 (4), and would call for a declaration by us that Congress intended by this section to reverse the entire transportation history of the nation. The clause about "persons" and "localities" is, as the legislative history shows, a practical enactment into law of a decision of this Court in the

"Shreveport" case.[3] *Houston, E. & W. T. R. Co.* v. *United States,* 234 U. S. 342. In the *"Shreveport"* case the Commission found from evidence that certain Texas intrastate rates to Texas points were far below the interstate rates charged to carry the same types of freight from Shreveport, Louisiana. The distances and conditions of both transportations were found to be substantially the same. The Court sustained the Commission's conclusion that the Texas intrastate rates constituted an unfair discrimination against Shreveport and persons doing business there. The Commission's order was not statewide, but only required removal of the discrimination against the particular localities and business groups affected by the discrimination.

In *Railroad Commission* v. *Chicago, B. & Q. R. Co.,* 257 U. S. 563, 579, 580, this Court refused to sustain a Commission order nullifying all state passenger rates because of a discrimination against interstate travelers and against localities. The Commission had found there as here that state and interstate passengers rode on the same trains in the same car and perhaps in the same seats. It had found there, as it did here, that this constituted an undue discrimination against interstate passengers, and it issued a general sweeping order against all intrastate

[3] The House Committee reporting this bill said with reference to the provisions of § 13 (4): "After such hearing the Commission shall make such findings and orders as may in its judgment tend to remove any undue advantage, preference, or prejudice as between persons or localities in state and interstate or foreign commerce. The provision practically enacts into law the decision of the Supreme Court in the so-called 'Shreveport' case. Any undue burden upon interstate or foreign commerce is forbidden and declared to be unlawful. It is believed that the provisions of this section will have a beneficial and harmonizing effect, and will tend to reduce the number of so-called 'Shreveport' cases, while at the same time recognizing the regulatory bodies of the several States." Report No. 456, 66th Cong., 1st Sess., p. 20.

passenger rates. This Court pointed out that the order went far beyond the principles announced in the *Shreveport* case, and declined to sustain the statewide order on this phase of the case. See also *Florida* v. *United States,* 282 U. S. 194, 208. So here, the finding that interstate passengers paid higher fares than intrastate passengers for the same facilities is an inadequate support for nullifying state rates on the ground that they constitute unjust discrimination against interstate passengers.

Discrimination Against Interstate Commerce. One ground of the Commission's order was that the intrastate rates discriminated against interstate commerce as such. The findings of the Commission on which this conclusion rested were that the 2.2 cents interstate rate was just and reasonable; the same trains in general carried both interstate and intrastate passengers; the North Carolina railroads to which the intrastate rates were applied, would have received $525,000 more annual income from the passengers they carried had the 2.2 cents interstate rate been applied; from this the conclusion was reached that intrastate traffic was "not contributing its fair share of the revenue required to enable respondents to render adequate and efficient transportation service."

This conclusion of the Commission, if based on findings supported by evidence, would justify its order. For in *Florida* v. *United States,* 292 U. S. 1, 5, we said that § 13 (4) authorized the Commission "to raise intrastate rates so that the intrastate traffic may produce its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return on the value of property devoted to the transportation service, both interstate and intrastate." We sustained the Commission's order there because it was based on findings supported by evidence that the intrastate rate "was abnormally low and less than reasonably compensatory . . . 'insufficient under all the circumstances and conditions to cover the full cost of the

service.'" Neither in its formal findings nor in its discussion of the facts did the Commission indicate that the North Carolina railroad rates here involved were less than compensatory or insufficient to cover the full cost of service. Nor did they find that maintenance of these rates was necessary to the operation of a nationally efficient and adequate railway system.[4]

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[4] In *Railroad Commission* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, this Court sustained a statewide Commission order raising intrastate rates. Section 13 (4) in the context of the 1920 Transportation Act, 41 Stat. 456, as it then existed, was construed as requiring the Commission to prescribe rates sufficient "to enable the carriers as a whole, or in groups selected by the Commission, to earn an aggregate annual net railway operating income equal to a fair return on the aggregate value of the railway property used in transportation." 584–585. The 1920 Act, however, treated the national railway system as a unit. The net returns for any particular railroad were limited by the Act. All above this limitation went into a common pool to be distributed for the use of weak railroads. In this way, all railway income inured to the benefit of all the railroads individually and collectively to aid in "maintaining an adequate railway system." This Court has said that Congress adopted the pooling provisions because "it was not clear that the people would tolerate greatly increased rates (although no higher than necessary to produce the required revenues of weak lines) if thereby prosperous competitors earned an unreasonably large return upon the value of their properties." *New England Divisions Case,* 261 U. S. 184, 191. But Congress in 1933, 48 Stat. 211, repealed this part of the 1920 Act; the income pooling system was abandoned; the rule of rate making was re-written, and while the Commission was to give consideration to the need of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service, and to the need of revenue sufficient to enable the carriers under honest, economical and efficient management to provide such service, the rates were no longer to be treated on a national basis as though all railroads constituted one system. House Report No. 193, 73rd Cong., 1st Sess., pp. 30–31. Railroads were to be treated on an individual basis. Abandonment of the profit pooling system made this necessary to carry out the continuing Congressional purpose to prevent "an unreasonably large return upon the value of their properties." The Commission recognized this legislative change in rate-making policies

But the question posed by the Commission's conclusion was whether the particular North Carolina railroads were obtaining from North Carolina's intrastate passenger rates their fair part of such funds as were required to enable these particular railroads to render adequate and efficient service. The Commission made no findings as to what contribution from intrastate traffic would constitute a fair proportion of the railroad's total income. It made no finding as to what amount of revenue was required to enable these railroads to operate efficiently. Instead, it relied on the mere existence of a disparity between what it said was a reasonable interstate rate and the intrastate rate fixed by North Carolina. It thought this action was justified by this Court's opinion in *Illinois Commerce Comm'n* v. *United States,* 292 U. S. 474, 485.[5] Aside from the fact that "the mere existence of a disparity between particular rates on intrastate and interstate traffic does not warrant the Commission in prescribing intrastate rates," *Florida* v. *United States,* 282 U. S. 194, 211–212; *Utah Edible Livestock Rates and Charges,* 206 I. C. C. 309, there is reasonable doubt as to whether the Commission had ever fixed 2.2 cents as the only reasonable interstate rate.

The whole argument that it had done so rests primarily on an order made in 1936. At that time, the Commission made a comprehensive investigation of rates throughout the nation, and after elaborate discussion made findings

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by its reference to "revenues required to enable *respondents* to render adequate and efficient transportation service." The "respondents" referred to were the individual railroads to which North Carolina's order applied.

[5] This case did not involve a sweeping statewide order based on general railroad revenue needs. It related to a problem like that considered in the *Shreveport* case. The rates involved applied to switching movements in a single "Switching District," "essentially a unit, so far as switching movements are concerned." This Court's holding in that case does not support the statewide order here.

of fact. It concluded that any rate over 2 cents per passenger mile would be unreasonable and unlawful. But it also declared that a rate of 1.5 cents then commonly charged throughout the Southern states, would not be "unreasonable or otherwise unlawful." 214 I. C. C. 174, 257. Railroads in the South continued to charge 1.5 cents most of the time from then until 1942. March 2, 1942, upon an application of the American railroads, the Commission in *Ex parte 148,* granted a general 10% increase on all rates then in existence. This increase it found was necessary to enable the railroads "to continue to render adequate and efficient railway-transportation service during the present emergency." 248 I. C. C. 545, 565. The Commission specifically stated, p. 606, that its conclusion was not based on "individual, sectional, or particular industrial desires or needs." Four months later, on July 14, 1942, certain railroads operating in the South, including the railroads involved in the *North Carolina* case, filed a petition with the Commission asking that it modify its 1936 order, so as to permit them to charge 2.2 cents per mile. Two weeks later, without a hearing, without evidence, and without discussion, the Commission entered an order declining to amend its 1936 order, but modifying its 10% rate increase order, "so as to *authorize*" the petitioning railroads to charge 2.2 cents per mile. It made no finding that the railroads needed this increase in order to maintain adequate railroad systems and of course could not have done so unless it relied upon the old 1936 evidence. There was no issue of this nature raised by any of the parties in the 10% rate increase proceedings. Neither before nor since these Southern railroads were authorized by the Commission to increase their interstate rate to 2.2 cents has any hearing been held on the subject. Petition of North Carolina for a hearing was denied. Nor has there been any finding based on evidence that the 1.65 cents rate which the Commission

found adequate, and neither "unreasonable nor unlawful," has ceased to be such. We are unable to find from any of the various orders that the Commission has ever yet made findings supported by evidence and upon them set aside its 1936 conclusions that a 1.5 cents rate for Southern territory was reasonable and lawful, except to the extent that it held that a 10% increase was justifiable.

Furthermore, even assuming that the Commission had previously made a valid 2.2 cents per mile general order broadly applicable to all railroads in the Southern territory or throughout the nation, it does not follow that such a general order must permanently stand as to each and every separate railroad or railroad system. The very nature of such a broad general order requires that it contain a saving clause for future modification and adjustment of particular rates. This Court declared that such a saving clause was essential even at the time that all surplus railroad profits were pooled for the common good of the national system. *Railroad Commission* v. *Chicago, B. & Q. R. Co.,* 257 U. S. 563, 579; *Georgia Commission* v. *United States,* 283 U. S. 765, 772; *United States* v. *Louisiana,* 290 U. S. 70, 76, 77, 79.

Such a saving clause left to the state its power to bring about particular changes in the internal intrastate rate structure necessary to keep intrastate revenues as a class in harmony with interstate needs. *Railroad Commission* v. *Chicago, B. & Q. R. Co.,* 257 U. S 563, 580. For the Interstate Commerce Commission was "without jurisdiction over intrastate rates except to protect and make effective some regulation of interstate commerce." *Illinois Commerce Comm'n* v. *Thomson,* 318 U. S. 675, 684. Consequently, no one but the state had power to readjust its internal intrastate rate structure. This it undertook to do by a hearing focussed upon the state railroads individually and collectively. Four railroads were denied the increase,

and they are the only ones now affected by the Interstate Commerce Commission order. Other roads were granted the increase. Its order to this effect rested on evidence as to the differing qualities of intrastate and interstate accommodations afforded as well as the net revenues of different roads. The State Commission found as to the four roads which it denied an increase that their profits from passenger revenues even on a 1.65 cents rate were so great that continuance of that rate would be reasonable and just to them.

In the proceedings before the Interstate Commerce Commission, the state and the Price Administrator presented these issues which the State Commission had considered. Both the railroads and their adversaries offered evidence on the points. There was evidence that the four railroads were carrying more passengers and more freight, and were more prosperous than they had ever been in their history. This evidence showed that they were in the highest excess profit tax brackets, and that somewhere between 80 and 90% of all their profits were subject to be paid for federal taxes.

There was evidence offered by the railroads, which indicated that their 1942 per mile net cost of carrying coach passengers was under or about 1 cent. The Commission had found facts in the 1936 report, 214 I. C. C. at pp. 216, 266, which indicated a mileage coach passenger cost of 3.25 cents. Evidence of the four railroads also showed their average revenue increase since 1936 had been approximately 250%. This great revenue increase transformed a 1936 $16,426.00 deficit of six North Carolina roads, including the four here involved, into a 1942 $26,699,988.00 profit. Most of this increased profit was shown to have been derived from passenger revenues.

All of this evidence and much more to which we might advert was sufficient to show that the Commission might have found, had it made any findings on the subject at all,

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that a 1.65 cents rate for these four North Carolina railroads would have been a fair coach passenger contribution to revenues required to enable them to operate profitably and efficiently. But it made no findings on this subject at all. The purpose of the National Transportation Law is to assure railroads a fair net operating income and no more. *Dayton-Goose Creek R. Co.* v. *United States,* 263 U. S. 456. The power of the Commission to require states to raise their intrastate rates depends upon whether intrastate traffic is contributing its fair share of the earnings required to meet maintenance and operating costs and to *yield a fair return on the value of property directed to the transportation service* both interstate and intrastate. *United States* v. *Louisiana,* 290 U. S. 70, 75. But the Commission cannot "require intrastate rates to be raised above a reasonable level." *United States* v. *Louisiana, supra,* 78. And where there is evidence as here from which the Commission could have found that a rate of 2.2 cents was far above a reasonable rate level for the intrastate coach traffic of these four railroads, the Commission must make findings on that issue, which findings are supported by evidence, before entering an order supplanting the state authority. Without such findings supported by evidence, the Commission was not authorized to find that the intrastate rates discriminated against interstate commerce.

Because the order of the Commission was not based on adequate findings, supported by evidence, the District Court should have declined to enforce its order. The judgment of the District Court is

Reversed.

MR. JUSTICE REED, dissenting.

The Court has set aside an order of the Interstate Commerce Commission which was entered May 8, 1944, on a Commission report of the preceding March 25th. 258 I. C. C. 133. The order covered investigations instituted

upon separate petitions of carriers in North Carolina, Kentucky, Alabama and Tennessee to determine whether the maintenance of intrastate fares in these states at levels below fares and charges established for application to interstate traffic in respective states on October 1, 1942, caused undue or unreasonable advantage, prejudice or preference between persons or localities in intrastate commerce on the one hand, and interstate commerce on the other, or any such discrimination against interstate commerce. 49 U. S. C. § 13 (4). The petitions sought, too, prescription of fares and charges by the Commission to remove any preference, advantage, prejudice or discrimination found to exist. See also *Alabama* v. *United States* and *Davis* v. *United States, post,* p. 535. This dissent is applicable both to this and that opinion.

Without summarizing the entire report we call attention to a finding which it contains that traffic moving under these lower intrastate fares is not contributing its fair share of the revenues required to enable appellees (the interstate carriers) to render adequate and efficient transportation service and that this "unlawfulness should be removed by increasing" the intrastate fares to the level of the interstate fares. 258 I. C. C. 154, 155, Findings 5 and 6. This finding, if supported by evidence, is in our opinion sufficient to justify the applicable order of May 8th which is under review in this appeal. That order required the carriers to maintain and apply intrastate fares on bases no lower than those applied by the carriers in interstate transportation to, from and through the four states.

The Interstate Commerce Commission has the power to make this order on a valid finding of such discrimination against interstate commerce. 49 U. S. C. § 13 (4). It has long been established that this section delegates a valid power of regulation of intrastate rates to the Commission. *Railroad Commission* v. *Chicago, B. & Q. R. Co.,* 257 U. S. 563. Cf. *Minnesota Rate Cases,* 230 U. S.

352, 432, and *Houston, E. & W. T. R. Co.* v. *United States* (the *Shreveport* case), 234 U. S. 342, 351. It gives authority to the Commission to raise intrastate rates so that that traffic may produce its fair share of the required earnings. *United States* v. *Louisiana,* 290 U. S. 70, 75. And that authority does not depend upon the recapture, in whole or in part, of excess earning of individual railroads under the requirements of the Transportation Act of 1920, 41 Stat. 488, § 15a, now repealed, Emergency Railroad Transportation Act, 1933, 48 Stat. 220, § 205, for creation of a general railroad contingent fund for financing the national transportation system of railways. Section 13 (4) was not changed by the Act of 1933. This section in conjunction with the revised and reenacted § 15a of the Interstate Commerce Act now empowers the Commission, in accordance with the statutory provisions, to remove the discrimination against interstate commerce by prescribing intrastate fares.[1] *Florida* v. *United States,* 292 U. S. 1, 4, First. Cf. *Illinois Commerce Comm'n* v. *Thomson,* 318 U. S. 675, 682. This Court today recognizes this rule. The four states attack the finding of discrimination against interstate commerce, which finding is essential to the validity of the present order to maintain intrastate fares at the level of interstate fares, on the ground that there is neither finding nor evidence that the intrastate rates are

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[1] The present § 15a, 49 U. S. C., reads as follows:

"(1) When used in this section, the term 'rates' means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.

"(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service."

not producing a proper proportion of the carriers' needed revenue. This Court sustains the attack as sufficient to invalidate the Commission order. We think the argument, which the Court has sustained, has its source in a misconception of the purpose of this present proceeding.

The petitions were filed by the carriers, the investigation was made and the order under dispute here was entered to coordinate the intrastate passenger fares in these four states with the passenger fare structure of the entire country. 258 I. C. C. 133. There had been a number of recent proceedings involving the national structure. The evidence, which will be referred to later, presented in those proceedings is, we think, properly to be considered in this investigation and the power of the Commission to require intrastate fares to conform to interstate fares in the four states is to be appraised in the light of a purpose to establish a national passenger rate structure. The Court apparently accepts as a premise the contention of the states that the present proceeding is an isolated investigation by the Commission into an application by the respective carriers in the four states to have their intrastate fares raised to the level of their interstate fares because the intrastate earnings were below a fair proportion of the carriers' total required income.[2] Instead we think that

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[2] Compare the following excerpt from the opinion of the Court: "But the question posed by the Commission's conclusion was whether the particular North Carolina railroads were obtaining from North Carolina's intrastate passenger rates their fair part of such funds as were required to enable these particular railroads to render adequate and efficient service. The Commission made no findings as to what contribution from intrastate traffic would constitute a fair proportion of the railroad's total income. It made no finding as to what amount of revenue was required to enable these railroads to operate efficiently. Instead, it relied on the mere existence of a disparity between what it said was a reasonable interstate rate and the intrastate rate fixed by North Carolina. It thought this action was justified by this Court's opinion in *Illinois Commerce Comm'n* v. *United States,* 292 U. S. 474, 485."

these proceedings are but another step in the comprehensive regulation by the Commission of the general passenger fare structure.

Basic Interstate Fares. The basic passenger fares were first investigated on a national scale by the Commission in *Passenger Fares and Surcharges,* No. 26550, decided February 28, 1936. In this proceeding carrier coach and pullman fares respectively were fixed at not to exceed 2 and 3 cents per passenger mile. 214 I. C. C. 174, 256.[3] The order, see paragraph 3, page 257, left these respondent roads in the southern territory free to continue certain experimental fares, which were as low as 1.5 cents per mile in coaches. A ten per cent increase, applicable to both the basic 2 and 3 cent fares and the experimental fares, was allowed on January 21, 1942, in a proceeding before the Commission, docketed as *Ex parte No. 148, Increased Railway Rates, Fares, and Charges,* 248 I. C. C. 545, 549, 564, 566, 612. A reference to the Commission's

[3] States made the earliest efforts to limit passenger fares. E. g. Kansas, 1901, § 66–167, Revised Statutes of Kansas (1923); North Dakota, 1907, § 4796, Compiled Laws of North Dakota (1913); Illinois, 1907, § 170, Callaghan's Illinois Statutes Annotated (1924); Iowa, 1913, § 8126, Code of Iowa (1924). Such limitations were, of course, not uniform. On May 25, 1918, by General Order No. 28, the United States Railroad Administration in order to increase the operating revenue fixed the national basic passenger fare in coaches, interstate and intrastate, at not less than 3 cents per mile, with a surcharge for pullmans. This produced a considerable degree of uniformity. An increase of 20% or to 3.6 cents was made as of August 26, 1920. In the depression of the 1930s certain carriers operating in southern territory experimented with fair success on revenues with fares as low as 1.5 cents per mile in coaches. *Alabama Intrastate Fares,* 258 I. C. C. at 134.

Approximate uniformity before 1936 was maintained by the Commission's use of 13 (4) orders to bring intrastate fares into line with interstate fares. The Commission found it more convenient later to secure state adoption of its rates by cooperation through agreement. See Sharfman, The Interstate Commerce Commission II, pp. 287–344.

decisions in the above proceedings will indicate the full hearing which was given the fare problems in those cases. In the *Passenger Fares* case, the report of the Commission, 214 I. C. C. at 175, shows that all carriers by railroad subject to the act were made respondents and that a committee of the State Commissioners cooperated with the Commission in determining the issues. In the *Increased Railway Rates* case, all the states were notified of the pendency of the proceeding and a committee of the state commissions also attended the hearing and oral argument and conferred as to the determination of the issues. 248 I. C. C. at 549. All rail carriers were again before the Commission.

After the ten per cent increase, the railroads of southern passenger association territory filed, on July 14, 1942, a petition in *Passenger Fares and Surcharges*, No. 26550, seeking a modification of paragraph 3 of the conclusions, 214 I. C. C. at 257, to enable them to file tariffs increasing their coach fare to 2.2 cents (2 cents plus 10 per cent). The Commission ruled that its former decision in No. 26550, 214 I. C. C. at 256, permitted all railroads, respondents therein, which included applicants, to charge a basic fare of 2 cents and that a general increase of 10 per cent on these rates had been authorized in *Ex parte No. 148*, and that therefore the Commission could and it did authorize the application of the 2.2 cent basic rate to interstate rates in southern territory. The Commission by order of August 1, 1942, directed that the petition in No. 26550 be denied, evidently because the order in that number had been superseded by the "Increased Rates" proceedings, *Ex parte No. 148*, and that its order in *Ex parte No. 148* be modified to effectuate this increase and that it be left otherwise unchanged.[4] The participating

[4] "*It is further ordered*, That the order of January 21, 1942, in Ex parte No. 148, be, and it is hereby, further modified so as to authorize the aforesaid petitioners to apply the increase of 10 per cent approved

carriers then approached the separate state authorities to obtain their consent to the increase for intrastate passenger traffic in accordance with the recitation in the order of January 21, 1942, in *Ex parte No. 148.*[5] On the refusal of the rate regulatory authorities of North Carolina, Alabama, Tennessee and Kentucky to authorize the application of the increased interstate basic coach fare of 2.2 cents, with corresponding adjustments for pullmans, to all intrastate fares, this present proceeding was initiated by the carriers to secure the Commission order of May 8, 1944, here involved, which requires the application of a basis no lower than their present interstate basis to intrastate fares, notwithstanding the refusal of the state rate authorities to authorize a similar application. The commissions of the respective states, and the Price Administrator for himself and the Director of Economic Stabilization intervened.

The foregoing references make plain that beginning with the comprehensive investigation of passenger fares, which was instituted by Commission order of June 4, 1934, and resulted in the order of February 28, 1936, 214 I. C. C. 174, the state regulatory authorities have not only been advised of the rate proceedings but have participated in

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in said order to a basic coach fare of 2 cents per mile on the lines of said petitioners, subject to the rule for the disposition of fractions as modified by order of July 6, 1942, in said proceeding, and that in all other respects said order of January 21, 1942, shall remain in full force and effect."

[5] The portion of the order referred to reads as follows:

"*It appearing* . . . that the proper authorities of all States have been notified of this proceeding, and similar application has been or will be made to the regulatory authority of the respective States for permission to increase similarly petitioners' intrastate rates, fares, and charges;

. . . . .

"*It is ordered*, That the increased passenger fares as proposed by the said petitioners be, and they are hereby, approved . . ."

them. The record specifically shows this participation except in the supplementary proceeding under docket No. 26550, which was filed July 14, 1942, and resulted in the order of August 1, 1942, in docket *Ex parte No. 148*. This August 1, 1942, order, note 4 *supra*, permitted increasing the carriers' interstate fares of 1.65 cents per passenger mile (the 1.50 cents of the 1936 experimental southern district fares, then adjudged by the Commission to be "not unreasonable or otherwise unlawful," 214 I. C. C. 257, par. 3, and the ten per cent increase thereon of *Ex parte No. 148*, 248 I. C. C. 545, 564–66) to 2.2 cents. There was no occasion or requirement for hearing or report by the Commission or notice to the states of the petition of the southern passenger association carriers for permission to apply this 2.2 cents basic passenger rate to their interstate traffic.

The southern railroad passenger rate problem was stated in the terms of "what reasonable fare basis will meet with the greatest revenue response from the public?" 214 I. C. C. at 201. The conclusion of the Commission is thus summarized at page 255, finding of fact No. 11:

"Giving appropriate consideration to all of the evident circumstances and conditions which are likely to affect the ultimate revenue result to respondents, a maximum-fare basis, one way and round trip, for general application, of 2 cents per mile in coaches and 3 cents per mile in pullmans would be most likely to lessen the transportation burden of respondents and to harmonize with present-day economic conditions, with consequent fuller assurance to the respondents of realizing a fair return upon their property investment. There is doubt whether at least in the southern district a coach fare of 1.5 cents per mile is not producing better revenue results for those respondents than would any higher fare, and it may also be that round-trip fares on both coach and pullman traffic at a lower rate per mile than the one-way fares herein pre-

scribed would bring to respondents better revenue results than the higher fares. These matters are left to the discretion of respondents."

This resulted in the following provision by the Commission, at page 257:

"3. The present experimental fares in the southern and western districts and on the Norfolk & Western are not unreasonable or otherwise unlawful."

Obviously this provision was to make clear that the current lower rates of the southern carriers were not disapproved. It cannot properly be read, even though entirely isolated from its context, as a requirement that the southern carriers should continue to apply this lower basis to their passenger fares. The preceding provision limited the regular passenger fare structure of all railroads, including of course the southern carriers now appellees, to a maximum of 2 cents per passenger mile in coaches, without prejudice to lower fares. Lower fares were "discretionary" with the company. The accompanying order limited maximum interstate fares generally to 2 cents and contained no reference to the lower experimental fares. Thus a national interstate basis schedule, universally applicable,[6] was established by the report and order in docket No. 26550, the *Passenger Fares and Surcharges* decision, and this basis was increased to 2.2 cents per mile by the January 21, 1942, order in *Ex parte No. 148,* 248 I. C. C. 545. Consequently when the southern carriers, appellees here, petitioned on July 14, 1942, seeking a modification to permit the publication of interstate passenger tariffs in conformity with the previous conclusions in No. 26550 and *Ex parte No. 148,* no further investigation, report or notice to anyone was needed.

The interstate basis had been fixed at 2.2 cents a few months before. Carriers and states alike had acquiesced. The carriers now wished to exercise the discretion to raise

[6] There were certain specified exceptions. 214 I. C. C. at 244.

fares, which discretion had been reserved to them in No. 26550, 214 I. C. C. at 255, and subsequent conclusions 2 and 3, at 256. All that was necessary was to modify the order in *Ex parte No. 148* of January 21, 1942, which had approved, "as proposed," a requested ten per cent increase in fares "as published in passenger tariffs," 248 I. C. C. 550, 565, and the order, note 5 *supra*, so that the limitation "as published in passenger tariffs" would be removed. The appellee carriers had outstanding published tariffs of 1.50 cents when the January 21, 1942, order was entered. The August 1, 1942 order removed the limitation. See note 4 *supra*.

The preceding paragraphs under "Basic Interstate Fares" demonstrate, we think, that no further hearings or findings by the Commission were necessary to enable the Commission to authorize the application of the national basis of 2.2 cents to their interstate fares by the appellee carriers, instead of the 1.65 cents in effect prior to the order of August 1, 1942.

Discrimination Against Interstate Commerce. The Court holds, however, that even if it is assumed that the order permitting the interstate basic fare of 2.2 cents is valid, it does not follow that the intrastate passenger traffic earnings on the 1.65 cent rate are not contributing a fair proportion of the required total earnings of the road. The Court points to evidence from which the Commission might have found that the 1.65 cent basis, or a lower basis than 2.2 cents, would produce sufficient to meet the intrastate contribution. Evidence is set out in the Court's opinion showing greatly increased passenger earnings. The Court concludes that as such evidence is presented in this record, the Commission must make finding that no lower fare will produce intrastate traffic's proportion of revenue before requiring the application of the interstate 2.2 cent rate to intrastate fares.

This argument, we think, flows from another phase of the same misconception to which we earlier referred as

the source of the Court's erroneous conclusion. These proceedings ought not to be treated as isolated efforts to secure higher intrastate rates because the present intrastate rates are not producing their fair share of the total required income. To the Court's requirement, which it reads into §§ 13 (4) and 15a, of a specific finding on the issue of whether the present 1.65 cent intrastate rate produces now the proper intrastate proportion of revenue, there seems to us a conclusive answer. The interstate maximum was adopted by the Commission on the assumption that the intrastate rates would be adjusted to the same level. Therefore revenue from intrastate rates at the interstate fares is required to produce the needed income.

In this present proceeding the validity of the interstate rate of these carrier appellees was re-examined.[7] Evidence as to each appellee carrier of former deficits from its entire passenger traffic prior to 1942 was noted. Evidence as to their passenger operating ratios, their increased expenses, their net earnings on passenger business and other operations also, was received and appraised. Attention was called, 258 I. C. C. 142, to the fact that the previous investigation into passenger rates, *Ex parte No. 148,* had anticipated the earnings during war years, page 142, and their need for deferred maintenance and war service, page 148. The interstate basic rate was found just and reasonable. See *Alabama Intrastate Fares,* 258 I. C. C. 133, 137.

The figures used were aggregate figures for past passenger receipts and expenses. Audits for representative periods showed the estimated amount of additional

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[7] The national investigation, *Ex parte No. 148,* has also been reopened and reexamined as late as December 12, 1944, but the passenger rates were left unchanged. 259 I. C. C. 159. This report discussed intermediate reexaminations of the national passenger rate structure.

revenue from the increased intrastate fares.[8] The statistics for the net railway operating income were introduced which covered all receipts and expenses. The evidence of train service in the respective states led the Commission to find that travel conditions were "substantially similar," 258 I. C. C. 154. If the Commission's conclusion as to carrier revenue needs assumed equal intrastate and interstate fares and if the present interstate rates were held "just and reasonable," it follows that the finding that the lower intrastate rates were not contributing their fair share of the "revenues required to enable respondents to render adequate and efficient transportation service" was proper. This logically led to the finding 6, that this failure of intrastate traffic to contribute its part discriminated against interstate commerce.

The determination of the necessary basic interstate rate in all these proceedings was made on the supposition of intrastate rates of equal level. When general basic rates, fares or charges are fixed by the Commission, the Commission necessarily gives consideration "to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide" railway transportation at the lowest cost. § 15a. Therefore when interstate rates are fixed with the supposition of an equal level for intrastate rates, for substantially similar service, it requires a contribution on that basis from intrastate rates to avoid intrastate discrimination against interstate traffic. If it appears that interstate fares have been fixed with the supposition of an equal level for intrastate

[8] *Alabama Intrastate Fares*, 258 I. C. C. 133, 154–55, Finding 5: "Respondents' revenues under the lower intrastate fares are less by at least $725,000 per annum in Alabama, $500,000 in Kentucky, $525,000 in North Carolina, and $525,000 in Tennessee than they would be if those fares were increased to the level of the corresponding interstate fares, and traffic moving under these lower intrastate fares is not contributing its fair share of the revenues required to enable respondents to render adequate and efficient transportation service."

fares, then it is clear that intrastate rates are not producing their expected revenue. The Commission thus would have manifested its consideration of the statutory requirements of §§ 13 (4) and 15a that due consideration be given revenue and efficient management in finding unjust discrimination against interstate commerce and in prescribing the intrastate rate which would remove the discrimination. See *United States* v. *Carolina Carriers Corp.,* 315 U. S. 475, 489.

In the proceeding in which these southern interstate carriers were permitted to apply the general basic interstate coach rate of 2.2 cents, the order therein of August 1, 1942, by adopting the order of January 21, 1942, in *Ex parte No. 148,* 248 I. C. C. 545, required the appellee carriers to make application to the state authorities for similar intrastate increases. See note 5, *supra.* The required applications led directly to this litigation.

Both in *Passenger Fares and Surcharges,* 214 I. C. C. 174, 257, par. 5, and *Increased Railway Rates, Ex parte No. 148,* 248 I. C. C. 545, 565–66, which are the two investigations which brought interstate coach fares to a maximum of 2.2 cents per passenger mile, the Commission itself ordered the numerous intrastate fares which were under its direction because regulated by the Commission through previous § 13 proceedings, modified in accordance with the interstate fares. As pointed out in the preceding paragraph the order in *Ex parte No. 148* required application to state rate regulatory bodies for authority to increase the intrastate passenger rates to the same level. Specific consideration was given to various objections raised by state commissions to the proposed new fares and rates, all with an eye to securing future compliance by the states with the interstate rates to be set by the Commission. See 248 I. C. C. at 560, 565, 574, 580, 582. In the *Passenger Fares* investigation, the figures on passenger traffic reflect the aggregate use of trains without consideration of a division of the traffic between inter- and intrastate. 214

I. C. C. 174, 176, 179, 180, 185, 200, 209, 221, 230, 231. The Commission said at page 187:

"At the time the 1920 increase was authorized many of the States prohibited passenger fares above certain amounts per mile, most of them 2 cents or 2.5 cents, and section 13 orders by us became necessary in order to bring the intrastate fares in those States up to the interstate basis."

The tables of passenger statistics in the appendices do not separate the traffic. Revenue from all passenger traffic was the dominant motive. See "Fact Findings," page 253. Evidence in *Ex parte No. 148* likewise related to aggregate revenue. So did the expected increases.

"On the basis of traffic, both interstate and intrastate, moved during 1941 and moving when the petition was filed, allowing for readjustments required by commercial and traffic conditions, petitioners estimate that the proposals will yield increased revenue for all class I railroads of about $356,956,000 per year." 248 I. C. C. 552.

The interstate increase of *Ex parte No. 148* "became effective on intrastate traffic in all of the States" by state order. 258 I. C. C. at 136. The general considerations on the decline in railroad passenger traffic which motivated the Commission in establishing the new interstate rate applied to both intrastate and interstate traffic. 214 I. C. C. at 176; 248 I. C. C. at 551. As a matter of fact, separation of interstate and intrastate income is not required by the Commission in its annual reports. 49 C. F. R. § 120.11 *et seq.* These proceedings convince us that the Commission reached its conclusion as to the proper interstate rate with the understanding that the interstate rate would be applied to intrastate traffic and that such revenue as might result from that application was needed by the carriers involved to furnish adequate service.

Under § 13 (4) of the Interstate Commerce Act in proceedings as to unjust discrimination against interstate commerce, the issue is not the earnings from intrastate

traffic but the appropriate proportion of those earnings as compared with earnings from interstate commerce. Section 15a requires consideration of costs, economy and adequate transportation service. Section 13 (4) requires a finding of discrimination against interstate commerce as a basis for regulation of intrastate commerce, 258 I. C. C. 154–55, pars. 5 and 6. It may be that the earnings from intrastate commerce may sometimes be one percentage of aggregate earnings and at another time another percentage. The Commission may conclude that the carriers' required revenue may best be obtained from intrastate passenger fares rather than from freight rates. The reverse was once true. Cf. 214 I. C. C. at 227. These are matters for Commission decision.

The language of 15a has been modified from its original form in the Transportation Act of 1920 so that it no longer specifically empowers the Commission to deal with fares and rates of carriers as a whole for the nation or as a whole in designated territories or rate groups. We think, however, that the present statute, "In the exercise of its power to prescribe just and reasonable rates," the Commission shall give consideration to various named factors, is adequate to permit general rate regulation under 15a and § 1 (5). This power has been unquestioned. See *Passenger Fares and Surcharges,* 214 I. C. C. 174, and Class Rate Investigation No. 28300 and Consolidated Freight Classification No. 28310. It is the only practicable approach to the problem. See discussion in *New England Divisions Case,* 261 U. S. 184, 196. We cannot treat the present proceeding as disassociated from the general investigation into passenger fares. *United States* v. *Louisiana,* 290 U. S. 70, 76–79. We think it is adequately shown that the orders in the general investigation were predicated upon the assumption that intrastate passenger traffic would have an equal basis with interstate traffic for fares.

Unjust or Unreasonable Intrastate Fares. It may be that the intrastate fares prescribed by the Commission are unjust or unreasonable in certain items. The report of the Commission provides a remedy for such a situation: "The foregoing findings are without prejudice to the right of the authorities of the affected States, or of any interested party, to apply for modification thereof as to any specific intrastate fare on the ground that such fare is not related to interstate fares in such a way as to contravene the provisions of the Interstate Commerce Act." 258 I. C. C. at p. 155.

The remedy for a readjustment of the basic interstate fare or for a separation of the levels of interstate and intrastate fares is by application to the Commission for reopening of *Passenger Fares and Surcharges,* 214 I. C. C. 174.

We do not consider the other points which are raised by the appeal.

The CHIEF JUSTICE, MR. JUSTICE ROBERTS and MR. JUSTICE FRANKFURTER join in this dissent.

ALABAMA ET AL. v. UNITED STATES ET AL.

NO. 574. APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.*

Argued April 24, 1945.—Decided June 11, 1945.

Decided on the authority of *North Carolina* v. *United States, ante,* p. 507.

56 F. Supp. 478, reversed.

APPEALS from a decree of a district court of three judges denying injunctions and dismissing the complaints in three suits to enjoin and set aside an order of the Interstate Commerce Commission.

*Together with No. 592, *Davis, Economic Stabilization Director, by Bowles, Price Administrator,* v. *United States et al.,* also on appeal from the District Court of the United States for the Western District of Kentucky.

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Forman Smith, Assistant Attorney General of Alabama, with whom *William N. McQueen,* Acting Attorney General, was on the brief, for the State of Alabama and the Alabama Public Service Commission; *Mr. J. E. Marks,* with whom *Eldon S. Dummit,* Attorney General of Kentucky, and *M. B. Holifield,* Assistant Attorney General, were on the brief, for the Commonwealth of Kentucky and the Railroad Commission of Kentucky; and *Mr. Leon Jourolmon, Jr.* for the State of Tennessee and the Railroad and Public Utilities Commission of Tennessee, appellants in No. 574.

Mr. Allen Crenshaw, with whom *Messrs. Daniel W. Knowlton* and *J. Stanley Payne* were on the brief, for the Interstate Commerce Commission, appellee. *Mr. David F. Cavers,* with whom *Messrs. Richard H. Field* and *Malcolm D. Miller* were on the brief, for the Economic Stabilization Director and the Price Administrator, appellees in No. 574 and appellants in No. 592. *Mr. Charles Clark,* with whom *Messrs. W. L. Grubbs, H. L. Walker* and *F. W. Gwathmey* were on the brief, for the Alabama Great Southern Railroad Co. et al., appellees in No. 574.

MR. JUSTICE BLACK delivered the opinion of the Court.

The States of Alabama, Tennessee and Kentucky filed a bill in a federal district court seeking to set aside and enjoin enforcement of an order of the Interstate Commerce Commission. The Federal Economic Stabilization Director, acting through the Price Administrator, was granted the right to intervene. The Commission's order directed that intrastate railroad rates in Alabama, Kentucky, Tennessee and North Carolina, be raised to the level of interstate rates fixed by the Commission.[1] The

[1] 258 I. C. C. 133. The state 1.65 cents per mile passenger coach rate was directed to be raised to 2.2 cents per mile. Round trip coach rates were ordered proportionately raised. Sleeping and parlor car intrastate fares in some of the States were also directed to be increased.

District Court declined to enjoin enforcement of the order, 56 F. Supp. 478, and the case is here on direct appeal under § 210 of the Judicial Code.

The issues here are substantially the same as in *North Carolina* v. *United States, ante,* p. 507, which involved the same order of the Commission as it applied to rates in the State of North Carolina. The Commission relied basically on the 1936 rate order, to which we referred in our opinion in the *North Carolina* case. Here also the Commissions of the three States had held hearings and determined that the intrastate rates were adequate in every respect to give the particular railroads involved a sufficient income to compensate them fully for their services and to enable the railroads adequately and efficiently to operate in the State. There was evidence before each of the state Commissions, as there was before the Interstate Commerce Commission, that the railroads were enjoying an unprecedented prosperity and reaping a tremendous harvest of profits from their railroad operations in the State. There was evidence from which the Interstate Commerce Commission could have found that the intrastate passenger rates involved were sufficient to pay each railroad a substantial profit for each mile it carried an intrastate passenger. The findings here possess the same infirmities as those in the *North Carolina* case. It follows that our judgment must be the same.

Because the order of the Commission was not based on adequate findings supported by evidence, the District Court should have declined to enforce the Commission's order. The judgment of the District Court is therefore

Reversed.

The Chief Justice, Mr. Justice Roberts, Mr. Justice Reed, and Mr. Justice Frankfurter dissent for the reasons stated in the dissent in *North Carolina* v. *United States, ante,* p. 520.

HILL ET AL. *v.* FLORIDA EX REL. WATSON, ATTORNEY GENERAL.

CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 811. Argued April 4, 5, 1945.—Decided June 11, 1945.

1. Section 4 of a statute of Florida (Laws of 1943, c. 21968) provides that no person shall be licensed as a "business agent" of a labor union who has not been a citizen of the United States for more than 10 years, who has been convicted of a felony, or who is not a person of good moral character. Section 6 requires every labor union operating in the State to file an annual report disclosing its name, the location of its principal offices, and the names and addresses of its officers; and to pay an annual fee of $1.00 therefor. Violation of the statute by any person or labor organization is made a misdemeanor punishable by fine and imprisonment. A state court enjoined the petitioner labor union from further functioning and operating, and enjoined its business agent from further acting in that capacity, until they shall have complied with the statute. *Held* that §§ 4 and 6 of the Florida statute, as so applied, are invalid as in conflict with the National Labor Relations Act. P. 541.
2. As here applied, § 4 of the Florida statute circumscribes the "full freedom" of choice of collective bargaining agents which is secured to employees by the National Labor Relations Act. P. 541.
3. The requirement of reports and the exaction of a $1.00 annual fee in § 6 does not, in and of itself, conflict with the National Labor Relations Act; it is the sanction here imposed—injunction against the labor union functioning as such—which is inconsistent with the federally protected process of collective bargaining. P. 543.

155 Fla. 254, 19 So. 2d 857, reversed.

CERTIORARI, 324 U. S. 832, to review the affirmance of a decree granting injunctions against a labor union and its business agent until they shall have complied with the requirements of a state statute the validity of which they challenged.

Messrs. Joseph A. Padway and *Herbert S. Thatcher* for petitioners.

J. Tom Watson, Attorney General of Florida, and *Howard S. Bailey*, Assistant Attorney General, for respondent.

Briefs were filed by *Solicitor General Fahy, Messrs. Robert L. Stern, Alvin J. Rockwell, Miss Ruth Weyand* and *Mrs. Elizabeth W. Weston* on behalf of the United States; *Messrs. Arthur Garfield Hayes* and *Osmond K. Fraenkel* on behalf of the American Civil Liberties Union; and *Mr. Paul O'Dwyer* on behalf of the Workers Defense League, as *amici curiae*, in support of petitioners.

MR. JUSTICE BLACK delivered the opinion of the Court.

The only question we find it necessary to decide in this case is whether a Florida statute [1] regulating labor union activities has been applied to these petitioners in a manner which brings it into irreconcilable conflict with the collective bargaining regulations of the National Labor Relations Act. 49 Stat. 449. That Federal Act, we decided in *Allen-Bradley Local* v. *Wisconsin Board*, 315 U. S. 740, did not wholly foreclose state power to regulate labor union activities. Certain conduct, such as mass picketing, threats, violence, and related actions, we held were not governed by the Wagner Act, and hence, Wisconsin was free to regulate them. We carefully pointed out, however, that had the state order under consideration, "affected the status of the employees, or . . . caused a forfeiture of collective bargaining rights, a distinctly different question would arise." That question which we so distinctly reserved in the *Wisconsin* case has now arisen in this case.

The Attorney General of Florida filed a bill for injunction against the petitioner union and its business agent, Hill, in a state court. He sought to restrain both of them

[1] House Bill No. 142, Laws of Florida, 1943, Chap. 21968, 565.

from functioning as such until they had complied with the Florida statute. The basis for the relief sought against Hill was that he had for a pecuniary reward acted as a business agent in violation of § 4; the basis for the relief sought against the union was that it had operated without obtaining a state license as required by § 6. Section 4, which was invoked against Hill, provides that no one shall be licensed as a "business agent" of a labor union who has not been a citizen of the United States for more than 10 years, who has been convicted of a felony, or who is not a person of good moral character. Application for a license as a "business agent" must be accompanied by a $1.00 fee and a statement signed by officers of the union setting forth the agent's authority. The statute then provides that the application be held for 30 days to permit the filing of objections to the issuance of a license. A Board, composed of the Governor, the Secretary of State, and the Superintendent of Education, then passes on the application, and if it finds the applicant measures up to the standards of the act, as it sees them, it authorizes the license to be issued, to "expire on December 31 of the year for which issued unless sooner surrendered, suspended, or revoked." Section 2 (2) defines "business agent" as "any person who shall for a pecuniary or financial consideration act or attempt to act" for a union "in soliciting or receiving from any employer any right or privilege for employees . . ." or "in the issuance of membership or authorization cards, work permits or any other evidence of rights granted or claimed in, or by, a labor organization . . ." Section 6, which the Attorney General invoked against the union, requires every labor union "operating" in the state to file a written report with the Secretary of State, disclosing its name, the location of its offices, and the names and addresses of its officers. Section 14 makes it a misdemeanor for "any person or labor organization" to violate the statute.

Motions by Hill and the union to dismiss the bill on the ground that the state statute violated the Fourteenth Amendment and conflicted with the Wagner Act were denied. Answers were then filed admitting violations of §§ 4 and 6. The court held the licensing and reporting provisions valid. Hill was enjoined from further acting as the union's business agent until he obtained a state license. The union was enjoined from further functioning and operating until it made the report and paid the fee to the Secretary of State. The State Supreme Court affirmed. 155 Fla. 254, 19 So. 2d 857.

It is apparent that the Florida statute has been so construed and applied that the union and its selected representative are prohibited from functioning as collective bargaining agents, or in any other capacity, except upon conditions fixed by Florida. The declared purpose of the Wagner Act, as shown in its first section, is to encourage collective bargaining, and to protect the "full freedom" of workers in the selection of bargaining representatives of their own choice. To this end Congress made it illegal for an employer to interfere with, restrain or coerce employees in selecting their representatives. Congress attached no conditions whatsoever to their freedom of choice in this respect. Their own best judgment, not that of someone else, was to be their guide. "Full freedom" to choose an agent means freedom to pass upon that agent's qualifications.

Section 4 of the Florida Act circumscribes the "full freedom" of choice which Congress said employees should possess. It does this by requiring a "business agent" to prove to the satisfaction of a Florida Board that he measures up to standards set by the State of Florida as one who, among other things, performs the exact function of a collective bargaining representative. To the extent that § 4 limits a union's choice of such an "agent" or bargaining representative, it substitutes Florida's judgment for the workers' judgment.

Thus, the "full freedom" of employees in collective bargaining which Congress envisioned as essential to protect the free flow of commerce among the states would be, by the Florida statute, shrunk to a greatly limited freedom. No elaboration seems required to demonstrate that § 4 as applied here "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz,* 312 U. S. 52, 67; *Cloverleaf Butter Co.* v. *Patterson,* 315 U. S. 148; *Napier* v. *Atlantic Coast Line R. Co.,* 272 U. S. 605. It is not amiss, however, to call attention to the fact that operation of this very section has already interfered with the collective bargaining process. An employer before the Labor Board defended its refusal to bargain with a duly selected representative of workers on the ground that the representative had not secured a Florida license as a business agent. *In the Matter of Eppinger & Russell Co.,* 56 N. L. R. B. 1259. The Board properly rejected the employer's contention, holding that Congress did not intend to subject the "full freedom" of employees to the eroding process of "varied and perhaps conflicting provisions of state enactments." Cf. *Labor Board* v. *Hearst Publications,* 322 U. S. 111.

Since the Labor Board has held that an employer must bargain with a properly selected union agent despite his failure to secure a Florida license, it is argued that the state law does not interfere with the collective bargaining process. But here, this agent has been enjoined, and if the Florida law is valid he could be found guilty of a contempt for doing that which the act of Congress permits him to do. Furthermore, he could, under § 14 of the state law, be convicted of a misdemeanor and subjected to fine and imprisonment. The collective bargaining which Congress has authorized contemplates two parties free to bargain, and cannot thus be frustrated by state legislation. We hold that § 4 of the Florida Act is repugnant to the National Labor Relations Act.

Section 6, as here applied, stands no better. The requirement as to the filing of information and the payment of a $1.00 annual fee does not, in and of itself, conflict with the Federal Act. But, for failure to comply, this union has been enjoined from functioning as a labor union. It could not without violating the injunction and also subjecting itself to the possibility of criminal punishment even attempt to bargain to settle a controversy or a strike. It is the sanction here imposed, and not the duty to report, which brings about a situation inconsistent with the federally protected process of collective bargaining. Cf. *Western Union Co.* v. *Massachusetts,* 125 U. S. 530, 553, 554; *Kansas City Southern R. Co.* v. *Kaw Valley Drainage District,* 233 U. S. 75, 78; *St. Louis S. W. R. Co.* v. *Arkansas,* 235 U. S. 350, 368. This is true because if the union or its representatives acted as bargaining agents without making the required reports, presumably they would be liable both to punishment for contempt of court and to conviction under the misdemeanor section of the act. Such an obstacle to collective bargaining cannot be created consistently with the Federal Act.

Nor can it be argued that our decision in *Thomas* v. *Collins,* 323 U. S. 516, forecloses such result. In that case we did not have, as here, to deal with such a direct impediment to the free exercise of the federally established right to collective bargaining.

Our holding is that the National Labor Relations Act and §§ 4 and 6 of the Florida Act as here applied cannot "move freely within the orbits of their respective purposes without impinging upon one another." *Union Brokerage Co.* v. *Jensen,* 322 U. S. 202, 207.[2] Accordingly the case

[2] The National Labor Relations Act applies only to activities which affect interstate commerce. *Labor Board* v. *Jones & Laughlin Corp.,* 301 U. S. 1, 29, 30. The original bill for an injunction prayed that this union might be restrained from functioning as a union in connection with employees of the St. Johns River Shipbuilding Co. of Jackson-

is reversed and remanded for proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. CHIEF JUSTICE STONE.

I concur in so much of the opinion as finds conflict between the licensing provisions of the Florida statute and the National Labor Relations Act. I do so only on the ground that the command of § 7 of the National Labor Relations Act that "employees shall have the right . . . to bargain collectively through representatives of their own choosing" conflicts with the licensing provisions of the Florida Act purporting to fix the qualifications of business agents of labor organizations.

This, of course, does not mean that labor unions or their officers are immune, in other respects, from the exercise of the state's police power to punish fraud, violence, or other forms of misconduct, either because of the commerce clause or the National Labor Relations Act. It is familiar ground that the commerce clause does not itself preclude a state from regulating those matters which, not being themselves interstate commerce, nevertheless affect the commerce, *California* v. *Thompson,* 313 U. S. 109, 113–114, 116, and cases cited; *Parker* v. *Brown,* 317 U. S. 341, 360, and cases cited, and that the state's authority is curtailed only as Congress may by law prescribe in the exercise of the commerce power. *United States* v. *Darby,* 312 U. S. 100, 119, and cases cited. I can find nothing in

ville, Florida, which company has been held by the Labor Board to be engaged in interstate commerce and subject to the Federal Act. *Matter of St. Johns River Shipbuilding Co.*, 52 N. L. R. B. 12; 52 N. L. R. B. 958; 55 N. L. R. B. 1451; 59 N. L. R. B. No. 83; 60 N. L. R. B. No. 55. The case was submitted on the pleadings, which assume that interstate commerce questions were involved. The Supreme Court of Florida so treated the case in holding that there was no constitutionally prohibited conflict between the Florida and Federal Acts.

the National Labor Relations Act or its legislative history to suggest a Congressional purpose to withdraw the punishment of fraud or violence, or the violation of any state law otherwise valid, from the state's power merely because the state might subject the business agent of a labor union, who violates its law, to imprisonment, which would prevent his functioning as a bargaining agent for employees under the National Labor Relations Act. *Allen-Bradley Local* v. *Board,* 315 U. S. 740, 748. See S. Rep. No. 573, 74th Cong., 1st Sess.; H. Rep. No. 1147, 74th Cong., 1st Sess.

For the same reasons, the National Labor Relations Act does not preclude a state from requiring a labor union, or its officers and agents, as such, to procure licenses or make reports or perform other duties which do not materially obstruct the exercise of rights conferred by the National Labor Relations Act or other federal legislation. *Thomas* v. *Collins,* 323 U. S. 516, 542. But it is quite another matter to say that a state may fix standards or qualifications for labor unions and their officers and agents which would preclude any of them from being chosen and from functioning as bargaining agents under § 7 of the National Labor Relations Act. The right conferred on employees to bargain collectively through a representative of their own choosing is the foundation of the National Labor Relations Act. Without that right, or if it were restricted by state action, the Act as drawn would have little scope for operation. The fact that the National Labor Relations Act imposes sanctions on the employer alone does not mean that it did not, by § 7, confer the right on employees as against others as well as the employer to make an uninhibited choice of their bargaining agents. Cf. *United States* v. *Hutcheson,* 312 U. S. 219. Section 7 confers the right of choice generally on employees and not merely as against the employer.

I dissent from so much of the opinion as holds that § 6 of the Florida statute, as applied, is invalid because it conflicts with the National Labor Relations Act. The requirement of filing by a labor organization of the information prescribed by § 6, accompanied by a filing fee of $1.00, is, as the opinion of the Court recognizes, not incompatible with the National Labor Relations Act, since it in no substantial way hinders or interferes with the performance of the union's functions under that Act. *Thomas* v. *Collins*, *supra*, 542; cf. *Northwestern Bell Tel. Co.* v. *Nebraska Comm'n*, 297 U. S. 471, 478; see *Smith* v. *Illinois Bell Tel. Co.*, 282 U. S. 133; *Western Distributing Co.* v. *Public Service Comm'n*, 285 U. S. 119; *Dayton Power Co.* v. *Public Utilities Comm'n*, 292 U. S. 290; *Natural Gas Co.* v. *Slattery*, 302 U. S. 300, 306.

Notwithstanding the conflict between the commerce clause or the federal statute and the local regulation which was found in *Western Union Co.* v. *Massachusetts*, 125 U. S. 530, 554, and *St. Louis S. W. R. Co.* v. *Arkansas*, 235 U. S. 350, 368, I can find no logical or persuasive legal ground or practical reason for saying that Congress by the enactment of the National Labor Relations Act intended to preclude the state from exercising to the utmost extent its sovereign power to enforce the lawful demands of § 6 of the Florida Act. There is no more occasion for implying such a Congressional purpose where the union is prevented from functioning by punishment or injunction, for a violation of a valid state law, than for saying that Congress, by the National Labor Relations Act, intended to forbid the states to arrest and imprison a labor leader for the violation of any other valid state law, because that would prevent his or the union's functioning under the National Labor Relations Act. The question is wholly one of state power. Here the state power is not restricted by the commerce clause standing alone, nor, so far as I can see, by any Congressional intention expressed

in the provisions of the National Labor Relations Act. *Union Brokerage Co.* v. *Jensen,* 322 U. S. 202, 206.

MR. JUSTICE FRANKFURTER, dissenting.

The Court is striking down a State law not because such a statute in and of itself is beyond the power of a State to enact. The Florida statute is nullified because, so Florida is told, Congress has barred Florida from this lawmaking, although Congress has neither expressly nor by fair inference forbidden Florida to deal with the matter with which Florida has dealt and Congress has not. Concretely, Congress by protecting employees in their right to choose representatives for collective bargaining free from the coercion or influence of employers did not impliedly wipe out the right of States under their police power to require qualifications appropriate for union officials having fiduciary duties.

It was settled early in our constitutional history that the mere fact that Congress has power to regulate commerce among the several States does not exclude State legislation in the exercise of the police power, even though it may affect such commerce, where the subject matter does not demand a nation-wide rule. *Willson* v. *Blackbird Creek Marsh Co.,* 2 Pet. 245; *Cooley* v. *Board of Wardens,* 12 How. 299, 319. The States, in short, may speak on matters even in the general domain of commerce so long as Congress is silent. But when Congress has spoken, although not as fully as the Constitution authorizes, that is, when a federal enactment falls short of the Congressional power to legislate touching commerce, the States may still speak where Congress is still silent. The real question is: Has Congress spoken so as to silence the States? The same regard for the harmonious balance of our federal system, whereby the States may protect local interests despite the dormant Commerce Clause, allows State legislation for the protection of local interests so

long as Congress has not supplanted local regulation either by a regulation of its own or by an unmistakable indication that there is to be no regulation at all. The relation of such enactments of local concern to federal enactments which fall short of the full reach of the Constitution raises a problem of judicial judgment similar to that presented where a State law encounters no federal statute. The problem is one of judicial accommodation between respect for the supplanting authority of Congress and the reserved police power of the States. Long ago this policy of accommodation was formulated by this Court: "We agree, that in the application of this principle of supremacy of an act of Congress in a case where the State law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together." *Sinnot* v. *Davenport,* 22 How. 227, 243.

But conflicts between State laws regulating aspects of business enterprise and federal enactments relating to such aspects were few and far between in the first hundred years of our history. Apart from taxes and tariffs, the regulation of fisheries, and measures dealing with the coastwise trade, there was little intervention by federal legislation in the affairs of men until, in 1887, the Interstate Commerce Act initiated the tide of federal regulation. Since then, this Court has often had to deal with the claim that a federal statute, though only partially regulating a particular phase of commerce, superseded State legislation in the exercise of the police power bearing upon that phase.

In a great variety of cases, the Court has applied the accommodation formulated in *Sinnot* v. *Davenport, supra,* and either reasserted or reinforced that policy. The emphasis has been on recognizing that both the State law and the federal statute must be allowed to prevail if they may prevail together—that is, if they do not, as a

matter of language or practical enforcement, collide, or if Congress has not manifested an unambiguous purpose that there be no regulation, either State or federal, as to matters for which it has not prescribed. This judicial principle is established by an impressive body of opinions. A few samples must suffice:

1. "May not these statutory provisions stand without obstructing or embarrassing the execution of the act of Congress? This question must of course be determined with reference to the settled rule that a statute enacted in execution of a reserved power of the State is not to be regarded as inconsistent with an act of Congress passed in the execution of a clear power under the Constitution, unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together." *Missouri, K. & T. R. Co.* v. *Haber,* 169 U. S. 613, 623.

2. "It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested. . . .

"The principle is universal that legislation, whether by Congress or by a State, must be taken to be valid, unless the contrary is made clearly to appear; and as the contrary does not so appear, the statute of Colorado is to be taken as a constitutional exercise of the power of the State." *Reid* v. *Colorado,* 187 U. S. 137, 148, 153.

3. "Is, then, a denial to the State of the exercise of its power for the purposes in question necessarily implied in the Federal statute? For when the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their

natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power. . . .

"But the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State. This principle has had abundant illustration." *Savage* v. *Jones,* 225 U. S. 501, 533.

4. "These cases recognize the established rule that a state law enacted under any of the reserved powers—especially if under the police power—is not to be set aside as inconsistent with an act of Congress, unless there is actual repugnancy, or unless Congress has, at least, manifested a purpose to exercise its paramount authority over the subject. The rule rests upon fundamental grounds that should not be disregarded." *Missouri, K. & T. R. Co.* v. *Harris,* 234 U. S. 412, 418–419.

5. "In construing federal statutes enacted under the power conferred by the commerce clause of the Constitution the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a State, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested." *Illinois Central R. Co.* v. *Public Utilities Comm'n,* 245 U. S. 493, 510.

6. "The principle thus applicable has been frequently stated. It is that the Congress may circumscribe its regulation and occupy a limited field, and that the intention to supersede the exercise by the State of its authority as to matters not covered by the federal legislation is not to be implied unless the Act of Congress fairly interpreted is in conflict with the law of the State." *Atchison, T. & S. F. R. Co.* v. *Railroad Comm'n,* 283 U. S. 380, 392–393.

7. "Unless limited by the exercise of federal authority under the commerce clause, the State has power to make and enforce the order. The purpose of Congress to supersede or exclude state action against the ravages of the disease is not lightly to be inferred. The intention so to do must definitely and clearly appear." *Mintz* v. *Baldwin*, 289 U. S. 346, 350.

8. "The power conferred upon the Congress is such that when exerted it excludes and supersedes state legislation in respect of the same matter. But Congress may so circumscribe its regulation as to leave a part of the subject open to state action. *Atlantic Coast Line* v. *Georgia*, 234 U. S. 280, 290. Cf. *Napier* v. *Atlantic Coast Line*, 272 U. S. 605. The purpose exclusively to regulate need not be specifically declared. *New York Central R. Co.* v. *Winfield*, 244 U. S. 147. But, ordinarily such intention will not be implied unless, when fairly interpreted, the federal measure is plainly inconsistent with state regulation of the same matter." *Gilvary* v. *Cuyahoga Valley R. Co.*, 292 U. S. 57, 60.

9. "The case calls for the application of the well-established principle that Congress may circumscribe its regulation and occupy a limited field, and that the intent to supersede the exercise by the State of its police power as to matters not covered by the federal legislation is not to be implied unless the latter fairly interpreted is in actual conflict with the state law." *Townsend* v. *Yeomans*, 301 U. S. 441, 454.

10. "States are thus enabled to deal with local exigencies and to exert in the absence of conflict with federal legislation an essential protective power. And when Congress does exercise its paramount authority, it is obvious that Congress may determine how far its regulation shall go. There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field.

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When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'" *Kelly* v. *Washington,* 302 U. S. 1, 10.

These rules of respect for the allowable area of State law have not been ceremonial phrases dishonored in observance. Deviations from this policy have been very rare, considering the fact that we are dealing not with a mathematical formula but with the application of a constitutional doctrine by judicial judgment. The deviations have been so rare all these decades, despite the changes in the Court, because of fidelity to the purposes of this vital aspect of our federalism.

A survey of the scores of cases in which the claim has been made that State action cannot survive some contradictory command of Congress leaves no doubt that State action has not been set aside on mere generalities about Congress having "occupied the field," or on the basis of loose talk instead of demonstrations about "conflict" between State and federal action. We are in the domain of government and practical affairs, and this Court has not stifled State action, unless what the State has required, in the light of what Congress has ordered, would truly entail contradictory duties or make actual, not argumentative, inroads on what Congress has commanded or forbidden.

Since the bulk of federal regulatory legislation has until recently been concerned with the great interstate utilities, the cases dealing with the relation of State to federal legislation in this field shed most light on the question before us. Moreover, these present situations least favorable to tolerance for State legislation. The

need for national control, with corresponding restriction of local regulation, is presumably most powerfully asserted where interstate transportation and communication are involved.

The range and particularity of federal legislation regulating railroads, expressed in a long series of enactments, have given rise to most of the cases in which State action has been found in conflict with federal action. Once Congress established a uniform federal rule concerning liability for freight loss or damage in place of the variegated rules of the several States, State policy "differently conceived" had to yield. *Charleston & W. C. R. Co.* v. *Varnville Co.,* 237 U. S. 597, 604. The comprehensive control over railroad rates, progressively exercised by Congress, necessarily displaced much prior State law. And so, the permissive power of States to deal with aspects of transportation in the absence of federal law ceased when State action ran counter to the specific requirements of the Hepburn Act. *Southern R. Co.* v. *Reid,* 222 U. S. 424; *Chicago, R. I. & P. R. Co.* v. *Hardwick Elevator Co.,* 226 U. S. 426. State regulation of the hours of railroad employees could not survive a Congressional policy as to hours of service. *Northern Pacific R. Co.* v. *Washington,* 222 U. S. 370. Explicitness by Congress relating to the equipping of freight cars with safety appliances superseded a State law dealing differently with such safety requirements. *Southern R. Co.* v. *Railroad Comm'n,* 236 U. S. 439. When Congress saw fit to define in the Federal Employers Liability Act a carrier's responsibility for the death or injury of its employees, a State could not assert a different basis of responsibility. *N. Y. Central R. Co.* v. *Winfield,* 244 U. S. 147. Uniform standards set by the Interstate Commerce Commission for the equipment of locomotives preclude different requirements for such equipment by the States. *Napier* v. *Atlantic Coast Line,* 272 U. S. 605. But merely because regulatory power is

possessed by a federal agency does not displace State regulation if no federal standards are set. See *Welch Co.* v. *New Hampshire*, 306 U.S. 79; *Eichholz* v. *Public Service Comm'n*, 306 U. S. 268. That even in this technical field a State is not denied the exercise of its police power beyond what is practically required by the actual use of federal power, is illustrated by the limited application given to *Pennsylvania R. Co.* v. *Public Service Comm'n*, 250 U. S. 566, in *Terminal Assn.* v. *Trainmen*, 318 U.S. 1.

These are illustrations of a closely knit body of regulations, full of technical implications, protected against incursions from local discriminations as to the very subject matter for which Congress deemed a national rule essential. There was, in short, concreteness of conflict between what a State prescribed and what Congress prescribed; the collision was demonstrable, not argumentative.

Even where the enforcement of a State statute carries international implications and thus deals with sensitive concerns peculiarly within the direction of federal authority, this Court only recently was slow to strike down an exercise of the State police power. When, in *Hines* v. *Davidowitz*, 312 U. S. 52, the United States strongly urged upon us that a Pennsylvania system of alien registration, established in 1939, had been superseded by the Federal Alien Registration Act of 1940, we did not displace the State law cavalierly, on the basis of loose inference and dogmatic assertion, but examined with painstaking care the particular requirements of Pennsylvania in order to ascertain whether, in their practical operation, they ran counter to the scheme as conceived by Congress and impinged upon its administration. A detailed examination of the long course of federal legislation affecting aliens, of which the Act of 1940 was the latest in a series, led the Court to conclude that Congress

had "provided a standard for alien registration in a single integrated and all-embracing system . . . through one uniform national registration system" to which Pennsylvania had to subordinate its local policy. 312 U. S. 52, 74. Even this conclusion evoked a weighty dissent, and one cannot read the Court's opinion without an awareness that the case presented a close question. Shortly after this decision we unanimously made it clear that *Hines* v. *Davidowitz* was not intended to relax the requirement of practical and effective conflict between a State law and a federal enactment before a State police measure can be nullified, and that the international bearing of the circumstances made persuasive the finding of conflict in that case. What was said about *Hines* v. *Davidowitz* in *Allen-Bradley Local* v. *Board,* 315 U. S. 740, 749, is precisely relevant here:

"In the *Hines* case, a federal system of alien registration was held to supersede a state system of registration. But there we were dealing with a problem which had an impact on the general field of foreign relations. The delicacy of the issues which were posed alone raised grave questions as to the propriety of allowing a state system of regulation to function alongside of a federal system. In that field, any 'concurrent state power that may exist is restricted to the narrowest of limits.' p. 68. Therefore, we were more ready to conclude that a federal Act in a field that touched international relations superseded state regulation than we were in those cases where a State was exercising its historic powers over such traditionally local matters as public safety and order and the use of streets and highways. *Maurer* v. *Hamilton,* [309 U. S. 598] *supra,* and cases cited. Here, we are dealing with the latter type of problem. We will not lightly infer that Congress by the mere passage of a federal Act has impaired the traditional sovereignty of the several States in that regard."

In truth, when a State statute is assailed because of alleged conflict with a federal law, the same considerations of forbearance, the same regard for the lawmaking power of States, should guide the judicial judgment as when this Court is asked to declare a statute unconstitutional outright. The problem of conflict arises only when the States have power concurrent with Congress to legislate; to find conflict is merely a form of denying the power of legislation to the States. Except in rare instances, as already indicated, this Court has been extremely cautious in upsetting State regulation unless it has found that the regulation devised by Congress and that by which the State dealt with some local concern cannot, in a practical world, coexist. Only then has the Court been justified in holding that Congress has manifested its will to displace the constitutional authority of the State. To strike down a State law when that which a State requires does not truly hinder or obstruct federal regulation is unwarrantably to deprive the States of their constitutional power.

These are the principles which have been recognized and applied by the vast body of the decisions of this Court, and they are the principles that should determine the fate of the Florida legislation now here for judgment.

By legislation known as House Bill No. 142, Florida, in 1943, undertook to regulate labor unions and their officers. Laws of Florida, 1943, Ch. 21968, p. 565. That Act prohibits any person from acting as a "business agent" for any "labor organization" without having obtained a license. § 9 (6). In order to obtain such a license, for a fee of one dollar, a person must file with the Secretary of State an application under oath, accompanied by a statement showing the applicant's authority to act as business agent, vouched for by the president and secretary of the labor organization. To permit the filing of objections to granting the license, the application must be held on file for thirty days. Thereafter, the application, with all relevant

documents, goes to a Board composed of the Governor, the Secretary of State and the Superintendent of Education. On finding the applicant qualified, the Board must authorize the Secretary of State to issue a license for the calendar year. A license may not be issued to any person who has not been a citizen and resident of the United States for at least ten years, or who has been convicted of a felony, or who is not of good moral character. § 4. Another provision of the Act requires every "labor organization operating in the State of Florida" to file an annual report with the Secretary of State giving the name of the organization, the location of its office, the names and addresses of the president, secretary, treasurer and business agent. A filing fee of one dollar is required. § 6. A penal provision provides for fines not exceeding $500, or six months imprisonment, or both, for violation of the Act by any person or labor organization. § 14.

The Attorney General of Florida sought and obtained from a Florida Circuit Court an injunction forbidding the petitioner, United Association of Journeymen Plumbers and Steamfitters, Local No. 234, from functioning as a labor union until it had complied with the requirements of § 6, and forbidding petitioner Hill from acting as business agent for the Association until he had procured the license required by § 4. The Supreme Court of Florida affirmed the injunction. 19 So. 2d 857. This Court reverses the Florida decision by concluding that the National Labor Relations Act, familiarly known as the Wagner Act, 49 Stat. 449, 29 U. S. C. § 151 *et seq.*, debarred Florida from dealing with the matters with which her legislation dealt.

The Court reaches this conclusion rather summarily, as though the conflict between the Wagner Act and the Florida Act is too obvious for argument. Considering the fact that this case involves what so often has been

characterized as the most delicate function of this Court, that of invalidating legislation, the issue cannot be disposed of so easily.

While employer-employee relations on railroads have been the subject of Congressional legislation for more than half a century, giving rise to a more and more comprehensive scheme of federal regulation, as to such relations in industry generally Congress abstained from regulation until 1935. Its first essay in this field was professedly very limited in scope. Not content with setting forth the central aim of the Wagner Act in the legislative reports, Congress in the Act itself defined its purposes. In view of the inequality between organized employers and employees devoid of "full freedom of association or actual liberty of contract," and of the "denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining," it was "declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." § 1. To that end § 8, the heart of the Act, enumerated conduct by employers which the National Labor Relations Board was established to prevent. § 10. It is an accurate summary of the Wagner Act to say that it aimed to equalize bargaining power between industrial employees and their employers by putting federal law behind the employees' right of association. The whole plan or scheme of the Wagner Act was to enable employees to bargain on a fair basis, freed from "restraint or coercion

by their employer" through the protection given by the federal government. *Labor Board* v. *Jones & Laughlin,* 301 U. S. 1, 33.

All proposals to make of the Wagner Act a more comprehensive industrial code, by dealing with the conduct of employees and their unions, were rejected. The rights Congress created, the obligations it defined, the machinery it devised for enforcing these rights and securing obedience to these obligations, all were exclusively concerned with putting the strength of the Government against this conduct by employers. All other aspects of industrial relations were left untouched by the Wagner Act, and purposely so. All activities or aspects of labor organizations outside of their right to be free from employer coercion were left wholly unregulated by that Act. Neither expressly nor by indirection did the Wagner Act displace whatever police power the States may have to deal with those aspects of the life of a trade union as to which Congress, with eyes wide open, refused to legislate. When Congress purposely dealt only with the employer aspect of industrial relations and purposely abstained from making any rules touching union activities, the internal affairs of unions, or the responsibility of union officials to union members and to the public, Congress certainly did not sponge out the States' police power as to these matters. It wipes out State power and distorts Congressional intention to disregard the limited policy explicitly set forth by Congress. That policy—curbing of employer interferences with union rights—was scrupulously observed by Congress in the substantive provisions as well as in the enforcement structure of the Act. There is not a breath in the Act referring to any aspect of union activity unrelated to employer interference therewith. By refusing to legislate beyond that, Congress did not forbid the States from so legislating.

If Congress tomorrow chose to subject labor organizations and their officers to regulations similar to those dealt

with in the Florida law, it could hardly be suggested that the Wagner Act, as it now stands, already covers these subjects. Specifically, if Congress were to make certain requirements for the filing of reports by labor organizations that seek to avail themselves of the rights defined by the Wagner Act, and also were to devise a system of identification and licensing of authorized representatives of the unions, one would be hard put to it to find anything in the Wagner Act to prove that it had already dealt with these matters. Congress may well believe that there is such a difference in local circumstances as to make it desirable to leave treatment of these matters to the different localities. In any event, since these subjects are outside of the Wagner Act for purposes of making additions by federal law, they cannot be inside it to justify nullification of the Florida law. Whether the interests of union members or of outsiders call for an identification and licensing system for men discharging the responsibilities of business agents, it is not for us to determine. The only issue before us is whether Florida is free to deal with these matters when Congress has not done so. To repeat what was said in *Allen-Bradley Local* v. *Board, supra,* "We will not lightly infer that Congress by the mere passage of a federal Act"—this very Act—"has impaired the traditional sovereignty of the several States" over such police matters as are the concern of the Florida legislation.

If the Wagner Act has left Florida free to deal with these matters, Florida may not only legislate but also provide for enforcement of its legislation. In other words, if Florida may call for reports and require business agents to apply for licenses, of course Florida may provide appropriate sanctions for such regulations. If a union may properly be required to file a report and does not do so and therefore is prohibited from pursuing its industrial activities until it does file such a report, the State is not interfering with whatever rights the union may have

under the Wagner Act. It will be time enough to consider such a claim of conflict, if anything that Florida may exact should, in a concrete situation, actively interfere with appropriate action by the National Labor Relations Board. In any event, we do not know the reach of the Florida Act. For all that appears the Supreme Court of Florida may construe the Act's requirements to apply only to intrastate activities of the union and its business agents.

The judgment should be affirmed.

MR. JUSTICE ROBERTS concurs in this dissent.

IN RE SUMMERS.

CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

No. 205. Argued April 27, 30, 1945.—Decided June 11, 1945.

1. The Illinois Supreme Court's refusal, on the merits, of petitioner's application for admission to the practice of law, although the matter was not regarded by that court as a judicial proceeding, *held* to involve a case or controversy within the judicial power under Art. III, §1, cl. 1 of the Federal Constitution. P. 566.
2. Refusal of an application for admission to the practice of law in a State, on the ground that the applicant would be unable in good faith to take the required oath to support the constitution of the State, because of conscientious scruples resulting in unwillingness to serve in the state militia in time of war, *held* not a denial of any right of the applicant under the First and Fourteenth Amendments of the Federal Constitution. P. 571.

Affirmed.

CERTIORARI, 323 U. S. 705, to review the action of the Supreme Court of Illinois in refusing petitioner's application for admission to the bar.

Mr. Julien Cornell, with whom *Messrs. Alfred T. Carton, Charles Liebman* and *Arthur Garfield Hayes* were on the brief, for petitioner.

William C. Wines, Assistant Attorney General of Illinois, with whom *George F. Barrett,* Attorney General, was on the brief, for the Justices of the Supreme Court of Illinois, respondents.

Messrs. Harold Evans, Ernest Angell, Claude C. Smith and *Thomas Raeburn White* filed a brief on behalf of the American Friends Service Committee, as *amicus curiae,* in support of petitioner.

MR. JUSTICE REED delivered the opinion of the Court.

Petitioner sought a writ of certiorari from this Court under Section 237 (b) of the Judicial Code to review the action of the Supreme Court of Illinois in denying petitioner's prayer for admission to the practice of law in that state. It was alleged that the denial was "on the sole ground that he is a conscientious objector to war" or to phrase petitioner's contention slightly differently "because of his conscientious scruples against participation in war." Petitioner challenges here the right of the Supreme Court to exclude him from the bar under the due process clause of the Fourteenth Amendment to the Constitution of the United States which secured to him protection against state action in violation of the principles of the First Amendment.[1] Because of the importance of the tendered issue in the domain of civil rights, we granted certiorari.[2] 323 U. S. 705.

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[1] Fourteenth Amendment:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

First Amendment:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

Cf. *Board of Education* v. *Barnette,* 319 U. S. 624, 639.

[2] The petition for certiorari was not accompanied by a certified record. Rule 38 (1). It alleged an inability to obtain a record from

Since the proceedings were not treated as judicial by the Supreme Court of Illinois, the record is not in the customary form. It shows accurately, however, the steps by which the issue was developed and the action of the Supreme Court on the prayer for admission to the practice of law in the State of Illinois. From the record it appears that Clyde Wilson Summers has complied with all prerequisites for admission to the bar of Illinois except that he has not obtained the certificate of the Committee on Character and Fitness. Cf. Illinois Revised Statutes 1943, c. 110, § 259.58. No report appears in the record from the Committee. An unofficial letter from the Secretary gives his personal views.[3] A petition was filed in the

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the Clerk of the Supreme Court of Illinois because the documents were not in that official's custody. See note 8, *infra*. No opposing brief was filed. After the expiration of the time for opposing briefs, Rule 38 (3), a rule issued "returnable within 30 days, requiring the Supreme Court of Illinois to show cause why the record in this proceeding should not be certified to this Court and also why the petition for writ of certiorari herein should not be granted." Journal, Supreme Court of the United States, October Term, 1944, p. 6. A return was duly made by the Chief Justice and the Associate Justices of the Supreme Court of Illinois which stated the position of the Justices on the certification of the supposed and alleged record and their opposition to the granting of the certiorari. On consideration our writ of certiorari issued, directed to the Honorable, the Judges of the Supreme Court of Illinois, commanding that "the record and/or papers and proceedings" be sent to this Court for review. Journal, Supreme Court of the United States, October Term, 1944, p. 93. The papers comprising the proceedings before the Supreme Court of Illinois were certified to us by the Clerk of that court.

[3] In part it reads:

"I think the record establishes that you are a conscientious objector,—also that your philosophical beliefs go further. You eschew the use of force regardless of circumstances but the law which you profess to embrace and which you teach and would practice is not an abstraction observed through mutual respect. It is real. It is the result of experience of man in an imperfect world, necessary we believe to restrain the strong and protect the weak. It recognizes the right

Supreme Court on August 2, 1943, which alleged that petitioner was informed in January, 1943, that the Committee declined to sign a favorable certificate. The petition set out that the sole reason for the Committee's refusal was that petitioner was a conscientious objector to war, and averred that such reason did not justify his exclusion because of the due process clause of the Fourteenth Amendment. The denial of the petition for admission is informal. It consists of a letter of September 20, 1943, to the Secretary of the Committee which is set out below,[4] a letter of the same date to Mr. Summers and a third letter of March 22, 1944, to Mr. Summers' attorney on petition for rehearing. These latter two letters are set out in note 8.

The answer of the Justices to these allegations does not appear in the record which was transmitted from the Supreme Court of Illinois to this Court but in their return to the rule to show cause why certiorari should not be granted. The answer is two-fold: First, that the proceedings were not a matter of judicial cognizance in Illinois and that no case or controversy exists in this Court

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even of the individual to use force under certain circumstances and commands the use of force to obtain its observance.

. . . . .

"I do not argue against your religious beliefs or your philosophy of non-violence. My point is merely that your position seems inconsistent with the obligation of an attorney at law."

[4] "This Court has an elaborate petition filed by Francis Heisler, an attorney of 77 West Washington Street, Chicago, Illinois, on behalf of Clyde Wilson Summers.

"The substance of the petition is that the Board should overrule the action of the Committee on Character and Fitness, in which the Committee refused to give him a certificate because he is a conscientious objector, and for that reason refused to register or participate in the present national emergency.

"I am directed to advise you that the Court is of the opinion that the report of the Committee on Character and Fitness should be sustained.

"Yours very truly, June C. Smith, Chief Justice."

under Article III of the Federal Constitution; second, that assuming the sole ground for refusing to petitioner admission to practice was his profession of conscientious objection to military service, such refusal did not violate the Fourteenth Amendment because the requirement for applicants for admission to the bar to take an oath to support the Constitution of Illinois could not be met. In view of his religious affirmations, petitioner could not agree, freely, to serve in the Illinois militia. Therefore petitioner was not barred because of his religion but because he could not in good faith take the prescribed oath, even though he might be willing to do so. We turn to consideration of the Justices' contentions.

Case or Controversy. The return of the Chief Justice and the Associate Justices states that the correspondence and communications of petitioner with the Justices were not spread upon the records of the Supreme Court of Illinois and that under the law of Illinois this petition for admission to the bar does not constitute a case or controversy or a judicial proceeding but is a mere application for appointment as an officer of the court.[5] We of course accept this authoritative commentary upon the law of Illinois as establishing for that state the non-judicial character of an application for admission to the bar.[6] We take it that the law of Illinois treats the action of the Su-

[5] Other courts reason to the contrary result. *Ex parte Secombe,* 19 How. 9, 15; *Ex parte Garland,* 4 Wall. 333; *Randall* v. *Brigham,* 7 Wall. 523, 535; *In the Matter of Cooper,* 22 N. Y. 67; *Ex parte Cashin,* 128 Miss. 224, 232, 90 So. 850.

[6] Illinois considers that the power and jurisdiction of its Supreme Court with respect to the admission of attorneys are inherent in the judiciary under the constitution of the state, which provides, Article III, for the traditional distribution of the powers of government. Smith-Hurd Illinois Anno. Statutes, Constitution, p. 394; *In re Day,* 181 Ill. 73, 82, 54 N. E. 646. Attorneys are officers of the court, answerable to it for their conduct. *People* v. *Peoples Stock Yards State Bank,* 344 Ill. 462, 470, 176 N. E. 901. The act of admission is an exercise of judicial power, *id.* 470, a judgment, *In re Day,* at p. 97,

preme Court on this petition as a ministerial act which is performed by virtue of the judicial power, such as the appointment of a clerk or bailiff or the specification of the requirements of eligibility or the course of study for applicants for admission to the bar, rather than a judicial proceeding.

For the purpose of determining whether the action of the Supreme Court of Illinois in denying Summers' petition for an order for admission to practice law in Illinois is a judgment in a judicial proceeding which involves a case or controversy reviewable in this Court under Article III, § 2, Cl. 1, of the Constitution of the United States,[7] we must for ourselves appraise the circumstances of the refusal. *Nashville, C. & St. L. R. Co.* v. *Wallace,* 288 U. S. 249, 259. Cf. *Bridges* v. *California,* 314 U. S. 252, 259-60; *Nixon* v. *Condon,* 286 U. S. 73, 88; *First National Bank* v. *Hartford,* 273 U. S. 548, 552; *Truax* v. *Corrigan,* 257 U. S. 312, 324.

A case arises, within the meaning of the Constitution, when any question respecting the Constitution, treaties

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even though it is not considered a judicial proceeding. In the exercise of its judicial power over the bar, the Supreme Court of Illinois has adopted rules for admission to practice before the courts of that state which permit the admission by the Supreme Court after satisfactory examination by the Board of Law Examiners which includes a certification by a Committee on Character and Fitness as to the applicant's character and moral fitness. Illinois Revised Statutes 1943, c. 110, § 259.58.

[7] Constitution, Art. III, § 2, cl. 1: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

or laws of the United States has assumed "such a form that the judicial power is capable of acting on it." *Osborn* v. *Bank*, 9 Wheat. 738, 819. The Court was then considering the power of the bank to sue in the federal courts. A declaration on rights as they stand must be sought, not on rights which may arise in the future, *Prentis* v. *Atlantic Coast Line,* 211 U. S. 210, 226, and there must be an actual controversy over an issue, not a desire for an abstract declaration of the law. *Muskrat* v. *United States,* 219 U. S. 346, 361; *Fairchild* v. *Hughes,* 258 U. S. 126, 129. The form of the proceeding is not significant. It is the nature and effect which is controlling. *Nashville, C. & St. L. R. Co.* v. *Wallace,* 288 U. S. 249, 259.

The brief for the Justices raises the question as to who are the adversary parties. The petition in the state court was entitled, "Clyde Wilson Summers, Petitioner, v. Committee on Character and Fitness for Third Appellate District, Respondent." The prayer sought relief against those named as respondents. The record does not show that any process issued or that any appearance was made. Our rule on the petition for certiorari required the Supreme Court of Illinois to show cause why a record should not be certified and the writ of certiorari granted. The return was by the Justices, not by the Court. The Supreme Court of Illinois, however, concluded that the "report of the Committee on Character and Fitness should be sustained." Thus it considered the petition on its merits. While no entry was placed by the Clerk in the file, on a docket, or in a judgment roll, the Court took cognizance of the petition and passed an order which is validated by the signature of the presiding officer.[8] Where relief is thus sought in a state court against the action of a com-

[8] The act of adjudging to which we have referred is contained in a letter addressed to petitioner, which reads as follows:

"Your petition to be admitted to the bar, notwithstanding the unfavorable report of the Committee on Character and Fitness for the

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mittee, appointed to advise the court, and the court takes cognizance of the complaint without requiring the appearance of the committee or its members, we think the consideration of the petition by the Supreme Court, the body which has authority itself by its own act to give the relief sought, makes the proceeding adversary in the sense of a true case or controversy.

A claim of a present right to admission to the bar of a state and a denial of that right is a controversy. When the claim is made in a state court and a denial of the right is

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Third Appellate Court District, has received the consideration of the Court.

"I am directed to advise you that the Court is of the opinion that the report of the Committee on Character and Fitness should be sustained.

"Yours very truly, June C. Smith, Chief Justice."

The letter was certified by the Clerk of the Supreme Court of Illinois under its seal as "filed in this office ——— in a certain cause entitled in this Court. Non Record No. 462. In Re Clyde Wilson Summers."

Later another letter was written in regard to the admission which reads as follows:

"March 22, 1944.

"Mr. Francis Heisler, Attorney at Law, 77 West Washington Street,
"Suite 1324, Chicago 2, Illinois.

"In re: Clyde Wilson Summers.

"Dear Sir:

"Your petition on behalf of Clyde Wilson Summers to reconsider the prior action of the Court sustaining the report of the Committee on Character and Fitness for the Third Appellate Court District, has had the consideration of the Court.

"I am directed to advise you that the Court declines to further consider its former action in this matter.

"Yours very truly, June C. Smith, Chief Justice."

By stipulation of petitioner and the Justices, the Clerk prepared a supplemental record in this cause which includes the following: (1) a transcript of the proceedings before the Character Committee; (2) the letter of March 22, 1944; (3) a certificate that the transcript is the original and the letter a document of the Supreme Court of Illinois.

made by judicial order, it is a case which may be reviewed under Article III of the Constitution when federal questions are raised and proper steps taken to that end, in this Court.[9]

Disqualification Under Illinois Constitution. The Justices justify their refusal to admit petitioner to practice before the courts of Illinois on the ground of petitioner's inability to take in good faith the required oath to support the Constitution of Illinois. His inability to take such an oath, the Justices submit, shows that the Committee on Character and Fitness properly refused to certify to his moral character and moral fitness to be an officer of the Court, charged with the administration of justice under the Illinois law. His good citizenship, they think, judged by the standards required for practicing law in Illinois, is not satisfactorily shown.[10] A conscientious belief in non-

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[9] In *Bradwell* v. *State,* 16 Wall. 130, this Court took cognizance of a writ of error to an order of the Supreme Court of Illinois which denied a motion of Mrs. Bradwell for admission to the bar of Illinois. The proceeding was entitled by the Supreme Court of Illinois, "In the matter of the application of Mrs. Myra Bradwell for a license to practice as an attorney-at-law." There was an opinion. A writ of error under the Illinois title was issued to bring up the case. The objection to Mrs. Bradwell's admission was on the ground of her sex. As no question was raised as to the jurisdiction of this Court under Article III of the Constitution, the case is of little, if any, value as a precedent on that point. *Arant* v. *Lane,* 245 U. S. 166, 170; *United States* v. *More,* 3 Cranch 159, 172.

[10] Section IX (2) of the Rules for Admission to the Bar reads as follows:

"Before admission to the Bar, each applicant shall be passed upon by the Committee in his district as to his character and moral fitness. He shall furnish the Committee with an affidavit in such form as the Board of Law Examiners shall prescribe concerning his history and environments, together with the affidavits of at least three reputable persons personally acquainted with him residing in the county in which the applicant resides, each testifying that the applicant is known to the affiant to be of good moral character and general fitness to practice law, setting forth in detail the facts upon which such

violence to the extent that the believer will not use force to prevent wrong, no matter how aggravated, and so cannot swear in good faith to support the Illinois Constitution, the Justices contend, must disqualify such a believer for admission.

Petitioner appraises the denial of admission from the viewpoint of a religionist. He said in his petition:

"The so-called 'misconduct' for which petitioner could be reproached for is his taking the New Testament too seriously. Instead of merely reading or preaching the Sermon on the Mount, he tries to practice it. The only fault of the petitioner consists in his attempt to act as a good Christian in accordance with his interpretation of the Bible, and according to the dictates of his conscience. We respectfully submit that the profession of law does not shut its gates to persons who have qualified in all other respects even when they follow in the footsteps of that Great Teacher of mankind who delivered the Sermon on the Mount. We respectfully submit that under our Constitutional guarantees even good Christians who have met all the requirements for the admission to the bar may be admitted to practice law."

Thus a court created to administer the laws of Illinois as it understands them, and charged particularly with the protection of justice in the courts of Illinois through supervision of admissions to the bar, found itself faced with the dilemma of excluding an applicant whom it deemed disqualified for the responsibilities of the profession of law or of admitting the applicant because of its deeply rooted tradition in freedom of belief. The responsibility for choice as to the personnel of its bar rests

knowledge is based. Each applicant shall appear before the Committee of his district or some member thereof and shall furnish the Committee such evidence of his moral character and good citizenship as in the opinion of the Committee would justify his admission to the Bar." Ill. Rev. Stat. 1943, c. 110, § 259.58.

with Illinois. Only a decision which violated a federal right secured by the Fourteenth Amendment would authorize our intervention. It is said that the action of the Supreme Court of Illinois is contrary to the principles of that portion of the First Amendment which guarantees the free exercise of religion. Of course, under our Constitutional system, men could not be excluded from the practice of law, or indeed from following any other calling, simply because they belong to any of our religious groups, whether Protestant, Catholic, Quaker or Jewish, assuming it conceivable that any state of the Union would draw such a religious line. We cannot say that any such purpose to discriminate motivated the action of the Illinois Supreme Court.

The sincerity of petitioner's beliefs are not questioned. He has been classified as a conscientious objector under the Selective Training and Service Act of 1940, 54 Stat. 885, as amended. Without detailing petitioner's testimony before the Committee or his subsequent statements in the record, his position may be compendiously stated as one of non-violence. Petitioner will not serve in the armed forces. While he recognizes a difference between the military and police forces, he would not act in the latter to coerce threatened violations. Petitioner would not use force to meet aggressions against himself or his family, no matter how aggravated or whether or not carrying a danger of bodily harm to himself or others. He is a believer in passive resistance. We need to consider only his attitude toward service in the armed forces.

Illinois has constitutional provisions which require service in the militia in time of war of men of petitioner's age group.[11] The return of the Justices alleges that petitioner has not made any showing that he would serve not-

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[11] "The militia of the state of Illinois shall consist of all able-bodied male persons resident in the state, between the ages of eighteen and forty-five, except such persons as now are, or hereafter may be, ex-

withstanding his conscientious objections. This allegation is undenied in the record and unchallenged by brief. We accept the allegation as to unwillingness to serve in the militia as established. While under § 5 (g) of the Selective Training and Service Act, *supra,* conscientious objectors to participation in war in any form now are permitted to do non-war work of national importance, this is by grace of Congressional recognition of their beliefs. *Hamilton* v. *Regents,* 293 U. S. 245, 261–65, and cases cited. The Act may be repealed. No similar exemption during war exists under Illinois law. The *Hamilton* decision was made in 1934, in time of peace.[12] This decision as to the powers of the state government over military training is applicable to the power of Illinois to require military service from her citizens.

The United States does not admit to citizenship the alien who refuses to pledge military service. *United States* v. *Schwimmer,* 279 U. S. 644; *United States* v. *Macintosh,* 283 U. S. 605. Even the powerful dissents which emphasized the deep cleavage in this Court on the issue of ad-

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empted by the laws of the United States, or of this state." (Constitution of Illinois, Art. XII, § 1, Ill. Rev. Stat. 1943.)

"No person having conscientious scruples against bearing arms shall be compelled to do militia duty in time of peace: *Provided,* such person shall pay an equivalent for such exemption." (Constitution of Illinois, Art. XII, § 6, Ill. Rev. Stat. 1943.)

[12] California imposed instruction in military tactics on male students in the University of California. Some students sought exemption from this training on the ground that such training was inconsistent with their religious beliefs. This Court denied them any such exemption based on the due process clause of the federal Constitution. The opinion states, at pp. 262–63:

"Government, federal and state, each in its own sphere owes a duty to the people within its jurisdiction to preserve itself in adequate strength to maintain peace and order and to assure the just enforcement of law. And every citizen owes the reciprocal duty, according to his capacity, to support and defend government against all enemies. *Selective Draft Law Cases, supra,* p. 378. *Minor* v. *Happersett,* 21 Wall. 162, 166."

mission to citizenship did not challenge the right of Congress to require military service from every able-bodied man. 279 U. S. at 653; 283 U. S. at 632. It is impossible for us to conclude that the insistence of Illinois that an officer who is charged with the administration of justice must take an oath to support the Constitution of Illinois and Illinois' interpretation of that oath to require a willingness to perform military service violates the principles of religious freedom which the Fourteenth Amendment secures against state action, when a like interpretation of a similar oath as to the Federal Constitution bars an alien from national citizenship.[13]

Affirmed.

MR. JUSTICE BLACK, dissenting.

The State of Illinois has denied the petitioner the right to practice his profession and to earn his living as a lawyer. It has denied him a license on the ground that his present religious beliefs disqualify him for membership in the legal profession. The question is, therefore, whether a state which requires a license as a prerequisite to practicing law can deny an applicant a license solely because of his deeply-rooted religious convictions. The fact that petitioner measures up to every other requirement for admission to

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[13] *United States* v. *Macintosh,* 283 U. S. 605, 625–26:

"If the attitude of this claimant, as shown by his statements and the inferences properly to be deduced from them, be held immaterial to the question of his fitness for admission to citizenship, where shall the line be drawn? Upon what ground of distinction may we hereafter reject another applicant who shall express his willingness to respect any particular principle of the Constitution or obey any future statute only upon the condition that he shall entertain the opinion that it is morally justified? The applicant's attitude, in effect, is a refusal to take the oath of allegiance except in an altered form. The qualifications upon which he insists, it is true, are made by parol and not by way of written amendment to the oath; but the substance is the same."

the Bar set by the State demonstrates beyond doubt that the only reason for his rejection was his religious beliefs.

The State does not deny that petitioner possesses the following qualifications:

He is honest, moral, and intelligent, has had a college and a law school education. He has been a law professor and fully measures up to the high standards of legal knowledge Illinois has set as a prerequisite to admission to practice law in that State. He has never been convicted for, or charged with, a violation of law. That he would serve his clients faithfully and efficiently if admitted to practice is not denied. His ideals of what a lawyer should be indicate that his activities would not reflect discredit upon the bar, that he would strive to make the legal system a more effective instrument of justice. Because he thinks that "Lawsuits do not bring love and brotherliness, they just create antagonisms," he would, as a lawyer, exert himself to adjust controversies out of court, but would vigorously press his client's cause in court if efforts to adjust failed. Explaining to his examiners some of the reasons why he wanted to be a lawyer, he told them: "I think there is a lot of work to be done in the law. . . . I think the law has a place to see to it that every man has a chance to eat and a chance to live equally. I think the law has a place where people can go and get justice done for themselves without paying too much, for the bulk of people that are too poor." No one contends that such a vision of the law in action is either illegal or reprehensible.

The petitioner's disqualifying religious beliefs stem chiefly from a study of the New Testament and a literal acceptance of the teachings of Christ as he understands them. Those beliefs are these:

He is opposed to the use of force for either offensive or defensive purposes. The taking of human life under any circumstances he believes to be against the Law of God and contrary to the best interests of man. He would if he could, he told his examiners, obey to the letter

these precepts of Christ: "Love your Enemies; Do good to those that hate you; Even though your enemy strike you on your right cheek, turn to him your left cheek also."[1] The record of his evidence before us bears convincing marks of the deep sincerity of his convictions, and counsel for Illinois with commendable candor does not question the genuineness of his professions.

I cannot believe that a state statute would be consistent with our constitutional guarantee of freedom of religion if it specifically denied the right to practice law to all members of one of our great religious groups, Protestant, Catholic, or Jewish. Yet the Quakers have had a long and honorable part in the growth of our nation, and an amicus curiae brief filed in their behalf informs us that under the test applied to this petitioner, not one of them if true to the tenets of their faith could qualify for the bar in Illinois. And it is obvious that the same disqualification would exist as to every conscientious objector to the use of force, even though the Congress of the United States should continue its practice of absolving them from military service. The conclusion seems to me inescapable that if Illinois can bar this petitioner from the practice of law it can bar every person from every public occupation solely because he believes in non-resistance rather than in force. For a lawyer is no more subject to call for military duty than a plumber, a highway worker, a Secretary of State, or a prison chaplain.

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[1] The quotations are the petitioner's paraphrase of the King James translation of Verses 38, 39 and 44 of St. Matthew, Chapter 5, which read as follows:

"Ye have heard that it hath been said, An eye for an eye, and a tooth for a tooth:

"But I say unto you, That ye resist not evil: but whosoever shall smite thee on thy right cheek, turn to him the other also . . .

"But I say unto you, Love your enemies, bless them that curse you, do good to them that hate you, and pray for them which despitefully use you, and persecute you . . ."

It may be, as many people think, that Christ's Gospel of love and submission is not suited to a world in which men still fight and kill one another. But I am not ready to say that a mere profession of belief in that Gospel is a sufficient reason to keep otherwise well qualified men out of the legal profession, or to drive law-abiding lawyers of that belief out of the profession, which would be the next logical development.

Nor am I willing to say that such a belief can be penalized through the circuitous method of prescribing an oath, and then barring an applicant on the ground that his present belief might later prompt him to do or refrain from doing something that might violate that oath. Test oaths, designed to impose civil disabilities upon men for their beliefs rather than for unlawful conduct, were an abomination to the founders of this nation. This feeling was made manifest in Article VI of the Constitution which provides that "no religious test shall ever be required as a Qualification to any Office or public Trust under the United States." *Cummings* v. *Missouri,* 4 Wall. 277; *Ex parte Garland,* 4 Wall. 333.

The state's denial of petitioner's application to practice law resolves itself into a holding that it is lawfully required that all lawyers take an oath to support the state constitution and that petitioner's religious convictions against the use of force make it impossible for him to observe that oath. The petitioner denies this and is willing to take the oath. The particular constitutional provision involved authorizes the legislature to draft Illinois citizens from 18 to 45 years of age for militia service. It can be assumed that the State of Illinois has the constitutional power to draft conscientious objectors for war duty and to punish them for a refusal to serve as soldiers,—powers which this Court held the United States possesses in *United States* v. *Schwimmer,* 279 U. S. 644, and *United States* v. *Macintosh,* 283 U. S. 605. But that is not to say

that Illinois could constitutionally use the test oath it did in this case. In the *Schwimmer* and *Macintosh* cases aliens were barred from naturalization because their then religious beliefs would bar them from bearing arms to defend the country. Dissents in both cases rested in part on the premise that religious tests are incompatible with our constitutional guarantee of freedom of thought and religion. In the *Schwimmer* case dissent, Mr. Justice Holmes said that "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate. I think that we should adhere to that principle with regard to admission into, as well as to life within this country." pp. 654–655. In the *Macintosh* case dissent, Mr. Chief Justice Hughes said, "To conclude that the general oath of office is to be interpreted as disregarding the religious scruples of these citizens and as disqualifying them for office because they could not take the oath with such an interpretation would, I believe, be generally regarded as contrary not only to the specific intent of the Congress but as repugnant to the fundamental principle of representative government." p. 632. I agree with the constitutional philosophy underlying the dissents of Mr. Justice Holmes and Mr. Chief Justice Hughes.

The Illinois Constitution itself prohibits the draft of conscientious objectors except in time of war and also excepts from militia duty persons who are "exempted by the laws of the United States." It has not drafted men into the militia since 1864, and if it ever should again, no one can say that it will not, as has the Congress of the United States, exempt men who honestly entertain the views that this petitioner does. Thus the probability that Illinois would ever call the petitioner to serve in a war has little more reality than an imaginary quantity in mathematics.

I cannot agree that a state can lawfully bar from a semi-public position a well-qualified man of good character solely because he entertains a religious belief which might prompt him at some time in the future to violate a law which has not yet been and may never be enacted. Under our Constitution men are punished for what they do or fail to do and not for what they think and believe. Freedom to think, to believe, and to worship, has too exalted a position in our country to be penalized on such an illusory basis. *West Virginia Board of Education* v. *Barnette,* 319 U. S. 624, 643–646.

I would reverse the decision of the State Supreme Court.

MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, and MR. JUSTICE RUTLEDGE concur in this opinion.

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10 EAST 40TH STREET BUILDING, INC. *v.* CALLUS ET AL.

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

No. 820. Argued April 6, 1945.—Decided June 11, 1945.

1. Maintenance employees of a typical metropolitan office building, operated as an independent enterprise, which is used and to be used for offices by every variety of tenants, including some producers of goods for commerce, *held* not to have such a close and immediate tie with the process of production as to be deemed engaged in an "occupation necessary to the production" of goods for commerce, within the meaning of § 3 (j) of the Fair Labor Standards Act, and therefore not covered by the Act. P. 583.
2. *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, *Borden Co.* v. *Borella, post,* p. 679, and this case differentiated. P. 580.

146 F. 2d 438, reversed.

CERTIORARI, 324 U. S. 833, to review the reversal of a judgment, 51 F. Supp. 528, dismissing the complaint in a suit under § 16 (b) of the Fair Labor Standards Act to recover amounts alleged to be due for overtime.

Mr. Joseph M. Proskauer, with whom *Mr. Harold H. Levin* was on the brief, for petitioner.

Mr. Monroe Goldwater, with whom *Messrs. Aaron Benenson* and *James L. Goldwater* were on the brief, for respondents.

Miss Bessie Margolin, with whom *Solicitor General Fahy, Messrs. Chester T. Lane* and *Douglas B. Maggs* were on the brief, for the Administrator of the Wage and Hour Division, United States Department of Labor, as *amicus curiae,* urging affirmance.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The Fair Labor Standards Act of 1938 regulates wages and hours not only of employees who are "engaged in commerce" but also those engaged "in the production of goods for commerce." Sections 6, 7, 52 Stat. 1060, 1062–63, 29 U. S. C. §§ 206, 207. For the purposes of that Act "an employee shall be deemed to have been engaged in the production of goods if such employee was employed . . . in any process or occupation necessary to the production thereof, in any State." § 3 (j). When these provisions first came here we made it abundantly clear that their enforcement would involve the courts in the empiric process of drawing lines from case to case, and inevitably nice lines. *Kirschbaum Co.* v. *Walling,* 316 U. S. 517. And this for two reasons. In enacting this statute Congress did not see fit, as it did in other regulatory measures, *e. g.,* the Interstate Commerce Act and the National Labor Relations Act, to exhaust its constitutional power over commerce. And "Unlike the Interstate Commerce Act and the National Labor Relations Act and other legislation, the Fair Labor Standards Act puts upon the courts the independent responsibility of applying *ad hoc* the

general terms of the statute to an infinite variety of complicated industrial situations." *Kirschbaum Co.* v. *Walling, supra,* at 523. Thus, Congress withheld from the courts the aid of constitutional criteria, compare, *e. g., Currin* v. *Wallace,* 306 U. S. 1; *Wickard* v. *Filburn,* 317 U. S. 111; *Polish Alliance* v. *Labor Board,* 322 U. S. 643, as well as the benefit of a prior judgment, on vexing and ambiguous facts, by an expert administrative agency. Compare, *e. g., Labor Board* v. *Fruehauf Co.,* 301 U. S. 49; *Gray* v. *Powell,* 314 U. S. 402, 412.

The Act has produced a considerable volume of litigation and has inevitably given rise to judicial conflicts and divisions. The lower courts, and only in a lesser measure this Court, have been plagued with problems in connection with employees of buildings occupied by those having at least some relation to goods that eventually find their way into interstate commerce.

In *Kirschbaum Co.* v. *Walling, supra,* we were concerned with maintenance employees of buildings concededly devoted to manufacture for commerce. In *Borden Co.* v. *Borella, post,* p. 679, the Fair Labor Standards Act was invoked on behalf of maintenance employees of a building owned by an interstate producer and predominantly occupied for its offices. Recognizing that the question in every case is "whether the particular situation is within the regulated area," we concluded that the employees of the buildings in the *Kirschbaum* case "had such a close and immediate tie with the process of production" carried on by the lessees as to come within the Act. The *Borden* case involved Borden employees who, if they had been under the same roof where the physical handling of the goods took place, could hardly, without drawing gossamer and not merely nice lines, be deemed not to be engaged in an "occupation necessary to the production of goods" as described by § 3 (j). To differentiate, in the incidence of the Fair Labor Standards Act, between main-

tenance employees who worked in the building where the business of the manufacture of milk products goes on and employees pursuing the same occupation for the Borden enterprise in an office separate from the manufacturing building, is to make too much turn on the accident of the division of the whole industrial process. The case immediately before us presents still a third situation differing both from *Kirschbaum* and *Borden.*

The facts are these. Petitioner owns and manages a 48-story New York office building. The offices are leased to more than a hundred tenants pursuing a great variety of enterprises including executive and sales offices of manufacturing and mining concerns, sales agencies representing such concerns, engineering and construction firms, advertising and publicity agencies, law firms, investment and credit organizations and the United States Employment Service. The distribution of occupancy in relation to the ultimate enterprises of the different groups of tenants was the subject of conflicting testimony and interpretation, but in our view does not call for particularization. Indisputably, the building is devoted exclusively to offices, and no manufacturing is carried on within it. The respondents are maintenance employees of the building, elevator starters and operators, window cleaners, watchmen and the like. They brought this suit under § 16 (b) of the Fair Labor Standards Act for claims of overtime payment to which they are entitled if their occupations be deemed "necessary to the production" of goods for commerce. Obviously they are not "engaged in commerce." The District Court dismissed the suit. 51 F. Supp. 528. The Circuit Court of Appeals reversed. 146 F. 2d 438. By a meticulous calculation, it found that the executive offices of manufacturing and mining concerns, sales agencies representing such concerns, and publicity concerns were engaged in the production of goods for interstate commerce, and, since the offices of these concerns occupied 42% of the rentable

area and 48% of the rented area, the maintenance employees of the owners of the building are engaged in occupations "necessary to the production" of goods for commerce. Conflict between this result and that reached by other circuits led us to bring the case here. 324 U.S. 833.[1]

The series of cases in which we have had to decide when employees are engaged in an "occupation necessary to the production" of goods for commerce has settled at least some matters. Merely because an occupation involves a function not indispensable to the production of goods, in the sense that it can be done without, does not exclude it from the scope of the Fair Labor Standards Act. Conversely, merely because an occupation is indispensable, in the sense of being included in the long chain of causation which brings about so complicated a result as finished goods, does not bring it within the scope of the Fair Labor Standards Act. See *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564; *Walton* v. *Southern Package Corp.*, 320 U. S. 540; *Armour & Co.* v. *Wantock*, 323 U. S. 126; *Skidmore* v. *Swift & Co.*, 323 U. S. 134. In giving a fair application to § 3 (j), courts must remember that the "necessary" in the phrase "necessary to the production" of goods for commerce "is colored by the context not only of the terms of this legislation but of its implications in the relation between state and national authority." *Kirschbaum Co.* v. *Walling, supra,* at 525. For as was pointed out in *Walling* v. *Jacksonville Paper Co., supra,* at 570, we cannot "be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states." We must be alert, therefore, not to absorb by adjudication essentially local

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[1] See, e. g., *Johnson* v. *Dallas Downtown Development Co.*, 132 F. 2d 287; *Cochran* v. *Florida Nat. Bldg. Corp.*, 134 F. 2d 615; *Tate* v. *Empire Bldg. Corp.*, 135 F. 2d 743; *Johnson* v. *Masonic Bldg. Corp.*, 138 F. 2d 817.

activities that Congress did not see fit to take over by legislation.

Renting office space in a building exclusively set aside for an unrestricted variety of office work spontaneously satisfies the common understanding of what is local business and makes the employees of such a building engaged in local business. Mere separation of an occupation from the physical process of production does not preclude application of the Fair Labor Standards Act. But remoteness of a particular occupation from the physical process is a relevant factor in drawing the line. Running an office building as an entirely independent enterprise is too many steps removed from the physical process of the production of goods. Such remoteness is insulated from the Fair Labor Standards Act by those considerations pertinent to the federal system which led Congress not to sweep predominantly local situations within the confines of the Act. To assign the maintenance men of such an office building to the productive process because some proportion of the offices in the building may, for the time being, be offices of manufacturing enterprises is to indulge in an analysis too attenuated for appropriate regard to the regulatory power of the States which Congress saw fit to reserve to them. Dialectic inconsistencies do not weaken the validity of practical adjustments, as between the State and federal authority, when Congress has cast the duty of making them upon the courts. Our problem is not an exercise in scholastic logic.

The differences between employees of a building owned by occupants producing therein goods for commerce, and the employees of a building intended for tenants who produce such goods therein, and the employees of the office building of a large interstate producer, are too thin for the practicalities of adjudication. But an office building exclusively devoted to the purpose of housing all the usual miscellany of offices has many differences in the practical

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affairs of life from a manufacturing building, or the office building of a manufacturer. And the differences are too important in the setting of the Fair Labor Standards Act not to be recognized by the courts.

We have heretofore tried to indicate the nature of the nexus between employees who, though not themselves engaged in commerce, are engaged in occupations necessary for the production of goods for commerce by describing the necessary work that brings the occupation within the scope of the Act as work that had "a close and immediate tie with the process of production." *Kirschbaum Co.* v. *Walling, supra,* at 525. Doubtless more felicitous adjectives could be chosen, but the attempt to achieve a form of words that could avoid an exercise of judgment that a particular occupation is more in the nature of local business than not, is merely to be content with formulas of illusory certainty.

On the terms in which Congress drew the legislation we cannot escape the duty of drawing lines. And when lines have to be drawn they are bound to appear arbitrary when judged solely by bordering cases. To speak of drawing lines in adjudication is to express figuratively the task of keeping in mind the considerations relevant to a problem and the duty of coming down on the side of the considerations having controlling weight. Lines are not the worse for being narrow if they are drawn on rational considerations. It is a distinction appropriate to the subject matter to hold that where occupations form part of a distinctive enterprise, such as the enterprise of running an office building, they are properly to be treated as distinct from those necessary parts of a commercial process which alone, with due regard to local regulations, Congress dealt with in the Fair Labor Standards Act. Of course an argument can be made on the other side. That is what is meant by a question of degree, as is the question before us. But for drawing the figurative line the basis must be some-

thing practically relevant to the problem in hand. We believe that is true of the line drawn in this case.

Judgment reversed.

MR. CHIEF JUSTICE STONE.

The views I expressed in my dissent in *Borden Co.* v. *Borella, post,* p. 679, would, if accepted, control the decision in this case. As those views have been rejected by the Court, I join in the Court's opinion in this case.

MR. JUSTICE MURPHY, dissenting.

A proper understanding of the nature of the activities carried on in petitioner's 48-story office building in New York City leads to the inevitable conclusion that the respondent maintenance employees, like those in *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, and in *Borden Co.* v. *Borella, post,* p. 679, are engaged in occupations "necessary to the production of goods for commerce" and hence are entitled to the benefits of the Fair Labor Standards Act of 1938.

(1) Approximately 26% of the rentable area of the building is occupied by the executive offices of manufacturing and mining concerns which are concededly engaged in the production of goods for commerce. Corporate policies are formed and directed from these offices. Most of them purchase raw materials for use in the physical processes of manufacturing. They keep in constant and close contact with the factories, supervising all of the manufacturing activities. Some of these offices draft designs and specifications for the articles produced in the factories. Business and sales departments located in these offices do work in connection with the distribution of these products. One office even handles parts for the machines manufactured by the company, doing repair work on the parts and packing and shipping them to out-of-state customers.

The case in this respect is indistinguishable from the facts in the *Borden* case. Here, as in the *Borden* case, the officers and employees working in these offices are part of the coordinated productive pattern of modern industry. The fact that none of the physical processes of manufacturing occurs in the same building is immaterial. Production requires central planning, control, supervision, purchase of raw materials, designing of products, sales promotion and the like as well as the physical, manual processes of manufacturing. These various central offices, then, are "part of an integrated effort for the production of goods," *Armour & Co.* v. *Wantock,* 323 U. S. 126, 130. And since the maintenance employees stand in the same relation to this productive process as did the employees in the *Kirschbaum* case, it follows that they are engaged in occupations "necessary to the production of goods for commerce."

The *Kirschbaum* case also made it clear that the provisions of the Act "expressly make its application dependent upon the character of the employees' activities." 316 U. S. at 524. Hence it is immaterial that the owner of the building which employs the respondent maintenance employees is not shown to have been engaged in the production of goods for commerce. As in the *Kirschbaum* case, it is enough if the employees are necessary to the production of goods by tenants occupying the building in which they work.

(2) Approximately 6.5% of the rentable area of the building is occupied by concerns engaged in writing and preparing mimeographed, photographic and printed matter which is shipped in interstate commerce. One company produces between 15,000 and 20,000 pages of mimeographed materials per week, 90% of which is sent outside the state. Another tenant produces 60 magazines having national circulations. Other concerns produce large quantities of pamphlets, photographs, magazines and advertising matter for interstate shipment.

Since telegraphic messages are "goods" within the meaning of the Act, *Western Union Co.* v. *Lenroot,* 323 U. S. 490, 502–503, it would seem clear that these magazines, pamphlets, etc. which are prepared in petitioner's office building are likewise "goods." And since the term "produced" includes "every kind of incidental operation preparatory to putting goods into the stream of commerce," *ibid.,* 503, the writing and preparation of these materials constitutes "production of goods" for interstate commerce. Here again the respondent maintenance employees are related to production in the same way as were the employees in the *Kirschbaum* case, thus making it clear that they are covered by the Act from this standpoint.

It is unnecessary to describe the activities of the other tenants, although it is conceded that about 58% of the total rentable area is occupied by concerns not engaged in the production of goods for commerce. It is sufficient that approximately 32.5% of the rentable area is devoted to production. The Administrator of the Wage and Hour Division of the Department of Labor has stated that he will take no enforcement action "with respect to maintenance employees in buildings in which less than 20 percent of the space is occupied by firms engaged there or elsewhere in the production of goods for commerce." Wage and Hour Division Release, November 19, 1943, P. R.–19 (rev.). Whether 20% occupancy by such firms is a reasonable minimum is not in issue here. Clearly a 32.5% occupancy is so substantial as to remove any doubt that the maintenance employees devote a large part of their time to activities necessary to the production of goods for commerce. Hence they are covered by the Act.

The starting point in cases of this nature is not to decide whether the activities carried on in the office building in question satisfy some nebulous "common understanding of what is local business." The crucial problem, rather, is to determine whether such activities constitute

an integral part of the productive process. Once it is clear that the activities are part of the process of production of goods for interstate commerce the interstate character of the activities becomes obvious; and it follows that occupations necessary to those activities partake of their interstate flavor. Neither attenuated analysis nor scholastic logic is necessary to understand the scope and coordination of the modern productive pattern and the integral part played by those who manage and direct the physical processes of production. To apply the Act in light of elementary economic facts is not beyond the ability of judges or beyond the intention of Congress.

Congress plainly intended "to leave local business to the protection of the states," *Walling* v. *Jacksonville Paper Co.,* 317 U. S. 564, 570, when it enacted this statute. But there is no indication that it intended to divide the process of producing goods for interstate commerce into interstate and local segments, applying the statute only to the former. And when Congress said that employees "necessary to the production" of goods for commerce were to be included within the Act, it meant just that, without limitation to those who were necessary only to the physical manufacturing aspects of production. Under such circumstances it is our duty to recognize economic reality in interpreting and applying the mandate of the people.

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

NEBRASKA v. WYOMING ET AL.

NO. 6, ORIGINAL. BILL IN EQUITY.

Argued March 5, 6, 7, 1945.—Decided June 11, 1945.

1. In a proceeding within the original jurisdiction of this Court, brought by Nebraska against Wyoming, in which Colorado was impleaded as a defendant and the United States was granted leave to intervene, this Court makes an equitable apportionment between the States of the water of the North Platte River. Pp. 591, 610.
2. Colorado and Wyoming having the rule of priority of appropriation, and that rule being dominant in the Nebraska areas affected, the case is treated as involving appropriation rights in the three States. P. 599.
3. Since the dependable natural flow of the river during the irrigation season has long been over-appropriated, since the claims of the States to the water of the river are based not only on present uses but on projected additional uses as well, and since the claims to the water exceed the supply, there exists a conflict of interests of that character and dignity which makes the controversy a justiciable one within the original jurisdiction of this Court. *Wyoming* v. *Colorado,* 259 U. S. 419, followed. P. 610.
4. The water rights on which the North Platte Project and the Kendrick Project rest having been obtained in compliance with state law, it is unnecessary to determine what rights to unappropriated water of the river the United States may have. Nor is it important to the decree to be entered in this case that there may be unappropriated water to which the United States may in the future assert rights through the machinery of state law or otherwise. P. 611.

   Assuming *arguendo* that the United States did own all of the unappropriated water, the appropriations under state law were made to the individual landowners pursuant to the procedure which Congress provided in the Reclamation Act, and the rights so acquired are as definite and complete as if they were obtained by direct cession from the federal government. P. 615.
5. Allocation of the water rights here in question to the States, who represent their citizens *parens patriae* in this proceeding, in no wise interferes with the ownership and operation by the United States of its storage and power plants, works, and facilities. P. 616.
6. The difficulties of drafting and enforcing a decree apportioning the water of the river among the claimant States—where efforts at settlement have failed; a genuine controversy exists; and the grav-

ity and importance of the case are apparent—do not justify refusal by this Court to perform the important function entrusted to it by the Constitution. P. 616.

7. Equitable apportionment among appropriation States does not require a literal application of the priority rule. P. 618.

Although priority of appropriation is the guiding principle, other relevant factors include: physical and climatic conditions; the consumptive use of water in the several sections of the river; the character and rate of return flows; the extent of established uses; the availability of storage water; the practical effect of wasteful uses on downstream areas; the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former.

8. The decree of equitable apportionment to be entered in this case must deal with conditions as they exist at present and must be based on the dependable flow of the river which is not greater than the average condition which has prevailed since 1930. P. 620.

9. The decree of equitable apportionment which is entered apportions the natural flow of the river among the three States to the Tri-State Dam in Nebraska but not below it. Pp. 621, 654.

10. The United States is not given a separate allocation of water, since the water rights appropriated by the Secretary of the Interior were adjudicated to be in the individual landowners and since the United States as an appropriator of storage water is represented by the State of Wyoming. P. 629.

11. Storage water is not included in the apportionment, although it is taken into account in determining each State's equitable share of the natural flow. P. 639.

12. The Court retains jurisdiction of the suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter of the controversy. P. 655.

Bill in equity by Nebraska against Wyoming (in which Colorado was impleaded as a defendant and the United States was granted leave to intervene) seeking an equitable apportionment of the water of the North Platte River and an injunction restraining alleged wrongful diversions.

Mr. Paul F. Good, with whom *Walter R. Johnson,* Attorney General of Nebraska, and *John L. Riddell,* Assist-

ant Attorney General, were on the brief, for the State of Nebraska, complainant.

Mr. W. J. Wehrli, with whom *Louis J. O'Marr,* Attorney General of Wyoming, was on the brief, for the State of Wyoming, defendant.

Mr. Jean S. Breitenstein, with whom *H. Lawrence Hinkley,* Attorney General of Colorado, *Messrs. George J. Bailey, Thomas J. Warren, Gail L. Ireland* and *Clifford H. Stone* were on the brief, for the State of Colorado, impleaded defendant.

Mr. Frederic L. Kirgis, with whom *Solicitor General Fahy, Messrs. J. Edward Williams, Walter H. Williams* and *William J. Burke* were on the brief, for the United States, intervenor.

A brief was filed on behalf of the States of Arizona, California, Idaho, Kansas, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah and Vermont, as *amici curiae.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Nebraska brought this suit in 1934 against Wyoming, invoking our original jurisdiction under Article III, § 2 of the Constitution. 293 U. S. 523. Colorado was impleaded as a defendant. 296 U. S. 553. The United States was granted leave to intervene. 304 U. S. 545. Issues were joined. A Special Master, Honorable Michael J. Doherty, was appointed and hearings were held before him. The matter is before us on exceptions to his report.

I

The controversy pertains to the use for irrigation purposes of the water of the North Platte River, a non-navigable stream. Nebraska alleged that Wyoming and Colorado by diversions of water from the river for irrigation

purposes were violating the rule of priority of appropriation in force in the three States and depriving Nebraska of water to which she was equitably entitled. The prayer was for a determination of the equitable share of each State in the water and of the priorities of all appropriations in both States, and for an injunction restraining the alleged wrongful diversions. Wyoming denied the diversion or use of any water to which Nebraska was equitably entitled but joined in the prayer of Nebraska for an equitable apportionment. Colorado filed an answer, together with a cross-bill against Nebraska and Wyoming, which denied any use or threatened use of the water of the North Platte beyond her equitable share, and prayed for an equitable apportionment between the three States, excepting only the tributary waters of the South Platte and Laramie rivers.[1] At the conclusion of Nebraska's case and again after all the evidence was in, Colorado moved to dismiss the suit on the ground that the evidence was insufficient to sustain any judgment in favor of, or against, any party. Colorado argues here that there should be no affirmative relief against her and that she should be dismissed from the case.

The North Platte River rises in Northern Colorado in the mountainous region known as North Park.[2] It pro-

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[1] The waters of the South Platte and the Laramie were previously apportioned—the former between Colorado and Nebraska by compact (44 Stat. 195), the latter between Colorado and Wyoming by decree. *Wyoming* v. *Colorado*, 259 U. S. 496. Those apportionments are in no way affected by the decree in this case.

[2] Approximate length of the North Platte:

Colorado	70 miles
Wyoming	435 miles
Nebraska (to North Platte)	180 miles

Drainage area of the North Platte, exclusive of the Laramie River:

Colorado	1,630 sq. mi.	6%
Wyoming	17,540 sq. mi.	63%
Nebraska	8,730 sq. mi.	31%
Total	27,900 sq. mi.	

ceeds in a northerly direction on the east side of the Continental Divide, enters Wyoming west of Cheyenne, and continues in a northerly direction to the vicinity of Casper. There it turns east across the Great Plains and proceeds easterly and southerly into and across Nebraska. About 40 miles west of the Nebraska line it is joined by the Laramie River. At North Platte, Nebraska, it is joined by the South Platte, forming the Platte River. It empties into the Missouri River at Plattsmouth, near the western border of Iowa. In North Park it is a rapid mountain stream. In eastern Wyoming it gradually broadens out, losing velocity. In western and central Nebraska its channel ranges from 3,000 to 6,000 feet; it frequently divides into small channels; and in times of low water is lost in the deep sands of its bed. Here it is sometimes characterized as a river "two miles wide and one inch deep."

There are six natural sections of the river basin: (1) North Park, Colorado, or more accurately Jackson County; (2) Colorado-Wyoming line to the Pathfinder Reservoir located between Rawlins and Casper, Wyoming; (3) Pathfinder Reservoir to Whalen, Wyoming, which is 42 miles from the Nebraska line; (4) Whalen, Wyoming to the Tri-State Dam in Nebraska near the Wyoming-Nebraska line; (5) Tri-State Dam to the Kingsley Reservoir, west of Keystone, Nebraska; (6) Kingsley Reservoir to Grand Island, Nebraska.[3]

[3] The average annual contributions from 1895 to 1939 to the water of the North Platte were computed by the Special Master as follows:

North Park	635,100 acre feet
Wyoming state line to Pathfinder	1,059,240 acre feet
Pathfinder to Whalen	390,000 acre feet
Whalen to Tri-State Dam	281,940 acre feet
Tri-State Dam to Kingsley	1,027,890 acre feet
Kingsley to Grand Island	308,200 acre feet

By States the contributions were as follows:

Colorado	819,220 acre feet	21%
Wyoming	1,731,600 acre feet	45%
Nebraska	1,336,090 acre feet	34%

The river basin in Colorado and Wyoming is arid, irrigation being generally indispensable to agriculture. Western Nebraska is partly arid and partly semi-arid. Irrigation is indispensable to the kind of agriculture established there. Middle Nebraska is sub-humid. Some crops can be raised without irrigation. But the lack of irrigation would seriously limit diversification. Eastern Nebraska, beginning at Grand Island, is sufficiently humid so as not to justify irrigation.

Irrigation in the river basin began about 1865, when some projects were started in eastern Wyoming and western Nebraska. Between 1880 and 1890 irrigation began on a large scale. Until 1909 storage of water was negligible, irrigation being effected by direct diversions and use. Prior to 1909 the development in Colorado and Wyoming was relatively more rapid than in Nebraska. Since 1910 the acreage under irrigation in Colorado increased about 14 per cent, that of Wyoming 31 per cent, and that of Nebraska about 100 per cent.[4] The large increase in Nebraska is mainly attributable to the use of storage water from the Pathfinder Reservoir.[5]

The Pathfinder Reservoir is part of the "North Platte Project" which followed the adoption by Congress in 1902 of the Reclamation Act. 32 Stat. 388. Pathfinder was completed in 1913. It has a capacity of 1,045,000 acre

[4]

	Colorado	*Wyoming*	*Nebraska**	*Total*
1880	200	11, 000		11, 200
1890	44, 500	86, 000	15, 300	145, 800
1900	83, 500	169, 100	105, 690	358, 290
1910	113, 500	224, 500	192, 150	530, 150
1920	129, 140	265, 375	306, 930	701, 445
1930	130, 540	307, 105	371, 300	808, 945
1939	131, 810	325, 720	383, 355	840, 885

*Not including about 65,000 acres now irrigated from the Platte River between North Platte and Kearney, Neb.

[5] Of the 174,650 acre increase since 1910, 104,000 acres are North Platte Project lands.

feet, which is 79 per cent of the average annual run-off of the North Platte River at that point. This project includes an auxiliary channel reservoir called Guernsey, located above Whalen, Wyoming. Its capacity is 50,870 acre feet. The project also includes two small reservoirs in Nebraska—Lake Alice and Lake Minatare—having a capacity of 11,400 and 67,000 acre feet respectively. There are two main supply canals—Interstate and Fort Laramie—which take out from the North Platte at the Whalen diversion dam. The Interstate canal runs on the north side and the Fort Laramie on the south side of the river. Both extend far into Nebraska. Northport—a third canal—is located wholly in Nebraska. These canals and their laterals extend over 1,600 miles. The project also includes a drainage system and two hydroelectric power plants. The United States contracted with landowners or irrigation districts for use of the water—selling it, as contemplated by the Reclamation Act, so as to recoup the cost of the project which was about $19,000,000. It also entered into so-called Warren Act contracts pursuant to the Act known by that name (36 Stat. 925) which authorized the Secretary of the Interior to contract for the storage and delivery of any surplus water conserved by any reclamation project in excess of the requirements of the project.

We have mentioned the Interstate, Ft. Laramie, and Northport canals which are part of the North Platte Project, the first two of which take out at the Whalen diversion dam. About a mile east of the Wyoming-Nebraska line is the Tri-State Dam. Just above that dam in Nebraska are the headgates of three large Nebraska canals—Tri-State, Gering, and Northport. Water for the Northport is diverted through the Tri-State headgate, Northport physically being an extension of the Tri-State canal. Another Nebraska canal is the Ramshorn which also receives its supply through Tri-State. Just above the state line is the headgate of the Mitchell canal serving Nebraska land.

While these five canals are commonly referred to as the Nebraska State Line Canals, this opinion generally uses the term as excluding Northport which, as we have said, is a North Platte Project canal. There are also nine Wyoming private canals diverting below Whalen. One of these, French Canal, serves lands in both Wyoming and Nebraska. The section of the river from Whalen to the Tri-State Dam is the pivotal section of the entire river. In this short stretch of 40-odd miles is concentrated a demand for water as great as in the entire preceding 415 miles apart from the Kendrick project to which we will refer. We will return to a consideration of the problems of this pivotal section shortly.

The North Platte Project has greatly increased the water resources of the river available for irrigation. Unused and wasted water are stored and held over from one season to another. Moreover, the storage water has affected the water tables through saturation of the subsoil. This has increased the return flows available for rediversion and irrigation. The Special Master found that due largely to the influence of the North Platte Project and the application of storage water to lands in eastern Wyoming and western Nebraska the return flows increased from a negligible quantity in 1911 to 700,000 acre feet in 1927. While that amount sharply declined during the drought beginning in 1931, it still is substantial. Thus from 1931–1936 it amounted to 54,300 acre feet in the Whalen-Tri-State Dam section. And as we have already said, the great and disproportionate increase in acreage irrigated in Nebraska since 1910 as compared with the increase in Colorado and Wyoming is largely attributable to the North Platte Project. While the North Platte Project has increased the water resources, it has complicated the problem of water administration in Wyoming and Nebraska. It has necessitated a segregation of storage and natural flow. The storage plants and diversion works are in Wyoming, although much of the beneficial use is in Nebraska. Appro-

priators in Nebraska are dependent on regulation and control in Wyoming.

There is a second large federal irrigation project in Wyoming known as the Kendrick project, the estimated cost of which is over $19,000,000. Its primary purpose is the irrigation of some 66,000 acres north and west of Casper, Wyoming. The first unit, capable of serving 35,000 acres, was completed in 1940. Due to the lack of water supply it has not yet been put into operation. The second unit is under construction. The storage facilities are completed. They consist of two channel reservoirs—the Seminoe, thirty miles above Pathfinder, with a capacity of 1,026,400 acre feet; the Alcova, thirteen miles below Pathfinder, with a capacity of 190,500 acre feet. Casper Canal will divert the water at Alcova and serve the lands of the project.

The combined storage capacity of the reservoirs of these two federal projects—Kendrick and North Platte—is 2,313,270 acre feet which, as the Special Master found, is 175 per cent of the long-time average annual run-off of the river at Pathfinder.

There are also two projects in Nebraska—Sutherland, with a capacity of 175,000 acre feet, and Tri-County, with a capacity of 2,000,000 acre feet. The latter is expected to bring under irrigation an additional 205,000 acres in Nebraska. Including that acreage but excluding the 60,000 acres expected to be irrigated in Wyoming under the Kendrick project, the Special Master found that the acreages under irrigation in the three States would be approximately as follows:

Colorado	131,800	acres	(12%)
Wyoming	325,720	"	(29%)
Nebraska	653,355	"	(59%)
Total	1,110,875		(100%)

Prior to the time when the North Platte project went into operation there was a serious shortage of water for

irrigation in western Nebraska and to some extent in eastern Wyoming. Many irrigation enterprises were closed. After the North Platte Project had been in operation for awhile most of the projects which had been abandoned were reopened. From then until 1931 the supply was reasonably adequate for most of the canals. But the year 1931 started the driest cycle or swing in the North Platte and Platte River valleys of which there is any record. The annual flow at Pathfinder[6] had always fluctuated widely.[7] The average flow for the 37 years commencing in 1904 was 1,315,900 acre feet, the maximum was 2,399,400 in 1917, the minimum was 382,200 in 1934. But a critical condition arose in 1931 with the advent of the dry cycle. The flow for each of the years between 1931 and 1940 as compared with the mean of the flow for the 37-year period ending in 1940 was as follows:

1931	55 per cent	1936	81 per cent
1932	116 per cent	1937	87 per cent
1933	89 per cent	1938	103 per cent
1934	30 per cent	1939	54 per cent
1935	54 per cent	1940	44 per cent

[6] Which the Special Master found to be the best single index on the river due to the fact that the main accretions of Colorado and Wyoming are already in the river and the natural flow is not appreciably distorted by storage releases as it is below Pathfinder.

[7]

Year	Acre Feet	Year	Acre Feet	Year	Acre Feet
1904	1, 262, 000	1917	2, 399, 400	1930	1, 072, 800
05	1, 159, 400	18	1, 486, 100	31	706, 300
06	1, 351, 000	19	859, 700	32	1, 506, 600
07	1, 851, 100	1920	1, 870, 100	33	1, 149, 500
08	918, 600	21	1, 782, 000	34	382, 200
09	2, 381, 800	22	1, 148, 200	35	696, 200
1910	918, 100	23	1, 500, 800	36	1, 045, 600
11	1, 123, 400	24	1, 489, 900	37	1, 130, 600
12	1, 820, 500	25	1, 244, 700	38	1, 334, 900
13	1, 265, 000	26	1, 776, 500	39	698, 200
14	1, 550, 900	27	1, 456, 200	1940	569, 800
15	900, 200	28	1, 725, 400		
16	1, 253, 400	29	1, 902, 700		

Since 1930 only one year equalled the mean of the 1904 to 1930 period. Previous droughts had not exceeded two or three years. The present cycle has persisted for 13 years.

The commencement of this dry cycle plus the initiation of the Kendrick project precipitated the present controversy. Nebraska rests her case essentially on evidence of shortage and of misappropriation of water by the upper States since 1930 and of threats of more serious shortage and diversions in the future.

II

The equitable apportionment which Nebraska seeks is based on the principle of priority of appropriation applied interstate. Colorado and Wyoming have the rule of priority of appropriation as distinguished from the rule of riparian rights. Colo. Constitution, Art. XVI, §§ 5, 6; *Farmers' High Line Canal Co.* v. *Southworth,* 13 Colo. 111, 21 P. 1028; *Sternberger* v. *Seaton Co.,* 45 Colo. 401, 102 P. 168; Wyo. Constitution, Art. VIII, § 3; Wyo. Rev. Stat. 1931, §§ 122–401, 122–418, 122–419; *Moyer* v. *Preston,* 6 Wyo. 308, 44 P. 845. And see the discussion of the problem in *Wyoming* v. *Colorado,* 259 U. S. 419, 459. Nebraska on the other hand was originally a riparian doctrine State. See *Meng* v. *Coffee,* 67 Neb. 500, 93 N. W. 713. But when the more arid sections of the State were settled and the need for irrigation increased, legislation was enacted adopting the appropriation principle. See Neb. L. 1889, ch. 68; L. 1895, ch. 69. That principle was recognized in the constitution which Nebraska adopted in 1920. See Article XV, §§ 4, 5, and 6. The adoption of the rule of appropriation did not extinguish riparian rights which had previously vested. See *Clark* v. *Cambridge & Arapahoe Co.,* 45 Neb. 798, 64 N. W. 239; *Crawford Co.* v. *Hathaway,* 60 Neb. 754, 84 N. W. 271, 61 Neb. 317, 85 N. W. 303, 67 Neb. 325, 93 N. W. 781; *Osterman* v. *Central*

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Nebraska District, 131 Neb. 356, 268 N. W. 334. But riparian rights may be condemned in favor of appropriators; and violation of riparian rights by appropriators will not be enjoined, only compensation or damages being awarded. *Cline* v. *Stock*, 71 Neb. 79, 102 N. W. 265; *McCook Irrigation Co.* v. *Crews*, 70 Neb. 115, 102 N. W. 249. In that sense riparian rights are considered inferior to rights of appropriators. More important, the rights asserted by Nebraska in this suit are based wholly on appropriations which have been obtained and recognized under Nebraska law. The appropriation system is dominant in the regions of Nebraska which are involved in the present litigation. Hence we, like the Special Master, treat the case as one involving appropriation rights not only in Colorado and Wyoming but in Nebraska as well.

North Park. There are at present in the North Park area in Colorado (Jackson County) 131,800 acres irrigated. The climate is arid. The sole industry is cattle raising, the only crops being native hay and pasturage. The growing season is short. While the diversions are high per acre (about 4½ acre feet) the return flows are large, making the average consumptive use [8] rate only .74 acre foot per acre. The 131,800 acres of irrigated land consume 98,572 acre feet annually, including reservoir evaporation. Exportations from the basin are expected to average 6,000 acre feet, making the total annual depletion 104,540 acre feet. Though Colorado claimed that an additional 100,000 acres in North Park was susceptible of irrigation, the Special Master found that there are only about 34,000 acres of additional land that could be brought under irrigation; 30,390 of those acres are irrigable from constructed ditch systems having water rights. Those projects, however, are not completed; they are indeed projects for the indefinite future. In addition to these

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[8] Consumptive use represents the difference between water diverted and water which returns to the stream after use for irrigation.

projects in North Park, Colorado also has proposed that large quantities of water from the river be exported from the basin into other rivers.

There have been out-of-priority diversions in Colorado and Wyoming above Pathfinder in relation to the priorities and needs of Nebraska users. Their full extent is not known. But as respects Pathfinder, the Special Master estimated that Colorado appropriators junior to Pathfinder consume about 30,000 acre feet a year. Since Pathfinder after 1930 has never been filled and has always been in need of water for storage, those Colorado junior diversions may be said to have violated the Pathfinder priority. The claims of Colorado to additional demands were construed by the Special Master as a threat of further depletion of the river within North Park. He found that there was no surplus in the supply and that any material increase in diversions in Colorado would be in violation of established priorities, notably Pathfinder.

Colorado Line to Pathfinder Reservoir. In the region between the Colorado-Wyoming line and Pathfinder appropriation rights cover about 272,000 acres, 149,400 of which are irrigated. But of those only 9,400 acres are irrigated from the main stream, the balance being irrigated from tributaries. The consumptive use rate is about 1 acre foot per acre. Over two-thirds of the volume of diversions (main stream and tributaries) and 88 per cent from the main stream are senior to the North Platte Project. They are in the main junior to the State Line Canals in Nebraska. Those projects junior to Pathfinder have been operated since 1930 in violation of its priority. The Special Master found that there is no present prospect of any large expansion of irrigation in this area, though five additional projects have been contemplated, some of them being partially constructed. The accretions to the river from tributaries in this section are very large—about 790,240 acre feet net. Land consumption is 16 per

cent of the net accretions, while that of rights junior to Pathfinder is about 5.6 per cent of the net.

North Platte Project. The priority of Pathfinder is December 6, 1904 and of Guernsey April 20, 1923. Between Pathfinder and the Nebraska state line there are 32 canals on the main river which have priorities senior to Pathfinder. The State Line Canals in Nebraska also are senior to Pathfinder. And Guernsey is junior to all canals below it down to the Nebraska line. The percentage of rights in each section senior and junior to the North Platte Project are as follows:

	Per-centage Senior	*Per-centage Junior*
North Park	67	33
Colorado State Line to Pathfinder Reservoir	88	12
Pathfinder Reservoir to Whalen	52	48
Whalen to Nebraska State Line (Wyoming private canals)	91	9
Nebraska State Line Canals	100	0

Under Wyoming law reservoirs in storing water must observe the priority of all senior Wyoming canals below them on the main river.

Kendrick Project. Seminoe Reservoir has a priority of December 1, 1931; Casper Canal, July 27, 1934 (natural flow); Alcova Reservoir, April 25, 1936. Apart from minor exceptions Seminoe is junior to every appropriator from Alcova to the Tri-State Dam. The project is expected to operate chiefly on storage water. In its early stages its water requirements will be heavier than they will be later, due to ground absorption and storage. When the project has been in operation a while, the depletion during the irrigation season will be about 122,000 acre feet, except as water stored in non-irrigation season is used. The Special Master found, however, that without violating the Pathfinder priority, the Kendrick project could have stored no water since 1930 and can store none in the future if present conditions continue. He also

found that under the average conditions which prevailed from 1895 to 1939 water could be conserved by Seminoe and Alcova without violation of the priorities between Pathfinder and Tri-State Dam and in sufficient quantities to supply Kendrick and to leave considerable return flow to the river in the irrigation season. There are in the first unit of the project two sump areas into which return water will flow and from which the United States has constructed drainage ditches so as to return the water to the river. On the uncompleted unit three sump areas are planned. These are designed to return to the river water which otherwise would be lost.

Pathfinder to Whalen. The total land irrigated in this section is in excess of 55,000 acres, of which about 14,000 acres are supplied from the main river. Alfalfa, sugar beets, potatoes, and grains are the principal irrigated crops. There are 60 canals taking out of the main river with priorities ranging from 1887 to 1937. In terms of acreage about 48 per cent of the rights on the river in this section are junior to the North Platte Project. All except one are junior to the Tri-State canal and most of them are junior to the other Nebraska State Line Canals. The irrigation projects on the river average not over 160 acres. The consumptive use rate is about 1.1 acre feet per acre. The diversion rate of 2.5 acre feet per acre is deemed adequate. But during the 1931–1940 period the average seasonal diversion rate for the section was only 2 acre feet, since in low stages of flow some of the ditches are unable to divert any water. But at the rate of 2.5 acre feet the total seasonal headgate diversion for the 14,000 acres is 35,000 acre feet of which 18,200 acre feet would be returned to the river. Of that return all but 15 per cent (2,730 acre feet) would occur during the irrigation season. The tributary inflow is greater than river depletion due to irrigations and other losses. The average annual net gain from 1931–1940 was 64,200 acre feet. During

the 1931–1940 period, the maximum seasonal average consumption out-of-priority in relation to the Nebraska State Line Canals was found by the Special Master to be 5,400 acre feet. With probable minor exceptions there are no further possibilities for irrigation developments in this section.

Whalen to Tri-State Dam. As we have said, this is the pivotal section of the river around which the central problems of this case turn. Apart from the Kendrick project, the demand for water is as great in this short section of the river as in the entire preceding 415 miles from North Park to Whalen. The lands irrigated from the river in this section total 326,000 acres as compared with 339,200 acres in the upper valley—main river and tributaries. The consumptive use on this 326,000 acres far exceeds that of the upper sections combined. We have mentioned the various canals which take out from the river in this section. The Special Master found their annual requirements to be 1,072,514 acre feet. The total net seasonal requirement of all the canals diverting in this section was found to be 1,027,000 acre feet. In the ten-year period from 1931 to 1940 this net seasonal requirement of 1,027,000 acre feet largely exceeded the supply in three years and was less than the supply in seven years.[9] In those seven years the seasonal flows passing the Tri-State Dam were far less than the excesses, indicating as the Special Master concluded that canal diversions in the section were greater than the requirements. He pointed out that if the diversions during the period had been re-

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[9] The excess or deficiency for each of those years is indicated by the following:

1931	+113,300	1936	+ 5,480
1932	+352,500	1937	+225,350
1933	+465,100	1938	+143,150
1934	−515,400	1939	+ 66,050
1935	−157,000	1940	−382,080

stricted to the determined requirements and if the excess had been held in storage in the upper reservoirs and released indiscriminately to all canals as needed, irrespective of storage rights, any surplus water would have been conserved and would not have passed Tri-State. He estimated that under that method of operation the total supply (excluding any supply for Kendrick) would have been approximately sufficient for the section.

But on the basis of the 1931–1940 supply the seasonal requirement of 1,027,000 acre feet cannot be met by natural flow alone and without storage water. The Special Master roughly estimated the deficiency of natural flow as follows for the period of 1931 to 1940:

Year	*Deficiency of natural flow* [1]
1931	552,952 acre feet
1932	305,000 " "
1933	251,980 " "
1934	841,488 " "
1935	666,058 " "
1936	495,737 " "
1937	489,975 " "
1938	501,991 " "
1939	450,908 " "
1940	751,244 " "

[1] "Natural flow," as used by the Special Master and as used in this opinion, means all water in the stream except that which comes from storage water releases.

On that basis the average seasonal supply of natural flow available in this section was only 48 per cent of the total requirement. In 1933, the year of largest flow, it was only 75 per cent. In general the practice has been to allow storage right canals having early priorities to receive natural flow water on a priority basis, using storage water merely as a supplementary supply. In this area 90 per cent of the lands have both natural flow and storage rights.[10] Seventy-eight per cent of the lands having stor-

[10] Of this 90 per cent, 68 per cent are project lands and 32 per cent have Warren Act contracts.

age rights are in Nebraska, 22 per cent in Wyoming. Of the lands having natural flow rights only 49 per cent are in Nebraska and 51 per cent in Wyoming.

As respects priority, the canals (listed later in this opinion) fall into thirteen groups, seven in Wyoming and six in Nebraska. The earliest in priority are some canals in Wyoming, then some in Nebraska, then others in Wyoming and so on.

The exceptional features of this section of the river were summarized by the Special Master as follows:

"(1) the great concentration of demand in a short compact section, (2) the presence of water, both natural flow and storage, to which Nebraska users are entitled under Wyoming appropriations, (3) the total dependence of Nebraska State Line Canals and the North Platte project canals upon water originating in Wyoming and Colorado, (4) the joint use of canals to serve both Wyoming and Nebraska lands, (5) the location in Wyoming of the head gates and works which divert great volumes of water for Nebraska, (6) the distinctly interstate scope and character of the water distribution without any real interstate administration."

The Special Master made a detailed study of the requirements of each canal in this section and the diversions of each during the 1931–1940 period. We need not recapitulate it. The nine Wyoming canals and the Tri-State canal fared well. A comparison of the average seasonal diversions with the seasonal requirements shows that they had an excess supply for the ten-year period—122 per cent and 111 per cent respectively—the former having a deficiency in only one of the ten years, the latter a deficiency in three. For the rest of these canals it appears that the average seasonal diversions supplied from 78 per cent to 98 per cent of their seasonal requirements. The Ft. Laramie was short in eight of the ten years, Gering, Ramshorn and Northport in seven each.

Tri-State Dam to Bridgeport, Neb. Nebraska originally claimed that any equitable distribution which was made should extend to all irrigated lands as far east as Grand Island, Neb. It is now conceded that the lands east of Bridgeport, Neb., which is some sixty miles from the Wyoming-Nebraska state line, can be reasonably satisfied out of local supplies. Hence we are not concerned in this case with that section.

In the section west of Bridgeport, there are twelve canals exclusive of the Ramshorn relevant to the present problem. Their requirements are 132,420 acre feet; their demand on the main river is 102,810 acre feet, the balance being obtained from interceptions of drains, return flows, and tributary streams. The Special Master concluded that local supplies even during the drought period were adequate to take care of the needs of these canals without calling upon up-river water. Some shortages occurred, caused for example by excessive use by some canals at the expense of others or by the withdrawal of water from the section to supply senior canals below. It would seem that the construction and operation of the Kingsley and Sutherland Reservoirs would largely eliminate the latter condition. And water passing Tri-State Dam and usable in the Tri-State to Bridgeport section is substantial—the mean divertible flow for the irrigation season in the 1931–1940 period being 81,700 acre feet. Over half of this occurred in May and June; very little in August and September.

III

Motion to Dismiss. As we have noted, Colorado moves to dismiss the proceeding. She asserts that the pleadings and evidence both indicate that she has not injured nor presently threatens to injure any downstream water user. She emphasizes the large increase since 1910 in acreage under irrigation in Wyoming and Nebraska as compared

with the increase in Colorado. She asserts there is a surplus of water in the stream, as evidenced by the fact that during the recent drought or dry cycle the Kendrick Project in Wyoming and the Tri-County Project in Nebraska have been constructed, indicating that the sponsors considered that the available water supply was not entirely used by existing projects. And she emphasizes that during the drought there was a divertible flow passing Tri-State Dam during the irrigation season. The argument is that the case is not of such serious magnitude and the damage is not so fully and clearly proved as to warrant the intervention of this Court under our established practice. *Missouri* v. *Illinois,* 200 U. S. 496, 521; *Colorado* v. *Kansas,* 320 U. S. 383, 393–394. The argument is that the potential threat of injury, representing as it does only a possibility for the indefinite future, is no basis for a decree in an interstate suit since we cannot issue declaratory decrees. *Arizona* v. *California,* 283 U. S. 423, 462–464, and cases cited.

We fully recognize those principles. But they do not stand in the way of an entry of a decree in this case.

The evidence supports the finding of the Special Master that the dependable natural flow of the river during the irrigation season has long been over-appropriated. A genuine controversy exists. The States have not been able to settle their differences by compact. The areas involved are arid or semi-arid. Water in dependable amounts is essential to the maintenance of the vast agricultural enterprises established on the various sections of the river. The dry cycle which has continued over a decade has precipitated a clash of interests which between sovereign powers could be traditionally settled only by diplomacy or war. The original jurisdiction of this Court is one of the alternative methods provided by the Framers of our Constitution. *Missouri* v. *Illinois,* 180 U. S. 208, 241; *Georgia* v. *Tennessee Copper Co.,* 206 U. S. 230, 237. The

Kendrick Project plainly is an existing threat to senior appropriators downstream. As we have noted, it is junior to practically every appropriation on the river between Alcova and the Tri-State Dam. Since 1930 there would have been no water for it if it were operated on a priority basis. And in view of the general position taken by Wyoming with respect to Nebraska priorities, it cannot be assumed that the Kendrick Project would be regulated for the benefit of senior appropriators in Nebraska. Neither Wyoming nor Colorado has ever recognized any extension of priorities across state lines. They have never limited or regulated diversions by their appropriators in subordination to the senior appropriators of a downstream State. Out-of-priority diversions by Colorado have had an adverse effect downstream. We do not know their full extent; but we do know that Colorado appropriators junior to Pathfinder consume about 30,000 acre feet a year and that Pathfinder has never been filled since 1930 and has always been in need of water. This alone negatives the absence of present injury. The fact that on the average there is some water passing Tri-State Dam unused is no answer. While over half of that excess amount occurred in May and June, there was comparatively little in August and September. Moreover, we are dealing here with the problems of natural flow. The critical condition of the supply of the natural flow during 1931–1940 in the Whalen to Tri-State Dam section is obvious. The claim of Colorado to additional demands may not be disregarded. The fact that Colorado's proposed projects are not planned for the immediate future is not conclusive in view of the present over-appropriation of natural flow. The additional demands on the river which those projects involve constitute a threat of further depletion. Colorado in her argument here asserts that "if Jackson County is to maintain its livestock industry to the same extent as it has in the past it will have to develop this additional summer

pasture and it cannot do this without increasing its irrigated acreage."

What we have then is a situation where three States assert against a river, whose dependable natural flow during the irrigation season has long been over-appropriated, claims based not only on present uses but on projected additional uses as well. The various statistics with which the record abounds are inconclusive in showing the existence or extent of actual damage to Nebraska. But we know that deprivation of water in arid or semi-arid regions cannot help but be injurious. That was the basis for the apportionment of water made by the Court in *Wyoming* v. *Colorado, supra.* There the only showing of injury or threat of injury was the inadequacy of the supply of water to meet all appropriative rights. As much if not more is shown here. If this were an equity suit to enjoin threatened injury, the showing made by Nebraska might possibly be insufficient. But *Wyoming* v. *Colorado, supra,* indicates that where the claims to the water of a river exceed the supply a controversy exists appropriate for judicial determination. If there were a surplus of unappropriated water, different considerations would be applicable. Cf. *Arizona* v. *California,* 298 U. S. 558. But where there is not enough water in the river to satisfy the claims asserted against it, the situation is not basically different from that where two or more persons claim the right to the same parcel of land. The present claimants being States, we think the clash of interests to be of that character and dignity which makes the controversy a justiciable one under our original jurisdiction.

Colorado v. *Kansas, supra,* is not opposed to this view. That case turned on its special facts. It is true that an apportionment of the water of an interstate river was denied in that case. But the downstream State (Kansas) did not sustain the burden of showing that since the earlier litigation between the States (see *Kansas* v. *Colorado,*

206 U. S. 46), there had been a material increase in the depletion of the river by Colorado. Improvements based upon irrigation had been made by Colorado while Kansas stood by for over twenty years without protest. We held that in those circumstances a plain showing was necessary of increased depletion and substantial injury to warrant a decree which would disrupt the economy of the upstream State built around irrigation. Moreover, we made clear (320 U. S. p. 392, note 2) that we were not dealing there with a case like *Wyoming* v. *Colorado, supra,* where the doctrine of appropriation applied in each of the States which were parties to the suit and where there was not sufficient water to meet all the present and prospective needs.

Colorado's motion to dismiss is accordingly denied.

IV

Claim of United States to Unappropriated Water. The United States claims that it owns all the unappropriated water in the river. It argues that it owned the then unappropriated water at the time it acquired water rights by appropriation for the North Platte Project and the Kendrick Project. Its basic rights are therefore said to derive not from appropriation but from its underlying ownership which entitles it to an apportionment in this suit free from state control. The argument is that the United States acquired the original ownership of all rights in the water as well as the lands in the North Platte basin by cessions from France, Spain and Mexico in 1803, 1819, and 1848, and by agreement with Texas in 1850. It says it still owns those rights in water to whatever extent it has not disposed of them. An extensive review of federal water legislation applicable to the Platte River basin is made beginning with the Act of July 26, 1866, 14 Stat. 251, the Act of July 9, 1870, 16 Stat. 217 and including the Desert Land Law (Act of March 3, 1877, 19 Stat. 377)

and the Reclamation Act of June 17, 1902, 32 Stat. 388. But we do not stop to determine what rights to unappropriated water of the river the United States may have. For the water rights on which the North Platte Project and the Kendrick Project rest have been obtained in compliance with state law. Whether they might have been obtained by federal reservation is not important. Nor, as we shall see, is it important to the decree to be entered in this case that there may be unappropriated water to which the United States may in the future assert rights through the machinery of state law or otherwise.

The Desert Land Act "effected a severance of all waters upon the public domain, not theretofore appropriated, from the land itself." *California Oregon Power Co.* v. *Beaver Portland Cement Co.,* 295 U. S. 142, 158. It extended the right of appropriation to any declarant who reclaimed desert land and provided: "all surplus water over and above such actual appropriation and use, together with the water of all, lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights." See *Ickes* v. *Fox,* 300 U. S. 82, 95; *Brush* v. *Commissioner,* 300 U. S. 352, 367.

Sec. 8 of the Reclamation Act provided: "That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and *the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws,* and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters

thereof: *Provided,* That *the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.*" (Italics added.)

The Secretary of the Interior pursuant to § 3 of the Reclamation Act withdrew from public entry certain public lands in Nebraska and Wyoming which were required for the North Platte Project and the Kendrick Project. Initiation of both projects was accompanied by filings made pursuant to § 8 in the name of the Secretary of the Interior for and on behalf of the United States. Those filings were accepted by the state officials as adequate under state law. They established the priority dates for the projects. There were also applications to the States for permits to construct canals and ditches. They described the land to be served. The orders granting the applications fixed the time for completion of the canal, for application of the water to the land, and for proof of appropriation. Individual water users contracted with the United States for the use of project water. These contracts were later assumed by the irrigation districts. Irrigation districts submitted proof of beneficial use to the state authorities on behalf of the project water users. The state authorities accepted that proof and issued decrees and certificates in favor of the individual water users. The certificates named as appropriators the individual landowners. They designated the number of acres included, the use for which the appropriation was made, the amount of the appropriation, and the priority date. The contracts between the United States and the irrigation districts provided that after the stored water was released from the reservoir it was under the control of the appropriate state officials.

All of these steps make plain that those projects were designed, constructed and completed according to the

pattern of state law as provided in the Reclamation Act. We can say here what was said in *Ickes* v. *Fox, supra,* pp. 94–95: "Although the government diverted, stored and distributed the water, the contention of petitioner that thereby ownership of the water or water-rights became vested in the United States is not well founded. Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the land owners; and by the terms of the law and of the contract already referred to, the water-rights became the property of the land owners, wholly distinct from the property right of the government in the irrigation works. Compare *Murphy* v. *Kerr,* 296 Fed. 536, 544, 545. The government was and remained simply a carrier and distributor of the water (*ibid.*), with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works."

The property right in the water right is separate and distinct from the property right in the reservoirs, ditches or canals. The water right is appurtenant to the land, the owner of which is the appropriator. The water right is acquired by perfecting an appropriation, i. e., by an actual diversion followed by an application within a reasonable time of the water to a beneficial use. See *Murphy* v. *Kerr,* 296 F. 536, 542, 544, 545; *Commonwealth Power Co.* v. *State Board,* 94 Neb. 613, 143 N. W. 937; *Kersenbrock* v. *Boyes,* 95 Neb. 407, 145 N. W. 837. Indeed § 8 of the Reclamation Act provides as we have seen that "the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."

We have then a direction by Congress to the Secretary of the Interior to proceed in conformity with state laws in appropriating water for irrigation purposes. We have a

compliance with that direction. Pursuant to that procedure individual landowners have become the appropriators of the water rights, the United States being the storer and the carrier.[11] We intimate no opinion whether a different procedure might have been followed so as to appropriate and reserve to the United States all of these water rights. No such attempt was made. Though we assume *arguendo* that the United States did own all of the unappropriated water, the appropriations under state law were made to the individual landowners pursuant to the procedure which Congress provided in the Reclamation Act. The rights so acquired are as definite and complete as if they were obtained by direct cession from the federal government. Thus even if we assume that the United States owned the unappropriated rights, they were acquired by the landowners in the precise manner contemplated by Congress.

It is argued that if the right of the United States to these water rights is not recognized, its management of the federal projects will be jeopardized. It is pointed out, for example, that Wyoming and Nebraska have laws which regulate the charges which the owners of canals or reservoirs may make for the use of water. But our decision does not involve those matters. We do not suggest that where Congress has provided a system of regulation for federal projects it must give way before an inconsistent state system. We are dealing here only with an allocation, through the States, of water rights among appropriators. The rights of the United States in respect to the storage of water are recognized. So are the water rights of the

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[11] The right of the United States as storer and carrier is not necessarily exhausted when it delivers the water to grantees under its irrigation projects. Thus in *Ide* v. *United States,* 263 U. S. 497 the right of the United States was held to extend to water which resulted from seepage from the irrigated lands under its project and which was not susceptible of private appropriation under local law.

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landowners. To allocate those water rights to the United States would be to disregard the rights of the landowners. To allocate them to the States, who represent their citizens *parens patriae* in this proceeding,[12] in no wise interferes with the ownership and operation by the United States of its storage and power plants, works, and facilities. Thus the question of the ownership by the United States of unappropriated water is largely academic so far as the narrow issues of this case are concerned.

V

There is some suggestion that if we undertake an apportionment of the waters of this interstate river, we embark upon an enterprise involving administrative functions beyond our province. We noted in *Colorado* v. *Kansas, supra,* p. 392, that these controversies between States over the waters of interstate streams "involve the interests of quasi-sovereigns, present complicated and delicate questions, and, due to the possibility of future change of conditions, necessitate expert administration rather than judicial imposition of a hard and fast rule. Such controversies may appropriately be composed by negotiation and agreement, pursuant to the compact clause of the federal Constitution. We say of this case, as the court has said of interstate differences of like nature, that such mutual accommodation and agreement should, if possible, be the medium of settlement, instead of invocation of our adjudicatory power." But the efforts at settlement in this case have failed. A genuine controversy exists. The gravity and importance of the case are apparent. The difficulties of drafting and enforcing a decree are no justification for us to refuse to perform the important function entrusted to us by the Constitution. Those

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[12] *Kansas* v. *Colorado,* 206 U. S. 46; *Missouri* v. *Illinois,* 180 U. S. 208.

considerations did not prevail in *Wyoming* v. *Colorado*, *supra*, where an apportionment of the waters of an interstate stream was made. Nor did they prevail in the drainage canal cases. *Wisconsin* v. *Illinois*, 278 U. S. 367, 281 U. S. 179, 309 U. S. 569, 311 U. S. 107, 313 U. S. 547. And see *Sanitary District* v. *United States*, 266 U. S. 405. We do not believe they should prevail here.

We recognize the difficulties of the problem. The matter is a delicate one and extremely complex. To begin with we are confronted with the problem of equitable apportionment. The Special Master recommended a decree based on that principle. That was indeed the principle adopted by the Court in *Wyoming* v. *Colorado*, *supra*, where an apportionment of the waters of an interstate stream was made between two States, each of which had the rule of appropriation. In speaking of that rule in application to a controversy between States the Court, through Mr. Justice Van Devanter, said: "The cardinal rule of the doctrine is that priority of appropriation gives superiority of right. Each of these States applies and enforces this rule in her own territory, and it is the one to which intending appropriators naturally would turn for guidance. The principle on which it proceeds is not less applicable to interstate streams and controversies than to others. Both States pronounce the rule just and reasonable as applied to the natural conditions in that region; and to prevent any departure from it the people of both incorporated it into their constitutions. It originated in the customs and usages of the people before either State came into existence, and the courts of both hold that their constitutional provisions are to be taken as recognizing the prior usage rather than as creating a new rule. These considerations persuade us that its application to such a controversy as is here presented cannot be other than eminently just and equitable to all concerned." 259 U. S. p. 470. And see *Wyoming* v. *Colorado*,

286 U. S. 494; *Washington* v. *Oregon,* 297 U. S. 517, 526. Since Colorado, Wyoming, and Nebraska are appropriation States, that principle would seem to be equally applicable here.

That does not mean that there must be a literal application of the priority rule. We stated in *Colorado* v. *Kansas, supra,* that in determining whether one State is "using, or threatening to use, more than its equitable share of the benefits of a stream, all the factors which create equities in favor of one State or the other must be weighed as of the date when the controversy is mooted." 320 U. S. p. 394. That case did not involve a controversy between two appropriation States. But if an allocation between appropriation States is to be just and equitable, strict adherence to the priority rule may not be possible. For example, the economy of a region may have been established on the basis of junior appropriations. So far as possible those established uses should be protected though strict application of the priority rule might jeopardize them. Apportionment calls for the exercise of an informed judgment on a consideration of many factors. Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former—these are all relevant factors. They are merely an illustrative, not an exhaustive catalogue. They indicate the nature of the problem of apportionment and the delicate adjustment of interests which must be made.

Practical considerations of this order underlie Nebraska's concession that the priority rule should not be strictly applied to appropriations in Colorado, though

some are junior to the priorities of appropriators in Wyoming and Nebraska. As the Special Master points out, the flowage time of water from North Park to Bridgeport, Nebraska is between two and three weeks. If a canal in North Park were closed to relieve the shortage of a senior appropriator in Nebraska, it would be highly speculative whether the water would reach the Nebraska appropriator in time or whether the closing of the Colorado canal would work more hardship there than it would bestow benefits in Nebraska. Moreover, there is loss of water in transit from the upper to the downstream sections, increasing with the distance. The lower appropriator thus receives less than the upper appropriator loses. And there is evidence that a river-wide priority system would disturb and disrupt long-established uses.

Nebraska, however, urges that priority of appropriation interstate be adopted from the Alcova Reservoir east and more particularly from the Whalen diversion dam east. She points out that there is a large acreage of Nebraska land which is irrigated by canals diverting at Whalen. There are four canals diverting in Wyoming and irrigating land entirely or in part in Nebraska—Mitchell, Interstate, Ft. Laramie and French. For example, the diversion point for Mitchell is in Wyoming though all the land it serves is in Nebraska. Nebraska has maintained that diversions of that canal should be regulated to observe the priorities of senior Nebraska canals including Tri-State. Wyoming was willing to regulate her upstream junior appropriators for the benefit of Mitchell provided the water go to Mitchell and not be used for Tri-State which is senior to both Mitchell and certain Wyoming appropriators.[13] Nebraska therefore urges an interstate allocation which would require junior appropriators in Wyo-

[13] That controversy between the States is partly reflected in *State* v. *Mitchell Irrigation District,* 129 Neb. 586, 262 N. W. 543, and *Mitchell Irrigation District* v. *Whiting,* 59 Wyo. 52, 136 P. 2d 502.

ming to respect not only Mitchell's priorities but also those of Tri-State and other Nebraska canals in this section of the river.

The United States takes substantially the same position on this matter as Nebraska except that it argues that a priority allocation interstate be confined to that area between Whalen and Tri-State Dam.

Wyoming contends for a system of mass allocation between the States, saying that no attempt can or should be made in this proceeding to determine the priorities interstate of the various appropriators in each State. The proposal of Wyoming envisages distribution of natural flow and storage water indiscriminately as a common fund to all users. It is based on the theory that there is a sufficiency of water for everyone.

The decree recommended by the Special Master departs from the theory of allocation advanced by the parties. In recommending his apportionment the Special Master did not rest on the long-time average flow of the river. We have discussed the drought which has persisted in this river basin since 1930. No one knows whether it has run its course or whether it represents a new norm. There is no reliable basis for prediction. But a controversy exists; and the decree which is entered must deal with conditions as they obtain today. If they substantially change, the decree can be adjusted to meet the new conditions. But the decree which is fashioned must be based, as the Special Master recognized, on the dependable flow. *Wyoming* v. *Colorado, supra.* In that case the Court pointed out that the average of all years was far from being a proper measure of the available supply. "An intending irrigator acquiring a water right based on such a measure would be almost certainly confronted with drought when his need for water was greatest. Crops cannot be grown on expectations of average flows which do not come, nor on recollections of unusual flows which have passed down the stream in prior years." 259 U. S. p. 476. On this record

we cannot say that the dependable flow is greater than the average condition which has prevailed since 1930. For reasons which we discuss at a later point in this opinion, we deal only with natural flow, not with storage water as Wyoming urges. On the basis of the conditions which have obtained since 1930, it is plain that the natural flow of the river during the irrigation season has been over-appropriated.

Colorado. As we have noted, there are presently under irrigation in this section of the river 131,800 acres which consume (including reservoir evaporation) 98,540 acre feet annually. Exportations from the basin amount on the average to 6,000 acre feet, making the total annual depletion 104,540 acre feet. There are, as we have seen, additional demands made by Colorado for future projects. The Special Master recommended that Colorado be enjoined (a) from the diversion of water for the irrigation in North Park of more than 135,000 acres of land, (b) from the accumulation in storage facilities in North Park of more than 17,000 acre feet between October 1 of any year and September 30 of the following year, and (c) from the transbasin diversion out of North Park of more than 6,000 acre feet between October 1 of any year and September 30 of the following year. Colorado excepts to these proposals. But with minor exceptions which we will note, we do not believe those exceptions are well taken.

We are satisfied that a reduction in present Colorado uses is not warranted. The fact that the same amount of water might produce more in lower sections of the river is immaterial. *Wyoming* v. *Colorado, supra,* p. 468. The established economy in Colorado's section of the river basin based on existing use of the water should be protected.[14] Cf. *Colorado* v. *Kansas, supra,* p. 394. Appropriators in Colorado junior to Pathfinder have made out-of-

[14] Nebraska objects to the margin of safety provided above actual existing uses. But we do not believe that the margin allowed is unjust under all the circumstances of the case.

priority diversions of substantial amounts. Strict application of the priority rule might well result in placing a limitation on Colorado's present use for the benefit of Pathfinder. But as we have said, priority of appropriation, while the guiding principle for an apportionment, is not a hard and fast rule. Colorado's countervailing equities indicate it should not be strictly adhered to in this situation. Colorado asserts, however, that the limitation of transbasin diversions to 6,000 acre feet a year should not be imposed. Her point is that 6,000 acre feet represent merely the average annual transbasin diversions, that annual diversions have exceeded that amount, and that a limitation of 6,000 acre feet annually will interfere with existing Colorado users. We think the point is well taken. The decree will enjoin Colorado exportations in excess of an average of 6,000 acre feet computed over a period of ten years.[15]

But Colorado's other exceptions to the suggested limitations to be placed on her use of the water of the North Platte are not sustained. The principal argument is that on the basis of the long-time averages there is enough water to go around, that no limitation on use is warranted, and that the proposed limitation is a deprivation suffered by Colorado for the benefit of downstream users. But that argument fails if we assume, as we must on the evidence before us, that the dependable supply does not exceed the amount of water which has been available since 1930. Nor can we see how existing projects can be protected on the basis of the 1931–1940 supply if additional projects in Colorado are permitted. If at any time additional projects are threatened in downstream areas, Colorado may make complaint. If conditions of supply substantially change, any party can apply for modification of

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[15] In accord with Colorado's suggestion the decree will embrace Jackson County and not North Park since the two are not coterminous and since Jackson County is entirely within the river basin and includes areas not located in North Park.

the decree. The decree will not necessarily be for all time. Provision will be made for its adjustment to meet substantially changed conditions. Nor will the decree interfere with relationships among Colorado's water users. The relative rights of the appropriators are subject to Colorado's control.

Colorado finally says that the proposed restriction on her uses of the water violate the Act of August 9, 1937, 50 Stat. 564, 595, which appropriated funds for the Kendrick Project. That Act provided that "in recognition of the respective rights of both the States of Colorado and Wyoming to the amicable use of the waters of the North Platte River, neither the construction, maintenance, nor operation of said (Kendrick) project shall ever interfere with the present vested rights or the fullest use hereafter for all beneficial purposes of the waters of said stream or any of its tributaries within the drainage basin thereof in Jackson County, in the State of Colorado, and the Secretary of the Interior is hereby authorized and directed to reserve the power by contract to enforce such provisions at all times." But that Act does not limit or restrict Nebraska's or Wyoming's claim for apportionment against Colorado. Moreover, the Kendrick Project under present conditions (which are the basis of the decree) could store no water without violating other priorities. If the long-time average conditions return, it can do so. Only at that time could there be a possible conflict with the policy of Congress contained in the Act of August 9, 1937. If that condition arises and a conflict with Colorado's interests appear imminent, it will be time to consider the problem.

Colorado State Line to Pathfinder and Guernsey. The Special Master recommends that Wyoming be enjoined (a) from diverting water from the main river above Guernsey and from its tributaries above Pathfinder for the irrigation of more than 168,000 acres, and (b) from the accumulation of storage water in reservoirs above Pathfinder in excess of 18,000 acre feet between October

1 of any year and September 30 of the following year. We deem this restriction appropriate provided the limitation of storage above Pathfinder does not include Seminoe Reservoir which lies above Pathfinder and which is to be the main source of supply for the Kendrick Project. As we have noted, most of the land under irrigation in the section above Pathfinder is irrigated from tributaries. The rights are small but very numerous. The total acreage under irrigation is 153,000 acres, allowing for a margin of error. Below Pathfinder and above Guernsey the Special Master dealt only with diversions from the main river. He concluded that the run-off of the tributaries becomes so far exhausted before any shortage of water occurs in the main river that any regulation of the tributary diversions would be of no material benefit. The tributary inflow is greater than the depletion of the river. There is some out-of-priority diversion as we have noted. But possibilities for future developments are largely non-existent. The Special Master concluded that if Wyoming were limited to the irrigation of 15,000 acres (which is the extent of present irrigation with a margin of error) natural conditions would militate against this section getting more than its equitable share of the water.

We think that is a practical and fair adjustment. So far as the tributaries above Pathfinder are concerned, practical difficulties of applying restrictions which would reduce the amount of water used by the hundreds of small irrigators would seem to outweigh any slight benefit which senior appropriators might obtain. This does not seem to be denied. And the conditions which obtain on the main river between Pathfinder and Guernsey support the limitation without more to the irrigation of 15,000 acres.

The United States, however, insists that some regulation of the tributaries between Pathfinder and Guernsey is essential. It claims that there are possibilities of future additional storage on these tributaries and that if future storage is increased there will be a reduction in tributary

flows into the main river available for storage in the Guernsey, Lake Alice and Lake Minatare reservoirs of the North Platte Project. We do not know from the present record the precise extent of existing reservoir storage in this area. We do know, however, that there is some storage capacity, e. g. 20,000 acre feet in the La Prele Project. In absence of evidence showing what contribution these tributaries now make to the supply of the reservoirs or what additional storage projects may be possible or what their effect might be, the Special Master concluded there was an insufficient basis for any present limitation on storage. We find no evidence of any present threat to the water supply from this source. If such threat appears and it promises to disturb the delicate balance of the river, application may be made at the foot of the decree for an appropriate restriction.

Pathfinder, Guernsey, Seminoe and Alcova Reservoirs and the Casper Canal. The Special Master recommends that Wyoming be enjoined from the storage of water in these four reservoirs and from the diversion of natural flow water through the Casper Canal for the Kendrick Project, between and including May 1 and September 30 of each year, otherwise than in accordance with the rule of priority in relation to the appropriations of the Nebraska lands supplied by the French Canal and by the State Line Canals; that all those Nebraska appropriations for that purpose be adjudged senior to those four reservoirs and to Casper Canal; and that the senior Nebraska appropriations be identified and defined as follows:

Lands	*Canal*	*Limitation in Second Feet*	*Seasonal Limitation in Acre Feet*
Tract of 1,025 acres	French	15	2,227
Mitchell Irrigation District	Mitchell	195	35,000
Gering Irrigation District	Gering	193	36,000
Farmers Irrigation District	Tri-State	748	183,050
Ramshorn Irrigation District	Ramshorn	14	3,000

We have noted the priorities of Pathfinder and Guernsey, as well as those of the Kendrick Project. We have noted that their priorities make them junior to many downstream appropriators including the State Line Canals. While the four reservoirs in question are Wyoming appropriators, Pathfinder and Guernsey were designed more for the benefit of Nebraska than of Wyoming lands. Recognition of the priorities interstate makes obvious the propriety of an interstate apportionment.

Wyoming objects to this treatment of the Kendrick Project. As we have said, she contends for a mass allocation of water between Nebraska and Wyoming under which a diversion requirement of 168,000 acre feet should be allotted for the Kendrick Project. Wyoming has presented a detailed analysis of the water supply of the river on the basis of which it is argued that the flow during the period since 1930 is not the true measure of the dependable supply. It is urged that the long-time averages must be considered in computing the dependable supply and if they are and if the storage capacity of these reservoirs is added to the natural flow, the dependable supply will be increased. Moreover, Wyoming argues that no allocation can be made to individual appropriators in any of the States because they are not parties and cannot be bound in their absence.

We have carefully considered these contentions of Wyoming and have concluded that they do not warrant a departure from the method of allocation proposed by the Special Master. On the record before us we are not justified in assuming that there will be a greater supply than has been available during the 1931–1940 period. To base the decree on a larger supply would not be to base it on a dependable supply. Under those conditions Kendrick can store no water. Even with reservoir regulation we are not convinced that Wyoming has shown an adequate supply to justify the allocation she seeks. The combined

storage capacity of the North Platte and Kendrick projects is equal to 175 per cent of the long-time annual average river run-off of the river at Pathfinder. We have here storage capacity in excess of the practicable limits of a dependable supply as that term has hitherto been construed. *Wyoming* v. *Colorado, supra.*

A mass allocation was made in *Wyoming* v. *Colorado.* But there is no hard and fast rule which requires it in all cases. The standard of an equitable apportionment requires an adaptation of the formula to the necessities of the particular situation. We may assume that the rights of the appropriators *inter se* may not be adjudicated in their absence. But any allocation between Wyoming and Nebraska, if it is to be fair and just, must reflect the priorities of appropriators in the two States. Unless the priorities of the downstream canals senior to the four reservoirs and Casper Canal are determined, no allocation is possible. The determination of those priorities for the limited purposes of this interstate apportionment is accordingly justified. The equitable share of a State may be determined in this litigation with such limitations as the equity of the situation requires and irrespective of the indirect effect which that determination may have on individual rights within the State. *Hinderlider* v. *La Plata Co.,* 304 U. S. 92, 106–108.

Nebraska contends that the allotment to Farmers Irrigation District be increased in the seasonal limitation recommended, so that the Warren Act contract which it has may be recognized. But for reasons which we will elaborate the only water subject to the present allocation is natural flow. Contracts requiring the supplementation of natural flow by storage are unaffected.[16]

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[16] Whether, as between the United States together with the irrigation projects sponsored by it on the one hand and the Farmers Irrigation District on the other, the United States is estopped by *United States* v. *Tilley,* 124 F. 2d 850, to deny the amount of acreage covered by the Warren Act contract with the district is not relevant here.

The United States contends that Nebraska's equitable share of natural flow water should be limited to that which is in fact being diverted and used by any or all of the designated canals within the specified limitations in acre-feet and second-feet. It is said that these provisions of the proposed decree are the operative provisions which determine the amount of natural flow to be passed into the Whalen-Tri-State Dam section of the river. It is said that Nebraska can permit, as it has heretofore, water to pass the Tri-State Dam for use below that point even though her equitable share is calculated only on the basis of the needs of appropriators at or above Tri-State. And it is pointed out that the lands served by diversions below Tri-State have no equitable claim on water originating in Wyoming or Colorado, their needs being reasonably met by local supplies. We think, as we will develop later, that the record sustains the conclusion that equitable apportionment does not permit Nebraska to demand direct flow water from above Whalen for use below Tri-State. The reservoirs above Whalen may store water and Kendrick may divert whenever and to the extent that the Nebraska canals at or above Tri-State are not using or diverting natural flow. We do not believe, however, that any revision of this part of the proposed decree need be made. We cannot assume that Nebraska will undertake to circumvent the decree. Moreover, the proposed revision offers difficulties. As Nebraska points out, when a junior Nebraska canal having storage rights is closed to natural flow due to operation of Nebraska priorities, it should be allowed to make up the deficiency in its supply in relation to its requirements by asking for storage water under such contracts as it may have with the United States. The United States does not repudiate those contracts. We conclude that it would unduly complicate the decree to recast its provisions so as to take them into account. If, as the United States fears, the decree is admin-

istered so as to divert water from above Tri-State to the use of those diverting below Tri-State, application for appropriate relief may be made at the foot of the decree.

The United States asserts that it should be given a separate allocation of water even if it is not treated as the owner of unappropriated water and hence the possessor of an unbroken chain of title to project water. The Special Master concluded that the position of the United States or the Secretary of the Interior is that of an appropriator of water for storage under the laws of Wyoming and that its interests are represented in that connection by Wyoming. That was in line with the ruling of this Court when Wyoming moved to dismiss this very case on the ground, among others, that the Secretary of the Interior was a necessary party. *Nebraska* v. *Wyoming*, 295 U. S. 40, 43. The Court said: "The bill alleges, and we know as matter of law, that the Secretary and his agents, acting by authority of the Reclamation Act and supplementary legislation, must obtain permits and priorities for the use of water from the State of Wyoming in the same manner as a private appropriator or an irrigation district formed under the state law. His rights can rise no higher than those of Wyoming, and an adjudication of the defendant's rights will necessarily bind him. Wyoming will stand in judgment for him as for any other appropriator in that state. He is not a necessary party." We have discussed the procedure of appropriation which has been followed in this region. The Secretary of the Interior made the appropriations under Wyoming law. But we have noted that the water rights were adjudicated to be in the individual landowners. Hence, so far as the water rights are concerned, we think it is not proper to analogize this case to one where the United States acquires property within a State and asserts its title against the State as well as others.

The United States claims that it is at least entitled to be recognized as the owner of the storage water with full

control over its disposition and use under Wyoming law. That seems to be true under Wyoming law. Wyo. Rev. Stats. (1931) §§ 122–1601, 122–1602; *Scherck* v. *Nichols*, 55 Wyo. 4, 19, 95 P. 2d 74. The decree which is entered will in no way cloud such claim as it has to storage water under Wyoming law; nor will the decree interfere with the ownership and operation by the United States of the various federal storage and power plants, works, and facilities. We repeat that the decree is restricted to an apportionment of the natural flow.

The decree will, however, place a restraint on the storage of water in Pathfinder, Guernsey, Seminoe and Alcova Reservoirs, so as to protect the Nebraska lands served by the French Canal and the State Line Canals which are senior. The United States points out that if Nebraska permits some of the natural flow to go below the Tri-State Dam, as it may do, thus causing certain of the State Line Canals to go short, those canals would be entitled to have any deficiencies replaced by the United States under Warren Act contracts. It says that under the proposed decree only storage water and not natural flow could be supplied and unless storage water is appropriately defined by the decree, it might not be possible to meet the contract requirements without violation of the limitations on natural flow which are fixed by the decree. And it says that that would be the result if storage water were defined to exclude all water passed through a reservoir at any time when its inflow is as great as or greater than its outflow.

Nebraska recognizes the desirability of that course. She contends, however, that where the outflow is equal to or less than the intake, none of the released water can be considered as storage water. And she says that when the water being released is greater than the inflow, that portion which represents the amount of natural flow being taken in at the intakes cannot be considered as storage. See *Gila Valley Irrigation Dist.* v. *United States*, 118 F.

2d 507. She says that the United States by its proposal is attempting to transform into storage water what is in fact natural flow originating above the reservoirs.

For reasons which will be more fully discussed, we think that storage water should be left for distribution in accordance with the contracts which govern it. Accordingly, we think it is advisable to define storage water in the manner proposed by the United States, so as to make the operation of the decree more certain and to adjust it to the storage water contracts which are outstanding. Storage water therefore is defined for purposes of this decree as any water which is released from reservoirs for use on lands under canals having storage contracts in addition to the water which is discharged through those reservoirs to meet the requirements of any canal as recognized in the decree. This definition does not adversely affect rights recognized in the decree. It is perhaps a departure from the ordinary meaning of storage. But so long as the Warren Act contracts are outstanding that definition is necessary in order to give them effectiveness. For they do not provide that the United States will furnish water in such amounts as may from time to time be available. The United States agrees to deliver water which will, with all the water to which the land is entitled by appropriation or otherwise, aggregate a stated amount.[17]

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[17] Thus the contract with the Gering Irrigation District provides: "The United States will impound, and store water in the Pathfinder Reservoir, or elsewhere and release the same into the North Platte River at such times and in sufficient quantities to deliver, and does hereby agree to deliver at the Wyoming-Nebraska State line for the use of said District an amount of water which will, with all the water the lands of the District may be entitled to by reason of any appropriations and all water not otherwise appropriated, including drainage and seepage waters developed by the United States, aggregate a flow of water as follows: [Here follows the delivery schedule]; the total amount to be so delivered being approximately 35,500 acre feet."

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There are other exceptions of a minor character to this part of the decree. We have considered them and conclude that they do not have merit.

Pathfinder, Guernsey, Seminoe and Alcova Reservoirs. The Special Master recommends that Wyoming be enjoined to respect the rule of priority of these reservoirs in respect to each other and that the order of seniority as between them be defined as follows: (1) Pathfinder, (2) Guernsey, (3) Seminoe, and (4) Alcova. He recommends, however, that water be allowed to be impounded in Seminoe "out of priority" in relation to Pathfinder and Guernsey for such use only in the generation of power by the Seminoe hydroelectric power plant as will not materially interfere with the administration of the water for irrigation purposes according to the priority as decreed for the French Canal and the State Line Canals.

The United States contends that the decree should permit joint operation of the federal reservoirs without reference to priorities among themselves or among the lands which they serve, in the event of an appropriate adjustment of storage contracts. Concededly the various storage water contracts, including Warren Act contracts, preclude joint operation of Seminoe and Pathfinder. The Special Master also concluded that joint operation would raise questions concerning rights under Wyoming natural flow appropriations senior to Seminoe but junior to Pathfinder. It may be that the latter problem would not be difficult. For as the United States suggests, under joint operation the reservoirs could operate on the Pathfinder priority until they had the combined storage equivalent to Pathfinder. Thereafter they would store no water except such as is needed for appropriations having priorities senior to Seminoe. Since joint operation, however, could not be presently instituted but would have to wait modifications of outstanding contracts, we think it best to defer consideration of the proposal until joint operation

in fact and in law is permissible. The decree will be without prejudice to the parties to make application for joint operation whenever changed conditions make it possible.

The Interstate, Ft. Laramie, and Northport canals are, as we have noted, part of the North Platte Project. The Kendrick Project is subordinate to the North Platte Project. The Special Master concluded that proper regulation for Kendrick would be one requiring the observance of priorities, Alcova to Tri-State Dam, both in the storage of water in Seminoe and Alcova and in the diversion of natural flow by the Casper Canal. The record supports that conclusion. Nebraska accordingly urges that the Interstate, Ft. Laramie, and Northport canals receive the same protection from Kendrick as the French Canal and the State Line Canals. If there were doubt that Interstate, Ft. Laramie, and Northport would receive priority in treatment, the decree could be fashioned so as to provide for it. But the matter is covered by contract between the United States and the Casper-Alcova Irrigation District. That contract, which the United States fully recognizes, precludes operation of the Kendrick Project except in recognition of prior rights in the North Platte Project.[18] We therefore do not think it is necessary to include in the decree the additional provision which Nebraska suggests.

Return Flow of Kendrick Project. The Special Master recommends that Wyoming be enjoined (1) from the recapture of return flow water of the Kendrick Project after

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[18] The contract provides:

"It is expressly agreed that the development of the Casper-Alcova Project and the irrigation of lands under it is in no way to impair the water rights for the Federal North Platte Reclamation Project in Wyoming and Nebraska, and the said North Platte Project, and Warren Act contractors under it are to receive a water supply of the same quantity as would have been received if the Casper-Alcova Project had not been constructed and operated."

it shall have reached the North Platte River and become commingled with the general flow of the river, and (2) from diverting water from the river at or above Alcova Reservoir as in lieu of Kendrick return flow water reaching the river below Alcova.

The United States points out that the first part of this restriction may be construed to forbid Wyoming diverters from making the same use of Kendrick return flow water as is permitted Nebraska diverters. Natural flow in this case is used throughout as including return flow. Return flows once returned to the river and abandoned are part of the natural flow available for use by all natural flow diverters within the limitations of the apportionment. To avoid any possible misunderstanding, there should be substituted for the first clause of this proposed provision a clause which makes clear that return flows of the Kendrick Project are, for purposes of the decree, deemed to be natural flows when they have reached the North Platte River.

The question whether the United States may divert water from the river at or above Alcova Reservoir as in lieu of Kendrick return flow water reaching the river below Alcova presents complexities. Both the United States and Wyoming contend that that privilege should be granted. The return flow is estimated at 96,000 acre feet a year, 46,000 acre feet being the estimated return during the irrigation season. Some of that return flow will be natural drainage, some will be from sump areas, already noted, from which the United States will construct drainage ditches and thus return to the river water which would otherwise be lost. How much will be returned by natural drainage and how much from the sump areas is not presently known, since the Kendrick Project is not completed.

We will consider first the return flow from natural drainage. *Ide* v. *United States,* 263 U. S. 497, held that

the United States might recapture water which resulted from seepage from irrigated lands under a reclamation project and which was not susceptible of private appropriation under Wyoming law. The same conclusion was reached in *United States* v. *Tilley,* 124 F. 2d 850, where the United States was held to be entitled to use and apply the seepage from one division of the North Platte Project to supply lands of another division as against the claim of Nebraska of a right to intercept the seepage and apply it to appropriators senior to the project. And see *Ramshorn Ditch Co.* v. *United States,* 269 F. 80. Cf. *United States* v. *Warmsprings Irrigation Dist.,* 38 F. Supp. 239. In the *Ide* case this Court said:

"The seepage producing the artificial flow is part of the water which the plaintiff, in virtue of its appropriation, takes from the Shoshone River and conducts to the project lands in the vicinity of the ravine for use in their irrigation. The defendants insist that when water is once used under the appropriation it cannot be used again,—that the right to use it is exhausted. But we perceive no ground for thinking the appropriation is thus restricted. According to the record it is intended to cover, and does cover, the reclamation and cultivation of all the lands within the project. A second use in accomplishing that object is as much within the scope of the appropriation as a first use is. The state law and the National Reclamation Act both contemplate that the water shall be so conserved that it may be subjected to the largest practicable use. A further contention is that the plaintiff sells the water before it is used, and therefore has no right in the seepage. But the water is not sold. In disposing of the lands in small parcels, the plaintiff invests each purchaser with a right to have enough water supplied from the project canals to irrigate his land, but it does not give up all control over the water or to do more than pass to the purchaser a right to use the water so far as may be necessary

in properly cultivating his land. Beyond this all rights incident to the appropriation are retained by the plaintiff. Its right in the seepage is well illustrated by the following excerpt from the opinion of District Judge Dietrich in *United States* v. *Haga*, 276 Fed. 41, 43:

"'One who by the expenditure of money and labor diverts appropriable water from a stream, and thus makes it available for fruitful purposes, is entitled to its exclusive control so long as he is able and willing to apply it to beneficial uses, and such right extends to what is commonly known as wastage from surface run-off and deep percolation, necessarily incident to practical irrigation. Considerations of both public policy and natural justice strongly support such a rule. Nor is it essential to his control that the appropriator maintain continuous actual possession of such water. So long as he does not abandon it or forfeit it by failure to use, he may assert his rights. It is not necessary that he confine it upon his own land or convey it in an artificial conduit. It is requisite, of course, that he be able to identify it; but, subject to that limitation, he may conduct it through natural channels and may even commingle it or suffer it to commingle with other waters. In short, the rights of an appropriator in these respects are not affected by the fact that the water has once been used.'" 263 U. S. pp. 505–506.

If that principle were literally applied, the United States could reclaim the return flows 200 miles downstream from Kendrick at Whalen where they could be diverted to the Interstate or Ft. Laramie Canal. Or if not reclaimed there, the return flows could be applied below the Nebraska line to Warren Act contract requirements. The Special Master thought any such program would be so disruptive of orderly administration as to be intolerable. That, of course, is not the proposal. The proposal is to divert water at or above Alcova in lieu of the return flows from Kendrick below Alcova. But we think the proposal is basically

not in accord with the principle underlying the *Ide* case. That principle is that although the water rights belong to the landowners, the owner of the irrigation project has an interest in the appropriative rights to the extent of obtaining the fullest use of the water for the project. It may, therefore, retain control over the water until abandonment. We think it goes too far to say that when the return flows are abandoned, they may nevertheless be exchanged for upstream diversions by the same amount. When the return flows are abandoned, they become subject to appropriation down stream. See 2 Kinney, Irrigation and Water Rights (2d ed. 1912) § 1114. They no longer remain subject to control for further use in the project. Any claim to them or their equivalent under the form of an "in lieu of" diversion is lost.

When it comes, however, to return flows resulting from drainage facilities installed by the United States, different considerations may be applicable. But for the drainage through artificial channels furnished by the United States, the unused water would never return to the river. The United States could rightfully leave the water in the sumps. In that case, no one would ever have the use of it. It is argued that since by artificial drainage the United States adds to the natural flow below Kendrick, it is only fair to allow Kendrick whatever benefit may result from that contribution. Cf. *Reno* v. *Richards,* 32 Ida. 1, 178 P. 81. One difficulty is that the drainage system has not been completed, Kendrick has not been put into operation, and we do not know what the contribution by artificial drainage will be. Accordingly, we do not at this time consider the claim on the merits. When Kendrick has been put into operation and there is a full development of return flows, application may be made for revision of the decree to permit "in lieu of" diversions at or above Alcova.

Whalen to Tri-State Dam. As we have said, this is the critical section of the river. The main controversy cen-

ters around it and around the Special Master's proposal for dealing with it. He proposes that the natural flow water in this section between May 1 and September 30 each year be apportioned on the basis of 25 per cent to Wyoming and 75 per cent to Nebraska. He recommends that Nebraska be given the right to designate from time to time the portion of its share which shall be delivered to the Interstate, Ft. Laramie, French and Mitchell Canals for use on Nebraska lands served by them and that Wyoming be enjoined from diversions contrary to this apportionment.[19]

None of the parties agrees to this apportionment.

Wyoming earnestly contends that storage water as well as natural flow should be included in the apportionment which is made for this section of the river. She points out that in *Wyoming* v. *Colorado, supra,* the Court made an apportionment based upon a supply "which is fairly constant and dependable, or is susceptible of being made so by storage and conservation within practicable limits." 259 U. S. p. 480. She argues that the Court has the power to allocate storage water though its disposition is controlled by contracts between the United States and irrigation districts; and that an apportionment which excludes storage water is unfair. The argument is that each State should be restricted to the use of such supplies only as are necessary to provide their respective irrigators, in-

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[19] He likewise recommends (1) that in the apportionment of water in this section the flow for each day, until ascertainable, shall be assumed to be the same as that of the preceding day as shown by the measurements and computations for that day; and (2) that in the segregation of natural flow and storage water, reservoir evaporation and transportation losses shall be determined in accordance with the formula and data which appear in the record identified as United States Exhibit 204A, unless and until Nebraska, Wyoming, and the United States may agree upon a modification thereof or upon another formula. We discuss the second of these recommendations later in this opinion. We adopt both of them.

cluding those receiving water under contracts, with such amounts as are necessary for beneficial use. The large excesses diverted by Nebraska are adverted to as showing the degree to which carry-over storage in the upper reservoirs has been diminished and the supply for Kendrick exhausted.

The Special Master concluded that since the North Platte Project storage water was disposed of under contracts between the United States and landowners under the project and under the Warren Act contracts, the obligations of those contracts and the necessity of performance under them must be recognized by the decree. He concluded, however, that in the allocation of the natural flow the storage water available might bear upon the equities of the States, although it would have no relevancy to the legal rights of individual appropriators *inter se* under the law of either Wyoming or Nebraska. We think the equities of the case support the failure to include storage water in the apportionment. We do not reach the question whether the presence of the storage water contracts would preclude an apportionment of storage water. The nine Wyoming private canals and the Mitchell and Ramshorn canals have no contract rights to receive storage water from the federal reservoirs. It is difficult for us to see how it would be equitable to make an apportionment on the basis that they do. In certain years in the past there have been excessive diversions by canals in this section, including the nine Wyoming private canals. We cannot assume that an apportionment of storage water is necessary to prevent a recurrence of those practices. Certainly an apportionment of storage water would disrupt the system of water administration which has become established pursuant to mandate of Congress in § 8 of the Reclamation Act that the Secretary of the Interior in the construction of these federal projects should proceed in conformity with state law. In pursuance thereto

all of the storage water is disposed of under contracts with project users and Warren Act canals. It appears that under that system of administration of storage water no State and no water users within a State are entitled to the use of storage facilities or storage water unless they contract for the use. See Wyo. Rev. Stats. (1931), §§ 122-1504, 122-1508, 122-1602. If storage water is not segregated, storage water contractors in times of shortage of the total supply will be deprived of the use of a part of the storage supply for which they pay. If storage water is not segregated, those who have not contracted for the storage supply will receive at the expense of those who have contracted for it a substantial increment to the natural flow supply which, as we have seen, has been insufficient to go around. In *Wyoming* v. *Colorado, supra*, the Court did not apportion storage water. It apportioned natural flow only. It took into account when it made that apportionment the effects of storage in equalizing natural flow in Wyoming. We think no more should be done here to effect an equitable apportionment.

We have already noted the exceptional features of this section—the great concentration of demand in a short, compact area, the distinctly interstate scope and character of water distribution, with Wyoming appropriations serving Nebraska uses, with the dependence of Nebraska canals on Wyoming diversions, with the joint use of canals to serve both States. There has been no effective interstate administration. The need to treat the section as an administrative unit without regard to state lines seems apparent. The Special Master concluded that the most feasible method of apportionment would be a distribution of natural flow on a percentage of daily flow basis.

If a division of flow were made according to total acreage, total requirements, or acreage or requirements of senior and junior appropriators, it would be as follows:

	Wyoming	Nebraska
Total Acreage	27%	73%
Total Requirement in Acre feet	23%	77%
Total Senior Acreage	24%	76%
Total Junior Acreage	28%	72%
Total Acre feet Requirement, Senior Acreage	22%	78%
Total Acre feet Requirement, Junior Acreage	23%	77%

If the river flow is separated according to priority groups, water values expressed in second feet, and it is assumed that each canal diverts, in order of priority, the maximum limit of one second foot for each 70 acres, the result is as follows:

Flow	*Priority Basis*		*Percentages*		*Acreage Basis 24%-76%*		*Acre Feet Basis 22%-78%*	
	Wyo.	*Neb.*	*Wyo.*	*Neb.*	*Wyo.*	*Neb.*	*Wyo.*	*Neb.*
1. Up to 103 second feet	103	0	100	0	24	79	23	80
2. 103 to 1,027 (924)	0	924			222	702	203	721
Cumulative Totals	103	924	10	90	246	781	226	801
3. 1,027 to 1,121 (94)	94	0			23	71	21	73
Cumulative Totals	197	924	18	82	269	852	247	874
4. 1,121 to 1,328 (207)	0	207			50	157	46	161
Cumulative Totals	197	1,131	15	85	319	1,009	293	1,035
5. 1,328 to 1,494 (166)	166	0			40	126	37	129
Cumulative Totals	363	1,131	24	76	359	1,135	330	1,164
6. 1,494 to 1,513 (19)	0	19			5	14	4	15
Cumulative Totals	363	1,150	24	76	364	1,149	334	1,179
7. 1,513 to 1,526 (13)	13	0			3	10	3	10
Cumulative Totals	376	1,150	25	75	367	1,159	337	1,189
					28%-72%		23%-77%	
8. 1,526 to 4,382 (2,858)	801	2,057	28	72	690	2,168	629	2,229
Grand Totals	1,177	3,207	27	73	1,057	3,327	966	3,418
	4,384				4,384		4,384	
					27%-73%		23%-73%	
1 to 8 inclusive	1,177	3,207	27	73	1,184	3,200	1,008	3,376

It is thus apparent that whether a division be proportioned to total acreage or to total diversion requirements or be made on a strict priority basis, there would be no substantial difference except as to the first 1,500 second feet. The maximum difference as to other water would be 6%.

Wyoming argues for a mass allocation, e. g. 705,000 acre feet to be allocated to Nebraska for diversion in this section during the irrigation season for Nebraska lands. The Special Master rejected that method. He concluded that it was based on an assumption of dependability of flow which would be bound to result in injustice to one or other of the States; that it apportioned not only natural flow but also storage water, the disposition of which is governed by contracts. We have already considered Wyoming's exception that storage water should have been included in the allocation. We have also considered the other phases of her argument in favor of mass allocation. We repeat that the inadequacy of the supply is too clear to permit adoption of Wyoming's formula.

The United States and Nebraska claim that the adoption of a priority schedule in this section would achieve the most equitable results. On a 25–75 percentage basis, Nebraska would get 75 second feet out of the first 100, to none of which she would be entitled in times of an extreme low flow; Wyoming would get 225 second feet out of the next 900 to none of which she would be entitled on a priority basis. A priority basis would only coincide with the percentage basis when the supply available was 400 second feet or 1,500 second feet. If the supply were 800 second feet, a priority basis would give Wyoming 103 second feet and Nebraska the remaining 697 second feet. On the 25–75 percentage basis, Wyoming would receive 200 second feet and Nebraska 600 second feet. It is argued that the unfairness of the proposed apportionment is demonstrated by the record of the low flow of the river in this section during the irrigation season in 1931–1940 period.

Thus in 1932 the flow never rose above 1,500 second feet after August 10th. In the 1934 season it rose above 1,500 second feet only once after June 10th. And in the 1936 season it was not often over 1,500 second feet. In 1932, 1934 and 1936 the direct flow frequently fell below 1,000 second feet. In 1934 it rose above 800 second feet for only about 33 days during the entire season and was below 400 second feet about 34 days. In 1936 it was below 1,000 second feet for over 50 days during the season and below 800 second feet about 28 days. The argument is that fluctuation in the rights to water is inherent in the priority system and that the percentage apportionment of 25–75 is too rigid and does not give sufficient recognition to that fact. The frequency with which the flow has dropped below 1,500 second feet during the drought and the inequities which result if a strict priority apportionment is not made at such times are emphasized.

The United States and Nebraska advance as their preferred alternative a strict priority apportionment in which the rights of each appropriator would be fixed. Wyoming says that may not be done since the appropriators are not parties to this proceeding. The Special Master had serious doubts on that score. He also felt that an interstate priority schedule for this section, while not open to all the objections which would be present if it were applied to the whole river, would have other objections. Those were (1) that it would deprive each State of full freedom of intrastate administration of her share of the water and (2) that it would burden the decree with administrative detail beyond what is necessary to an equitable apportionment. Our judgment is that these latter considerations without more are sufficient justification for rejection of the strict priority allocation advanced by the United States and Nebraska. An equitable apportionment may be had without fashioning a decree of that detail. And greater administrative flexibility may be achieved within the respective States by choice of another alternative.

The United States and Nebraska, however, press on us a second alternative in lieu of the 25–75 percentage basis recommended by the Special Master. They suggest that a schedule of varying flows of the stream be adopted. Under that theory there would be an allocation on a priority basis to each of the seven "blocks" of second feet up to and including 1,526 second feet. All above 1,526 second feet would be apportioned on a percentage basis, *e. g.* 28 per cent to Wyoming and 72 per cent to Nebraska.

That alternative method has much to recommend it because of its rather strict adherence to the principle of priority during the periods of low flow. And it may be that it would involve no greater administrative burden than the flat percentage method. For as Nebraska points out, when the supply is determined it would seem to be as easy to give Wyoming the first 103 second feet and Nebraska the next 924 second feet as it would be to divide the second feet of flow by percentages. Moreover, the proposed alternative method would preserve, as well as the flat percentage method, the full control of each State over the internal administration of her water supply.

We are not satisfied, however, that the block system of allocation up to and including 1,526 second feet is the more equitable under the circumstances of this case. The combined requirement of the Tri-State and Mitchell Canals is 924 second feet. Under the block system of apportionment there would be no water for the Wyoming canals in groups 3, 5, and 7 of the foregoing table except such storage water as would be available to the Lingle and Hill Districts in group 5 under their Warren Act contracts. The Wyoming appropriations in these groups are, to be sure, junior to Tri-State and Mitchell. But as the Special Master points out those Wyoming appropriations, though junior, represent old established uses in existence from 40 to over 50 years. Their water supply was not challenged by Nebraska on behalf of Tri-State and Mitchell until the 1931–1940 drought cycle. For example, 6,282 acres are

served by two canals which have exercised their appropriative rights without interference for over 50 years. Furthermore, the great increase in return flows from the North Platte Project, which we discussed earlier, are relevant here. Those return flows are a "windfall" to irrigators who are so situated on the river as to use them yet who do not have storage rights and who share no part of storage costs. As we have seen, these return flows are substantial and should be taken into account in balancing the equities between Wyoming and Nebraska in this section of the river. Moreover, the storage water rights of the lands included in groups 1, 2, 3, and 4 of the foregoing table bear upon this problem. Eighty-two per cent of that Nebraska acreage has storage water rights under Warren Act contracts; 7 per cent of that Wyoming acreage has storage water rights. When groups 1 to 7 are considered, 82 per cent of the Nebraska acreage and 47 per cent of the Wyoming acreage have storage water rights under Warren Act contracts. The Mitchell and Ramshorn Canals are the only Nebraska canals in the 7 groups which have no storage water rights. As we have said, storage water, though not apportioned, may be taken into account in determining each State's equitable share of the natural flow. *Wyoming* v. *Colorado, supra.* Our problem is not to determine what allocation would be equitable among the canals in Nebraska or among those in Wyoming. That is a problem of internal administration for each of the States. Our problem involves only an appraisal of the equities between the claimants whom Wyoming represents on the one hand and those represented by Nebraska on the other. We conclude that the early Wyoming uses, the return flows, and the greater storage water rights which Nebraska appropriators have in this section as compared with those of Wyoming appropriators tip the scales in favor of the flat percentage system recommended by the Special Master. It should be noted, moreover, that that method of apportionment, though not strictly adher-

ing to the principle of priority, gives it great weight and does not cause as great a distortion as might appear to be the case. For on the first 412 second feet of flow the advantage would be with Nebraska, since 412 is the point at which 25 per cent of the flow would first equal the 103 second feet which on a priority basis would go to Wyoming. On the next 1,114 second feet the advantage would be with Wyoming, since Wyoming's share on a priority basis would equal 25 per cent of the flow only after the total flow had reached 1,526 second feet.

Accordingly, we conclude that the flat percentage method recommended by the Special Master is the most equitable method of apportionment. We have considered the arguments advanced against the apportionment being made on the basis of 25–75 per cent. But we do not believe the evidence warrants a change in those percentages.

Wyoming urges reductions in the requirements for the Whalen to Tri-State Dam section of the river. As we have seen, the seasonal requirement, as found by the Special Master, is 1,027,000 acre feet. Wyoming thinks this should be reduced 85,000 acre feet by lowering the estimates for the Interstate, Tri-State and Northport Canals and by eliminating the demand of Ramshorn. Wyoming would reduce Interstate by 60,000 acre feet—15,000 on account of alleged excessive acreage, 27,000 on account of possible large winter diversions to Lake Minatare and Lake Alice, 18,000 on account of water which can be pumped from wells. We have examined the evidence on the alleged excessive acreage and the Lake Minatare and Lake Alice diversions and are satisfied that Wyoming has not made a showing sufficient to sustain her exceptions. It would serve no useful purpose to burden this opinion with the details. As respects the desired reduction because of pumping little need be said. In 1940 Interstate received only 45 per cent of its requirements. Wyoming estimates that the water pumped during that year was the equivalent of 18,000 acre feet at the headgate. It is diffi-

cult to see the equity in Wyoming's demand that Interstate's quota from the river be reduced by that amount. These irrigators bore their share of the cost of the operation and maintenance of Pathfinder and Guernsey and also paid the cost of the pumping. It is not just that they forego the benefits of the water for which they are paying, give the benefits to others, and take on the additional expense of pumping.

We have carefully considered Wyoming's claim that excessive estimates have been allowed Tri-State and Northport. As respects Tri-State there is a sharp conflict over the evidence concerning the acreage served. While the acreage of 52,300 acres computed by the Special Master is liberal, it has support in the evidence and Wyoming has not made a sufficient showing which warrants a reduction from that figure. It is true that the Tri-State acreage expanded as the result of Warren Act contracts and that a demand on natural flow to supply that aggregate acreage on its face seems inequitable in relation to canals junior to Tri-State which have no storage rights. But the Special Master found that the supply for the Wyoming private canals in this section had also been enhanced through the operation of Pathfinder and return flows resulting from the use of storage water. We do not believe sufficient disparity has been shown to warrant an adjustment in the decree. The Special Master allowed 30 per cent for loss in the Tri-State Canal. Wyoming claims that should be reduced because water intercepted in the Tri-State Canal for delivery to Northport does not suffer as great a loss since it is not carried as far. But Wyoming's witness reached the same view as the Special Master. And no proof is advanced by Wyoming which undermines that conclusion. Moreover, an examination of the points at which the return flows are intercepted indicates that the room for difference of opinion is not as great as Wyoming suggests.

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Wyoming's contention that in determining the requirements of the canals in this section Ramshorn should not have been allotted 3,000 acre feet per annum presents different problems. Ramshorn receives its supply through Tri-State. The Special Master in computing the requirements of Tri-State deducted the return flows below the Tri-State Dam which were intercepted and utilized by the canal.[20] But there apparently was not deducted the accretions from Spring Creek, a tributary which flows into the river below the Wyoming-Nebraska line and above Tri-State Dam.[21] The average run-off of Spring Creek from May to September during the 1932–1940 period appears to have been 2,855 acre feet. We agree that this accretion should be taken into account in computing Nebraska's requirement of water from Wyoming.

The Special Master found that the priorities of the canals in this section, the acres served, the requirements in second feet (one second foot for each 70 acres), and the acre feet requirement per season were as follows:

Canal	*Priority*	*Acres*	*Second Feet*	*Acre Feet*
1. Wyo.:				
Grattan	11/1/82	614	9	1, 639
North Platte	9/22/83	3, 153	45	8, 418
Rock Ranch	Spring/84	2, 250	32	5, 908
Pratt Ferris	5/22/86	1, 200	17	3, 204
		7, 217	103	19, 169
2. Neb.:				
Tri-State	9/16/87	51, 000	729	[1] 178, 500
Mitchell	6/20/90	13, 633	195	35, 000
		64, 633	924	213, 500
3. Wyo.:				
Burbank	11/6/91	292	5	833
Torrington	11/28/91	2, 061	29	5, 503
Lucerne	2/21/93	4, 221	60	11, 270
		6, 574	94	17, 606

See footnotes at end of table.

[20] They are shown on Wyoming's Exhibit No. 149.

[21] They are shown on Wyoming's Exhibit No. 150.

Canal	*Priority*	*Acres*	*Second Feet*	*Acre Feet*
4. Neb.:				
Ramshorn	3/20/93	994	14	3,000
Gering	3/15/97	13,500	193	36,000
		14,494	207	39,000
5. Wyo.:				
Burbank	3/12/98	20	1	53
Narrows	11/13/99	110	2	334
Lingle-Hill (via Interstate)	9/6/01	11,500	164	34,299
		11,630	167	34,686
6. Neb.: Tri-State	4/14/02	1,300	19	[1] 4,550
7. Wyo.:				
Wright	4/23/02	110	2	303
Grattan	1/27/04	70	1	187
Murphy	4/2/04	100	1	275
Grattan	12/2/04	639	9	1,706
		919	13	2,471
8. Wyo.:				
Lingle-Hill (via Interstate)	12/6/04	2,300	33	11,655
Pathfinder Irrigation District (via Interstate) Wyoming lands	12/6/04	2,300	33	9,844
Goshen Irrigation District (via Ft. Laramie)	12/6/04	50,000	714	137,500
		54,600	780	158,999
9. Neb.:				
Pathfinder Irrigation District (via Interstate) Nebraska Lands	12/6/04	[2] 84,950	1,213	363,586
Gering-Ft. Laramie Irrigation District (via Ft. Laramie)	12/6/04	53,500	764	147,100
Northport	12/6/04	[3] 4,548	65	19,100
		142,998	2,042	529,786
10. Wyo.:				
Rock Ranch	1/3/10	822	12	2,195
French	2/20/11	504	7	1,346
		1,326	19	3,541
11. Neb.: French	12/21/11	770	11	2,056
12. Wyo.: French	7/14/15	147	2	392
13. Neb.:				
French	9/11/15	213	3	569
French	3/20/20	42	1	102
		255	4	167

[1] The value for Tri-State assumes that the historical interceptions (35,500 acre feet annually) by this canal below the state line will in the future be delivered to the Northport District, in compliance with the decree in *United States* v. *Tilley*, 124 F. 2d 850.

[2] 98,000 acres minus 10,748 acres supplied by winter diversions to inland reservoirs and minus 2,300 acres of Wyoming lands included in Pathfinder District. Second feet and acre feet requirements are adjusted correspondingly.

[3] This canal supplies a total of 13,000 acres, but 8,452 acres will be supplied in the future by interception below state line. See Note 1.

Nebraska contends that the requirements of Tri-State should be 196,000 acre feet and that the allotment to the Gering-Ft. Laramie Irrigation District should be 169,165 acre feet. The argument for the increase for Tri-State is based on the theory that Nebraska has not been given in this section the same margin of safety which was allowed Wyoming in the Pathfinder-Whalen section of the river. But Nebraska has not shown that this allowance was less accurate than the ones made to Wyoming in the other section of the river. And our reading of the record convinces us that the allowances to Nebraska are as liberal as those to Wyoming and that an increase to either would not be justified in view of the overappropriation of the natural flow. The argument of an increase in the allotment to the Gering-Ft. Laramie Irrigation District points out that it receives the same headgate allotment as the Goshen Irrigation District in Wyoming which supplies the Wyoming land under this canal and that the lower area should be given a substantially larger headgate allotment to compensate for canal losses in the upper section of the canal. This argument, however, is not supported by evidence. The same allowance for the lands in each State is supported by the record. For there is evidence that the delivery to the lands in each State in relation to headgate diversions is substantially the same.

The United States contends that the allowance of 65 second feet for the Northport Canal is error. As the Special Master indicated, the 65 second feet allowance is the amount necessary to serve the acreage under that canal which will not be served by return flow intercepted and transported for Northport by the Tri-State Canal. But as the United States points out, return flow is not steady during the irrigation season. It presented a study showing that in the seven best years from 1930 to 1940 the average return flow intercepted by Tri-State on May 1 was only 23 second feet, averaged only 43.9 second feet for the

month of May, averaged 135 second feet for the month of July and did not reach its peak of 200 second feet until September 30, the end of the irrigation season. On that basis Northport could irrigate very little of its acreage from return flow in the first part of the irrigation season, though at the end of the season it could irrigate all. The second feet requirement of Northport is 186. We conclude that Northport should be entitled to use that amount of flow during the season to meet its requirement of 19,100 acre feet. The 186 second feet will, however, be subject to reduction by the amount of return flow intercepted by the Tri-State Canal for delivery to Northport at any given point of time.

As we have noted,[22] the Special Master recommends that for this part of the decree segregation of natural flow and storage water be determined in accordance with the formula and data appearing in U. S. Exhibit 204A, unless and until Nebraska, Wyoming and the United States agree upon a modification or upon another formula. Wyoming contends that it is impossible to determine what is natural flow and what is storage water in the Whalen-Tri-State Dam section of the river from day to day. The problem is a perplexing one. Physical segregation is, of course, impossible. But on the basis of the record we think that it is feasible to determine what portion of the flow at a given point is storage water and what portion is natural flow. Precision is concededly impossible. But approximations are possible; and they are sufficient for the administration of the river under the decree. It is true, as Wyoming says, that in order to segregate storage water and natural flow, losses by evaporation must be determined and, since those losses vary from section to section, the number of days required for the water to travel from one point to another must be known. The time required for water to travel from Alcova to Nebraska varies under different conditions. As an expert of the Bureau of

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[22] Note 19, *supra*.

Reclamation testified, since that time interval varies with the amount of water flowing in the river, it is difficult to make a formula which reflects it. Indeed U. S. Exhibit 204A does not include the time lag element and therefore does not supply all the data necessary in the segregation of natural flow and storage water at Whalen. But this expert testified that although it had not been possible to reflect the time interval in a formula, an adjustment for it was made:

> "Q.—In making this time interval correction, you use your best judgment, based upon your experience on the river and your observation of what conditions were in the river, and, using that judgment, you arrive at the figure for this time interval correction, do you not?
>
> "A.—Yes, it is a more or less arbitrary correction . . ."

But while the adjustment is an arbitrary one, corrections can be made and are made so that over a short period of days the segregation is balanced.[23] And the

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[23] This expert for the Bureau of Reclamation, C. F. Gleason, testified:

"Q.—If there is an error in a series of four or five days as to the amount of natural flow in relation to the storage, that might mean that a natural flow canal might get more or might get less than its due allotment of water, isn't that right?

"A.—That might be true over a very short period. However, the corrections made which are shown in the work sheets as plus or minus storage in that section of the river are made to balance out in such a way that over the season there is no robbery of natural flow or storage and no particular accrual to it as a result of this method of calculation.

"Q.—That is, an attempt is made to balance out, according to your judgment of what ought to be the amount of natural flow and storage at the State line, is that right?

"A.—It is not balanced out according to judgment. It is balanced out mathematically.

"Q.—But it is balanced out mathematically upon what factors?

"A.—Upon the factors of plus and minus channel storage, if you want to use that term. If we plus storage into the channel some days,

evidence is that though this adjustment is only approximate and lacks precision, it is sufficiently accurate for administrative purposes. For this expert of the Bureau of Reclamation testified:

"Q.—But, giving consideration to all of these factors, there isn't any way of making any accurate determination, day to day, of the actual balance of natural flow and storage at either Guernsey or the Nebraska-Wyoming line, is there?

"A.—That term 'accurate' depends upon what is accurate.

"Q.—I mean this, Mr. Gleason—if there is 5,000 second feet of water arriving at Guernsey, is there any way that you can correctly and accurately determine that 2,500, for instance, is storage and that 2,500 is natural flow?

"A.—Oh, I believe that we arrive at a figure that is correct enough for administrative purposes. It must be realized that an error of ten second feet in five hundred is inevitable. All hydrographic records are inaccurate to a varying extent, and the computations based upon them, and based upon assumptions as to evaporation in preparing formulae, so the judgment of the men doing it enters into the final figure, and the most we can hope to do is to arrive at daily figures which, summed up over a period of time, will more

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we minus the total of the same amount later on to make it balance out.

"Q.—That is to say, and you just testified in that way, that your balancing out of these plus and minus quantities that you put in is based upon your judgment of how much natural flow and storage water is at the State line, in view of the conditions and the quantities of natural flow and storage at Alcova?

"A.—Yes, that is correct.

"Q.—Accordingly, the plus or minus corrections are based upon this matter of judgment.

"A.—Yes."

closely approximate the accurate figures than the daily figures taken individually do."

No other expert testimony undermines that conclusion.

We cannot conclude that the segregation of natural flow and storage water lacks feasibility. If a comprehensive formula can be agreed upon, it may later be incorporated in the decree.

Gauging Stations and Measuring Devices. The Special Master recommends that such additional gauging stations and measuring devices at or near the Wyoming-Nebraska state line be installed as are necessary for effecting the apportionment in the Whalen-Tri-State Dam section of the river and that they be constructed and maintained at the joint and equal expense of Nebraska and Wyoming. The parties take no exception to this recommendation and it will be adopted.

Tri-State Dam to Bridgeport, Neb. The Special Master excluded this section of the river from the apportionment on the grounds that its canals are adequately supplied from return flows and other local sources. Nebraska takes exception to that exclusion. She points out that of the 12 canals in this section which bear on our problem, two have Warren Act contracts. Nine are senior to all Wyoming appropriations except the first 103 second feet for the oldest appropriators; only about 200 second feet of Wyoming appropriations are senior to these Nebraska appropriations. Nebraska says that four of these canals had insufficient supplies during the three dry years of 1934, 1936 and 1940. And she points out that during the same periods the nine Wyoming canals, serving substantially the same kinds of areas, had excessive diversions. But it appears that other Nebraska canals in the section had excessive diversions during the same years. And the record supports the conclusion of the Special Master that seasonal supplies are adequate. He explained the shortages as due (1) to lack of coincidence between the time

and quantity of supplies and the time and extent of needs; (2) the excessive diversions by some canals at the expense of others; (3) the withdrawal of water as a matter of priority to supply senior canals in the lower section. The latter he thought would be largely eliminated due to the construction of the Kingsley and Sutherland Reservoirs.

Nebraska has not convinced us that there is error in this conclusion. Two of the canals have Warren Act contracts. In the 1931–1940 period while there was no limitation on Wyoming uses for Nebraska's benefit, the mean divertible flow passing Tri-State Dam for the May-September period was 81,700 acre feet. This is in addition to the local supplies which even during the drought period were adequate to meet the needs of the canals without calling upon up-river water.

This section will accordingly not be included in the apportionment.

Modification of the Decree. The Special Master recommends that the decree permit any of the parties to apply at the foot of the decree for its amendment or for further relief, and that the Court retain jurisdiction of the suit for the purpose of any order, direction, or modification of the decree or any supplementary decree that may at any time be deemed proper in relation to the subject matter in controversy. Colorado and Wyoming object to this provision. Colorado's objection that this provision places administrative burdens on the Court which we should not assume has been sufficiently answered. Wyoming's objection is in the main that a complete equitable apportionment should be made, leaving open for future consideration only the question of additional development above Whalen in Wyoming and Colorado. But our rejection of the proposal for a mass allocation disposes of this objection. And we do not think it appropriate to bar, as Wyoming suggests, applications for modifications within a period of ten years, or alternately five years, from entry of the decree.

Ordinary and Usual Domestic and Municipal Purposes. The Special Master reports that the parties are agreed that there should be no restriction upon the diversion from the North Platte River in Colorado or Wyoming of water for ordinary and usual domestic and municipal purposes and consumption and that nothing in the recommended decree is intended to or will interfere with such diversions and uses. Wyoming suggests that that provision cover not only diversions from the North Platte River in Colorado and Wyoming but also diversion from its tributaries in those States and that stock-watering purposes be excepted as well as ordinary and usual domestic and municipal purposes. We think those suggestions are appropriate ones. They will be adopted.

Records of Irrigation and Storage. The decree, as has been seen, will limit Wyoming and Colorado to the irrigation of stated acreages above Pathfinder and to storage of more than stated amounts of water in that region. The United States insists that the decree should also require Wyoming and Colorado to maintain complete and accurate records of irrigation and storage of water in those areas and to keep them available. Wyoming says that is an unnecessary provision. Colorado says that its officials already have such duties. But the record in this case reflects the need for complete and accurate records. And it seems to us desirable that such records be kept. Otherwise, neither the States nor the other interested parties can know if the acreage and storage limitations are being met. Continuous records will simplify the program of administration. The proposal is adopted.

Importation of Water. The decree which we enter apportions only the natural flow of the North Platte River. The United States suggests that the decree explicitly state that it does not cover any additional supply of water which may be imported into this basin from the watershed of an entirely separate stream and which presently does not

flow into the basin. To remove any possible doubt on that score the decree will contain a provision that it does not and will not affect the use of such additional supplies of water or the return flow from it. All questions concerning the apportionment of such water will await the event.

The parties may within ninety days submit the form of decree to carry this opinion into effect. Costs will be apportioned and paid as follows: The State of Colorado, one-fifth; the State of Wyoming, two-fifths; and the State of Nebraska, two-fifths.

It is so ordered.

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

MR. JUSTICE ROBERTS.

I am unable to agree with the court's disposition of this case. I think the decision constitutes a departure from principles long established and observed by the court in litigations between the states of the Union, and adopts a course diametrically opposed to our most recent adjudication in the field of interstate waters.[1] Without proof of actual damage in the past, or of any threat of substantial damage in the near future, the court now undertakes to assume jurisdiction over three quasi-sovereign states and to supervise, for all time, their respective uses of an interstate stream on the basis of past use, including, over a ten-year term, the greatest drought in the history of the region, admitting, in effect, that its allocation of privileges to the respective states will have to be revised and modified when that drought ceases and more water becomes available for beneficial use. I doubt if, in such interstate controversies, any state is ever entitled to a declaratory judgment from this court. I am sure that, on the showing in the present record, none of the states is entitled to a dec-

[1] *Colorado* v. *Kansas*, 320 U. S. 383.

laration of rights. The precedent now made will arise to plague this court not only in the present suit but in others. The future will demonstrate, in my judgment, how wrong it is for this court to attempt to become a continuing umpire or a standing Master to whom the parties must go at intervals for leave to do what, in their sovereign right, they should be able to do without let or hindrance, provided only that they work no substantial damage to their neighbors. In such controversies the judicial power should be firmly exercised upon proper occasion, but as firmly withheld unless the circumstances plainly demand the intervention of the court. Such mutual accommodations for the future as Nebraska and Wyoming desire should be arranged by interstate compact, not by litigation.

Nebraska initiated this suit on the theory that Wyoming was diverting water under Wyoming appropriations junior to Nebraska appropriations, which, at the time, were either receiving no water or an insufficient supply. Nebraska, in support of its position, attempted to prove the worth of an acre-foot of water for irrigation. But, of course, this is not the way to prove damage in such a controversy; water for beneficial use is what counts. No injury results from the deprivation of water unless a need is shown for that water for beneficial consumptive use at the time by the State claiming to have been wrongfully deprived of it. If water is not needed by downstream senior rights, the denial of water to upstream junior rights can result only in waste. No State may play dog in the manger, and build up reserves for future use in the absence of present need and present damage.

Even on Nebraska's theory, she did not see fit to implead Colorado, obviously because she despaired of showing that anything Colorado was doing, or threatening presently to do, deprived her of any right. Wyoming impleaded Colorado not on the theory that Colorado was

injuring Wyoming, or threatening so to do, but on the theory that there ought to be an apportionment of "rights" in the waters of the stream as between the three States,—an advisory judgment on the subject.

I shall first discuss the contemplated decree as it affects Colorado. The Master finds:

"Equity does not require any restriction upon or interference with present uses of water by Colorado within the North Platte Basin in North Park or any reduction in the present rate of transbasin exportation from North Park.

. . . . .

"Furthermore, reduction in Colorado use would not correspondingly enhance the supply of the other States. In fact there is no clear showing as to the *extent* of benefit to the North Platte Project or other Wyoming or Nebraska users of any limitation upon present uses in North Park."

The Master concludes:

"From a consideration of all the factors bearing on those equities, my judgment is that equitable apportionment does not require any interference with present uses in North Park."

After referring to possible schemes for further use of water in Colorado as constituting a threat of further depletion, he says of the threat: "It can hardly be said to be immediate." He sums up his conclusions as to Colorado as follows:

"A prohibition against further expansion of irrigation in North Park seems to me recommended by consideration of (a) the insufficiency of the present supply at best to more than satisfy the requirements of presently established uses, (b) the principle laid down in *Wyoming* v. *Colorado,* (c) the consonance of such limitation with the general plan of apportionment being recommended herein. At the same time to impose a permanently fixed restriction against further irrigation development in North Park would not appear justified in view of the possibility of such future increase in supply as to render it unneces-

sary. The three alternatives are (1) an outright dismissal as to Colorado, (2) denial of any present relief against that state with retention of jurisdiction to grant such relief on a later showing of such continuation of present conditions of supply as to require the conclusion that they must be accepted as the measure of dependability, (3) imposition of a limitation to present uses of water with retention of jurisdiction to release the restriction if and when the 'dry cycle' shall run its course and it appears that the water supply has become such as to justify further expansion of irrigation in North Park. A reasonable argument can be made for any of these three alternatives. My recommendation in line with the third alternative is that Colorado be limited to the irrigation of 135,000 acres, to the accumulation annually of 17,000 acre feet of storage water, and the exportation of 6,000 acre feet per annum to the South Platte basin."

In the proposed decree, he would enjoin Colorado in accordance with this recommendation although, confessedly, Colorado is not diverting or contemplating diversion of the waters in question. A more gratuitous interference with a quasi-sovereign State I cannot imagine. It would disregard all that we have repeatedly said to the effect that a State should not be enjoined by this court at the suit of a sister State unless she is inflicting, or threatening immediately to inflict, grave and substantial damage upon the complainant. I cannot imagine that, as between private parties, an injunction would go against one who is not doing, or immediately threatening to do, harm to the complainant. The court is simply taking Colorado under its wing and proposes to act as guardian of the State in respect to the waters of the North Platte within her borders.

One need only examine the Master's report to determine that Nebraska's case against Wyoming stands no better than that against Colorado.

This court stated, in *Colorado* v. *Kansas,* 320 U. S. 383, 393: "Such a controversy as is here presented is not to be determined as if it were one between two private

riparian proprietors or appropriators." Nor is it to be determined by the relative priorities of the users in the upper and the lower States. Yet that is what in effect Nebraska sought by her complaint. She is not awarded the relief she asked but instead the so-called "natural flow" water is apportioned in percentages between Wyoming and Nebraska. This is done in spite of the fact that the Master finds that Nebraska needs none of the natural flow which passes the Tri-State Dam for lands lying below that point but has ample water for those lands, regardless of any such flow. Without a showing of need for water for beneficial use and, in spite of the fact that some of the water flowing past the Tri-State Dam is found now to go to waste, an apportionment is made between Wyoming and Nebraska. The Master's findings show that, under the heretofore uniform test, Nebraska has not proved such damage as would entitle her now to relief. The table quoted in footnote 4 of the court's opinion demonstrates that during a thirty-year period, while irrigation did not increase materially in Colorado and increased about one-third in Wyoming, Nebraska more than doubled her acreages under irrigation. Speaking of Nebraska agriculture's dependence on irrigation, the Master says:

"On the other hand, when scanned for evidence of serious drouth damage since 1931, the statistics are equivocal. It appears that there was a rather sharp reduction in the production of alfalfa and sugar beets, but the indication is that this was due to a reduction of acreage rather than of rate of yield. While there was some decline in the production rate of alfalfa, there was a rise in the rate for sugar beets. The acreages devoted to beans and potatoes increased to very closely offset the reduction in beets and alfalfa, the total acreages devoted to the four crops for the three five-year periods, being 124,281, 122,332, and 122,130 respectively. The large increase in total production of beans and potatoes should also be noted. The statistics, taken all in all, are, to say the least,

inconclusive as to the existence or extent of damage to Nebraska by reason of the drouth or by reason of any deprivation of water by wrongful uses in Wyoming or Colorado.

"Nebraska makes no strong claim for its showing in this regard. Her brief says:

'. . . the factors involved in the crop statistics which cannot be eliminated largely distort the picture and make it difficult to show one way or the other the effect and results of the shortage of irrigation water upon crop production. However, we believe that when the statistics are properly considered in the light of other factors, they indicate that crop production is seriously damaged when the water supply is low.'

"Another apparent demonstration of the importance of the part played by irrigation in the economic development of western Nebraska may be seen in its Exhibits 433 and 434, in which the growth of population in eight counties in which irrigation has been practiced is compared with that of six counties without irrigation, the latter lying immediately east and south of the irrigated group. The first or irrigated group of counties shows an increase in population in the 40-year period between 1890 and 1930 of 131 per cent. The second, the nonirrigated group, for the same period shows a population loss of three per cent. No attempt, however, is made to attribute this lack of growth in the second group to anything done in Wyoming or Colorado."

Again the Master says:

"It is of course obvious in general and without any detailed proof that in an arid or semi-arid country deprivation of water for irrigation in time of need cannot be otherwise than injurious to the area deprived. The weakness, if such there be, in Nebraska's proof is uncertainty as to the *extent* of any invasion of her equitable share except as measured by diversions 'out of priority' and uncertainty as to the *extent* of her injury consequent upon the alleged violation of her equitable rights, except as measured by the dollar value assigned to the water lost to her through such diversions. If to sustain her burden of proof Nebraska must establish not only violations of

her priorities or infringement otherwise on her equitable share by the other States, but also that as a result she has suffered injury of great magnitude in the broad sense of serious damage to her agriculture or industries or observable adverse effects upon her general economy, prosperity or population, then her proof has failed, for there is no clear evidence of any of these things." (Italics in Master's report.)

Further the Master finds:

"Another factor favoring Nebraska is that there will commonly be accidental water in substantial quantities passing the state line above that allocated to the State. Even during the dry cycle and with no restriction on Wyoming uses, the usable water passing Tri-State Dam averaged in the May-September period 81,700 acre feet. More than half of this flow, however, occurred in May and June with comparatively little in August and September. The quantity is perhaps too uncertain to be considered of great importance. It is a minor factor in the balancing of equities between the States."

Thus it is apparent that of the very natural flow of water with which the Master is dealing some of it went to waste in the area he considered critical. In other words, there was more water for Nebraska than she turned to beneficial use even in the drought years.

As respects both defendants the decree makes a provisional adjustment based upon drought conditions, with the understanding that if conditions change, by reason of events not now envisaged, the defendants may again come to this court for another provisional arrangement which shall stand until some party to the decree thinks that a further revision should be made. Thus three States, with respect to their quasi-sovereign rights, will be in tutelage to this court henceforth.

Such controversies between States are not easily put to repose. Even when judicial enforcement of rights is required, the attempt finally to adjudicate them often proves abortive. Our reports afford evidence of this fact. Kan-

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sas and Colorado came here twice, at the instance of Kansas, in a dispute over the flow of the Arkansas River.[2] In a case presenting, on the whole, less difficulty than the present one this court entered a decree June 5, 1922,[3] only to find it necessary to revise it on October 9, 1922.[4] But the controversy would not down. The parties came back here on three occasions because of misunderstandings and disagreements with respect to the effect of our decree.[5]

The controversy with respect to the diversion of the waters of Lake Michigan seemed to require a decree conditioned upon, and containing provisions with respect to, future conduct. The difficulty of administering that decree is evidenced by the repeated appearance of the parties in this court.[6]

Experience teaches the wisdom of the rule we have so often announced, that, in such cases, the complaining State must show actual or immediately threatened damage of substantial magnitude to move this court to grant relief; and that, until such showing is made, the court should not interfere. The court, as I think, now departs from this course.

The bill should be dismissed.

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

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[2] *Kansas* v. *Colorado,* 206 U. S. 46; *Colorado* v. *Kansas,* 320 U. S. 383.

[3] *Wyoming* v. *Colorado,* 259 U. S. 496.

[4] *Id.* 260 U. S. 1.

[5] *Id.* 286 U. S. 494; 298 U. S. 573; 309 U. S. 572.

[6] *Wisconsin* v. *Illinois,* 278 U. S. 367; 281 U. S. 179; 289 U. S. 395; 309 U. S. 569; 311 U. S. 107; 313 U. S. 547.

DECREE.

(Entered October 8, 1945.)

This cause having been heretofore submitted on the report of the Special Master and the exceptions of the parties thereto, and the Court being now fully advised in the premises:

It is ordered, adjudged and decreed that:

I. The State of Colorado, its officers, attorneys, agents and employees, be and they are hereby severally enjoined

(a) From diverting or permitting the diversion of water from the North Platte River and its tributaries for the irrigation of more than a total of 135,000 acres of land in Jackson County, Colorado, during any one irrigation season;

(b) From storing or permitting the storage of more than a total amount of 17,000 acre feet of water for irrigation purposes from the North Platte River and its tributaries in Jackson County, Colorado, between October 1 of any year and September 30 of the following year;

(c) From exporting out of the basin of the North Platte River and its tributaries in Jackson County, Colorado, to any other stream basin or basins more than 60,000 acre feet of water in any period of ten consecutive years reckoned in continuing progressive series beginning with October 1, 1945.

II. Exclusive of the Kendrick Project and Seminoe Reservoir the State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined

(a) From diverting or permitting the diversion of water from the North Platte River above the Guernsey Reservoir and from the tributaries entering the North Platte River above the Pathfinder Dam for the

irrigation of more than a total of 168,000 acres of land in Wyoming during any one irrigation season.

(b) From storing or permitting the storage of more than a total amount of 18,000 acre feet of water for irrigation purposes from the North Platte River and its tributaries above the Pathfinder Reservoir between October 1 of any year and September 30 of the following year.

III. The State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe and Alcova Reservoirs otherwise than in accordance with the relative storage rights, as among themselves, of such reservoirs, which are hereby defined and fixed as follows:

First, Pathfinder Reservoir;
Second, Guernsey Reservoir;
Third, Seminoe Reservoir; and
Fourth, Alcova Reservoir;

Provided, however, that water may be impounded in or released from Seminoe Reservoir, contrary to the foregoing rule of priority operation for use in the generation of electric power when and only when such storage or release will not materially interfere with the administration of water for irrigation purposes according to the priority decreed for the French Canal and the State Line Canals.

IV. The State of Wyoming, its officers, attorneys, agents and employees be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe or Alcova Reservoirs, and from the diversion of natural flow water through the Casper Canal for the Kendrick Project between and including May 1 and September 30 of each year otherwise than in accordance with the rule of priority in relation to the appropriations of the Nebraska lands supplied by the French Canal and by the State Line Canals, which said

Nebraska appropriations are hereby adjudged to be senior to said four reservoirs and said Casper Canal, and which said Nebraska appropriations are hereby identified and defined, and their diversion limitations in second feet and seasonal limitations in acre feet fixed as follows:

Lands	*Canal*	*Limitation in Sec. Feet*	*Seasonal Limitation in Acre Ft.*
Tract of 1,025 acres	French	15	2,227
Mitchell Irrigation District	Mitchell	195	35,000
Gering Irrigation District	Gering	193	36,000
Farmers Irrigation District	Tri-State	748	183,050
Ramshorn Irrigation District	Ramshorn	14	3,000

V. The natural flow in the Guernsey Dam to Tri-State Dam section between and including May 1 and September 30 of each year, including the contribution of Spring Creek, be and the same hereby is apportioned between Wyoming and Nebraska on the basis of twenty-five per cent to Wyoming and seventy-five per cent to Nebraska, with the right granted Nebraska to designate from time to time the portion of its share which shall be delivered into the Interstate, Fort Laramie, French and Mitchell Canals for use on the Nebraska lands served by these canals. The State of Nebraska, its officers, attorneys, agents and employees, and the State of Wyoming, its officers, attorneys, agents and employees, are hereby enjoined and restrained from diversion or use contrary to this apportionment, provided that in the apportionment of water in this section the flow for each day, until ascertainable, shall be assumed to be the same as that of the preceding day, as shown by the measurements and computations for that day, and provided further, that unless and until Nebraska, Wyoming and the United States agree upon a modification thereof, or upon another formula, reservoir evaporation and transportation losses in the segregation of natural flow and storage shall be computed in accordance with the following formula taken from United States' Exhibit 204A:

Reservoir Evaporation Losses.

Seminoe, Pathfinder and Alcova Reservoirs.

Evaporation will be computed daily based upon evaporation from Weather Bureau Standard 4 foot diameter Class "A" pan located at Pathfinder Reservoir. Daily evaporation will be multiplied by area of water surface of reservoir in acres and by co-efficient of 70% to reduce pan record to open water surface.

Guernsey Reservoir.

Compute same as above except use pan evaporation at Whalen Dam.

River Carriage Losses.

River carriage losses will be computed upon basis of area of river water surface as determined by aerial surveys made in 1939 and previous years and upon average monthly evaporation at Pathfinder Reservoir for the period 1921 to 1939, inclusive, using a co-efficient of 70% to reduce pan records to open water surface.

Daily evaporation losses in second-feet for various sections of the river are shown in the following table:

TABLE

River Section	Area Acres	Daily Loss—Second Feet May	June	July	Aug.	Sept.
Alcova to Wendover........	8,360	53	76	87	76	56
Guernsey Res. to Whalen..	560	4	5	6	5	4
Whalen to State Line......	2,430	16	22	25	22	16

Above table is based upon mean evaporation at Pathfinder as follows: May .561 ft.; June .767 ft.; July .910 ft.; Aug. .799 ft.; Sept. .568 ft. Co-efficient of 70% to reduce pan record to open water surface.

Above table does not contain computed loss for section of river from Pathfinder Dam to head of Alcova Reservoir (area 170 acres) because this area is less than submerged area of original river bed in Alcova Reservoir, and is, therefore, considered as off-set.

Likewise the area between Seminoe Dam and head of Pathfinder Reservoir is less than area of original river bed through Pathfinder Reservoir—considered as off-set. Evaporation losses will be divided between natural flow and storage water flowing in any section of river channel upon a proportional basis. This proportion will ordinarily be determined at the upper end of the section except under conditions of intervening accruals or diversions that materially change the ratio of storage to natural flow at the lower end of the section. In such event the average proportion for the section will be determined by using the mean ratio for the two ends of the section.

In the determination of transportation losses for the various sections of the stream, such time intervals for the passage of water from point to point shall be used as may be agreed upon by Nebraska, Wyoming and the United States, or in the absence of such agreement, as may be decided upon from day to day by the manager of the government reservoirs, with such adjustments to be made by said manager from time to time as may be necessary to make as accurate a segregation as is possible.

VI. This decree is intended to and does deal with and apportion only the natural flow of the North Platte River. Storage water shall not be affected by this decree and the owners of rights therein shall be permitted to distribute the same in accordance with any lawful contracts which they may have entered into or may in the future enter into, without interference because of this decree.

VII. Such additional gauging stations and measuring devices at or near the Wyoming-Nebraska state line, if any, as may be necessary for making any apportionment herein decreed, shall be constructed and maintained at the joint and equal expense of Wyoming and Nebraska to the extent that the costs thereof are not paid by others.

VIII. The State of Wyoming, its officers, attorneys, agents and employees be and they are hereby severally

enjoined from diverting or permitting the diversion of water from the North Platte River or its tributaries at or above Alcova Reservoir in lieu of or in exchange for return flow water from the Kendrick Project reaching the North Platte River below Alcova Reservoir.

IX. The State of Wyoming and the State of Colorado be and they hereby are each required to prepare and maintain complete and accurate records of the total area of land irrigated and the storage and exportation of the water of the North Platte River and its tributaries within those portions of their respective jurisdictions covered by the provisions of paragraphs I and II hereof, and such records shall be available for inspection at all reasonable times; provided, however, that such records shall not be required in reference to the water uses permitted by paragraph X hereof.

X. This decree shall not affect or restrict the use or diversion of water from the North Platte River and its tributaries in Colorado or Wyoming for ordinary and usual domestic, municipal and stock watering purposes and consumption.

XI. For the purposes of this decree:

(a) "Season" or "seasonal" refers to the irrigation season, May 1 to September 30, inclusive;

(b) The term "storage water" as applied to releases from reservoirs owned and operated by the United States is defined as any water which is released from reservoirs for use on lands under canals having storage contracts in addition to the water which is discharged through those reservoirs to meet natural flow uses permitted by this decree;

(c) "Natural flow water" shall be taken as referring to all water in the stream except storage water;

(d) Return flows of Kendrick Project shall be deemed to be "natural flow water" when they have reached the North Platte River, and subject to the same diversion and use as any other natural flow in the stream.

XII. This decree shall not affect:

(a) The relative rights of water users within any one of the States who are parties to this suit except as may be otherwise specifically provided herein;

(b) Such claims as the United States has to storage water under Wyoming law; nor will the decree in any way interfere with the ownership and operation by the United States of the various federal storage and power plants, works and facilities.

(c) The use or disposition of any additional supply or supplies of water which in the future may be imported into the basin of the North Platte River from the water shed of an entirely separate stream, and which presently do not enter said basin, or the return flow from any such supply or supplies.

(d) The apportionment heretofore made by this Court between the States of Wyoming and Colorado of the waters of the Laramie River, a tributary of the North Platte River;

(e) The apportionment made by the compact between the States of Nebraska and Colorado, apportioning the water of the South Platte River.

XIII. Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy. Matters with reference to which further relief may hereafter be sought shall include, but shall not be limited to, the following:

(a) The question of the applicability and effect of the Act of August 9, 1937, 50 Stat. 564, 595–596, upon the rights of Colorado and its water users when and if water hereafter is available for storage and use in connection with the Kendrick Project in Wyoming.

(b) The question of the effect upon the rights of upstream areas of the construction or threatened construction in downstream areas of any projects not now existing or recognized in this decree;

(c) The question of the effect of the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir;

(d) The question of the right to divert at or above the headgate of the Casper Canal any water in lieu of, or in exchange for, any water developed by artificial drainage to the river of sump areas on the Kendrick Project;

(e) Any question relating to the joint operation of Pathfinder, Guernsey, Seminoe and Alcova Reservoirs whenever changed conditions make such joint operation possible;

(f) Any change in conditions making modification of the decree or the granting of further relief necessary or appropriate.

XIV. The costs in this cause shall be apportioned and paid as follows: the State of Colorado one-fifth; the State of Wyoming two-fifths; and the State of Nebraska two-fifths. Payment of the fees and expenses of the Special Master has been provided by a previous order of this Court.

XV. The clerk of this Court shall transmit to the chief magistrates of the States of Colorado, Wyoming, and Nebraska, copies of this decree duly authenticated under the seal of this Court.

LINCOLN NATIONAL LIFE INSURANCE CO. *v.* READ, INSURANCE COMMISSIONER OF OKLAHOMA, ET AL.

APPEAL FROM THE SUPREME COURT OF OKLAHOMA.

No. 833. Argued April 24, 25, 1945.—Decided June 11, 1945.

When appellant, an Indiana life insurance company, first qualified to do business in Oklahoma in 1919, the Oklahoma constitution provided that no foreign insurance company should be granted a license or be permitted to do business in the State unless it "shall agree to pay all such taxes and fees as may at any time be imposed" by the legislature. Foreign life insurance companies were required to pay annually an "entrance fee" of $200, a 2 per cent tax on all premiums collected in the State, and a tax of three dollars on each local agent. A renewal license was obtainable by payment on or before the last day of February of the gross premium tax on all premiums received during the preceding calendar year. A statute of 1941 increased the 2 per cent gross premium tax to 4 per cent. *Held:*

1. Appellant was not denied equal protection of the laws in violation of the Fourteenth Amendment, either by the 2 per cent or the 4 per cent gross premium tax, even though the tax was inapplicable to domestic corporations. *Hanover Ins. Co.* v. *Harding,* 272 U. S. 494, distinguished. P. 675.

A State may impose on a foreign corporation for the privilege of doing business within its borders more onerous conditions than it imposes on domestic companies.

2. The equal protection clause does not require that the tax or rate of tax exacted from a foreign corporation be the same as that imposed on domestic corporations. P. 678.

3. The fact that the State collects the tax at the end of the license year is immaterial; what is controlling is that the tax was levied upon the privilege of entering the State and engaging in business there. P. 678.

194 Okla. 542, 156 P. 2d 368, affirmed.

APPEAL from a judgment denying, in part, a recovery of allegedly unconstitutional taxes.

Mr. Russell V. Johnson, with whom *Mr. Charles E. France* was on the brief, for appellant.

Fred Hansen, First Assistant Attorney General of Oklahoma, with whom *Randell S. Cobb*, Attorney General, was on the brief, for appellees.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The sole question presented by this appeal is whether Oklahoma has denied appellant the equal protection of the laws in violation of the Fourteenth Amendment.

Appellant is an Indiana corporation. It qualified to do business in Oklahoma in 1919 and has continued to do business there every year since then. The Oklahoma Constitution then provided, as it does now, in Article XIX, § 1, that:

"No foreign insurance company shall be granted a license or permitted to do business in this State until it shall have complied with the laws of the State, including the deposit of such collateral or indemnity for the protection of its patrons within this State as may be prescribed by law, and shall agree to pay all such taxes and fees as may at any time be imposed by law or act of the Legislature, on foreign insurance companies, and a refusal to pay such taxes or fees shall work a forfeiture of such license."

Section 2, Article XIX of the Oklahoma Constitution also required all foreign life insurance companies to pay per annum an "entrance fee" of $200, and provided:

"Until otherwise provided by law, domestic companies excepted, each insurance company, including surety and bond companies, doing business in this State, shall pay an annual tax of two per centum on all premiums collected in the State, after all cancellations are deducted, and a tax of three dollars on each local agent."

Appellant paid the "entrance fee." It made application for a license. And it satisfied the other requirements prescribed by Oklahoma for admission to do business in the State.[1] In each year subsequent to 1919 it made appli-

[1] See Okla. Stat. 1941, Tit. 36, §§ 47, 101.

cation for a renewal license and satisfied the various requirements of the State.

When a foreign insurance company desires, for the first time, to do business in Oklahoma, it must apply for a license to expire on the last day of February next after the issue of the license and on or before such date it must pay the gross premium tax on all premiums, less proper deductions, received by it in Oklahoma from the date of its license to and including December 31st of that year. When a foreign insurance company which holds a license to do business in Oklahoma for a particular year desires to do business there during the ensuing year, it must make application for a license on or before the last day of February of the current license year, pay the gross premium tax on premiums received in Oklahoma during the preceding calendar year, and on or before the last day of February of the ensuing license year pay the gross premium tax on premiums received by it in Oklahoma during the preceding calendar year. That is to say, the licenses issued expire on the last day of February next after their issuance; and to obtain a renewal the company must pay on or before the last day of February in each year the gross premium tax on all premiums received during the preceding calendar year. We are told by the Supreme Court of Oklahoma that that has been the uniform administrative practice of the Insurance Commissioner since 1909.

In 1941 Oklahoma enacted a law, effective April 25, which increased the 2 per cent gross premium tax to 4 per cent.[2] Okla. Stat. 1941, Tit. 36, § 104. Like the 2 per cent tax, this new tax is applicable only to foreign insur-

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[2] This tax together with the entrance fee and the annual tax on each agent is "in lieu of all other taxes or fees, and the taxes and fees of any subdivision or municipality of the State." Okla. Stat. 1941, Tit. 36, § 104. On a failure to pay the tax the Insurance Commissioner "shall revoke the certificate of authority granted to the agent or agents of that company to transact business in this State." *Id.*

ance companies, not to domestic insurance companies. Appellant reported the gross premiums collected in Oklahoma during the calendar year 1941, paid the 4 per cent tax under protest, and brought this suit to recover the amount so paid. Appellant challenged the constitutionality of both the 2 per cent and the 4 per cent tax. The Supreme Court of Oklahoma allowed recovery of the taxes paid at the increased rate on premiums collected prior to the effective date of the act, April 25, 1941. But it disallowed recovery for the balance against the claim that the exaction of the tax from foreign insurance companies while domestic insurance companies were exempt violated the equal protection clause of the Fourteenth Amendment. 156 P. 2d 368. The case is here by appeal. § 237 Judicial Code, 28 U. S. C. § 344.

We can put to one side such cases as *Hanover Ins. Co.* v. *Harding*, 272 U. S. 494, where a foreign insurance company, having obtained an unequivocal license to do business in Illinois and built up a business there, was subsequently subjected to discriminatory taxation. In the present case each annual license, pursuant to the provisions of the Oklahoma Constitution, was granted on condition (1) that appellant agree to pay all such taxes and fees as the legislature might impose on foreign insurance companies and (2) that a refusal to pay such taxes or fees should work a forfeiture of the license. The payment of the gross premium tax on or before the expiration of the license year was always a condition precedent to the issuance of the license for the following year. Accordingly, appellant, unlike the foreign corporation in *Hanover Ins. Co.* v. *Harding*, *supra*, never obtained from Oklahoma an unequivocal license to do business there; it agreed to pay not only for the renewal but also for the retention of its annual license such taxes as Oklahoma might impose.

It has been held both before and after the Fourteenth Amendment that a State may impose on a foreign corpo-

ration for the privilege of doing business within its borders more onerous conditions than it imposes on domestic companies. *Paul* v. *Virginia,* 8 Wall. 168; *Ducat* v. *Chicago,* 10 Wall. 410; *Philadelphia Fire Assn.* v. *New York,* 119 U. S. 110. But it is said that a State may not impose an unconstitutional condition—that is it may not exact as a condition an infringement or sacrifice of the rights secured to the corporation by the Constitution of the United States.[3] The argument apparently is that since appellant is entitled to the equal protection of the laws, a condition cannot be imposed which results in its unequal and discriminatory treatment.

But that argument proves too much. If it were adopted, then the long-established rule that a State may discriminate against foreign corporations by admitting them under more onerous conditions than it exacts from domestic companies would go into the discard. Moreover, it has never been held that a State may not exact from a foreign corporation as a condition to admission to do business the payment of a tax measured by the business done within its borders. See *Continental Assurance Co.* v. *Tennessee,* 311 U. S. 5. That was the nature of the tax imposed in *Philadelphia Fire Assn.* v. *New York, supra.* That company was licensed to do business in New York under a law which required it to pay such a tax as its home State might impose on New York companies doing business there. After it had qualified to do business in New York, its home state exacted from foreign corporations a tax of 3 per cent on premiums received in that State. New York accordingly followed suit. The Court sustained the increased tax, saying that since the license of the foreign company was subject to the conditions prescribed by the New York statute, the amount of the tax

[3] See the cases reviewed in *Hanover Ins. Co.* v. *Harding,* 272 U. S. 494, 507–508; Henderson, The Position of Foreign Corporations in American Constitutional Law (1918), ch. VIII.

could at any time be increased for the future. "The State, having the power to exclude entirely, has the power to change the conditions of admission at any time, for the future, and to impose as a condition the payment of a new tax, or a further tax, as a license fee. If it imposes such license fee as a prerequisite for the future, the foreign corporation, until it pays such license fee, is not admitted within the State or within its jurisdiction. It is outside, at the threshold, seeking admission, with consent not yet given." 119 U. S. p. 119. And the equal protection clause does not require the tax or rate of tax exacted from a foreign corporation as a condition of entry to be the same as that imposed on domestic corporations. *Hanover Ins. Co.* v. *Harding, supra,* pp. 510–511.

The fact that Oklahoma collects the tax at the end of the license year is not material. That was done in *Philadelphia Fire Assn.* v. *New York, supra.* The controlling fact is that the tax though collected later was levied upon the privilege of entering the State and engaging in business there.[4] *Continental Assurance Co.* v. *Tennessee, supra.*

Affirmed.

MR. JUSTICE ROBERTS dissents.

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[4] It is not contended that appellant is engaged in interstate commerce. Hence we do not have presented any question concerning the effect of *United States* v. *South-Eastern Underwriters Assn.,* 322 U. S. 533, on the problem.

Counsel for Parties.

BORDEN COMPANY v. BORELLA ET AL.

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

No. 688. Argued April 6, 1945.—Decided June 11, 1945.

1. A manufacturing corporation owned and operated an office building in which 58% of the rentable space was used for its central offices, where its production of goods for interstate commerce was administered, managed and controlled, although the goods were actually produced at plants located elsewhere. *Held* that maintenance employees of the building were engaged in an "occupation necessary to the production" of goods for interstate commerce, within the meaning of § 3 (j) of the Fair Labor Standards Act, and were therefore covered by the Act. Pp. 680, 684.
2. In an economic sense, executive officers and administrative employees working in the central office building of an industrial organization are actually engaged in the production of goods, and the maintenance employees working in such a building are engaged in occupations necessary to that production. P. 683.
3. In the absence of any contrary evidence, it can not be assumed that Congress in the Fair Labor Standards Act referred to production in other than its ordinary and comprehensive economic sense. P. 684.

145 F. 2d 63, affirmed.

Certiorari, 323 U. S. 706, to review the reversal of a judgment for the defendant, 52 F. Supp. 952, in a suit to recover overtime compensation and liquidated damages under the Fair Labor Standards Act.

Mr. John A. Kelly, with whom *Messrs. George F. Keenan* and *Henry Kirk Greer* were on the brief, for petitioner.

Mr. A. H. Frisch, with whom *Messrs. George W. Newgass* and *Bertram S. Nayfack* were on the brief, for respondents.

Miss Bessie Margolin, with whom *Solicitor General Fahy, Messrs. Chester T. Lane* and *Douglas B. Maggs* were

on the brief, for the Administrator of the Wage and Hour Division, United States Department of Labor, as *amicus curiae,* urging affirmance.

MR. JUSTICE MURPHY delivered the opinion of the Court.

Once again, as in *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, we are required to consider the application of the Fair Labor Standards Act of 1938 [1] to employees engaged in activities relating to the maintenance and operation of a building.

In the *Kirschbaum* case we held that the Act does apply to such employees working in a loft building in which large quantities of goods for interstate commerce are physically produced. In the instant case, the porters, elevator operators and night watchmen in question work in a 24-story office building in the business district of New York City. The building is owned and operated by the petitioner, the Borden Company, which is a New Jersey corporation engaged in the business of manufacturing milk products and other food products. Petitioner occupies approximately 17 of the 24 floors and 58% of the total rentable area. The remainder of the office space is leased to various tenants, none of which was found by the District Court to produce, manufacture, handle, process or in any other manner work on any goods in the building.[2]

Petitioner has manufacturing plants and factories in both the United States and Canada and its products are sold in large volumes throughout this and other countries. These establishments are admittedly engaged in the production of goods for interstate commerce. The heart of

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[1] 52 Stat. 1060, 29 U. S. C. § 201 *et seq.*

[2] The leasing of space to these tenants is incidental to the use of the building by the Borden Company and we need not consider whether the activities of the tenants are such as to constitute production of goods for commerce.

this industrial empire, however, lies in the central office building in New York City. Here the entire enterprise is supervised, managed and controlled.

In this building the directors meet and the corporate officers conceive and direct the policies of the company. Although geographically divorced from the manufacturing plants, employees working in this building dictate, control and coordinate every step of the manufacturing processes in the individual factories. By means of direct teletype wires, they maintain detailed and meticulous supervision of the plants, the local superintendents exercising discretion only in the conduct of routine matters. While no products are actually processed or sold in the building, the purchase of raw materials and supplies, the methods of production, the amounts to be produced, the quantity and character of the labor, the safety measures, the budgeting and financing, the legal matters, the labor policies and the maintenance of the plants and equipment are all directed from this building. Such are the activities of petitioner's central office which is maintained, serviced and guarded by the respondent employees.

The respondents brought this suit against petitioner to recover overtime compensation and liquidated damages, plus reasonable counsel fees. The District Court denied relief, holding that they were not entitled to the benefits of the Act under the rule of the *Kirschbaum* case.[3] 52 F. Supp. 952. The Second Circuit Court of Appeals reversed the judgment. 145 F. 2d 63. We took the case because

[3] The District Court also ruled that the preparation and drafting of labels, photostat and advertising material in petitioner's central office did not constitute "production of goods" within the meaning of the Act and that the case in this respect was controlled by *McLeod* v. *Threlkeld*, 319 U. S. 491, and *Stoike* v. *First National Bank*, 290 N. Y. 195, 48 N. E. 2d 482. The Circuit Court of Appeals, however, found it unnecessary to pass upon this phase of the case. We likewise have no occasion to express our views on this matter since the determination of the main issue is sufficient to dispose of this case.

of the asserted conflict with the decision of the Tenth Circuit Court of Appeals in *Rucker* v. *First National Bank*, 138 F. 2d 699, and because of the importance of the issue as to the application of the *Kirschbaum* doctrine to such facts as are here presented.

Under § 7 (a) of the Act, overtime compensation must be paid to all employees "engaged in commerce or in the production of goods for commerce." As to the latter category of employees it is unnecessary that they directly participate in the actual process of producing goods inasmuch as § 3 (j) provides that "for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed . . . in any process or occupation necessary to the production thereof, in any State." Our problem thus is to determine whether the respondent maintenance employees are engaged in a process or occupation necessary to the production of goods for commerce so as to come within the ambit of § 7 (a).

The *Kirschbaum* case made it clear that the work of maintenance employees in a building where goods were physically manufactured or processed had "such a close and immediate tie with the process of production for commerce, and was therefore so much an essential part of it, that the employees are to be regarded as engaged in an occupation 'necessary to the production of goods for commerce.'" 316 U. S. at 525–526. The maintenance of a safe, habitable building, with adequate light, heat and power, was deemed necessary to the production of goods for commerce. See also *Walton* v. *Southern Package Corp.*, 320 U. S. 540; *Armour & Co.* v. *Wantock*, 323 U. S. 126. The only distinction between this and the *Kirschbaum* case lies in the fact that here the employees work in a building where production of goods is administered, managed and controlled rather than carried on physically. We hold, however, that this distinction is without eco-

nomic or statutory significance and that it cannot form the basis for concluding that the respondent employees are engaged in occupations unnecessary to the production of goods for commerce.

In an economic sense, production includes all activity directed to increasing the number of scarce economic goods. It is not simply the manual, physical labor involved in changing the form or utility of a tangible article. Such labor is but an integral part of the coordinated productive pattern of modern industrial organizations. Equally a part of that pattern are the administration, management and control of the various physical processes together with the accompanying accounting and clerical activities. Economic production, in other words, requires planning and control as well as manual labor.[4] He who conceives or directs a productive activity is as essential to that activity as the one who physically performs it. From a productive standpoint, therefore, petitioner's executive officers and administrative employees working in the central office building are actually engaged in the production of goods for commerce just as much as are those who process and work on the tangible products in the various manufacturing plants. And since the respondent maintenance employees stand in the same relation to this production as did the maintenance workers in the *Kirschbaum* case, it follows that they are engaged in occupations "necessary" to such production, thereby qualifying for the benefits of the Fair Labor Standards Act.

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[4] In the words of the court below, "As was observed over a century ago, every process of manufacture (indeed for that matter every process by which men can affect the outside world at all) may be resolved into the movement of things in space, and it would be absurd to say that, although what the artisans do in the factory, or the dispatching clerks do upon the shipping platforms, is 'necessary' to 'production,' the directions they receive that govern all the movements they impart, are not 'necessary.'" 145 F. 2d at 65.

We find nothing in the Act militating against this conclusion. Sections 7 (a) and 3 (j) both speak of production without attempting to limit its meaning to physical labor. Section 3 (j) in particular defines the term "produced" not only in the physical sense of manufacturing, mining and handling but also in the more general sense of producing or "in any other manner" working on goods. In the absence of any contrary evidence we are unable to assume that Congress used the term in other than its ordinary and comprehensive economic sense. Indeed, the fact that § 13 (a) (1) specifically excludes from the provisions of §§ 6 and 7 those employees employed in a bona fide executive, administrative or professional capacity is clearly consistent with the conclusion that these activities are included within the concept of production as that term is used in the Act and that full effect should be given that fact unless otherwise provided. Thus where, as here, the work of employees is essential or necessary to such executive, administrative or professional activities of a productive nature the employees fall within the purview of § 7 (a) even though those directly engaged in such activities are by express exemption precluded from sharing in its benefits.

Nor do we find in the interpretative principles laid down in the *Kirschbaum* case any basis for holding that the respondent employees are not "necessary" to petitioner's production. Since they bear the same relation to production as did the maintenance employees in that case they cannot be considered any less essential to production; nor can this conclusion have any different "implications in the relation between state and national authority." 316 U. S. at 525. Petitioner's industrial organization is such that the operation and maintenance of a central office building is essential to the economy, efficiency and continuity of production. In short, this office is "part of an integrated effort for the production of goods," *Armour & Co.* v.

Wantock, supra, 130, and the statutory consequences that flow from that fact cannot be avoided.

The judgment below is

Affirmed.

MR. JUSTICE FRANKFURTER concurs in the result.

MR. CHIEF JUSTICE STONE, dissenting.

No doubt there are philosophers who would argue, what is implicit in the decision now rendered, that in a complex modern society there is such interdependence of its members that the activities of most of them are necessary to the activities of most others. But I think that Congress did not make that philosophy the basis of the coverage of the Fair Labor Standards Act. It did not, by a "house-that-Jack-built" chain of causation, bring within the sweep of the statute the ultimate *causa causarum* which result in the production of goods for commerce. Instead it defined production as a physical process. It said in § 3 (j) "'Produced' means produced, manufactured, mined, handled, or in any other manner worked on" and declared that those who participate in any of these processes "or in any process or occupation necessary to" them are engaged in production and subject to the Act.

In *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, after pointing out that Congress did not undertake to make the Act applicable to all occupations which affect commerce, we held that the services of elevator men and other service employees in a manufacturing loft building, where those services contributed to and assisted the manufacturing process carried on there, were within the Act. But nothing then decided or said seems to me to justify our saying that the elevator men and other maintenance employees in an office building, in which no manufacturing is done, either participate in or are necessary to the manufacturing process, because tenants of its building are ex-

ecutive or administrative officers of a company which does manufacturing elsewhere.

The fact that it is convenient or even necessary for the president of the company to ride in an elevator does not seem to me to meet the requirement of the statute that the occupation must be one necessary to the physical process of production. The statute includes those who are necessary to that process, but it does not also include those who are necessary to them. The manufacturing process could proceed without many activities which are necessary or convenient to the executive officers of a manufacturing company but which do not in any direct or immediate manner contribute to the manufacturing process, as did the services rendered in *Kirschbaum Co.* v. *Walling, supra.*

The services rendered in this case would seem to be no more related, and no more necessary to the processes of production than the services of the cook who prepares the meals of the president of the company or the chauffeur who drives him to his office. Compare *McLeod* v. *Threlkeld,* 319 U. S. 491. All are too remote from the physical process of production to be said to be, in any practical sense, a part of or necessary to it.

I would reverse the judgment.

MR. JUSTICE ROBERTS joins in this opinion.

GOLDSTONE ET AL., EXECUTORS, v. UNITED STATES.

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

No. 699. Argued April 26, 1945.—Decided June 11, 1945.

Decedent purchased from an insurance company two single-premium contracts. The first contract insured the decedent's life and provided for payment of the proceeds to his wife or, if she predeceased him, to their daughters; and if the decedent survived all beneficiaries, the proceeds were to be paid to his executors or administrators. The second contract, which the decedent was required to purchase in lieu of a physical examination, provided for semi-annual payments to the decedent during his lifetime and for payment of a specified amount to his wife upon his death; or, if she predeceased him, to the daughters; and, if they were not then living, to his estate. Each contract provided that the wife, during her lifetime, should have the right to assign it, to borrow money on it, to receive dividends, to change the beneficiaries, and to surrender the contract and obtain its cash surrender value. If the wife predeceased the decedent, those powers were to pass to him. Decedent was 63 years of age when the contracts were purchased, and died nearly five years later, survived by his wife and daughters. His wife had not surrendered, assigned or alienated either contract prior to his death. *Held:*

1. The contracts, which must be considered together, involved no true insurance risk; therefore § 302 (g) of the Revenue Act of 1926, relating to amounts receivable "as insurance under policies taken out by the decedent upon his own life," was inapplicable. *Helvering* v. *Le Gierse,* 312 U. S. 531. P. 690.

2. For purposes of the federal estate tax, the proceeds of the contracts were includible in the gross estate of the decedent, under § 302 (c) of the Revenue Act of 1926, as an interest of which the decedent had made an inter vivos transfer "intended to take effect in possession or enjoyment at or after his death." P. 690.

3. The decedent's death was the decisive fact that terminated all of his potential rights and insured the complete ripening of the wife's interests. The transfer of the proceeds of the contracts having been effectuated finally and definitely at the decedent's death, § 302 (c) requires that those proceeds be included within the decedent's gross estate. P. 692.

4. The essential element here is the decedent's possession of a reversionary interest at the time of his death, which postponed until then the determination of the ultimate possession or enjoyment of the property. The existence of such an interest constitutes an important incident of ownership sufficient in itself to support the imposition of the estate tax. *Helvering* v. *Hallock,* 309 U. S. 106. P. 692.

5. Imposition and computation of the federal estate tax are based upon interests in actual existence at the time of the decedent's death. Events which would have extinguished the decedent's reversionary interest had they occurred, but which did not occur, must be ignored. P. 693.

144 F. 2d 373, affirmed.

CERTIORARI, 324 U. S. 833, to review the affirmance of a judgment, 52 F. Supp. 704, dismissing the complaint in a suit for a refund of federal estate taxes.

Mr. Eugene L. Bondy for petitioners.

Mr. Loring W. Post, with whom *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key* and *J. Louis Monarch* were on the brief, for the United States.

MR. JUSTICE MURPHY delivered the opinion of the Court.

The question here is whether the proceeds of certain contracts payable upon the death of the decedent to his wife are includible in his gross estate for estate tax purposes under Section 302 (c) of the Revenue Act of 1926, as amended, Internal Revenue Code § 811 (c).[1]

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[1] "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

. . . . .

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death . . ."

On June 29, 1933, the Equitable Life Assurance Society of the United States issued two contracts for which the decedent paid sums aggregating $26,500:

(1) The first contract, for which the decedent paid a single premium of $14,357.08, insured the decedent's life for $18,928, payable upon death to his wife or, if she predeceased him, to their daughters. If all the beneficiaries predeceased the decedent, the proceeds of the contract were to be paid to his executors or administrators. In lieu of a physical examination in connection with the issuance of this contract, decedent was required to purchase a second or an annuity contract.

(2) Under the annuity contract, the decedent paid a single premium of $12,142.92. The contract provided for semi-annual payments of $386.51 to be made to the decedent during his lifetime and for payment of $6,071.46 to his wife upon his death or, if she predeceased him, to their daughters or, if they were dead, to his estate.

By the terms of each contract the wife had the unrestricted right to assign it, to borrow money on it, to receive dividends, to change the beneficiaries and to surrender the contract and obtain the surrender value thereof. The contracts designated her as the "Owner" or "Purchaser," the decedent being called the "Insured" or "Annuitant." In the event that the wife should predecease the decedent, the contracts provided that all of the enumerated powers were to vest in the decedent to the extent that such powers had not otherwise been exercised by the wife.

The decedent was 63 years old when the contracts were issued. He died nearly five years later, on February 23, 1938, survived by his wife and daughters. His wife had not surrendered, assigned or alienated either contract prior to his death. The Equitable Life Assurance Society thereupon paid the widow $6,071.46 under the annuity contract, $18,928 under the life contract and $182.24 as accumulated dividends, making a total of $25,181.70.

On these facts the Commissioner of Internal Revenue determined that the proceeds of the two contracts were includible in decedent's estate for estate tax purposes. The petitioners, as executors of the estate, were assessed a deficiency of $5,376.11. After paying that amount they filed a claim for refund. The claim was rejected. They then brought this suit for refund. The District Court sustained the action of the Commissioner and dismissed the complaint. 52 F. Supp. 704. The Second Circuit Court of Appeals affirmed this judgment. 144 F. 2d 373. An apparent conflict of authority among lower courts on the question presented led us to grant certiorari.[2]

Helvering v. *Le Gierse,* 312 U. S. 531, makes it plain that these two contracts, which must be considered together, contain none of the true elements of insurance risk. Section 302 (g) of the Act, relating to amounts receivable "as insurance under policies taken out by the decedent upon his own life," is therefore inapplicable. The sole question, then, is whether the proceeds of the contracts are includible in the decedent's gross estate under § 302 (c) as the subject of a transfer intended to take effect in possession or enjoyment at or after the decedent's death. That question we answer in the affirmative.

Section 302 (c), as demonstrated by *Helvering* v. *Hallock,* 309 U. S. 106, reaches all *inter vivos* transfers which may be resorted to, as a substitute for a will, in making

[2] The judgment below is stated by the United States to be inconsistent with the result reached in *Lloyd's Estate* v. *Commissioner,* 141 F. 2d 758 (C. C. A. 3) and to be in harmony with *Bailey* v. *United States,* 31 F. Supp. 778 (Ct. Cls.). The United States also claims that the result below is inconsistent with the same court's prior affirmance of *Estate of Ballard* v. *Commissioner,* 47 B. T. A. 784, affirmed, 138 F. 2d 512 (C. C. A. 2). In view of the manner of our disposition of the instant case, however, we have no occasion to determine whether these asserted conflicts exist or whether the decision here necessarily controls the factual situations presented in these other cases.

dispositions of property operative at death. It thus sweeps into the gross estate all property the ultimate possession or enjoyment of which is held in suspense until the moment of the decedent's death or thereafter. *Fidelity-Philadelphia Trust Co.* v. *Rothensies,* 324 U. S. 108, 111. In so doing, § 302 (c) pierces all the verbiage of "unwitty diversities of the law of property." *Helvering* v. *Hallock, supra,* 118. Testamentary dispositions of an *inter vivos* nature cannot escape the force of this section by hiding behind legal niceties contained in devices and forms created by conveyancers.

In this instance the decedent carefully procured the issuance of two contracts in his wife's name without possessing for a measurable period most of the usual attributes of ownership over the contracts. But this procedure does not conceal the fact that decedent used these contracts as a means of effecting a transfer of approximately $25,000 of his estate to the natural objects of his bounty. Nor does it negative the fact that this *inter vivos* transfer possessed all the indicia of a testamentary disposition. There was, in other words, a "transfer of property procured through expenditures by the decedent with the purpose, effected at his death, of having it pass to another." *Chase National Bank* v. *United States,* 278 U. S. 327, 337. Section 302 (c) must therefore be brought to bear.

The decedent, in making disposition of $25,000 of his property through these two contracts, retained a valuable interest in that amount which was not extinguished until he died. He retained not only the right to semi-annual payments under the annuity contract but also a contingent reversionary interest in the entire proceeds of both contracts. Had he survived his wife he could have exercised the attributes of ownership over the contracts, changing the beneficiaries or surrendering the contracts as he saw fit. If he had survived both his wife and his daughters

the proceeds of the two contracts would automatically have been payable to his estate when he died. Thus the ultimate disposition of the proceeds of the contracts was suspended until the moment of decedent's death. Only then did the respective interests of the wife and daughters become fixed; only then were their interests freed from the contingency of the decedent's survival. His death was the decisive fact that terminated all of his potential rights and insured the complete ripening of the wife's interests. The transfer of the proceeds of the contracts having been effectuated finally and definitely at the decedent's death, as in the *Hallock* case, § 302 (c) requires that those proceeds be included within the decedent's gross estate.

This conclusion is unaltered by the fact that the wife had the unrestricted power during the decedent's lifetime to exercise many important incidents of ownership over the contracts, including the power to terminate the decedent's reversionary interest in the proceeds. Whatever the likelihood of the exercise of this power, it is a fact that the wife did not change the beneficiaries or surrender the contracts so as to destroy decedent's reversionary interest. The string that the decedent retained over the proceeds of the contracts until the moment of his death was no less real or significant because of the wife's unused power to sever it at any time.

The essential element in this case, therefore, is the decedent's possession of a reversionary interest at the time of his death, delaying until then the determination of the ultimate possession or enjoyment of the property. The existence of such an interest constitutes an important incident of ownership sufficient by itself to support the imposition of the estate tax. *Helvering* v. *Hallock, supra.* The indefeasibility of that interest prior to death or the decedent's possession of other powers of ownership is unnecessary and indecisive of estate tax liability.

The disappearance of a decedent's reversionary interest, together with the resulting estate tax liability, prior to death through events beyond the decedent's control is a possibility in many situations such as the one in issue.[3] Likewise a reversionary interest may become vested prior to a decedent's death because of the occurrence of other events beyond the realm of the decedent's volition and unconnected in any way with his death. But the imposition and computation of the estate tax are based upon the interests in actual existence at the time of the decedent's death. It follows that only those events that actually occurred prior to that moment can be considered in determining the existence and value of the taxable interests. Events that might have but failed to take place so as to erase a decedent's reversionary interest must be ignored; such unrealized possibilities, if significant at all, only add to the remoteness of the reversionary interest.

In our view of the case we need not consider the alternative argument urged by the United States to the effect that the specific amendments to § 302 (c) are also applicable since the decedent actually received an annual return from the contracts for a period which did not in fact end before his death. Nor do we reach any questions of valuation of the decedent's reversionary interest such as those which were decided in *Fidelity-Philadelphia Trust Co.* v.

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[3] Thus, in *Fidelity-Philadelphia Trust Co.* v. *Rothensies,* 324 U. S. 108, the decedent's contingent power of appointment was exercisable only if her two daughters died before her and left no surviving descendants. If the daughters died first but left surviving descendants, it would be certain before the decedent's death that her power of appointment would be nugatory. But such a contingency did not happen. At the time when the decedent died there was still the possibility that her power of appointment might be effective. The fact that the power of appointment might have been destroyed prior to the decedent's death did not prevent the imposition of the estate tax. The decedent's death was still the decisive factor which enlarged and matured the interests of the daughters.

Rothensies, supra, and *Commissioner* v. *Estate of Field,* 324 U. S. 113.

Affirmed.

MR. JUSTICE ROBERTS.

I think the judgment should be reversed.

The court's decision repudiates *Helvering* v. *Hallock,* 309 U. S. 106, and other cases which have applied its reasoning. We have recently been told that the question whether, within the intent of the Revenue Acts, a transfer is "intended to take effect in possession or enjoyment at or after" the grantor's death is to be decided not by the terminology of conveyancing or the ancient real property law respecting vested and contingent estates, possibilities of reverter, and the like. We have been warned that the taxpayer and his estate must have regard to substance rather than to form, in answering the question whether the transfer becomes complete only at the transferor's death. I have assumed that the tax gatherer could not ignore the same test. Here I think the Commissioner is permitted to do just that. In order to reach substance in disregard of form, this court only recently has treated two independent contracts, one for insurance and the other for an annuity, as constituting but a single transaction and amounting to a gift in favor of the beneficiary of the insurance policy. *Helvering* v. *Le Gierse,* 312 U. S. 531.

The transaction under review in the present case is a common one. Where an applicant for insurance is beyond the age at which a company will underwrite the risk, life insurance may be obtained by purchasing an annuity, which diminishes or eliminates risk of serious loss to the company by the early death of the insured. Here the decedent, a man of about sixty-three, in good health, and with apparently no contemplation of early death, consummated such an arrangement with an insurer. I think it demonstrable that the transaction as respects the bene-

ficiary, his wife, was no different in substance or effect than an outright gift of money or property to her.

The decedent paid some $14,000 as a single premium for a policy by which the insurer agreed to pay some $18,000 to the beneficiaries named, that is, to his wife, if living, if she were dead, to his two daughters. The policy was issued to the wife and designated her as the owner of it. She had the following powers: To change the beneficiary without the husband's consent, to surrender the contract, assign or pledge it without his consent or that of any subsequent owner, change the form or plan of insurance (without reference to the insured, any beneficiary or subsequent owner), to surrender the contract and receive a specified cash value, to borrow on the policy at her sole election, to receive the dividends in cash or accumulate them to purchase additional insurance, in either case for her own use. If she exercised none of these rights the decedent would have become, at her death, if he were then living, the owner of the policy in her place and stead.

It is evident that if the policy be treated as an item of property, she had sole, full, and untrammelled dominion over it and its proceeds. She was in truth, and not by any fiction, absolute owner of the property. I cannot distinguish this case from one in which a husband, not in contemplation of death, conveys money or property, real or personal, in fee simple to his wife or to any other relative. For, in such a case, all, or a portion of the property, may, upon the death of the donee, descend to the donor under the intestate laws, and both parties to the transaction know this to be the fact. Notwithstanding then that, under the law, the wife may, until her death, spend, convey, mortgage or dispose of the property, I suppose it will be held that, inasmuch as all or some of it will descend to him if she omits so to do, he will be held, within the meaning of the statute, to have made a conveyance to take effect at his death because the only way he can avoid in-

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heriting it from the donee is to die. Apparently courts are only to look to the realities of the situation, the essential nature of the ownership of the donee, where that spells taxability, but are to ignore the true character of the donee's untrammelled power over the subject matter of the gift where so to do spells taxability.

For the annuity purchased by the decedent he gave his check for the sum of $12,000. The contract describes his wife as the purchaser. Except for an annuity of a few hundred dollars per annum, payable to the decedent and subject to reduction under the terms of the contract, the wife's rights were again absolute. Upon the death of the decedent she was to receive a death benefit of some $6,000, but she might obtain this benefit at any time during his life, without his consent, and without other condition, upon mere surrender of the contract. Such surrender she might make without anyone's consent. She might, without decedent's consent, change to another form of plan or contract, or change the beneficiary, or assign the contract, might receive the dividends or allow them to accumulate, borrow money on the contract, and elect a mode of settlement thereunder. Her assignment of the contract might, if she so elected, exclude all rights of any beneficiary or annuitant under it. Here again, a small annuity, payable to the decedent only so long as his wife permitted, was the sole element of interest remaining in the decedent. The property was subject to the wife's dominion and hers alone.

To say that the decedent here retained an interest which passed at his death is to fly in the face of the facts. It is to say that, although we know the donee was as free to deal with the property as if she were described, in accordance with the niceties of conveyancing, or the ancient law of estates, as the owner in fee simple, yet this reality is to be ignored for the purpose of finding that the decedent gave her something less than absolute and full ownership

of the property by enabling her to do exactly as she pleased with it; that the so-called "string" which he retained upon the property need not have the quality of a tie that binds.

MR. JUSTICE DOUGLAS joins in this opinion.

INLAND EMPIRE DISTRICT COUNCIL, LUMBER & SAWMILL WORKERS UNION, ET AL. v. MILLIS, INDIVIDUALLY AND AS CHAIRMAN AND MEMBER OF THE NATIONAL LABOR RELATIONS BOARD, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

No. 613. Argued February 26, 27, 1945.—Decided June 11, 1945.

1. No showing having been made in this case that the National Labor Relations Board, in certifying a bargaining representative of employees pursuant to § 9 (c) of the National Labor Relations Act, acted unlawfully—either by non-compliance with statutory requirements or by denial of constitutional right—it is inappropriate to determine whether the Act bars judicial review of certification by an independent suit under § 24 of the Judicial Code. Pp. 699–700.
2. The hearing afforded by the National Labor Relations Board in this certification proceeding pursuant to § 9 (c) was "appropriate" within the meaning of that section, whether or not the proceedings prior to the election ordered by the Board were adequate, since the procedure upon rehearing after the election was adequate and cured any defects which may have existed at earlier stages of the hearing. P. 708.
3. Rules of the National Labor Relations Board applicable to proceedings under § 9 (c) contemplate further hearings upon reconsideration before the final act of certification. P. 709.
4. Due process does not require a hearing at the initial stage, or at any particular point, or at more than one point, in an administrative proceeding, but is satisfied if the requisite hearing is held before the final order becomes effective. P. 710.

144 F. 2d 539, affirmed.

CERTIORARI, 323 U. S. 703, to review the reversal of a judgment refusing to dismiss for want of jurisdiction a suit against members of the National Labor Relations Board to set aside a certification of a collective bargaining representative.

Mr. George E. Flood, with whom *Messrs. Joseph A. Padway* and *James A. Glenn* were on the brief, for petitioners.

Mr. Alvin J. Rockwell, with whom *Solicitor General Fahy, Messrs. Charles F. McErlean, David Findling* and *Miss Ruth Weyand* were on the brief, for respondents.

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

This controversy grows out of a contest between rival labor unions over the right to act as collective bargaining representative of employees of Potlatch Forests, Inc., a company conducting logging, lumbering and milling operations in northern Idaho. Petitioners seek relief from a certification order of the National Labor Relations Board issued pursuant to § 9 (c) of the National Labor Relations Act. 49 Stat. 453; 29 U. S. C. § 159 (c). They are affiliated with the American Federation of Labor, the certified union with the Congress of Industrial Organizations.

In *American Federation of Labor* v. *Labor Board,* 308 U. S. 401, this Court held that a certification under § 9 (c) is not reviewable by the special statutory procedure except incidentally to review of orders restraining unfair labor practices under § 10. Decision was expressly reserved whether, apart from such proceedings, review of certification may be had by an independent suit brought pursuant to § 24 of the Judicial Code. 308 U. S. 412.

Petitioners now assert the right to such review. Prior to the certification, they had represented the company's employees in collective bargaining. They do not seek

review upon the merits of the certification. Their claim is that they were denied the "appropriate hearing" which § 9 (c) requires and that the effect was not only to deprive them of the statutory right to hearing but also to deny them due process of law contrary to the Fifth Amendment's guaranty. Accordingly they seek, in substance, injunctive relief requiring respondents, members of the Board, to vacate the order of certification or, in the alternative, a declaratory judgment that the order is invalid.

The District Court declined to dismiss the suit, upon respondents' motion alleging, among other grounds, that the court was without jurisdiction of the subject matter. The Court of Appeals reversed the judgment, one judge dissenting. 144 F. 2d 539. That court held that the statutory review is exclusive, with the consequence that this suit cannot be maintained. The obvious importance of the decision caused us to grant the petition for certiorari.[1] 323 U. S. 703.

In *American Federation of Labor* v. *Labor Board,* 308 U. S. at 412, the Court said, with reference to the question whether the Wagner Act has excluded judicial review of

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[1] The inferior courts have divided on the question. Compare *Association of Petroleum Workers* v. *Millis,* No. 20854 (N. D. Ohio), unreported; *Sun Ship Employees Association, Inc.* v. *Labor Board,* 139 F. 2d 744 (C. C. A. 3); *International Brotherhood of Electrical Workers* v. *Labor Board,* No. 21994 (N. D. Ohio), unreported; *American Broach Employees Association* v. *Labor Board,* No. 4242 (E. D. Mich.), unreported; *Spokane Aluminum Trades Council* v. *Labor Board,* No. 349 (E. D. Wash.), unreported; with *International Brotherhood of Electrical Workers* v. *Labor Board,* 41 F. Supp. 57 (E. D. Mich.); *American Federation of Labor* v. *Madden,* 33 F. Supp. 943 (D. D. C.); *Klein* v. *Herrick,* 41 F. Supp. 417 (S. D. N. Y.); *R. J. Reynolds Employees Association, Inc.* v. *Labor Board* (M. D. N. C.), unreported; *Reilly* v. *Millis,* 52 F. Supp. 172 (D. D. C.), affirmed, 144 F. 2d 259 (App. D. C.); *Brotherhood & Union of Transit Employees of Baltimore* v. *Madden,* 58 F. Supp. 366, 15 L. R. R. 519 (D. Md.), reversed, 147 F. 2d 439, 15 L. R. R. 806; *Inland Empire District Council* v. *Graham,* 53 F. Supp. 369 (W. D. Wash.).

certification under § 9 (c) by an independent suit brought under § 24 of the Judicial Code:

"It can be appropriately answered only upon a showing in such a suit that unlawful action of the Board has inflicted an injury on the petitioners for which the law, apart from the review provisions of the Wagner Act, affords a remedy."

Petitioners earnestly urge that this case presents the required showing of unlawful action by the Board and resulting injury. Unless they are right in this view, it would be inappropriate, as was said in the *American Federation of Labor* case, to determine the question of reviewability. That question should not be decided in the absence of some showing that the Board has acted unlawfully. Upon the facts presented, we think no such showing has been made, whether by way of departure from statutory requirements or from those of due process of law.

On March 9, 1943, local unions affiliated with the C. I. O. filed petitions with the Board for certification as bargaining representatives in three of the company's five logging and milling plants or units. The plants were geographically separate. Some were located as far from others as one hundred miles. But there was common ownership, management and control, with occasional shifting of crews or men from one plant to another.[2] Although the petitions sought separate local units rather than a single company-wide unit, the Board consolidated them for hearing before a trial examiner.

The hearing was held in May, 1943. The company, the C. I. O., and the petitioners, who may be referred to collectively as the A. F. of L.,[3] appeared and participated.

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[2] Some special operations, e. g., the Washington-Idaho-Montana Railroad, were conducted through wholly owned subsidiaries.

[3] The collective designation is approximate both for convenience and by reason of the facts, noted in the text, relating to A. F. of L.'s dealings with the company through both a "master contract" and local supplemental agreements.

No complaint is made concerning this hearing. It was apparently a typical representation proceeding. The principal issue was the character of the appropriate unit. The A. F. of L. urged that the unit should be company-wide. The C. I. O. advocated separate plant units.

The Board's decision was rendered July 13, 1943. 51 N. L. R. B. 288. It found that the A. F. of L. had organized the employees on a company-wide basis and on this basis had made a "master contract" with the company, which, however, was supplemented by local contracts relating to local matters in each of the five operations. The Board concluded that the history of the bargaining relations had demonstrated the appropriateness of a unit consisting of all the logging and mill employees of the company. It therefore dismissed the petitions of the C. I. O. on the ground that the three separate plant units sought were inappropriate.

Three days later, on July 16, the C. I. O. filed a further petition, this time asking to be certified as bargaining representative on a company-wide basis, excluding clerical, supervisory, confidential, and temporary employees, as well as employees of Potlatch Townsite and Potlatch Mercantile Company.[4] The unit thus suggested conformed generally to the one covered by the outstanding A. F. of L. contract.

On September 14, pursuant to C. I. O.'s motion, the Board served notice upon the A. F. of L. to show cause why the decision of July 13 should not be vacated; the petitions in the earlier cases reinstated and treated as amended by the new petition; and why the Board should not reconsider and proceed to decision without further hearing. The order also proposed to make part of the

[4] The Board's report shows that employees of these operations had been excluded from the units in the local contracts which the A. F. of L. had with the separate operations of the company. 52 N. L. R. B. 1377, 1382–1383.

record the statement of the Board's field examiner concerning the C. I. O. claims of authorization to represent employees.[5]

The A. F. of L. responded by filing a "Protest and Objection." This alleged that the proposed order contemplated a decision without the taking of evidence, to be based in part on an ex parte survey of the C. I. O. claims of authorization by employees; that employees of the two units not involved in the first proceeding would have no opportunity to present evidence in their own behalf;[6] and that the Board had no authority to set aside the A. F. of L.'s existing contract by such proceedings.

The Board considered the objections, but found them insufficient, rejected the protest and, without further hearing for the taking of evidence, considered the case upon the full record, including that made in the original hearings. It again approved a company-wide unit, following the historical lines of organization, but excluded certain "fringe" classifications in conformity with generally established policy. It further found that a question concerning representation had arisen and directed that an election be held among the employees in the appropriate unit as it had been determined. The Board's decision was rendered October 14, 1943. 52 N. L. R. B. 1377.

The election was held during the following November and resulted in a majority for the C. I. O.[7] The A. F. of L. filed "Objections and Exceptions to Election," see 55

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[5] The field examiner's report is introduced, not as proof of the extent of representation by the petitioning union, but to satisfy the Board that there is a substantial membership among the employees in the unit claimed to be appropriate sufficient to justify the Board's investigation.

[6] These were the plants located at Potlatch and Coeur d'Alene, which were not included in the units sought by the C. I. O. in its original petitions.

[7] The majority was of the ballots cast, but not of the total number of employees eligible to vote.

N. L. R. B. 255, 256, which renewed the claim of impropriety in failing to hold another hearing and also challenged some exclusions of employees from eligibility to take part in the election. Accordingly the A. F. of L. moved to vacate the decision and direction of election, to vacate the election itself, to stay certification and to grant an appropriate hearing.

In January, 1944, the Board granted the A. F. of L.'s motion for further hearing, but deferred ruling upon the request to vacate the previous decision and the election. The hearing was held before a trial examiner in February, 1944. Petitioners appeared and participated fully, as did the company and the C. I. O. No complaint is made concerning the scope of this hearing or the manner in which it was conducted, except as to its timing in relation to the election. Full opportunity was afforded petitioners to present objections and evidence in support of them. From the absence of contrary allegation, as well as the official report of the Board's decision, it must be taken that all available objections to the Board's procedure and action were made, considered, and determined adversely to petitioners.[8]

The Board rendered its supplemental decision on March 4, 1944. 55 N. L. R. B. 255. This made supplemental findings of fact based upon the entire record, including the record in the original proceedings, the election report, petitioners' objections and exceptions, the motion for reconsideration, and the evidence and objections taken at the February hearing. After reviewing the entire proceedings, the Board found that an "appropriate hearing" had been given, within the requirement of § 9 (c); ruled upon each of petitioners' objections, whether new or renewed; and concluded that none of them furnished adequate reason for disturbing its previous decision and direction for election. Accordingly it denied the motion to vacate that

[8] Cf. 55 N. L. R. B. 255.

decision and the election, and certified the C. I. O. as exclusive bargaining representative of the employees in the unit found appropriate. A. F. of L.'s further motion for reconsideration was denied and thereafter the present suit was instituted.[9]

Upon this history petitioners say they have been denied the "appropriate hearing" § 9 (c) requires. They insist that the hearing, to be "appropriate," must precede the election. Accordingly the February, 1944, hearing is said to be inadequate to satisfy the statutory requirement, as well as due process, although no complaint is made concerning its adequacy in any respect other than that it followed, rather than preceded, the election.

Petitioners urge also that the procedure was unwarranted for the Board to vacate the decision of July, 1943, reopen or "reinstate" the original proceedings, treat the C. I. O.'s petition for company-wide certification as an amendment to its original petitions, and thereafter to regard the record in the earlier proceedings as part of the record in the later ones, together with the field examiner's report concerning C. I. O. employee representation.

Petitioners' exact contention concerning the reopening of the original proceedings is not altogether clear.[10] But,

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[9] The suit is the last in a series intended to prevent the holding of the election or to avoid certification founded upon it. See *Inland Empire District Council* v. *Graham,* 53 F. Supp. 369 (W. D. Wash.); *Local 2766, Lumber & Sawmill Workers Union* v. *Hanson,* Civil Action No. 1553 (D. Idaho), unreported; *Inland Empire District Council* v. *Graham,* Civil Action No. 834 (W. D. Wash.), unreported; *Inland Empire District Council* v. *Labor Board,* Civil Action No. 22353 (D. D. C.), unreported.

[10] The argument appears to regard them as irrevocably closed by the decision of July 13, 1943, and that decision as endowed with finality precluding the Board from later reopening the proceedings and considering further the record made in them. It seems also to suggest that the original petitions could not be amended, at any rate by treating the later petition as an amendment, after the decision, notwithstanding an order vacating it.

in any event, it clearly maintains that the Board's action, in effect treating the later proceedings as a continuance of the earlier ones, injected new issues upon which petitioners were entitled to present additional evidence. Accordingly it is claimed that the original record, together with the additional matter presented by the new petition, the motions which followed and the proceeding to show cause, was not adequate to sustain the Board's action in vacating its first decision and entering the direction for election. Although petitioners urge that the preelection proceedings were defective, they emphasize most strongly that the February hearing could not cure the failure to grant the further hearing they demanded prior to the election.

The Board's position is, in effect, twofold: that there was no departure from the statute's requirements or those of due process in the proceedings prior to the election;[11]

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[11] The Board says that the two proceedings involved the same substantial controversy, namely, representation of the Potlatch Company's employees; and therefore the material issues were the same except that in the later proceedings the C. I. O. acceded to the decision that a company-wide unit was appropriate and sought representation on that basis. Only a waste of time and money for all concerned would have resulted, in the Board's view, from retracing the ground covered in the earlier hearings. Accordingly, it was entirely proper to treat the later ones as in substance a continuation of them and to proceed with the determination of the other questions relating to representation which the narrow ground of the first decision had made unnecessary to decide.

The Board also maintains that a further hearing was not required in the absence of a showing by petitioners that new issues were presented which required the taking of additional evidence. In its view the procedure to show cause afforded adequate opportunity for petitioners to do this and none of the issues they presented furnished adequate basis either to require holding a further hearing or for refusing to proceed with the election upon the basis proposed.

The Board and the petitioners are at odds therefore concerning the materiality of the issues presented on the show cause procedure and their sufficiency to require further hearing for the presentation of evi-

and, if they were defective in any respect, the departure was cured by the full hearing granted at petitioners' insistence after the election.

We think petitioners have misconceived the effects of § 9 (c). It is as follows:

"Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. *In any such investigation,* the Board shall provide for an *appropriate hearing upon due notice,* either in conjunction with a proceeding under section 10 or otherwise, and *may* take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives." (Emphasis added.)

The section is short. Its terms are broad and general. Its only requirements concerning the hearing are three. It must be "upon due notice," it must be "appropriate," and it is mandatory "in any such investigation," but may be held in conjunction with a § 10 (unfair practice) proceeding or otherwise.

Obviously great latitude concerning procedural details is contemplated. Requirements of formality and rigidity are altogether lacking. The notice must be "due," the hearing "appropriate." These requirements are related to the character of the proceeding of which the hearing is only a part. That proceeding is not technical. It is an "investigation," essentially informal, not adversary. The investigation is not required to take any particular form or confined to the hearing. The hearing is mandatory—"the Board *shall* provide for" it. But the requirement is only that it shall be provided "in any such investigation." The statute does not purport to specify when

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dence. But, in any event, the Board says that if it was wrong as to this in any respect the error was cured by the full hearing allowed in February, 1944.

or at what stage of the investigation the hearing shall be had. It may be conducted "in conjunction with a proceeding under section 10 or otherwise."

Moreover, nothing in the section purports to require a hearing before an election. Nothing in fact requires an election. The hearing "in any such investigation" is mandatory. But the election is discretionary. The Board "*may* take a secret ballot . . . or utilize any other suitable method to ascertain such representatives."

An election, when held, is only a preliminary determination of fact. Sen. Rep. No. 573, 74th Cong., 1st Sess., 5–6; H. R. Rep. No. 1147, 74th Cong., 1st Sess., 6–7. A direction of election is but an intermediate step in the investigation, with certification as the final and effective action. *Labor Board* v. *International Brotherhood of Electrical Workers,* 308 U. S. 413, 414–415. Nothing in § 9 (c) requires the Board to utilize the results of an election or forbids it to disregard them and utilize other suitable methods.

It hardly can be taken, in view of all these considerations, that Congress intended a hearing which it made mandatory "in any such investigation" always to precede an election which it made discretionary for all and which, in the committee reports, it specifically denominated as only a method for making a preliminary determination of fact. That characterization was not beyond congressional authority to make and is wholly consistent with the discretionary status the section gives that mode of determination.

In view of the preliminary and factual function of an election, we cannot agree with petitioners' view that only a hearing prior to an election can be "appropriate" within the section's meaning. The conclusive act of decision, in the investigation, is the certification. Until it is taken, what precedes is preliminary and tentative. The Board is free to hold an election or utilize other suitable methods.

Such other methods are often employed and frequently are of an informal character. Petitioners' view logically would require the hearing to be held in advance of the use of any such other method as much as when the method of election is used.

Congress was fully informed concerning the effects of mandatory hearings preceding elections upon the process of certification. For under Public Resolution 44, which preceded § 9 (c), the right of judicial hearing was provided. The legislative reports cited above show that this resulted in preventing a single certification after nearly a year of the resolution's operation and that one purpose of adopting the different provisions of the Wagner Act was to avoid these consequences.[12] In doing so Congress accomplished its purpose not only by denying the right of judicial review at that stage but also by conferring broad discretion upon the Board as to the hearing which § 9 (c) required before certification.

Petitioners' argument does not in terms undertake to rewrite the statute. But the effect would be to make it read as if the words "appropriate . . . in any such investigation" were replaced with the words "hearing prior to any election." Neither the language of the section nor the legislative history discloses an intent to give the word "appropriate" such an effect. We think the statutory purpose rather is to provide for a hearing in which interested parties shall have full and adequate opportunity to present their objections before the Board concludes its investigation and makes its effective determination by the order of certification.

In this case that opportunity was afforded to petitioners. We need not decide whether the hearing would have been adequate or "appropriate," if the February, 1944, hearing had not been granted and held. In the Board's view, petitioners, when afforded the opportunity in the

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[12] Cf. note 9.

proceedings to show cause held prior to the election, brought forward nothing which required it to hold a further hearing for the taking of evidence. With this petitioners disagree. We need not examine whether one or the other was correct in its view. For when the objections were renewed after the election, and others also were advanced, the Board gave full and adequate opportunity for hearing, including the presentation of evidence, concerning them. Petitioners do not contend that the hearing was a sham or that the Board did not consider their objections. They do not ask for review upon the merits. Their only objection is that the hearing came too late. That objection is not tenable in view of the statute's terms and intent.

It may be, as petitioners insist, that their interests were harmfully affected by the outcome of the election, through loss of prestige and in other ways. It does not follow that the injury is attributable to any failure of the Board to afford a hearing which was "appropriate" within the section's meaning. This being true, and since petitioners do not now question the Board's rulings upon the merits of the issues apart from those relating to the character of the hearing, the injury must be regarded, for presently material purposes, as an inevitable result of losing an election which was properly conducted.

Petitioners also assert that the Board departed from its own rules in failing to accord them the hearing demanded prior to the election. The regulations provide for direction of election to follow the hearing before the trial examiner and, in the Board's discretion, oral argument or further hearing as it may determine. Rules and Regulations, Art. III, §§ 3, 8, 9. But the regulations also contemplate further hearings for reconsideration before the final act of certification, a procedure of which petitioners had full advantage in this case. Whether or not the hearings provided before the election were adequate to

comply with the regulations, the procedure upon rehearing afterward was adequate to perform its intended function of affording full opportunity for correcting any defect which may have existed in the previous stages of hearing.[13]

We think no substantial question of due process is presented. The requirements imposed by that guaranty are not technical, nor is any particular form of procedure necessary. *Morgan* v. *United States,* 298 U. S. 468, 481. "The demands of due process do not require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective." *Opp Cotton Mills* v. *Administrator,* 312 U. S. 126, 152, 153; cf. *Bowles* v. *Willingham,* 321 U. S. 503, 519–521.[14] That requirement was fully met in this case.

The judgment is

Affirmed.

MR. JUSTICE ROBERTS dissents.

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[13] We need not determine whether in a situation where no hearing whatever is afforded prior to an election, the failure would be cured by allowing one afterward, whether as a matter of compliance with the statute or with the regulations. That situation is not presented. The proceedings in this case prior to the election afforded opportunity for hearing. At most the hearing was defective, and the opportunity given by the postelection hearing was effective to cure whatever defects may have existed, if any.

[14] Cf. also *Buttfield* v. *Stranahan,* 192 U. S. 470, 496–497; *Labor Board* v. *Mackay Radio & Tel. Co.,* 304 U. S. 333, 350, 351; *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337, 342, 343; *United States* v. *Ju Toy,* 198 U. S. 253, 263; *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226, 235; *Phillips* v. *Commissioner,* 283 U. S. 589, 596–597.

Counsel for Parties.

ELGIN, JOLIET & EASTERN RAILWAY CO. *v.* BURLEY ET AL.

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

No. 160. Argued November 15, 1945.—Decided June 11, 1945.

1. The contention that an award of the National Railroad Adjustment Board under the Railway Labor Act amounts to nothing more than an advisory opinion is inconsistent with the terms, purposes and legislative history of the Act and with decisions of this Court construing it. P. 720.
2. A collective bargaining representative is without statutory authority under the Railway Labor Act to compromise and settle accrued monetary claims of individual employees (arising out of alleged violations of a collective agreement by the employer) or to represent them exclusively before the National Railroad Adjustment Board in proceedings before it for determination of such claims; and, in the absence of legally sufficient authorization, a settlement so effected and an adverse award based thereon do not bar a suit by the individual employees to enforce such claims. P. 738.
3. Upon the record in this case, it can not be said as a matter of law that the collective bargaining representative was authorized in any legally sufficient manner to settle the claims in question or to represent the individual employees before the Adjustment Board. P. 748.

140 F. 2d 488, affirmed.

CERTIORARI, 323 U. S. 690, to review the reversal of a summary judgment for the defendant railroad company in a suit by employees upon claims arising out of alleged violations of a collective bargaining agreement.

Mr. Paul R. Conaghan for petitioner.

Mr. John H. Gately, with whom *Mr. Gerald J. Koptik* was on the brief, for respondents.

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MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

This cause, arising upon an amended complaint,[1] brings for decision novel and important questions concerning the authority of a collective bargaining representative, affecting the operation of the Railway Labor Act of 1934. 48 Stat. 1185, 45 U. S. C. § 151 ff. The ultimate issues are whether such an agent has authority, by virtue of the Act or otherwise, either to compromise and settle accrued monetary claims of ten employees or to submit them for determination by the National Railroad Adjustment Board to the exclusion of their right, after the settlement and after the Board's adverse decision, to assert them in a suit brought for that purpose. The claims are for "penalty damages" for alleged violation of the starting time provisions of a collective agreement, varying from $3,500 to $14,000, and in the aggregate amounting to $65,274.00.[2]

The District Court rendered summary judgment for the carrier, holding that the Board's award was a final adjudication of the claims, within the union's power to seek and the Board's to make, precluding judicial review.[3] The Court of Appeals reversed the judgment, 140 F. 2d 488, holding that the record presented a question of fact

[1] Amendments were allowed to cure jurisdictional defects found to exist upon an earlier appeal. *Alderman* v. *Elgin, J. & E. R. Co.,* 125 F. 2d 971.

[2] The record sets forth no provision for penalty damages. But the complaint alleges that under the terms of the agreement each of the plaintiffs is entitled to "pay for an additional day, at time and one-half, at the regular daily rate" for each day he was required to work contrary to the agreement's terms.

[3] The court said: "I think that the controversy was submitted to the Board, that it had jurisdiction and that it was decided, and that the plaintiffs were represented there and are bound thereby. . . . I think the ruling of the Adjustment Board was binding upon the plaintiffs as well as upon the defendant, and that it is binding on this court in this proceeding."

whether the union had been authorized by respondents "to negotiate, compromise and settle" the claims. We granted certiorari, 323 U. S. 690, in order to resolve the important questions affecting application and operation of the Act.

A statement of the more important facts will put the issues in sharper perspective. The controversy relates to operations in petitioner's so-called "Whiting Yard." Prior to July 24, 1934, respondents, or some of them, were employed by the Standard Oil Company to do private intraplant switching in its Whiting, Indiana, plant. On that date this work was taken over by petitioner. Until then Standard Oil's switching crews began work each day at hours fixed in advance by the management, which varied as plant operations required.

Prior to 1934 petitioner's crews at all yards in Indiana and Illinois began work daily in accordance with starting time provisions contained in Article 6 of a collective agreement made in 1927 between petitioner and the Brotherhood of Railroad Trainmen, governing rules, working conditions and rates of pay of yardmen.

Upon transfer of the Whiting yard switching to petitioner, respondents theretofore employed by Standard Oil became employees of petitioner and members of the Brotherhood. On July 24, 1934, company officials conferred with representatives of the engineers, the firemen and the yardmen concerning terms of employment. The Brotherhood acted for the yardmen. Apparently agreement was reached on all matters except starting time but, as to that, versions of what transpired differ. Respondents and the Brotherhood have maintained that the 1927 agreement, including Article 6, became applicable to them upon the transfer. They say, however, that they assented to a suspension of Article 6 for thirty days from July 27, 1934, to enable the company to work out adjustment to the plant's operations, and accordingly it governed their relation with petitioner from August 26, 1934.

The company has insisted that Article 6 did not become applicable to respondents upon the transfer and that it made no agreement to apply Article 6, other than to follow it as closely as possible, prior to October 31, 1938, when it and the Brotherhood eventually agreed to place Whiting yard crews on fixed starting time, under circumstances to be noted.

Whichever version is true, a long controversy resulted. The carrier continued to follow the former practice, although departures from the schedule were reduced, as it claims, in conformity with the oral undertaking to observe it as far as possible. The work went on without interruption. But numerous complaints on account of departures were made through local officers of the Brotherhood. Time slips were filed by the employees. Frequent negotiations took place. None however resulted in a settlement prior to October 31, 1938.

In this state of affairs, respondents authorized the Brotherhood to file complaint with the National Railroad Adjustment Board for violation of Article 6. This was done on November 23, 1936. The "statement of claim" was signed and filed by Williams, chairman of the general grievance committee. It asserted that the carrier, having "placed the employees under the agreement of the yardmen," had "failed to put into effect the starting time provisions" of Article 6, and denied that violation was justified either because the carrier had agreed with the Engineers to follow the formerly prevailing practice or by the carrier's claim that the work could be done in no other way. The submission was intended to secure compliance. There was no prayer for money damages. Petitioner maintained that Article 6 was not applicable.

The Board, following its customary procedure,[4] docketed the claim as No. 3537, notified the carrier and the

[4] The procedure, though informal, consists principally in written statements or "submissions" filed by the parties, which perform the functions of pleading and evidence combined, and oral argument upon

union that the case, with many others docketed at the same time, was "assumed to be complete," and forwarded to each copies of the other's submissions. The record does not disclose what followed until nearly two years later.

On October 31, 1938, Williams and Johnson, secretary of the Brotherhood, two of the grievance committee's three members, accepted an offer made by petitioner's president, Rogers, to settle the claim. The settlement took the form of a proposal, made in a letter by Rogers to Williams, to settle some 61 different claims, including "Labor Board Docket No. 3537—Starting time of switch engines in Whiting S. O. Yard." Williams and Johnson endorsed acceptance for the Brotherhood and the yardmen on the letter. Because of its importance, pertinent portions are set forth in the margin.[5] On the day the settlement was concluded

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the submissions thus made. See Garrison, The National Railroad Adjustment Board: A Unique Administrative Agency (1937) 46 Yale L. J. 567, for a detailed description of the procedure. See also Final Report of the Attorney General's Committee on Administrative Procedure (1941) 185 ff.; Administrative Procedure in Government Agencies, Sen. Doc. No. 10, Part IV, 77th Cong., 1st Sess.

[5] The letter was addressed to Williams, as general chairman of the Brotherhood, and dated October 28, 1938. It stated:

"Since my letter of August 18th in which I tentatively proposed settlement of certain matters of grievance we have had further correspondence and conferences which have modified our decision in some cases. Therefore, in order that the whole matter be placed in concrete form I am outlining below our proposals to settle all of the cases except as otherwise specified.

. . . . .

"Case No. 5—Labor Board Docket #3537—Starting time of switch engines in Whiting S. O. Yard.

"Settled by agreement that *the starting times for a ninety day trial period* commencing November 15th, 1938, *shall be the times provided for in Article 6* of the Yardmen's Agreement *instead of the starting times heretofore agreed upon and now being followed.* If at the end of the ninety day trial period the Railway Company or its employees claim that the starting times as fixed in Article 6 do not result in efficient and economical operation and in satisfaction to our employees

Rogers and Williams advised the Board of it by letter and jointly requested that the case be withdrawn from the docket, which accordingly was done.

Notwithstanding the settlement, a further dispute arose. In March, 1939, the Brotherhood, through Williams, requested the carrier to furnish a complete list of crews in the Whiting yard started at times other than those fixed by Article 6 from August 27, 1934, to November 15, 1938, when the settlement became effective. The company declined to furnish the list, stating it was at a loss to understand the reason for the request in view of the settlement.

The upshot of the dispute was the filing of another claim with the Board, Docket No. 7324, on May 18, 1939, by Williams, acting for the Brotherhood. This submission

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and to the industry served, then representatives of the Railway Company and representatives of the Yardmen, and representatives of the Engineers and representatives of the Firemen *will sit down and work out a schedule of starting time best suited for meeting the special requirements of the industry.*

. . . . .

"We have by this letter given you a complete résumé of all of the claims which have not heretofore been disposed of, filed by you on behalf of the employees whom you represent and have proposed in this letter a very liberal disposition of all the cases involved. The settlements proposed are predicated on *a complete settlement and withdrawal of all cases now pending* either before the board, *or under discussion with this office except Case No. 4,* which it is understood will be left to a decision by the National Railroad Adjustment Board, *and it is further understood that in the event these settlements are accepted that the claims listed in this letter cover all claims of a similar nature, and that no other claims covering the same or like situations will be presented when such claims arise from causes occurring prior to the date of this settlement.* [Emphasis added.]

"Yours truly,

"S. M. Rogers, *President.*

"Accepted for the Yardmen: Oct. 31, 1938.

"C. H. Williams, General Chairman, B. of R. T.

"S. F. Johnson, Secretary, B. of R. T."

was "for one day's pay at time and one-half for each foreman and each helper for each day they were required to work in yard service in the Whiting (Standard Oil Company) Yard, in violation of the fixed starting time provided for in Article No. 6 of the Yardmen's Agreement . . . effective January 1, 1927, and applicable to Whiting (Standard Oil Company) Yardmen, July 27, 1934, from dates of August 27, 1934, until November 14, 1938, inclusive."

The submission not only maintained the applicability of Article 6 and accrual of the individual claims asserted. It also maintained that the settlement of October 31, 1938, was effective only to fix the starting time for the future and had no effect to waive or determine individual claims for penalty damages accrued prior to the settlement.[6]

The carrier's submission reiterated its position in Case No. 3537. It also relied upon the settlement as precluding later assertion of any claim, individual or collective, based upon occurrences prior to the date of the settlement.

The matter went to decision by the Board. Under the procedure prescribed in case of deadlock, cf. § 3 First (l),

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[6] Cf. note 5. The submission stated: "There were no agreements reached whereby payment for violation of Article No. 6 of the Yardmen's Agreement would be waived as a result of withdrawal of Labor Board Docket No. 3537. *In fact that case held no claim for payment for time. It was simply a case to settle* the dispute as to *the carrier's right to force the yard crews* in the Whiting yard *to work at times other than the fixed starting time* provided for in Article 6 . . .

"As stated before, Case No. 5—Labor Board Docket No. 3537 *contained no claim for pay* to Whiting Yardmen. *Consequently it was not a question before the Management and the Committee in the* starting time *negotiation* and claim cannot be made that a waiver was made on a matter which was not negotiated."

The submission also denied that oral agreements relating to starting time, claimed by the carrier to have been made at the time of the transfer in 1934, could be effective "to invalidate the prescribed written rule of Article 6." Williams however did not question the validity of the verbal agreement, as he maintained, for the thirty-day suspension.

a referee was called in. The award was made by the First Division on September 6, 1940. It sustained the Board's jurisdiction,[7] found that "the parties to said dispute were given due notice of hearing thereon," and held that "the evidence shows that the parties to the agreement disposed of the claim here made by the letter of carrier dated October 28, 1938, accepted by employees October 31, 1938." Accordingly the claim was "denied per findings."

Thereafter, on November 19, 1940, the present suit was instituted. As has been noted, the case comes here after a summary judgment rendered on the carrier's motion, supported by the affidavit of its vice president. This in effect set up the compromise agreement and the award in Case No. 7324 as bases for the judgment sought.

The range and precise nature of the issues may be summarized best perhaps as they were shaped upon respondents' opposition to the carrier's motion. They denied that either Williams or the union had authority to release their individual claims or to submit them for decision by the Board. They relied upon provisions of the Brotherhood's constitution and rules,[8] of which the carrier was alleged to have knowledge, as forbidding union officials to release individual claims or to submit them to the Board "without specific authority so to do granted by the individual members themselves"; and denied that such authority in either respect had been given.

The validity and the conclusive effect of the award were challenged also upon other grounds, among them that

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[7] The submissions in no way challenged the jurisdiction of the Board or of the Division.

[8] See Part III. The provisions regulate the union's internal procedure in relation to making changes in a "general or system wage schedule or agreement," Rule No. 3, and that to be followed when the local chairman or grievance committee fails "satisfactorily to adjust any grievance referred to it." Rule No. 7. The latter includes a provision that "a general grievance committee may authorize their chairman to handle all grievances received from local lodges." See also note 40.

respondents individually received no notice of the submission or the hearing until after the award was made; that since the award denied a claim for money damages, it was within the exception of § 3 First (m), which provides that "the awards shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award," and therefore did not preclude this suit; and that the Act, if construed to make the award conclusive, would violate the Fifth Amendment's due process provision by denying judicial review to defeated employees, though allowing it to defeated employers. Cf. § 3 First (p), (q); *Washington Terminal Co.* v. *Boswell*, 124 F. 2d 235, affirmed by an equally divided Court, 319 U. S. 732.

Finally respondents suggested most sweepingly that the Board may act "merely as an arbitrator," with the result that "any decisions thereunder are void because it passes on matters and bases its decision and its opinion on law and fact which is contrary to public policy." The prayer was that the court overrule the carrier's motion for summary judgment and, in doing so, determine that the release was not effective; the award was not a final adjudication of the claims; and the award was void for lack of jurisdiction of the parties or the subject matter or "because said Act under which award was entered is unconstitutional."

The District Court's judgment rested squarely on the conclusive effect of the award in Docket No. 7324. It did not indicate whether it regarded the Brotherhood's authority to submit the claims and appear for the employees as derived from the statute or, apart from the statute, as a matter of law upon the particular facts. But it must be taken to have held that, upon the pleadings and the affidavits, no genuine issue of material fact was presented, Fed. Rules Civ. Proc., Rule 56 (c), and therefore that it was immaterial if, as alleged, respondents had not individually given the Brotherhood or Williams specific authority

to submit their claims for decision or represent them in the hearings.

The Court of Appeals, however, made no reference to the issues concerning the award and its effect upon the claims. But its judgment must be taken to have determined implicitly that none of petitioner's contentions in these respects is valid.

The issues are not merely, as the Court of Appeals assumed, whether the Brotherhood had authority to compromise and settle the claims by agreement with the carrier and whether on the record this presents a question of fact. For petitioner insists, and the District Court held, that the award of the Board was validly made, and is final, precluding judicial review. We do not reach the questions of finality, which turn upon construction of the statutory provisions and their constitutional validity as construed.[9] Those questions should not be determined unless the award was validly made, which presents, in our opinion, the crucial question. Respondents attack the validity and legal effectiveness of the award in three ways. Two strike at its validity on narrow grounds. Respondents say the Brotherhood had no power to submit the dispute for decision by the Board without authority given by each of them individually and that no such authority was given. They also maintain that they were entitled to have notice individually of the proceedings before the Board and none was given.

The third and most sweeping contention undercuts all other issues concerning the award's effects, whether for validity or for finality. In substance it is that the award, when rendered, amounts to nothing more than an advisory opinion. The contention, founded upon language of the opinion in *Moore* v. *Illinois Central R. Co.,* 312 U. S. 630, regards the Act's entire scheme for the settlement of grievances as wholly conciliatory in character, involving

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[9] Cf. § 3 First (m), (o), (p), (q).

no element of legal effectiveness, with the consequence that the parties are entirely free to accept or ignore the Board's decision.

At the outset we put aside this broadest contention as inconsistent with the Act's terms, purposes and legislative history.[10] The *Moore* case involved no question concerning the validity or the legal effectiveness of an award when rendered.[11] Nor did it purport to determine that the Act creates no legal obligations through an award or otherwise. Apart from the affirmance by equal division in *Washington Terminal Co.* v. *Boswell, supra,* both prior and later decisions here are wholly inconsistent with such a view of its effects. Cf. *Virginian R. Co.* v. *System Federation,* 300 U. S. 515; *Texas & N. O. R. Co.* v. *Railway Clerks,* 281 U. S. 548;[12] *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297; *General Committee* v.

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[10] Cf. Part I.

[11] It was held that nothing in the Act "purports to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in court," 312 U. S. at 634; and therefore the employee's suit could be maintained against the carrier without prior resort to the Adjustment Board. Among the reasons assigned was that the machinery provided for settling disputes was not "based on a philosophy of legal compulsion" but created "a system for peaceful adjustment and mediation voluntary in its nature."

The problem presented was whether the Adjustment Board procedure either was exclusive or was an essential preliminary to judicial proceedings within the doctrine of primary jurisdiction. These were questions not entirely determinable by the criterion of whether the procedure is wholly advisory or conciliatory in character. For, conceivably, Congress might have made the taking of the Board's merely advisory opinion a condition precedent to asking for judicial relief; and, conversely, allowing that relief without prior resort to the Board does not necessarily make the Board's action, when taken, merely advisory.

[12] Thus, one of the statute's primary commands, judicially enforceable, is found in the repeated declaration of a duty upon all parties to a dispute to negotiate for its settlement. See note 26; *Virginian*

M.-K.-T. R. Co., 320 U. S. 323; *General Committee* v. *Southern Pacific Co.*, 320 U. S. 338.

I

The difference between disputes over grievances and disputes concerning the making of collective agreements is traditional in railway labor affairs. It has assumed large importance in the Railway Labor Act of 1934, substantively and procedurally.[13] It divides the jurisdiction and functions of the Adjustment Board from those of the Mediation Board, giving them their distinct characters. It also affects the parts to be played by the collective agent and the represented employees, first in negotiations for settlement in conference and later in the quite different procedures which the Act creates for disposing of the two types of dispute. Cf. §§ 3, 4.

The statute first marks the distinction in § 2, which states as among the Act's five general purposes: "(4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." The two sorts of dispute are sharply distinguished,[14] though there are points of common treatment. Nevertheless, it is clear from the Act itself, from the history of railway labor dis-

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R. Co. v. *System Federation*, 300 U. S. 515; cf. *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 300, 320; *General Committee* v. *M.-K.-T. R. Co.*, 320 U. S. 323, 331, 334. This duty is not merely perfunctory. Good faith exhaustion of the possibility of agreement is required to fulfill it. Cf. *Virginian R. Co.* v. *System Federation, supra*, at 548, 550; *Trainmen* v. *Toledo, P. & W. R. Co.*, 321 U. S. 50, 56 ff. At successive stages of the statutory procedure other duties are imposed. Cf. §§ 5 First (b), 6, 10.

[13] Cf. the references cited in notes 4 and 15.

[14] Cf. text Part II at note 38; also *Hughes Tool Co.* v. *Labor Board*, 147 F. 2d 69, 72, 73.

putes and from the legislative history of the various statutes which have dealt with them,[15] that Congress has drawn major lines of difference between the two classes of controversy.

The first relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.

The second class, however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e. g., claims on account of personal injuries. In either case the claim is to rights accrued, not merely to have new ones created for the future.

In general the difference is between what are regarded traditionally as the major and the minor disputes of the railway labor world.[16] The former present the large issues

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[15] See the references cited in note 4; Hearings before Committee on Interstate Commerce on H. R. 7650, 73d Cong., 2d Sess.; Hearings before Committee on Interstate Commerce on S. 3266, 73d Cong., 2d Sess.; *Pennsylvania R. Co.* v. *Railroad Labor Board,* 261 U. S. 72; *Pennsylvania System Federation* v. *Pennsylvania R. Co.,* 267 U. S. 203; *Texas & N. O. R. Co.* v. *Brotherhood,* 281 U. S. 548; *Virginian R. Co.* v. *System Federation,* 300 U. S. 515.

[16] Cf. the references cited in note 4. Commissioner (also Coordinator) Eastman, who very largely drafted the 1934 amendments, said in testifying at the House Committee hearings concerning them:

"Please note that disputes concerning changes in rates of pay, rules, or working conditions may not be so referred [to the National Adjust-

about which strikes ordinarily arise with the consequent interruptions of traffic the Act sought to avoid. Because they more often involve those consequences and because they seek to create rather than to enforce contractual rights, they have been left for settlement entirely to the processes of noncompulsory adjustment.

The so-called minor disputes, on the other hand, involving grievances, affect the smaller differences which inevitably appear in the carrying out of major agreements and policies or arise incidentally in the course of an employment. They represent specific maladjustments of a detailed or individual quality. They seldom produce strikes, though in exaggerated instances they may do so.[17] Because of their comparatively minor character and the general improbability of their causing interruption of peaceful relations and of traffic, the 1934 Act sets them apart from the major disputes and provides for very different treatment.

Broadly, the statute as amended marks out two distinct routes for settlement of the two classes of dispute, respectively, each consisting of three stages. The Act treats the two types of dispute alike in requiring negotiation as the first step toward settlement and therefore in contemplating voluntary action for both at this stage, in the sense that agreement is sought and cannot be compelled. To

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ment Board], but are to be handled, when unadjusted, through the process of mediation. The national adjustment board is to handle only the minor cases growing out of grievances or out of the interpretation or application of agreements." Hearings before Committee on Interstate Commerce on H. R. 7650, 73d Cong., 2d Sess., 47; cf. also pp. 49, 51, 59, 62. And see the testimony of Harrison, a principal union proponent, before the House Committee, *id.*, at 80–83; and before the Senate Committee, Hearings before Committee on Interstate Commerce on S. 3266, 73d Cong., 2d Sess., 33, 35.

[17] Cf. the testimony of Eastman and Harrison, cited in note 16.

induce agreement, however, the duty to negotiate is imposed for both grievances and major disputes.[18]

Beyond the initial stages of negotiation and conference, however, the procedures diverge. "Major disputes" go first to mediation under the auspices of the National Mediation Board; if that fails, then to acceptance or rejection of arbitration, cf. § 7; *Trainmen* v. *Toledo, P. & W. R. Co.*, 321 U. S. 50; and finally to possible presidential intervention to secure adjustment. § 10. For their settlement the statutory scheme retains throughout the traditional voluntary processes of negotiation, mediation, voluntary arbitration, and conciliation. Every facility for bringing about agreement is provided and pressures for mobilizing public opinion are applied. The parties are required to submit to the successive procedures designed to induce agreement. § 5 First (b). But compulsions go only to insure that those procedures are exhausted before resort can be had to self-help. No authority is empowered to decide the dispute and no such power is intended, unless the parties themselves agree to arbitration.

The course prescribed for the settlement of grievances is very different beyond the initial stage. Thereafter the Act does not leave the parties wholly free, at their own will, to agree or not to agree. On the contrary, one of the main purposes of the 1934 amendments was to provide a more effective process of settlement.[19]

Prior to 1934 the parties were free at all times to go to court to settle these disputes. Notwithstanding the contrary intent of the 1926 Act, each also had the power, if

[18] Cf. note 12; also notes 26, 27, and text *infra*. The obligation is not partial. In plain terms the duty is laid on carrier and employees alike, together with their representatives; and in equally plain terms it applies to all disputes covered by the Act, whether major or minor.

[19] H. Rep. No. 1944 on H. R. 9861, 73d Cong., 2d Sess., 3; S. Rep. No. 1065 on S. 3266, 73d Cong., 2d Sess., 1, 2.

not the right, to defeat the intended settlement of grievances by declining to join in creating the local boards of adjustment provided for by that Act. They exercised this power to the limit. Deadlock became the common practice, making decision impossible. The result was a complete breakdown in the practical working of the machinery. Grievances accumulated and stagnated until the mass assumed the proportions of a major dispute. Several organizations took strike ballots and thus threatened to interrupt traffic, a factor which among others induced the Coordinator of Transportation to become the principal author and advocate of the amendments. The sponsor in the House insisted that Congress act upon them before adjournment for fear that if no action were taken a railroad crisis might take place.[20] The old Mediation Board was helpless.[21] To break this log jam, and at the same time to get grievances out of the way of the settling of major disputes through the functioning of the Mediation Board, the Adjustment Board was created and given power to decide them.[22]

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[20] Cf. 78 Cong. Rec. 12553. Coordinator Eastman referred, in his testimony, to four recent strike votes occasioned by deadlock. Hearings before Committee on Interstate Commerce on S. 3266, 73d Cong., 2d Sess., 17.

[21] The Chairman told the Senate Committee: "The provision in the present act [1926] for adjustment boards is in practice about as near a fool provision as anything could possibly be. I mean this—that on the face of it they shall, by agreement, do so and so. Well, you can do pretty nearly anything by agreement, but how can you get them to agree?" Hearings before Committee on Interstate Commerce on S. 3266, 73d Cong., 2d Sess., 137.

[22] See, for a general view of the circumstances inducing enactment of the 1934 Amendments, the references cited above in notes 4, 15, 16, 19. The report of the House Committee in charge of the bill stated:

"Many thousands of these disputes have been considered by boards established under the Railway Labor Act; but the boards have been unable to reach a majority decision, and so the proceedings have been

The procedure adopted is not one of mediation and conciliation only, like that provided for major disputes under the auspices of the Mediation Board. Another tribunal of very different character is established with "jurisdiction" to determine grievances and make awards concerning them. Each party to the dispute may submit it for decision, whether or not the other is willing, provided he has himself discharged the initial duty of negotiation.[23] § 3 First (i). Rights of notice, hearing, and participation or representation are given. § 3 First (j). In some instances judicial review and enforcement of awards are expressly provided or are contemplated. § 3 First (p); cf. § 3 First (m). When this is not done, the Act purports to make the Board's decisions "final and binding." § 3 First (m).

The procedure is in terms and purpose very different from the preexisting system of local boards. That system was in fact and effect nothing more than one for what respondents call "voluntary arbitration." No dispute could be settled unless submitted by agreement of all parties. When one was submitted, deadlock was common and there was no way of escape. The Adjustment Board

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deadlocked. These unadjusted disputes have become so numerous that on several occasions the employees have resorted to the issuance of strike ballots and threatened to interrupt interstate commerce in order to secure an adjustment. This has made it necessary for the President of the United States to intervene and establish an emergency board to investigate the controversies. This condition should be corrected in the interest of industrial peace and of uninterrupted transportation service. This bill, therefore, provides for the establishment of a national board of adjustment to which these disputes may be submitted if they shall not have been adjusted in conference between the parties." H. Rep. No. 1944, 73d Cong., 2d Sess., 3. Cf. also the testimony of Coordinator Eastman, Hearings before Committee on Interstate Commerce on H. R. 7650, 73d Cong., 2d Sess., 49.

[23] Section 3 First (i) expressly conditions the right to move from negotiation into proceedings before the Adjustment Board upon "failing to reach an adjustment in this manner," i. e., by negotiation.

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was created to remove the settlement of grievances from this stagnating process and bring them within a general and inclusive plan of decision.[24] The aim was not to dispense with agreement. It was to add decision where agreement fails and thus to safeguard the public as well as private interests against the harmful effects of the preexisting scheme.

II

The collective agent's power to act in the various stages of the statutory procedures is part of those procedures and necessarily is related to them in function, scope and purpose.

The statute itself vests exclusive authority to negotiate and to conclude agreements concerning major disputes in the duly selected collective agent. Cf. *Virginian R. Co.* v. *System Federation, supra.*[25] Since the entire statutory

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[24] See the testimony of Coordinator Eastman and Mr. Harrison, cited in note 16. The latter stated, at the Senate Committee hearings, pp. 33, 35:

". . this has been a question for the last 14 years as to what kind of boards we are going to have to settle our grievances . . . We have always sought national boards; the railroads . . . have sought the system boards, regional boards . . . Most of the boards . . . under the present law . . . have deadlocked on any number of cases. As a result of that there was fast growing up in our industry a serious condition that might very well develop into substantial interruption of interstate commerce . . . These *railway labor organizations have always opposed compulsory determination of their controversies.* We have lived a long time and got a lot of experience, and we know that these minor cases that develop out of contracts that we make freely, and . . . *we are now ready to concede that we can risk having our grievances go to a board and get them determined, and that is a contribution that these organizations are willing to make.* . . . if we are going to get a hodgepodge arrangement by law . . . then we don't want to give up that right, because we only give up the right because we feel that we will get a measure of justice by this machinery that we suggest here." (Emphasis added.)

[25] Cf. also *Medo Photo Supply Corp.* v. *Labor Board,* 321 U. S. 678; *J. I. Case Co.* v. *Labor Board,* 321 U. S. 332.

procedure for settling major disputes is aimed only at securing agreement and not decision, unless the parties agree to arbitration, this exclusive authority includes representation of the employees not only in the stage of conference, but also in the later ones of mediation, arbitration and conciliation.

Whether or not the agent's exclusive power extends also to the settlement of grievances, in conference or in proceedings before the Board, presents more difficult questions. The statute does not expressly so declare. Nor does it explicitly exclude these functions. The questions therefore are to be determined by implication from the pertinent provisions. These are the ones relating to rights of participation in negotiations for settlement and in proceedings before the Board. They are in part identical with the provisions relating to major disputes, but not entirely so; and the differences are highly material.

The questions of power to bargain concerning grievances, that is, to conclude agreements for their settlement, and to represent aggrieved employees in proceedings before the Board are not identical. But they obviously are closely related in the statutory scheme and in fact. If the collective agent has exclusive power to settle grievances by agreement, a strong inference, though not necessarily conclusive, would follow for its exclusive power to represent the aggrieved employee before the Board. The converse also would be true. Accordingly it will be convenient to consider the two questions together.

The primary provisions affecting the duty to treat are found in § 2 First and Second, imposing the duty generally as to all disputes, both major and minor, and §§ 2 Sixth and 3 First (i), together with the proviso to § 2 Fourth, which apply specially to grievances. These sections in material part are set forth in the margin,[26] except the

[26] By § 2 First, "*It shall be the duty of all* carriers, their officers, agents, and *employees* to exert every reasonable effort to make and

proviso which is as follows: "Provided, That nothing in this Act shall be construed to prohibit a carrier from permitting *an employee, individually,* or local representatives of employees *from conferring* with management during

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maintain agreements concerning rates of pay, rules, and working conditions, and *to settle all disputes,* whether arising out of *the application* of such agreements or otherwise, in order to avoid any interruption to commerce . . ." By § 2 Second, "*All* disputes between a carrier or carriers and its or their employees *shall be considered, and, if possible, decided,* with all expedition, in conference *between representatives designated and authorized* so to confer, respectively, by the carrier or carriers and *by the employees thereof interested in the dispute.*" (Emphasis added.) These are the basic sections creating the duty, applicable to all disputes, major or minor, and to carriers and employees alike.

Other provisions affecting the general duty to treat are those of § 2 Third, that "representatives, *for the purposes of this Act,* shall be designated by the respective parties without interference" by the other and "need not be persons in the employ of the carrier"; of § 2 Fourth, that "the majority of any craft or class of employees shall have the right to determine who shall be *the representative of the craft or class for the purposes of this Act*"; and of § 2 Eighth that "every carrier shall notify its employees by printed notices . . . that *all disputes* between the carrier and its employees *will be handled in accordance with the requirements of this Act.*" (Emphasis added.)

Section 2 Sixth applies specially to grievances, as does § 3 First (i). The former provides: "In case of a dispute between a carrier or carriers and its or their employees, *arising out of grievances or out of the interpretation or application of agreements* concerning rates of pay, rules, or working conditions, *it shall be the duty of the designated representative* or representatives of such carrier or carriers and *of such employees,* within ten days after the receipt of notice of a desire on the part of either party *to confer* in respect to such dispute, to specify a time and place . . ." Section 3 First (i) is as follows: "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*

working hours *without loss of time,* or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization."[27] (Emphasis added.)

Relating to participation in the Board's proceedings, in addition to the concluding sentence of § 3 First (i), see note 26, is § 3 First (j), as follows: "Parties may be heard either *in person,* by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings *to the employee* or employees and the carrier or carriers involved in any dispute submitted to them." (Emphasis added.)

Petitioner urges that, notwithstanding the proviso and § 3 First (j), the effect of the provisions taken as a whole is to make the collective agent the employees' exclusive representative for the settlement of *all* disputes, both major and minor, and of the latter "whether arising out of the application of such [collective] agreements or otherwise." The argument rests primarily upon §§ 2 First, Second, Third, Fourth, Sixth, and 3 First (i). It emphasizes the carrier's duty to treat with the collective representative, as reinforced by §§ 2 Eighth and Tenth.[28]

Petitioner does not squarely deny that the aggrieved employee may confer with the carrier's local officials either

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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." (Emphasis added.)

[27] Section 2 Eighth makes this proviso part of the contract of employment between the carrier and each employee, and § 2 Tenth makes it a misdemeanor for the carrier to refuse to observe it. Section 2 Eighth incorporates the provisions of §§ 2 Third, Fourth and Fifth in each employee's contract of employment. Section 2 Tenth makes it a misdemeanor for the carrier to fail or refuse to comply with the terms of §§ 2 Third, Fourth, Fifth, Seventh and Eighth.

[28] See note 27.

personally or through *local* union representatives in accordance with the proviso to § 2 Fourth. But this right, if it exists, is regarded apparently as at most one to be heard, since in petitioner's view the power to make settlement by agreement is vested exclusively in the collective agent. Cf. §§ 2 Sixth and 3 First (i).

The collective agent, as the carrier conceives the statute, is the "representative[s], designated and authorized to confer" within the meaning of § 2 Second, without distinction between major and minor disputes. It is likewise the "representative, for the purposes of this Act," again without distinction between the two types of dispute, in the selection of which by "the respective parties" § 2 Third forbids the other to interfere. It is also "the designated representative" of the employees with whom, by § 2 Sixth, the carrier is required to treat concerning grievances in conference, a provision considered to carry over into § 3 First (i). The latter requires that disputes over grievances "shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes."

In accordance with this view "either party," within the further provision of § 3 First (i) authorizing reference of the dispute to the Adjustment Board "by petition of the parties or by either party," refers to the carrier or the collective agent, not to the aggrieved employee acting otherwise than by the collective agent. Hence, "parties" as used in § 3 First (j) is given similar meaning. Consequently the collective agent also has exclusive power to submit the dispute to the Board and to represent aggrieved employees before it.

Petitioner's view has been adopted, apparently, in the general practice, if not the formally declared policy of the Adjustment Board. And this, it seems, has been due to the position taken consistently by the employees' representatives on the Board, over the opposition of carrier

representatives.[29] The unions, apparently, like petitioner in this case, interpret the Act as not contemplating two distinct systems for the settlement of disputes, one wholly collective for major disputes, the other wholly individual for minor ones. In this view the collective agent becomes a party to the collective agreement by making it, and its interest as representative of the collective interest does not cease when that function ends. It remains a party to the agreement, as such representative, after it is made; and consequently, in that capacity and for the protection of the collective interest, is concerned with the manner in which the agreement may be interpreted and applied.

Accordingly, petitioner urges that the statute, both by its terms and by its purpose, confers upon the collective agent the same exclusive power to deal with grievances, whether by negotiation and contract, or by presentation to the Board when agreement fails, as is given with respect to major disputes. And the aggrieved employee's rights of individual action are limited to rights of hearing before the union and possibly also by the carrier.

We think that such a view of the statute's effects, in so far as it would deprive the aggrieved employee of effective voice in any settlement and of individual hearing before the Board, would be contrary to the clear import of its provisions and to its policy.

It would be difficult to believe that Congress intended, by the 1934 amendments, to submerge wholly the individual and minority interests, with all power to act concerning them, in the collective interest and agency, not only in forming the contracts which govern their employment relation,[30] but also in giving effect to them and to all other

[29] Cf. Administrative Procedure in Government Agencies, Sen. Doc. 10, Part IV, 77th Cong., 1st Sess., 7.

[30] Cf. *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192; *Tunstall* v. *Brotherhood of Locomotive Firemen*, 323 U. S. 210; *Wallace Corp.* v. *Labor Board*, 323 U. S. 248.

incidents of that relation. Acceptance of such a view would require the clearest expression of purpose. For this would mean that Congress had nullified all preexisting rights of workers to act in relation to their employment, including perhaps even the fundamental right to consult with one's employer, except as the collective agent might permit. Apart from questions of validity, the conclusion that Congress intended such consequences could be accepted only if it were clear that no other construction would achieve the statutory aims.[31]

The Act's provisions do not require such a construction. On the contrary they appear expressly to preclude it. The proviso to § 2 Fourth in terms reserves the right of "an employee *individually*" to confer with management; and § 3 First (j) not only requires the Board to give "due notice of all hearings *to the employee* . . . involved in any dispute *submitted* . . .," but provides for "parties" to be heard "either *in person,* by counsel, or by other representatives, as they may respectively elect."

These provisions would be inapposite if the collective agent, normally a labor union and an unincorporated association, exclusively were contemplated. Such organizations do not and cannot appear and be heard "in person." Nor would the provision for notice "to *the employee* . . . involved in any dispute" be either appropriate or necessary. If only the collective representative were given

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[31] In this connection it is important to recall that the Act does not contemplate the existence of closed shops, to the extent at any rate that the carrier is forbidden to make such agreements. Cf. § 2 Fourth; 78 Cong. Rec. 12,402; 40 Op. Atty. Gen., No. 59 (Dec. 29, 1942). Accordingly the interests of unorganized workers and members of minority unions are concerned in the solution. These are not always adverse to the interests of the majority or of the designated union. But they may be so or even hostile. Cf. the authorities cited in note 30. To regard the statute as so completely depriving persons thus situated of voice in affairs affecting their very means of livelihood would raise very serious questions.

rights of submission, notice, appearance and representation, language more aptly designed so to limit those rights was readily available and was essential for the purpose.

This conclusion accords fully with the terms of the proviso to § 2 Fourth. It appears to be intended as a qualification, in respect to loss of time and free transportation, of the section's preceding prohibitions against the carrier's giving financial and other aid to labor organizations and to employees in an effort to influence their union affiliations.[32] However, the language clearly contemplates also that the individual employee's right to confer with the management about his own grievance is preserved. There is some indication in the legislative history to this effect.[33] The right is so fundamental that we do not believe the purpose was to destroy it. Cf. 40 Op. Atty. Gen., No. 59, pp. 5, 6 (Dec. 29, 1942); *Hughes Tool Co.* v. *Labor Board,* 147 F. 2d 69.

Rights of conference are not identical with rights of settlement. But the purpose of conference and the duty to treat is to bring about agreement. The right and the obligation to share in the negotiations are relevant to their aim. Conceivably the statute might confer the right to participate in the negotiations, that is, to be heard before any agreement is concluded, either upon the collective agent or upon the aggrieved employee or employees, at the same time conferring upon the other the final voice in determining the terms of the settlement. This is, in effect, the position taken by each of the parties in this case. But they differ concerning where the final say has been

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[32] This undoubtedly was the primary object. The language in the concluding clause, "while engaged in the business of a labor organization," applies literally only to employees travelling upon union business, and has no apparent application to the preceding provision relating to the individual employee's right to confer with management.

[33] Hearings before Committee on Interstate Commerce on H. R. 7650, 73d Cong., 2d Sess., 36, 44, 89.

vested. Petitioner maintains it has been given to the union. Respondents say it has been left with them.

In the view we take the Act guarantees to the aggrieved employee more than merely the right to be heard by the union and the carrier. We cannot say that the terms of the proviso to § 2 Fourth and of § 3 First (j) are so limited. Moreover, § 3 First (p) expressly states that the statutory suit to enforce an award in favor of an aggrieved employee may be brought by "the petitioner," presumably the collective agent or by the employee. All of these provisions contemplate effective participation in the statutory procedures by the aggrieved employee.

His rights, to share in the negotiations, to be heard before the Board, to have notice, and to bring the enforcement suit, would become rights more of shadow than of substance if the union, by coming to agreement with the carrier, could foreclose his claim altogether at the threshold of the statutory procedure. This would be true in any case where the employee's ideas of appropriate settlement might differ from the union's. But the drastic effects in curtailment of his preexisting rights to act in such matters for his own protection would be most obvious in two types of cases: one, where the grievance arises from incidents of the employment not covered by a collective agreement, in which presumably the collective interest would be affected only remotely, if at all; the other, where the interest of an employee not a member of the union and the collective interest, or that of the union itself, are opposed or hostile. That the statute does not purport to discriminate between these and other cases furnishes strong support for believing its purpose was not to vest final and exclusive power of settlement in the collective agent.[34]

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[34] Cf. note 37 and text. It is to be doubted that Congress by the generally inclusive language used concerning grievances intended, for instance, to give the collective agent exclusive power to settle a

We need not determine in this case whether Congress intended to leave the settlement of grievances altogether to the individual workers, excluding the collective agent entirely except as they may specifically authorize it to act for them, or intended it also to have voice in the settlement as representative of the collective interest. Cf. *Matter of Hughes Tool Co.*, 56 N. L. R. B. 981, modified and enforced, *Hughes Tool Co.* v. *Labor Board, supra.* The statute does not expressly exclude grievances from the collective agent's duty to treat or power to submit to the Board. Both collective and individual interests may be concerned in the settlement where, as in this case, the dispute concerns all members alike, and settlement hangs exclusively upon a single common issue or cause of dispute arising from the terms of a collective agreement.[35]

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grievance arising independently of the collective agreement, affecting only nonunion men to whose claim the union and the majority were hostile.

[35] But whether or not the carrier's violation affects all the members of the group immediately and alike, so as to create a present basis for claims by each, the violation, though resulting from misinterpretation, would constitute a present threat to the similar rights of all covered by the contract. Cf. *Hughes Tool Co.* v. *Labor Board, supra,* 72, 74; 40 Op. Atty. Gen., No. 59, pp. 4, 5 (Dec. 29, 1942).

To leave settlements in such cases ultimately to the several choices of the members, each according to his own desire without regard to the effect upon the collective interest, would mean that each affected worker would have the right to choose his own terms and to determine the meaning and effect of the collective agreement for himself. Necessarily, the carrier would be free to join with him in doing so and thus to bargain with each employee for whatever terms its economic power, pitted against his own, might induce him to accept. The result necessarily would be to make the agreement effective, not to all alike, but according to whatever varied interpretations individual workers, from equally varied motivations, might be willing to accept. To give the collective agent power to make the agreement, but exclude it from any voice whatever in its interpretation would go far toward destroying its uniform application.

Those interests combine in almost infinite variety of relative importance in relation to particular grievances, from situations in which the two are hostile or in which they bear little or no relation of substance to each other and opposed to others in which they are identified.[36]

Congress made no effort to deal specifically with these variations.[37] But whether or not the collective agent has rights, independently of the aggrieved employee's authorization, to act as representative of the collective interest and for its protection in any settlement, whether by agreement or in proceedings before the Board, an award cannot be effective as against the aggrieved employee unless he is represented individually in the proceedings in accordance with the rights of notice and appearance or representation given to him by § 3 First (j). Those rights are separate and distinct from any the collective agent may have to represent the collective interest. For an award to affect the employee's rights, therefore, more must be shown than that the collective agent appeared and purported to act for him. It must appear that in some legally sufficient way he authorized it to act in his behalf.[38]

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[36] Depending upon the substantive character of the claim, its foundation in a collective agreement or otherwise, its intrinsically substantial or insubstantial nature, the number of employees affected, the length of time it remains unsettled, the number of claims allowed so to run, or perhaps other factors, the grievance may be a matter of large moment to the group as a whole or of little or no concern to it and, it may be, of either identical or converse importance to the individual or individuals directly affected.

[37] Congress was concerned primarily with differences between the carrier and the employees, not with differences among the latter or between them, or some of them, and the collective agent. The statute therefore was not drawn with an eye levelled to these problems, except as to choice of representatives, cf. § 2 Fourth; § 2 Ninth; and note 34.

[38] Authority might be conferred in whatever ways would be sufficient according to generally accepted or "common law" rules for the creation of an agency, as conceivably by specific authorization given

Petitioner's contrary view, as has been indicated, regards the settlement of grievances as part of the collective bargaining power, indistinguishable from the making of collective agreements. The assumption ignores the major difference which the Act has drawn between those functions, both in defining them and in the modes provided for settlement.

To settle for the future alone, without reference to or effect upon the past, is in fact to bargain collectively, that is, to make a collective agreement. That authority is conferred independently of the power to deal with grievances, as part of the power to contract "concerning rates of pay, rules, or working conditions." It includes the power to make a new agreement settling for the future a dispute concerning the coverage or meaning of a preexisting collective agreement. For the collective bargaining power is not exhausted by being once exercised; it covers changing the terms of an existing agreement as well as making one in the first place.

But it does not cover changing them with retroactive effects upon accrued rights or claims. For it is precisely the difference between making settlements effective only for the future and making them effective retroactively to conclude rights claimed as having already accrued which marks the statutory boundary between collective bargaining and the settlement of grievances. The latter by explicit definition includes the "interpretation or application" of existing agreements. To regard this as part of the collective bargaining power identifies it with making new agreements having only prospective operation; and

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orally or in writing to settle each grievance, by general authority given to settle such grievances as might arise, or by assenting to such authority by becoming a member of a union and thereby accepting a provision in its constitution or rules authorizing it to make such settlements.

by so doing obliberates the statute's basic distinction between those functions.[39]

The Brotherhood had power, therefore, as collective agent to make an agreement with the carrier, effective for the future only, to settle the question of starting time, and that power was derived from the Act itself. In dealing within its scope, the carrier was not required to look further than the Act's provisions to ascertain the union's authority. But it does not follow, as petitioner assumes, that it had the same right to deal with the union concerning the past. That aspect of the dispute was not part of the collective agent's exclusive statutory authority.

If to exclude it severs what otherwise might be considered organic, the severance clearly is one which Congress could make and is one we think it has made, by its definition of grievances and by the provisions for individual participation in their settlement. If, moreover, as petitioner urges, this may make the settlement less convenient than if power to deal with grievances were vested exclu-

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[39] The distinction holds true although "interpretation or application" may look to the future as well as the past, as it often does. It goes to the source of the right asserted, whether in an antecedent agreement or only to one presently sought. The difference is important for other issues as well as those presently involved, e. g., application of statutes of limitations.

The distinction is not to be ignored or wiped out merely because a particular dispute or agreement may look both to the past and to the future. The special procedure for settling grievances was created because it was intended they should be disposed of differently from disputes over "rates of pay, rules, or working conditions," which were committed exclusively to the collective agent's authority. One important difference preserved the aggrieved employee's rights to participate in all stages of the settlement. Congress therefore, when it preserved those rights, contemplated something more than collective representation and action to make the settlement effective for the past. It follows that the individual employee's rights cannot be nullified merely by agreement between the carrier and the union. They are statutory rights, which he may exercise independently or authorize the union to exercise in his behalf.

sively in the collective agent, that consequence may be admitted. But it cannot outweigh the considerations of equal or greater force which we think Congress has taken into account in preserving the individual workman's right to have a voice amounting to more than mere protest in the settlement of claims arising out of his employment.

From the fact that the Brotherhood occupied the position of collective bargaining agent and as such had power to deal for the future, therefore, petitioner was not entitled to make any assumption concerning its authority to settle the claims accrued for the past or to represent the claimants exclusively in proceedings before the Board. Accordingly for the union to act in their behalf with conclusive effect, authorization by them over and above any authority given by the statute was essential.

III

Petitioner urges that, apart from the statute, the facts of record show as a matter of law that respondents authorized the Brotherhood to settle the claims, to submit them to the Board, and to represent them in its proceedings. Respondents deny that authority in any of these respects was given, either by individual authorization or by virtue of the Brotherhood's constitution and rules; and they insist that the record presents these questions as issues of fact.

Stripped of its statutory influences, petitioner's argument comes in substance to this. It is undisputed that from August 27, 1934, to November 23, 1936, when the complaint in Docket No. 3537 was filed, respondents made out time slips and filed many complaints with the carrier's local officials through local officers of the Brotherhood on account of departures from the schedule of Article 6. The question of the article's applicability was a matter of discussion between the Brotherhood and company officials from the time of the transfer in 1934. Respondents admit

having authorized the Brotherhood, at a meeting of their local lodge, to file the complaint in Docket No. 3537 and that this complaint was filed in full compliance with the Brotherhood's constitution and rules. The settlement of October, 1938, and the consequent withdrawal of the claim in Docket No. 3537 were made by the same official, Williams, whom respondents had authorized to file the claim and with whom, in effect, both the collective agreement and the Brotherhood's regulations required petitioner to deal concerning the matter.[40] Moreover, the complaint in Docket No. 7324, filed in May, 1939, was filed by Williams and in the same manner as the complaint in Docket No. 3537.

From these facts petitioner concludes that respondents authorized the Brotherhood to settle the claims and to represent them before the Board. In its view, all of these transactions related to the same subject matter, namely, whether Article 6 was applicable in the Whiting yard, the only difference being that the relief sought in the two proceedings was not the same; and that difference is not material.

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[40] The collective agreement, of which Article 6 is a part, provides: "Any controversy arising *as to the application* of the rules herein agreed upon . . . shall be taken up . . ." by the general grievance committee with the general superintendent of the carrier, "and in the event of their failure to agree upon a satisfactory settlement, the Committee may appeal to the Vice President." (Emphasis added.) Petitioner says this provision bound it to deal only with the general committee.

Petitioner also relies upon Rule 10 of the Brotherhood's constitution and general rules as imposing the same duty:

"Whatever action may be taken by the General Grievance Committee or Board of Adjustment of any system within the meaning of the above General Rules shall be law to the Lodges on that road until and unless reversed by the Board of Appeals, and if any member refuses to vote or abide by the action of such General Grievance Committee or Board of Adjustment, he shall be expelled from the Brotherhood for violation of obligation."

See also note 8.

Respondents differ concerning the effect of these facts and others they set forth. They allege that under the Brotherhood's constitution and rules neither Williams and Johnson nor the general grievance committee could "revise or change a general wage 'schedule' or agreement concerning rates of pay, nor working conditions, unless authorized to do so by a majority vote of the lodges, or by a majority vote of the membership in the system"; that claims of individual members for back compensation could not be released without specific authority given individually; that no such authority was given; and that the carrier had knowledge of these limitations. They further allege that Williams and Johnson failed to notify them of the settlement, as the by-laws required;[41] and deny that they knew of the settlement, the proceedings in Docket 7324 or the award until after the award was made, when they promptly repudiated it.[42] They say accordingly that Williams acted without authority from them directly or through the Brotherhood's regulations in submitting and presenting the claims; and that the award is invalid not only for this reason but also because no notice of the proceeding was given to them.

It is apparent that the parties are at odds upon the inferences to be drawn from the facts and their legal effects rather than upon the facts themselves. Respondents deny, and petitioner apparently does not claim, that they at any time individually and specifically authorized the Brotherhood or its officials to compromise their claims for money due or to act for them exclusively in Board proceedings concerning those claims. If there is an issue

[41] This, they say, was because Williams did not regard the agreement as waiving the money claims, since he did not give them the required notice and shortly after the settlement filed the money claims with the Board. Cf. note 6.

[42] Respondents also attack the settlement because it was not signed by the third member of the grievance committee, the local grievance chairman. This objection borders on the frivolous.

in this respect it is obviously one of fact concerning which evidence and findings would be required.

The real issues, as we view the record, come down to whether respondents assented, in legal effect, to the final settlement of their claims by the union or to exclusive representation by it in any of the following ways: (1) by making complaints through local union officials; (2) by authorizing the Brotherhood to submit the complaint in Docket No. 3537; (3) by virtue of the Brotherhood's regulations; (4) by virtue of the collective agreement.

The collective agreement could not be effective to deprive the employees of their individual rights. Otherwise those rights would be brought within the collective bargaining power by a mere exercise of that power, contrary to the purport and effect of the Act as excepting them from its scope and reserving them to the individuals aggrieved. In view of that reservation the Act clearly does not contemplate that the rights saved may be nullified merely by agreement between the carrier and the union.

Nor can we say as a matter of law that the mere making of complaints through local Brotherhood officials amounted to final authorization to the union to settle the claims or represent the employees before the Board. Neither the statute nor the union's regulations purported to give these effects to that conduct. The time slips apparently were filed by the employees themselves. The record shows only the general fact that complaints concerning departures were made through local officials. More than this would be required to disclose unequivocal intention to surrender the individual's right to participate in the settlement and to give the union final voice in making it together with exclusive power to represent him before the Board. The making of complaints in this manner was only preliminary to negotiation and equivocal at the most.

Nor can we say, in the present state of the record, that the union's regulations unequivocally authorized the gen-

eral grievance committee or its chairman either to settle the claims or to act as exclusive representative before the Board. The parties rely upon apparently conflicting provisions or, if they are not actually in conflict, then upon different ones, the applicability of some of which is in dispute. Thus respondents rely upon Rule 3, which forbids change in existing agreements without the required vote of local lodges or system membership, and petitioner says the rule is not applicable to the dispute in this case. Whether or not the rule is applicable is a question of fact to be determined in the light of whatever evidence may be presented to sustain the one view or the other. Conceivably it may be intended to apply only where no grievance is involved or to the settlement of grievances and other disputes as well. But we cannot say, in the absence of further light than is now available, that on its face the rule bears only the one construction or the other.

Similar difficulties arise in connection with the other regulations. Only some of them are set forth in the printed record, although the full constitution and rules were made a part of the record proper by petitioner. The rules and regulations do not purport to require members to negotiate and settle their grievances only through the union. The general committee can act only when a grievance is referred to it by a local lodge. The rules are extensive, parts of them appear to involve possible conflict, the parties differ concerning their effects, and the mode of their operation quite obviously may be largely affected by the manner in which they are applied in practice. Their construction and legal effect are matters of some complexity and should not be undertaken in a vacuum apart from the facts relating to their application in practice. Because both factual and legal inferences would be involved in determining the effects of the regulations to bring about a surrender of the individual rights to take part in the settlement and in the Board's proceedings,

those effects cannot be determined as a matter of law in the first instance here.

Nor can we say as a matter of law that authorizing the submission in Docket No. 3537, without more, constituted authorization either to make the agreement of settlement or to represent the employees in Docket No. 7324. The matter requires some explication in the light of the view we have taken concerning the rights of an aggrieved employee in the settlement of grievances. In that view no valid settlement can be made unless he agrees. If settlement by agreement after negotiation fails, he has the right to submit the dispute to the Board for decision. If it is submitted he has rights of notice, hearing and individual representation according to his choice.

All these rights are separate and distinct, though closely related. A surrender or delegation of one would not result in surrender of the others as a matter of law or necessarily as a matter of fact. Whether in particular circumstances it might do so would depend upon whether they were considered sufficient to disclose such an intent.[43] It follows that authority to concur in an agreement of settlement does not imply without more authority to represent the employee in Board proceedings, or the latter the former. This is true when the authority is given to the collective agent as it is when it is given to another. That circumstance is not controlling. It only bears as one fac-

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[43] In other words, the aggrieved employee has the right to delegate his power to concur in an agreement of settlement, but at the same time to reserve his rights to make submission to the Board and of appearance and representation before it, or conversely to reserve his right to concur and delegate the rights of submission and representation. To what extent he may delegate one or all depends therefore upon the intent with which he makes the particular delegation as disclosed by the circumstances in which it is made, or gives evidence of such intent by his conduct, and this will be a question of fact unless the circumstances so clearly show he intended to make the delegation claimed that no other conclusion is possible.

tor in the total situation. Accordingly in this case the mere fact that the respondents authorized the union to make the submission and to represent them in Docket No. 3537 did not imply authority to make the settlement agreement or to represent them in the quite different later proceedings in Docket No. 7324.

The record does not show conclusively that prior to the submission in Docket No. 3537 the employees had finally committed the whole matter of their claims into the union's hands in such a manner as to constitute a surrender of their individual rights to concur in any agreement of settlement. That conclusion is not justified merely from the fact that the union participated in negotiations with the carrier.

Moreover, the authorization, to act in Docket No. 3537, obviously was given after efforts to secure settlement by negotiation and agreement were considered to have failed. Only then was anyone entitled to make the submission. Accordingly that authorization was entirely consistent with the idea that no further negotiations would be had, and therefore, without more, also with the idea that no authority to negotiate further was implied. It may be that upon a full hearing concerning the course and scope of the negotiations prior to this submission, the evidence will justify a conclusion that the respondents had authorized the union to act finally for them. But the record in its present state does not justify that conclusion as a matter of law.[44]

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[44] It is true that respondents' position concerning the consequences of their authorization to make the submission in Docket No. 3537 is not altogether consistent. For in claiming that they authorized submission only to determine the applicability of Article 6 for the future, and not to determine the question of retroactivity so as to establish or conclude adversely the basis for their individual monetary claims, they appear to ignore, as does petitioner in some of its contentions, the distinction between collective bargaining and the settlement of grievances as the Act defines them. Cf. note 39 and text. If their

It may be true also that if Docket No. 3537 had been carried to decision the award would have been effective to determine the rights of the parties. But no award was made in that proceeding. It was terminated and the claim was withdrawn. Whether or not that action or other events occurring later were effective to terminate the authority given to submit for the Board's determination the issue which was the foundation of respondents' monetary claims or whether that authority continued in spite of the changed conditions are questions also to be determined from a factual evaluation of the entire situation, essentially preliminary to determination of legal effects, which we cannot make.

Since upon the total situation we cannot say as a matter of law that respondents had authorized the Brotherhood to act for them in Docket No. 7324, whether in submitting the cause or in representing them before the Board; since it is conceded also that they were not given notice of the proceedings otherwise than as the union had knowledge of them; and since further they have denied that they had knowledge of the proceedings and of the award until after it was entered, the question whether the award was effective in any manner to affect their rights must be determined in the further proceedings which are required. The crucial issue in this respect, of course, will be initially whether respondents had authorized the Brotherhood in any legally sufficient manner to represent them, individually, in the Board's proceedings in Docket No. 7324.

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purpose was merely to authorize settlement for the future, without retroactive effects, the submission to the Adjustment Board was misconceived, since it has no power to render a decision requiring the carrier or the union to make a new agreement. Its only authority, under the Act, is to determine what they have agreed upon previously or, outside the scope of a collective agreement, what rights the carrier and its employees may have acquired by virtue of other incidents of the employment relation. Such an issue by its very nature looks to the past, though it may also seek compliance for the future.

Until that question is determined, it is not necessary for us to pass upon the important issue concerning the finality and conclusive effect of the award, or to determine the validity and legal effect of the compromise agreement. We accordingly express no opinion concerning those issues.

The judgment is affirmed. The cause is remanded for further proceedings in conformity with this opinion.

MR. JUSTICE FRANKFURTER, dissenting.

On July 27, 1934, the Brotherhood of Railroad Trainmen made an agreement with petitioner, Elgin, Joliet and Eastern Railway Company, affecting its yardmen whereby the starting time for switching crews was fixed. The respondents are employed as switching crews in the Whiting, Indiana yard of petitioner. They are all members of the Brotherhood. Observance by petitioner of this yard agreement was called into question. After abortive conferences for the adjustment of these claims between officials of petitioner and of the Brotherhood, C. H. Williams, General Chairman of the Brotherhood General Grievance Committee, filed a complaint covering several grievances with the National Railroad Adjustment Board, created by the Railway Labor Act of 1934, 48 Stat. 1185, 45 U. S. C. § 151 *et seq.*, to compel petitioner's compliance with the agreed time. In November, 1936, the cases were duly docketed. Before they came to be heard, petitioner, on October 28, 1938, proposed settlement of numerous claims against it by the Brotherhood then pending before the Adjustment Board. Among these claims was the dispute as to starting time. Petitioner agreed for a ninety-day trial period, beginning November 15, 1938, to abide by the time fixed in the 1934 agreement. But its offer was conditioned "on a complete settlement and withdrawal of all cases now pending either before the board, or under discussion with this office . . . and it is further under-

stood that in the event these settlements are accepted that the claims listed in this letter cover all claims of a similar nature, and that no other claims covering the same or like situations will be presented when such claims arise from causes occurring prior to the date of this settlement." On October 31, 1938, settlement on these terms was accepted for the yardmen by Williams, General Chairman, and S. F. Johnson, the Secretary of the Brotherhood's General Grievance Committee. On the same day and upon request of the Brotherhood and Railway, the cases were removed from its docket by the Adjustment Board.

Later the Brotherhood filed with the Adjustment Board a second complaint claiming money damages on behalf of its members for violation of the 1934 agreement. The Board, by formal award, denied the claim on the ground that the "evidence shows that the parties to the agreement disposed of the claim here made by the letter of carrier dated October 28th, 1938, accepted by employes October 31, 1938."

Respondents then filed this suit in the District Court for damages. Petitioner invoked the 1938 settlement and the Board's award thereon as a bar, and moved for summary judgment. Respondents resisted this motion by denying the authority of the Brotherhood officials to present their claims to the Board or to agree to the settlement. The District Court gave summary judgment for the petitioner which was reversed by the Circuit Court of Appeals for the Seventh Circuit on the ground that the question of authority of the Brotherhood officials raised an issue of fact for trial by the District Court. 140 F. 2d 488. The correctness of this ruling is the important question now before us. 323 U. S. 690.

We have had recent occasion to consider the Railway Labor Act in other aspects. *Switchmen's Union* v. *Board*, 320 U. S. 297; *General Committee* v. *M.-K.-T. R. Co.*, 320 U. S. 323; *General Committee* v. *Southern Pacific Co.*,

320 U. S. 338. The complexities which the problems in those cases laid bare, make clear that the specific question immediately before us cannot be isolated from the scheme and structure of the Railway Labor Act as an entirety. The Act in turn cannot be appreciated apart from the environment out of which it came and the purposes which it was designed to serve.

From the point of view of industrial relations our railroads are largely a thing apart. The nature and history of the industry, the experience with unionization of the roads, the concentration of authority on both sides of the industry in negotiating collective agreements, the intimacy of relationship between the leaders of the two parties shaped by a long course of national, or at least regional, negotiations, the intricate technical aspects of these agreements and the specialized knowledge for which their interpretation and application call, the practical interdependence of seemingly separate collective agreements—these and similar considerations admonish against mutilating the comprehensive and complicated system governing railroad industrial relations by episodic utilization of inapposite judicial remedies.

The Railway Labor Act of 1934 is primarily an instrument of government. As such, the view that is held of the particular world for which the Act was designed will largely guide the direction of judicial interpretation of the Act. The railroad world for which the Railway Labor Act was designed has thus been summarized by one of the most discerning students of railroad labor relations: "The railroad world is like a state within a state. Its population of some three million, if we include the families of workers, has its own customs and its own vocabulary, and lives according to rules of its own making. . . . This state within a state has enjoyed a high degree of internal peace for two generations; despite the divergent interests of its component parts, the reign of law has been firmly

established." Garrison, The Railroad Adjustment Board: A Unique Administrative Agency (1937) 46 Yale L. J. 567, 568–69.

The Railway Labor Act of 1934 is an expression of that "reign of law" and provides the means for maintaining it. Nearly half a century of experimental legislation lies behind the Act. It is fair to say that every stage in the evolution of this railroad labor code was progressively infused with the purpose of securing self-adjustment between the effectively organized railroads and the equally effective railroad unions and, to that end, of establishing facilities for such self-adjustment by the railroad community of its own industrial controversies. These were certainly not expected to be solved by ill-adapted judicial interferences, escape from which was indeed one of the driving motives in establishing specialized machinery of mediation and arbitration. Government intervention of any kind was contemplated only as a last resort for the avoidance of calamitous strikes.

The landmarks in this history, tersely summarized, are the meager act of October 1, 1888, 25 Stat. 501, providing for voluntary arbitration; the Erdman Act of June 1, 1898, 30 Stat. 424, securing government mediation and arbitration, but applicable only to those actually engaged in train service operations; the Newlands Act of July 15, 1913, 38 Stat. 103, providing for a permanent board of mediation and also a board of arbitration; the Adamson Act of September 3, 1916, 39 Stat. 721, as to which see *Wilson* v. *New,* 243 U. S. 332; Order No. 8 of February 21, 1918, formulating the labor policy of the Government after the United States took over the railroads, see Hines, War History of American Railroads (1928), p. 155 *et seq.;* the more elaborate machinery established by Title III of the Transportation Act of 1920, 41 Stat. 456, 469, for adjustments of these controversies, which in its turn was repealed and replaced by the Railway Labor Act of May

20, 1926, 44 Stat. 577, legislation agreed upon between the railroads and the Brotherhoods and probably unique in having been frankly accepted as such by the President and Congress.[1] The actual operation of this legislation partly disappointed the hopes of its sponsors, and led, for the still greater promotion of self-government by the railroad industry, to the Act of 1934.

The assumption as well as the aim of that Act is a process of permanent conference and negotiation between the carriers on the one hand and the employees through their unions on the other. Section 2, First, provides "It shall be the duty of all carriers . . . and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise . . ." Section 2, Second, provides "All disputes between a carrier . . . and its . . . employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier . . . and by the employees thereof interested in the dispute." According to § 2, Sixth, "In case of a dispute . . . arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier . . . and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such

[1] In his message of December 8, 1925, to Congress, President Coolidge stated: "I am informed that the railroad managers and their employees have reached a substantial agreement as to what legislation is necessary to regulate and improve their relationship. Whenever they bring forward such proposals, which seem sufficient also to protect the interests of the public, they should be enacted into law." 67 Cong. Rec. 463.

conference shall be held . . ." Section 3, First (i) directs that disputes growing out of grievances or the interpretation or application of agreements concerning rates of pay, rules, or working conditions be handled by conference and negotiation, including resort if necessary to the chief operating officer of the carrier. Compliance with these statutory duties is a prerequisite to appeal to the National Railroad Adjustment Board. The purpose of this legislation is the exertion of maximum pressure toward amicable settlement between the parties. Resort to the Adjustment Board is the last step in the statutory process.

In the controversy before us an amicable adjustment between the parties—the goal of the legislation—had been achieved by pursuing the course which the Act of 1934 directed. We are now asked to nullify this settlement, arrived at after prolonged negotiations, and to open the door of litigation to new discords. Not only is it sought to revive the dispute and to restore it to the status it had before the Adjustment Board more than eight years ago. The respondents claim that after all these years they have a right to repudiate their bargaining agents and to try the authority of these agents as though this were a conventional lawsuit involving the responsibility of a principal for the conduct of his agent.

As members of their Brotherhood, respondents were of course familiar with the procedure whereby the union speaks for them both to the Railroad and before the Adjustment Board. The Brotherhood's "Constitution and General Rules," which the respondents made part of their case below, are clear about this. Rule No. 7 declares that, after a grievance has been transmitted to a General Grievance Committee, that Committee "shall have power to alter, amend, add to or strike out . . . any part or all of any complaint or claim submitted to the committee, subject to appeal to the entire General Committee and/or Board of Appeals. A general grievance Committee may

authorize their chairman to handle all grievances received from local lodges with the management for settlement . . ." Respondents cannot deny that the Brotherhood officials had authority to seek compliance by the railroad with the starting time agreement through the Adjustment Board. In view of the sweeping power of the General Grievance Committee to settle grievances, the settlement that was made on behalf of the Brotherhood is invulnerable. The attack on the settlement because it was signed by only two of the three members of the Committee is frivolous. Such procedure is not at all unusual. Williams and Johnson settled other grievances in like manner, many of them involving claims for money. The Brotherhood's own rules sanction such action in that the Committee may authorize the Chairman to handle all grievances.

This is not a simple little case about an agent's authority. Demands of the employees' representative imply not only authority from those for whom he speaks but the duty of respect from those to whom he speaks. The carrier is under a legal duty to treat with the union's representative for the purposes of the Railway Labor Act. Section 2, Ninth; see *Virginian R. Co.* v. *System Federation,* 300 U. S. 515. We do not have the ordinary case where a third person dealing with an ostensible agent must at his peril ascertain the agent's authority. In such a situation a person may protect himself by refusing to deal. Here petitioner has a duty to deal. If petitioner refuses to deal with the officials of the employees' union by challenging their authority, it does so under pain of penalty. If it deals with them on the reasonable belief that the grievance officials of the Brotherhood are acting in accordance with customary union procedure, settlements thus made ought not to be at the hazard of being jettisoned by future litigation. To allow such settlements to be thus set aside is to obstruct the smooth

working of the Act. It undermines the confidence so indispensable to adjustment by negotiation, which is the vital object of the Act. See *Division 525, Order of Railway Conductors* v. *Gorman,* 133 F. 2d 273, 278.

But respondents claim that irrespective of the authority of the Brotherhood officials to handle claims for the enforcement of the agreed starting time, Williams did not have authority to present to the Adjustment Board the claim for damages due to respondents for petitioner's alleged past violation of the starting-time agreement. They insist that there is no relation between a claim for money resulting from the violation of a collective agreement and a claim for the enforcement of a collective agreement. But surely this is to sever that which is organic. It wholly disregards the nature of such a collective agreement, its implications and its ramifications. In passing on the claim for money damages arising out of the yard agreement, any tribunal would have to examine, interpret and apply the collective agreement precisely as it would if the issue were the duty to observe the agreement in the future. An award based on the application of the collective agreement would, quite apart from technical questions of *res judicata,* affect future claims governed by the same collective agreement whatever the particular forms in which the claims may be cast. To find here merely an isolated, narrow question of law as to past liability is to disregard the ties which bind the money controversy to its railroad environment. Such a view is blind to the fact that "all members of the class or craft to which an aggrieved employee belongs have a real and legitimate interest in the dispute. Each of them, at some later time, may be involved in a similar dispute." 40 Ops. Atty. Gen., No. 59 (Dec. 29, 1942) pp. 4–5. Indeed, such a view leaves out of consideration not only the significant bearing of the construction of the same collective agreement on parts of the carrier's lines not immediately before the Court. It

overlooks the relation of a provision in a collective agreement with one railroad to comparable provisions of collective agreements with other roads.

To allow the issue of authorization after an award by the Board to be relitigated in the courts is inimical to the internal government of the Brotherhood. Union membership generates complicated relations. Policy counsels against judicial intrusion upon these relations. If resort to courts is at all available, it certainly should not disregard and displace the arrangements which the members of the organization voluntarily establish for their reciprocal interests and by which they bound themselves to be governed. The rights and duties of membership are governed by the rules of the Brotherhood. Rule 10 concerns objections to official action: "Whatever action may be taken by the general grievance committee . . . shall be law to the lodges on that road until the next meeting of the board of appeals, and if any member refuses to vote or abide by the action of such general grievance committee or board of adjustment he shall be expelled from the Brotherhood for violation of obligation." To ask courts to adjudicate the meaning of the Brotherhood rules and customs without preliminary resort to remedial proceedings within the Brotherhood is to encourage influences of disruption within the union instead of fostering these unions as stabilizing forces. Rules of fraternal organizations, with all the customs and assumptions that give them life, cannot be treated as though they were ordinary legal documents of settled meaning. "Freedom of litigation, for instance, is hardly so essential a part of the democratic process that the courts should be asked to strike down all hindrances to its pursuit. The courts are as wise, to take an example of this, in adhering to the general requirement that all available remedies within the union be exhausted before redress is sought before them as they are unwise in many of the exceptions they have grafted upon

this rule." Witmer, Civil Liberties and the Trade Union (1941) 50 Yale L. J. 621, 630. To an increasing extent, courts require dissidents within a union to seek interpretation of the organization's rules and to seek redress for grievances arising out of them before appropriate union tribunals. Compare *Norfolk & Western R. Co.* v. *Harris,* 260 Ky. 132, 84 S. W. 2d 69; *Agrippino* v. *Perrotti,* 270 Mass. 55, 169 N. E. 793; *Snay* v. *Lovely,* 276 Mass. 159, 176 N. E. 791; *Webb* v. *Chicago, R. I. & G. R. Co.,* 136 S. W. 2d 245.

The Railway Labor Act, as the product of long experience, is a complicated but carefully devised scheme for adjusting the relations between the two powerful groups constituting the railroad industry. It misconceives the legislation and mutilates its provisions to read into it common law notions for the settlement of private rights. If, when a dispute arises over the meaning of a collective agreement, the legally designated railroad bargaining unit cannot negotiate with the carrier without first obtaining the specific authorization of every individual member of the union who may be financially involved in the dispute, it not only weakens the union by encouraging divisive elements. It gravely handicaps the union in its power to bargain responsibly. That is not all. Not to allow the duly elected officers of an accredited union to speak for its membership in accordance with the terms of the internal government of the union and to permit any member of the union to pursue his own interest under a collective agreement undermines the very conception of a collective agreement. It reintroduces the destructive individualism in the relations between the railroads and their workers which it was the very purpose of the Railway Labor Act to eliminate. To allow every individual worker to base individual claims on his private notions of the scope and meaning of a collective agreement intended to lay down uniform standards for all those covered by the

collective agreement, is to permit juries and courts to make varying findings and give varying constructions to an agreement inevitably couched in words or phrases reflecting the habits, usage and understanding of the railroad industry. Thus will be introduced those dislocating differentiations for workers in the same craft which have always been among the most fertile provocations to friction, strife, and strike in the railroad world. The Railway Labor Act, one had supposed, would be construed so as to reduce and not to multiply these seeds of strife.

In order to avoid mischievous opportunities for the assertion of individual claims by shippers as against the common interest of uniformity in construing railroad tariffs, this Court so construed the Interstate Commerce Act in the famous *Abilene Cotton Oil* case, 204 U. S. 426, as to withdraw from the shipper the historic common law right to sue in the courts for charging unreasonable rates. It required resort to the Interstate Commerce Commission because not to do so would result in the impairment of the general purpose of that Act. It did so because even though theoretically this Court could ultimately review such adjudications imbedded in the various judicial judgments—if a shipper could go to a court in the first instance—there would be considerations of fact which this Court could not possibly disentangle so as to secure the necessary uniformity. The beneficent rule in the *Abilene Cotton Oil* case was evolved by reading the Interstate Commerce Act not as though it were a collection of abstract words, but by treating it as an instrument of government growing out of long experience with certain evils and addressed to their correction. Chief Justice White's opinion in that case was characterized by his successor, Chief Justice Taft, as a "conspicuous instance of his unusual and remarkable power and facility in statesmanlike interpretation of statute law." 257 U. S. xxv. The provisions of the Railway Labor Act do not even

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necessitate such a creative act of adjudication as this Court in the *Abilene* case unanimously accomplished. The Railway Labor Act contains no embarrassing specific provision, as was true of § 22 of the Interstate Commerce Act, 24 Stat. 379, 387, calling for subordination to the main purpose of the legislation. The considerations making for harmonious adjustment of railroad industrial relations through the machinery designed by Congress in the Railway Labor Act are disregarded by allowing that machinery to be by-passed and by introducing dislocating differentiations through individual resort to the courts in the application of a collective agreement.

Since the claim before the Adjustment Board was for money, there remains the question whether its disposition was open to judicial review. The Railway Labor Act commands that the Board's "awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award." § 3, First (m). But the determination here in controversy does not "contain a money award" so as to be excepted from the final and binding effect given other awards. The obvious meaning of "money award" is an award directing the payment of money, not one denying payment. See *Berryman* v. *Pullman Co.*, 48 F. Supp. 542. We are pointed to no aids to construction that should withhold us from giving the familiar term "money award" any other than its ordinary meaning as something that awards money. This construction is confirmed by comparison with the provisions of the Interstate Commerce Act dealing with reparation orders. Since both Acts came out of the same Congressional Committees one finds, naturally enough, that the provisions for enforcement and review of the Adjustment Board's awards were based on those for reparation orders by the Interstate Commerce Commission. Compare Railway Labor Act, § 3, First (p) with Interstate Commerce Act, as amended by § 5 of the Hepburn Act, 34

Stat. 584, 590, 49 U. S. C. § 16 (1), (2). If a carrier fails to comply with a reparation order, as is true of non-compliance with an Adjustment Board award, the complainant may sue in court for enforcement; the Commission's order and findings and evidence then become *prima facie* evidence of the facts stated. But a denial of a money claim by the Interstate Commerce Commission bars the door to redress in the courts. *Baltimore & Ohio R. Co.* v. *Brady*, 288 U. S. 448; *I. C. C.* v. *United States*, 289 U. S. 385, 388; *Terminal Warehouse* v. *Pennsylvania R. Co.*, 297 U. S. 500, 507.

The Railway Labor Act precludes review of the Board's award; and, since authorization of the Brotherhood officials to make the settlement is not now open to judicial inquiry, the judgment calls for reversal.

The CHIEF JUSTICE, MR. JUSTICE ROBERTS and MR. JUSTICE JACKSON join in this dissent.

SOUTHERN PACIFIC CO. v. ARIZONA EX REL. SULLIVAN, ATTORNEY GENERAL.

APPEAL FROM THE SUPREME COURT OF ARIZONA.

No. 56. Argued March 26, 27, 1945.—Decided June 18, 1945.

1. State power to regulate the length of railroad trains is not curtailed or superseded by § 1 of the Interstate Commerce Act (paragraphs 10–17) of itself, and in the absence of administrative implementation by the Interstate Commerce Commission; nor by provisions of the Safety Appliance Act for brakes on trains; nor by the provision of § 25 of Part I of the Interstate Commerce Act permitting the Commission to order the installation of train stop and control devices. Pp. 765–766.

In enacting legislation within its constitutional authority over interstate commerce, Congress will not be deemed to have intended to strike down a state statute designed to protect the health and safety of the public unless its purpose to do so is clearly manifested; or unless the state law, in terms or in its practical administration,

conflicts with the Act of Congress or plainly and palpably infringes its policy. P. 766.

2. The Arizona Train Limit Law (Arizona Code Ann., 1939, § 69-119), making it unlawful to operate within the State a passenger train of more than fourteen cars or a freight train of more than seventy cars, *held*, as applied to interstate trains, invalid as contravening the commerce clause of the Federal Constitution. Pp. 763, 781.
3. The commerce clause, even without the aid of Congressional legislation, protects against state legislation which is inimical to the national commerce; and in such cases, where Congress has not acted, this Court, and not the state legislature, is the final arbiter of the competing demands of state and national interests. P. 769.
4. Although this Court, upon review of a decision of a state court, may determine for itself the facts upon which an asserted federal right depends, the crucial findings of the state court here are not challenged in material particulars, are supported by evidence, and supply an adequate basis for decision of the constitutional issue presented. P. 771.
5. The state regulation here involved, admittedly obstructive to interstate train operation, and having a seriously adverse effect on transportation efficiency and economy, passes beyond what is plainly essential for safety, since it does not appear that it will lessen rather than increase the danger of accident. Examination of all relevant factors makes it plain that the state interest here asserted is outweighed by the interest of the nation in an adequate, economical and efficient railway transportation service. P. 781.
6. The relative weights of the state and national interests involved are not such as to make inapplicable the rule, generally observed, that the free flow of interstate commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the commerce clause from state interference. Pp. 770, 781.
7. The full-train-crew cases and *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, distinguished. P. 782.

61 Ariz. 66, 145 P. 2d 530, reversed.

Appeal from a judgment upholding the constitutionality of the Arizona Train Limit Law.

Messrs. Burton Mason and *J. Carter Fort* argued the cause, and *Messrs. Cleon T. Knapp* and *C. W. Durbrow* were with *Mr. Mason* on the brief, for appellant.

Messrs. Harold N. McLaughlin and *Harold C. Heiss* argued the cause, and *Joe Conway,* Attorney General of Arizona, *Earl Anderson,* Assistant Attorney General, and *Mr. Charles L. Strouss* were with *Mr. McLaughlin* on the brief, for appellee.

Mr. Robert L. Stern, with whom *Solicitor General Fahy* and *Mrs. Carolyn R. Just* were on the brief, for the United States, as *amicus curiae,* urging reversal.

Messrs. J. Carter Fort and *Thomas Reed Powell* filed a brief on behalf of the Association of American Railroads, as *amicus curiae,* urging reversal.

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

The Arizona Train Limit Law of May 16, 1912, Arizona Code Ann., 1939, § 69–119, makes it unlawful for any person or corporation to operate within the state a railroad train of more than fourteen passenger or seventy freight cars, and authorizes the state to recover a money penalty for each violation of the Act. The questions for decision are whether Congress has, by legislative enactment, restricted the power of the states to regulate the length of interstate trains as a safety measure and, if not, whether the statute contravenes the commerce clause of the Federal Constitution.

In 1940 the State of Arizona brought suit in the Arizona Superior Court against appellant, the Southern Pacific Company, to recover the statutory penalties for operating within the state two interstate trains, one a passenger train of more than fourteen cars, and one a freight train of more than seventy cars. Appellant answered, admitting the train operations, but defended on the ground that the statute offends against the commerce clause and the due process clause of the Fourteenth Amendment and conflicts with federal legislation. After an extended trial,

without a jury, the court made detailed findings of fact on the basis of which it gave judgment for the railroad company. The Supreme Court of Arizona reversed and directed judgment for the state. 61 Ariz. 66, 145 P. 2d 530. The case comes here on appeal under § 237 (a) of the Judicial Code, appellant raising by its assignments of error the questions presented here for decision.

The Supreme Court left undisturbed the findings of the trial court and made no new findings. It held that the power of the state to regulate the length of interstate trains had not been restricted by Congressional action. It sustained the Act as a safety measure to reduce the number of accidents attributed to the operation of trains of more than the statutory maximum length, enacted by the state legislature in the exercise of its "police power." This power the court held extended to the regulation of the operations of interstate commerce in the interests of local health, safety and well-being. It thought that a state statute, enacted in the exercise of the police power, and bearing some reasonable relation to the health, safety and well-being of the people of the state, of which the state legislature is the judge, was not to be judicially overturned, notwithstanding its admittedly adverse effect on the operation of interstate trains.

Purporting to act under § 1, paragraphs 10–17 of the Interstate Commerce Act, 24 Stat. 379 as amended (49 U. S. C. § 1 *et seq.*), the Interstate Commerce Commission, as of September 15, 1942, promulgated as an emergency measure Service Order No. 85, 7 Fed. Reg. 7258, suspending the operation of state train limit laws for the duration of the war, and denied an application to set aside the order. *In the Matter of Service Order No. 85,* 256 I. C. C. 523. Paragraph 15 of § 1 of the Interstate Commerce Act empowers the Commission, when it is "of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any

section of the country," to make or suspend rules and practices "with respect to car service," which includes by paragraph 10 of § 1 "the use, control, supply, movement, distribution, exchange, interchange, and return" of locomotives and cars, and the "supply of trains." Paragraph 16 of § 1 provides that when a carrier is unable properly to transport the traffic offered, the Commission may make reasonable directions "with respect to the handling, routing, and movement of the traffic of such carrier and its distribution over other lines of roads." The authority of the Commission to make Order No. 85 is currently under attack in *Johnston* v. *United States,* Civil Action No. 1408, pending in the Western District of Oklahoma.

The Commission's order was not in effect in 1940 when the present suit was brought for violations of the state law in that year, and the Commission's order is inapplicable to the train operations here charged as violations. Hence the question here is not of the effect of the Commission's order, which we assume for purposes of decision to be valid, but whether the grant of power to the Commission operated to supersede the state act before the Commission's order. We are of opinion that, in the absence of administrative implementation by the Commission, § 1 does not of itself curtail state power to regulate train lengths. The provisions under which the Commission purported to act, phrased in broad and general language, do not in terms deal with that subject. We do not gain either from their words or from the legislative history any hint that Congress in enacting them intended, apart from Commission action, to supersede state laws regulating train lengths. We can hardly suppose that Congress, merely by conferring authority on the Commission to regulate car service in an "emergency," intended to restrict the exercise, otherwise lawful, of state power to regulate train lengths before the Commission finds an "emergency" to exist.

Congress, in enacting legislation within its constitutional authority over interstate commerce, will not be deemed to have intended to strike down a state statute designed to protect the health and safety of the public unless its purpose to do so is clearly manifested, *Reid* v. *Colorado,* 187 U. S. 137, 148; *Missouri Pacific R. Co.* v. *Larabee Mills,* 211 U. S. 612, 621, *et seq.; Missouri, K. & T. R. Co.* v. *Harris,* 234 U. S. 412, 418-419; *Welch Co.* v. *New Hampshire,* 306 U. S. 79, 85; *Allen-Bradley Local* v. *Board,* 315 U. S. 740, 749, or unless the state law, in terms or in its practical administration, conflicts with the Act of Congress, or plainly and palpably infringes its policy. *Sinnot* v. *Davenport,* 22 How. 227, 243; *Missouri, K. & T. R. Co.* v. *Haber,* 169 U. S. 613, 623; *Savage* v. *Jones,* 225 U. S. 501, 533; *Carey* v. *South Dakota,* 250 U. S. 118, 122; *Atchison, T. & S. F. R. Co.* v. *Railroad Comm'n,* 283 U. S. 380, 391; *Townsend* v. *Yeomans,* 301 U. S. 441, 454.

The contention, faintly urged, that the provisions of the Safety Appliance Act, 45 U. S. C. §§ 1 and 9, providing for brakes on trains, and of § 25 of Part I of the Interstate Commerce Act, 49 U. S. C. § 26 (b), permitting the Commission to order the installation of train stop and control devices, operate of their own force to exclude state regulation of train lengths, has even less support. Congress, although asked to do so,[1] has declined to pass legislation specifically limiting trains to seventy cars. We are therefore brought to appellant's principal contention, that the state statute contravenes the commerce clause of the Federal Constitution.

Although the commerce clause conferred on the national government power to regulate commerce, its possession of the power does not exclude all state power of regulation. Ever since *Willson* v. *Black-Bird Creek Marsh*

[1] See Senate Report No. 416, 75th Cong., 1st Sess.; 81 Cong. Rec. 7596; and Hearings before House Committee on Interstate and Foreign Commerce, 75th Cong., 3d Sess., S. 69, Train Lengths.

Co., 2 Pet. 245, and *Cooley* v. *Board of Wardens*, 12 How. 299, it has been recognized that, in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it. *Minnesota Rate Cases*, 230 U. S. 352, 399–400; *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 187, *et seq.*; *California* v. *Thompson*, 313 U. S. 109, 113–14 and cases cited; *Parker* v. *Brown*, 317 U. S. 341, 359–60. Thus the states may regulate matters which, because of their number and diversity, may never be adequately dealt with by Congress. *Cooley* v. *Board of Wardens*, *supra*, 319; *South Carolina Highway Dept.* v. *Barnwell Bros.*, *supra*, 185; *California* v. *Thompson*, *supra*, 113; *Duckworth* v. *Arkansas*, 314 U. S. 390, 394; *Parker* v. *Brown*, *supra*, 362, 363. When the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation, and the consequent incentive to deal with them nationally is slight, such regulation has been generally held to be within state authority. *South Carolina Highway Dept.* v. *Barnwell Bros.*, *supra*, 188 and cases cited; *Lone Star Gas Co.* v. *Texas*, 304 U. S. 224, 238; *Milk Board* v. *Eisenberg Co.*, 306 U. S. 346, 351; *Maurer* v. *Hamilton*, 309 U. S. 598, 603; *California* v. *Thompson*, *supra*, 113–14 and cases cited.

But ever since *Gibbons* v. *Ogden*, 9 Wheat. 1, the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority.[2] *Cooley* v. *Board of Wardens*, *supra*, 319; *Leisy*

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[2] In applying this rule the Court has often recognized that to the extent that the burden of state regulation falls on interests outside

v. *Hardin,* 135 U. S. 100, 108, 109; *Minnesota Rate Cases, supra,* 399–400; *Edwards* v. *California,* 314 U. S. 160, 176. Whether or not this long-recognized distribution of power between the national and the state governments is predicated upon the implications of the commerce clause itself, *Brown* v. *Maryland,* 12 Wheat. 419, 447; *Minnesota Rate Cases, supra,* 399, 400; *Pennsylvania* v. *West Virginia,* 262 U. S. 553, 596; *Baldwin* v. *Seelig,* 294 U. S. 511, 522; *South Carolina Highway Dept.* v. *Barnwell Bros., supra,* 185, or upon the presumed intention of Congress, where Congress has not spoken, *Welton* v. *Missouri,* 91 U. S. 275, 282; *Hall* v. *DeCuir,* 95 U. S. 485, 490; *Brown* v. *Houston,* 114 U. S. 622, 631; *Bowman* v. *Chicago & N. W. R. Co.,* 125 U. S. 465, 481–2; *Leisy* v. *Hardin, supra,* 109; *In re Rahrer,* 140 U. S. 545, 559–60; *Brennan* v. *Titusville,* 153 U. S. 289, 302; *Covington & C. Bridge Co.* v. *Kentucky,* 154 U. S. 204, 212; *Graves* v. *New York ex rel. O'Keefe,* 306 U. S. 466, 479, n., Dowling, Interstate Commerce and State Power, 27 Va. Law Rev. 1, the result is the same.

In the application of these principles some enactments may be found to be plainly within and others plainly without state power. But between these extremes lies the infinite variety of cases, in which regulation of local matters may also operate as a regulation of commerce, in which reconciliation of the conflicting claims of state and

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the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected. *Cooley* v. *Board of Wardens, supra,* 315; *Gilman* v. *Philadelphia,* 3 Wall. 713, 731; *Escanaba Co.* v. *Chicago,* 107 U. S. 678, 683; *Robbins* v. *Shelby County Taxing Dist.,* 120 U. S. 489, 499; *Lake Shore & M. S. R. Co.* v. *Ohio,* 173 U. S. 285, 294; *South Carolina Highway Dept.* v. *Barnwell Bros. supra,* 185, n.; *McGoldrick* v. *Berwind-White Co.,* 309 U. S. 33, 46, n.; cf. *McCulloch* v. *Maryland,* 4 Wheat. 316, 428; *Pound* v. *Turck,* 95 U. S. 459, 464; *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 196, 205; *Helvering* v. *Gerhardt,* 304 U. S. 405, 412.

national power is to be attained only by some appraisal and accommodation of the competing demands of the state and national interests involved. *Parker* v. *Brown, supra,* 362; *Terminal Railroad Assn.* v. *Brotherhood,* 318 U.S. 1, 8; see *DiSanto* v. *Pennsylvania,* 273 U. S. 34, 44 (and compare *California* v. *Thompson, supra*); *Illinois Gas Co.* v. *Public Service Co.,* 314 U. S. 498, 504–5.

For a hundred years it has been accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests. *Cooley* v. *Board of Wardens, supra; Kansas City Southern R. Co.* v. *Kaw Valley District,* 233 U. S. 75, 79; *South Covington R. Co.* v. *Covington,* 235 U. S. 537, 546; *Missouri, K. & T. R. Co.* v. *Texas,* 245 U. S. 484, 488; *St. Louis & S. F. R. Co.* v. *Public Service Comm'n,* 254 U. S. 535, 537; *Foster-Fountain Packing Co.* v. *Haydel,* 278 U. S. 1, 10; *Gwin, White & Prince* v. *Henneford,* 305 U. S. 434, 441; *McCarroll* v. *Dixie Lines,* 309 U. S. 176.

Congress has undoubted power to redefine the distribution of power over interstate commerce. It may either permit the states to regulate the commerce in a manner which would otherwise not be permissible, *In re Rahrer, supra,* 561–62; *Adams Express Co.* v. *Kentucky,* 238 U. S. 190, 198; *Rosenberger* v. *Pacific Express Co.,* 241 U. S. 48, 50, 51; *Clark Distilling Co.* v. *Western Maryland R. Co.,* 242 U. S. 311, 325–6; *Whitfield* v. *Ohio,* 297 U. S. 431, 438–40; *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.,* 299 U. S. 334, 350–51; *Hooven & Allison Co.* v. *Evatt,* 324 U. S. 652, 679, or exclude state regulation even of matters of peculiarly local concern which nevertheless affect interstate commerce. *Addyston Pipe & Steel Co.* v.

United States, 175 U. S. 211, 230; *Louisville & Nashville R. Co.* v. *Mottley,* 219 U. S. 467; *Houston, E. & W. T. R. Co.* v. *United States,* 234 U. S. 342; *American Express Co.* v. *Caldwell,* 244 U. S. 617, 626; *Illinois Central R. Co.* v. *Public Utilities Comm'n,* 245 U. S. 493, 506; *New York* v. *United States,* 257 U. S. 591, 601; *Louisiana Public Service Comm'n* v. *Texas & N. O. R. Co.,* 284 U. S. 125, 130; *Pennsylvania R. Co.* v. *Illinois Brick Co.,* 297 U. S. 447, 459.

But in general Congress has left it to the courts to formulate the rules thus interpreting the commerce clause in its application, doubtless because it has appreciated the destructive consequences to the commerce of the nation if their protection were withdrawn, *Gwin, White & Prince* v. *Henneford, supra,* 441, and has been aware that in their application state laws will not be invalidated without the support of relevant factual material which will "afford a sure basis" for an informed judgment. *Terminal Railroad Assn.* v. *Brotherhood, supra,* 8; *Southern R. Co.* v. *King,* 217 U. S. 524. Meanwhile, Congress has accommodated its legislation, as have the states, to these rules as an established feature of our constitutional system. There has thus been left to the states wide scope for the regulation of matters of local state concern, even though it in some measure affects the commerce, provided it does not materially restrict the free flow of commerce across state lines, or interfere with it in matters with respect to which uniformity of regulation is of predominant national concern.

Hence the matters for ultimate determination here are the nature and extent of the burden which the state regulation of interstate trains, adopted as a safety measure, imposes on interstate commerce, and whether the relative weights of the state and national interests involved are such as to make inapplicable the rule, generally observed, that the free flow of interstate commerce and its freedom

from local restraints in matters requiring uniformity of regulation are interests safeguarded by the commerce clause from state interference.

While this Court is not bound by the findings of the state court, and may determine for itself the facts of a case upon which an asserted federal right depends, *Hooven & Allison Co.* v. *Evatt, supra,* p. 659, and cases cited, the facts found by the state trial court showing the nature of the interstate commerce involved, and the effect upon it of the train limit law, are not seriously questioned. Its findings with respect to the need for and effect of the statute as a safety measure, although challenged in some particulars which we do not regard as material to our decision, are likewise supported by evidence. Taken together the findings supply an adequate basis for decision of the constitutional issue.

The findings show that the operation of long trains, that is trains of more than fourteen passenger and more than seventy freight cars, is standard practice over the main lines of the railroads of the United States, and that, if the length of trains is to be regulated at all, national uniformity in the regulation adopted, such as only Congress can prescribe, is practically indispensable to the operation of an efficient and economical national railway system. On many railroads passenger trains of more than fourteen cars and freight trains of more than seventy cars are operated, and on some systems freight trains are run ranging from one hundred and twenty-five to one hundred and sixty cars in length. Outside of Arizona, where the length of trains is not restricted, appellant runs a substantial proportion of long trains. In 1939 on its comparable route for through traffic through Utah and Nevada from 66 to 85% of its freight trains were over seventy cars in length and over 43% of its passenger trains included more than fourteen passenger cars.

In Arizona, approximately 93% of the freight traffic and 95% of the passenger traffic is interstate. Because

of the Train Limit Law appellant is required to haul over 30% more trains in Arizona than would otherwise have been necessary. The record shows a definite relationship between operating costs and the length of trains, the increase in length resulting in a reduction of operating costs per car. The additional cost of operation of trains complying with the Train Limit Law in Arizona amounts for the two railroads traversing that state to about $1,000,000 a year. The reduction in train lengths also impedes efficient operation. More locomotives and more manpower are required; the necessary conversion and reconversion of train lengths at terminals and the delay caused by breaking up and remaking long trains upon entering and leaving the state in order to comply with the law, delays the traffic and diminishes its volume moved in a given time, especially when traffic is heavy.

To relieve the railroads of these burdens, during the war emergency only, the Interstate Commerce Commission, acting under § 1 of the Interstate Commerce Act, suspended the operation of the state law for the duration of the war by its order of September 15, 1942, to which we have referred. In support of the order the Commission declared: "It was designed to save manpower, motive power, engine-miles and train-miles; to avoid delay in the movement of trains; to increase the efficient use of locomotives and cars and to augment the available supply thereof; and to relieve congestion at terminals caused by setting out and picking up cars on each side of the train-limit law States." *In the Matter of Service Order No. 85*, 256 I. C. C. 523, 524. Appellant, because of its past compliance with the Arizona Train Limit Law, has been unable to avail itself fully of the benefits of the suspension order because some of its equipment and the length of its sidings in Arizona are not suitable for the operation of long trains. Engines capable of hauling long trains were not in service. It can engage in long

train operations to the best advantage only by rebuilding its road to some extent and by changing or adding to its motive power equipment, which it desires to do in order to secure more efficient and economical operation of its trains.

The unchallenged findings leave no doubt that the Arizona Train Limit Law imposes a serious burden on the interstate commerce conducted by appellant. It materially impedes the movement of appellant's interstate trains through that state and interposes a substantial obstruction to the national policy proclaimed by Congress, to promote adequate, economical and efficient railway transportation service. Interstate Commerce Act, preceding § 1, 54 Stat. 899. Enforcement of the law in Arizona, while train lengths remain unregulated or are regulated by varying standards in other states, must inevitably result in an impairment of uniformity of efficient railroad operation because the railroads are subjected to regulation which is not uniform in its application. Compliance with a state statute limiting train lengths requires interstate trains of a length lawful in other states to be broken up and reconstituted as they enter each state according as it may impose varying limitations upon train lengths. The alternative is for the carrier to conform to the lowest train limit restriction of any of the states through which its trains pass, whose laws thus control the carriers' operations both within and without the regulating state.

Although the seventy car maximum for freight trains is the limitation which has been most commonly proposed, various bills introduced in the state legislatures provided for maximum freight train lengths of from fifty to one hundred and twenty-five cars, and maximum passenger train lengths of from ten to eighteen cars.[3] With such

[3] One hundred sixty-four bills limiting train lengths have been introduced in state legislatures since 1920, of which only three were passed,

laws in force in states which are interspersed with those having no limit on train lengths, the confusion and difficulty with which interstate operations would be burdened under the varied system of state regulation and the unsatisfied need for uniformity in such regulation, if any, are evident.[4]

At present the seventy freight car laws are enforced only in Arizona and Oklahoma, with a fourteen car passenger car limit in Arizona. The record here shows that the enforcement of the Arizona statute results in freight trains being broken up and reformed at the California border and in New Mexico, some distance from the Arizona line. Frequently it is not feasible to operate a newly assembled train from the New Mexico yard nearest to Arizona, with the result that the Arizona limitation governs the flow of traffic as far east as El Paso, Texas. For similar reasons the Arizona law often controls the

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in Nevada, Louisiana and Oklahoma. The Nevada and Louisiana laws were held unconstitutional and never enforced. *Southern Pacific Co.* v. *Mashburn,* 18 F. Supp. 393; *Texas & N. O. R. Co.* v. *Martin* (No. 428—Equity, E. D. of La. 1936), unreported. The Arizona law, passed in 1912, was held unconstitutional in *Atchison, T. & S. F. R. Co.* v. *La Prade,* 2 F. Supp. 855, reversed on other grounds, 289 U. S. 444.

[4] Had these bills been passed a freight train running over established routes (from Virginia to Michigan for example) would normally proceed through states with a seventy-five car maximum (Virginia), a one hundred and twenty-five car maximum (West Virginia), a three thousand foot maximum (Ohio), and a seventy car limit (Michigan). A train from Arkansas to Wisconsin might be subjected to a fifty car maximum (Arkansas), one-half mile (Mississippi), three thousand feet (Iowa), one and a half miles (Minnesota), and thirty-three hundred feet (Wisconsin). A train running from Nebraska to California might be subject to a sixty, seventy-five or eighty-five maximum in Nebraska, to a limit fixed by commission in Kansas, to a sixty-five car limit in Colorado, to a seventy-five car limit in New Mexico, to a seventy car limit in Arizona, and to a seventy-four car limit in California. A passenger train might be limited to fourteen cars in New Jersey, ten in Pennsylvania and eighteen in West Virginia.

length of passenger trains all the way from Los Angeles to El Paso.[5]

If one state may regulate train lengths, so may all the others, and they need not prescribe the same maximum limitation. The practical effect of such regulation is to control train operations beyond the boundaries of the state exacting it because of the necessity of breaking up and reassembling long trains at the nearest terminal points before entering and after leaving the regulating state. The serious impediment to the free flow of commerce by the local regulation of train lengths and the practical necessity that such regulation, if any, must be prescribed by a single body having a nation-wide authority are apparent.

The trial court found that the Arizona law had no reasonable relation to safety, and made train operation more dangerous. Examination of the evidence and the detailed findings makes it clear that this conclusion was rested on facts found which indicate that such increased danger of accident and personal injury as may result from the greater length of trains is more than offset by the increase in the number of accidents resulting from the larger number of trains when train lengths are reduced. In considering the effect of the statute as a safety measure, therefore, the factor of controlling significance for present purposes is not whether there is basis for the conclusion of the Arizona Supreme Court that the increase in length of trains beyond the statutory maximum has an adverse effect upon safety of operation. The decisive question is whether in the circumstances the total effect of the

[5] In Oklahoma three lines running from Chicago or Kansas City west pass through Oklahoma for distances of sixty, one hundred and seventeen and one hundred and forty-three miles. Since no other state through which the traffic passes (except Arizona) restricts train lengths in any way, the effect of the Oklahoma law is to require through trains to be broken up for the short distances they pass through that state.

law as a safety measure in reducing accidents and casualties is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it and subject it to local regulation which does not have a uniform effect on the interstate train journey which it interrupts.

The principal source of danger of accident from increased length of trains is the resulting increase of "slack action" of the train. Slack action is the amount of free movement of one car before it transmits its motion to an adjoining coupled car. This free movement results from the fact that in railroad practice cars are loosely coupled, and the coupling is often combined with a shock-absorbing device, a "draft gear," which, under stress, substantially increases the free movement as the train is started or stopped. Loose coupling is necessary to enable the train to proceed freely around curves and is an aid in starting heavy trains, since the application of the locomotive power to the train operates on each car in the train successively, and the power is thus utilized to start only one car at a time.

The slack action between cars due to loose couplings varies from seven-eighths of an inch to one and one-eighth inches and, with the added free movement due to the use of draft gears, may be as high as six or seven inches between cars. The length of the train increases the slack since the slack action of a train is the total of the free movement between its several cars. The amount of slack action has some effect on the severity of the shock of train movements, and on freight trains sometimes results in injuries to operatives, which most frequently occur to occupants of the caboose. The amount and severity of slack action, however, are not wholly dependent upon the length of train, as they may be affected by the mode and conditions of operation as to grades, speed, and load. And accidents due to slack action also occur in the opera-

tion of short trains. On comparison of the number of slack action accidents in Arizona with those in Nevada, where the length of trains is now unregulated, the trial court found that with substantially the same amount of traffic in each state the number of accidents was relatively the same in long as in short train operations. While accidents from slack action do occur in the operation of passenger trains, it does not appear that they are more frequent or the resulting shocks more severe on long than on short passenger trains. Nor does it appear that slack action accidents occurring on passenger trains, whatever their length, are of sufficient severity to cause serious injury or damage.

As the trial court found, reduction of the length of trains also tends to increase the number of accidents because of the increase in the number of trains. The application of the Arizona law compelled appellant to operate 30.08%, or 4,304, more freight trains in 1938 than would otherwise have been necessary. And the record amply supports the trial court's conclusion that the frequency of accidents is closely related to the number of trains run. The number of accidents due to grade crossing collisions between trains and motor vehicles and pedestrians, and to collisions between trains, which are usually far more serious than those due to slack action, and accidents due to locomotive failures, in general vary with the number of trains.[6] Increase in the number of trains results in more starts and stops, more "meets" and "passes," and more switching movements, all tending to increase the number

[6] The record shows that in 1939 the number of slack accident casualties in the United States, 399, was only 6% of the number of train and train service casualties to railroad employees, 6,713. In that year three of the 399 slack accident casualties were fatal, whereas the average number of grade crossing casualties per year from 1935 to 1939 was 5,718. And in 1939, 1,398 persons were killed and 3,999 were injured in highway, grade crossing accidents. I. C. C., Bureau of Statistics, Accident Bulletin, No. 108, pp. 22–23.

of accidents not only to train operatives and other railroad employees, but to passengers and members of the public exposed to danger by train operations.

Railroad statistics introduced into the record tend to show that this is the result of the application of the Arizona Train Limit Law to appellant, both with respect to all railroad casualties within the state and those affecting only trainmen whom the train limit law is supposed to protect. The accident rate in Arizona is much higher than on comparable lines elsewhere, where there is no regulation of length of trains. The record lends support to the trial court's conclusion that the train length limitation increased rather than diminished the number of accidents. This is shown by comparison of appellant's operations in Arizona with those in Nevada,[7] and by comparison of operations of appellant and of the Santa Fe Railroad in Arizona with those of the same roads in New Mexico,[8] and by like comparison between appellant's operations in Arizona and operations throughout the country.[9]

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[7] With passenger traffic in Nevada 78% as heavy as in Arizona, from 1923 to 1938 two hundred and thirty-nine casualties were caused to persons by passenger trains in Arizona and one hundred and nine in Nevada. Between 1923 and 1939 five persons in Nevada and fourteen in Arizona were injured by sudden stops or jerks on passenger trains.

[8] Casualties to employees, occurring in freight train operations in New Mexico, have been substantially less in both number and frequency than in Arizona. From 1930 to 1940 there were one hundred and twenty-nine casualties to all classes of employees in New Mexico at the rate of 7.97 per million train miles, 12.84 per hundred million car miles. In Arizona there were two hundred and fifty-one casualties to employees, at the rate of 10.03 per million train miles, and 18.10 per hundred million car miles.

[9] On a national basis the findings show that while the national accident rate per hundred million car miles for all railroad employees and for trainmen decreased 70% to 66% respectively between 1923–1928 and 1935–1940, the rate for the Southern Pacific in Arizona declined 52.3% and 53.3%. Appellant's rate in Nevada decreased 71.1% and 69.1%.

Upon an examination of the whole case the trial court found that "if short-train operation may or should result in any decrease in the number or severity of the 'slack' or 'slack-surge' type of accidents or casualties, such decrease is substantially more than offset by the increased number of accidents and casualties from other causes that follow the arbitrary limitation of freight trains to 70 cars . . . and passenger trains to 14 cars."

We think, as the trial court found, that the Arizona Train Limit Law, viewed as a safety measure, affords at most slight and dubious advantage, if any, over unregulated train lengths, because it results in an increase in the number of trains and train operations and the consequent increase in train accidents of a character generally more severe than those due to slack action. Its undoubted effect on the commerce is the regulation, without securing uniformity, of the length of trains operated in interstate commerce, which lack is itself a primary cause of preventing the free flow of commerce by delaying it and by substantially increasing its cost and impairing its efficiency. In these respects the case differs from those where a state, by regulatory measures affecting the commerce, has removed or reduced safety hazards without substantial interference with the interstate movement of trains. Such are measures abolishing the car stove, *New York, N. H. & H. R. Co.* v. *New York,* 165 U. S. 628; requiring locomotives to be supplied with electric headlights, *Atlantic Coast Line R. Co.* v. *Georgia,* 234 U. S. 280; providing for full train crews, *Chicago, R. I. & P. R. Co.* v. *Arkansas,* 219 U. S. 453; *St. Louis & I. M. R. Co.* v. *Arkansas,* 240 U. S. 518; *Missouri Pacific R. Co.* v. *Norwood,* 283 U. S. 249; and for the equipment of freight trains with cabooses, *Terminal Railroad Assn.* v. *Brotherhood, supra.*

The principle that, without controlling Congressional action, a state may not regulate interstate commerce so

as substantially to affect its flow or deprive it of needed uniformity in its regulation is not to be avoided by "simply invoking the convenient apologetics of the police power," *Kansas City Southern R. Co.* v. *Kaw Valley District, supra,* 79; *Buck* v. *Kuykendall,* 267 U. S. 307, 315. In the *Kaw Valley* case the Court held that the state was without constitutional power to order a railroad to remove a railroad bridge over which its interstate trains passed, as a means of preventing floods in the district and of improving its drainage, because it was "not pretended that local welfare needs the removal of the defendants' bridges at the expense of the dominant requirements of commerce with other States, but merely that it would be helped by raising them." And in *Seaboard Air Line R. Co.* v. *Blackwell,* 244 U. S. 310, it was held that the interference with interstate rail transportation resulting from a state statute requiring as a safety measure that trains come almost to a stop at grade crossings, outweigh the local interest in safety, when it appeared that compliance increased the scheduled running time more than six hours in a distance of one hundred and twenty-three miles. Cf. *Southern R. Co.* v. *King, supra,* where the crossings were less numerous and the burden to interstate commerce was not shown to be heavy; and see *Erb* v. *Morasch,* 177 U. S. 584.

Similarly the commerce clause has been held to invalidate local "police power" enactments fixing the number of cars in an interstate train and the number of passengers to be carried in each car, *South Covington R. Co.* v. *Covington, supra,* 547; regulating the segregation of colored passengers in interstate trains, *Hall* v. *DeCuir, supra,* 488–9; requiring burdensome intrastate stops of interstate trains, *Illinois Central R. Co.* v. *Illinois,* 163 U. S. 142; *Cleveland, C., C. & St. L. R. Co.* v. *Illinois,* 177 U. S. 514; *Mississippi Railroad Comm'n* v. *Illinois Central R. Co.,* 203 U. S. 335; *Herndon* v. *Chicago, R. I. & P. R. Co.,*

218 U. S. 135; *St. Louis-S. F. R. Co.* v. *Public Service Comm'n,* 261 U. S. 369; requiring an interstate railroad to detour its through passenger trains for the benefit of a small city, *St. Louis & S. F. R. Co.* v. *Public Service Comm'n, supra;* interfering with interstate commerce by requiring interstate trains to leave on time, *Missouri, K. & T. R. Co.* v. *Texas,* 245 U. S. 484; regulating car distribution to interstate shippers, *St. Louis S. W. R. Co.* v. *Arkansas,* 217 U. S. 136; or establishing venue provisions requiring railroads to defend accident suits at points distant from the place of injury and the residence and activities of the parties, *Davis* v. *Farmers Co-operative Co.,* 262 U. S. 312; *Michigan Central R. Co.* v. *Mix,* 278 U. S. 492; cf. *Denver & R. G. W. R. Co.* v. *Terte,* 284 U. S. 284; see also *Buck* v. *Kuykendall, supra; Foster-Fountain Packing Co.* v. *Haydel, supra; Baldwin* v. *Seelig, supra,* 524; *South Carolina Highway Dept.* v. *Barnwell Bros., supra,* 184–5 n., and cases cited.

More recently in *Kelly* v. *Washington,* 302 U. S. 1, 15, we have pointed out that when a state goes beyond safety measures which are permissible because only local in their effect upon interstate commerce, and "attempts to impose particular standards as to structure, design, equipment and operation [of vessels plying interstate] which in the judgment of its authorities may be desirable but pass beyond what is plainly essential to safety and seaworthiness, the State will encounter the principle that such requirements, if imposed at all, must be through the action of Congress which can establish a uniform rule. Whether the State in a particular matter goes too far must be left to be determined when the precise question arises."

Here we conclude that the state does go too far. Its regulation of train lengths, admittedly obstructive to interstate train operation, and having a seriously adverse effect on transportation efficiency and economy, passes beyond what is plainly essential for safety since it does

not appear that it will lessen rather than increase the danger of accident. Its attempted regulation of the operation of interstate trains cannot establish nation-wide control such as is essential to the maintenance of an efficient transportation system, which Congress alone can prescribe. The state interest cannot be preserved at the expense of the national interest by an enactment which regulates interstate train lengths without securing such control, which is a matter of national concern. To this the interest of the state here asserted is subordinate.

Appellees especially rely on the full train crew cases, *Chicago, R. I. & P. R. Co.* v. *Arkansas, supra; St. Louis & I. M. R. Co.* v. *Arkansas, supra; Missouri Pacific R. Co.* v. *Norwood, supra,* and also on *South Carolina Highway Dept.* v. *Barnwell Bros., supra,* as supporting the state's authority to regulate the length of interstate trains. While the full train crew laws undoubtedly placed an added financial burden on the railroads in order to serve a local interest, they did not obstruct interstate transportation or seriously impede it. They had no effects outside the state beyond those of picking up and setting down the extra employees at the state boundaries; they involved no wasted use of facilities or serious impairment of transportation efficiency, which are among the factors of controlling weight here. In sustaining those laws the Court considered the restriction a minimal burden on the commerce comparable to the law requiring the licensing of engineers as a safeguard against those of reckless and intemperate habits, sustained in *Smith* v. *Alabama,* 124 U. S. 465, or those afflicted with color blindness, upheld in *Nashville, C. & St. L. R. Co.* v. *Alabama,* 128 U. S. 96, and other similar regulations. *New York, N. H. & H. R. Co.* v. *New York, supra; Atlantic Coast Line R. Co.* v. *Georgia, supra;* cf. *County of Mobile* v. *Kimball,* 102 U. S. 691.

South Carolina Highway Dept. v. *Barnwell Bros., supra,* was concerned with the power of the state to regulate the weight and width of motor cars passing interstate over its highways, a legislative field over which the state has a far more extensive control than over interstate railroads. In that case, and in *Maurer* v. *Hamilton, supra,* we were at pains to point out that there are few subjects of state regulation affecting interstate commerce which are so peculiarly of local concern as is the use of the state's highways. Unlike the railroads local highways are built, owned and maintained by the state or its municipal subdivisions. The state is responsible for their safe and economical administration. Regulations affecting the safety of their use must be applied alike to intrastate and interstate traffic. The fact that they affect alike shippers in interstate and intrastate commerce in great numbers, within as well as without the state, is a safeguard against regulatory abuses. Their regulation is akin to quarantine measures, game laws, and like local regulations of rivers, harbors, piers, and docks, with respect to which the state has exceptional scope for the exercise of its regulatory power, and which, Congress not acting, have been sustained even though they materially interfere with interstate commerce (303 U. S. at 187–188 and cases cited).

The contrast between the present regulation and the full train crew laws in point of their effects on the commerce, and the like contrast with the highway safety regulations, in point of the nature of the subject of regulation and the state's interest in it, illustrate and emphasize the considerations which enter into a determination of the relative weights of state and national interests where state regulation affecting interstate commerce is attempted. Here examination of all the relevant factors makes it plain that the state interest is outweighed by the interest of the nation in an adequate, economical

and efficient railway transportation service, which must prevail.

Reversed.

MR. JUSTICE RUTLEDGE concurs in the result.

MR. JUSTICE BLACK, dissenting.

In *Hennington* v. *Georgia,* 163 U. S. 299, 304, a case which involved the power of a state to regulate interstate traffic, this Court said, "The whole theory of our government, federal and state, is hostile to the idea that questions of legislative authority may depend . . . upon opinions of judges as to the wisdom or want of wisdom in the enactment of laws under powers clearly conferred upon the legislature." What the Court decides today is that it is unwise governmental policy to regulate the length of trains. I am therefore constrained to note my dissent.

For more than a quarter of a century, railroads and their employees have engaged in controversies over the relative virtues and dangers of long trains. Railroads have argued that they could carry goods and passengers cheaper in long trains than in short trains. They have also argued that while the danger of personal injury to their employees might in some respects be greater on account of the operation of long trains, this danger was more than offset by an increased number of accidents from other causes brought about by the operation of a much larger number of short trains. These arguments have been, and are now, vigorously denied. While there are others, the chief causes assigned for the belief that long trains unnecessarily jeopardize the lives and limbs of railroad employees relate to "slack action." Cars coupled together retain a certain free play of movement, ranging between 1½ inches and 1 foot, and this is called "slack action." Train brakes do not ordinarily apply or release simultaneously on all cars. This frequently results in a severe

shock or jar to cars, particularly those in the rear of a train. It has always been the position of the employees that the dangers from "slack action" correspond to and are proportionate with the length of the train. The argument that "slack movements" are more dangerous in long trains than in short trains seems never to have been denied. The railroads have answered it by what is in effect a plea of confession and avoidance. They say that the added cost of running short trains places an unconstitutional burden on interstate commerce. Their second answer is that the operation of short trains requires the use of more separate train units; that a certain number of accidents resulting in injury are inherent in the operation of each unit, injuries which may be inflicted either on employees or on the public; consequently, they have asserted that it is not in the public interest to prohibit the operation of long trains.

In 1912, the year Arizona became a state, its legislature adopted and referred to the people several safety measures concerning the operation of railroads. One of these required railroads to install electric headlights, a power which the state had under this Court's opinion in *Atlantic Coast Line R. Co.* v. *Georgia,* 234 U. S. 280. Another Arizona safety statute submitted at the same time required certain tests and service before a person could act as an engineer or train conductor, and thereby exercised a state power similar to that which this Court upheld in *Nashville, C. & St. L. R. Co.* v. *Alabama,* 128 U. S. 96. The third safety statute which the Arizona legislature submitted to the electorate, and which was adopted by it, is the train limitation statute now under consideration. By its enactment the legislature and the people adopted the viewpoint that long trains were more dangerous than short trains, and limited the operation of train units to 14 cars for passenger and 70 cars for freight. This same question was considered in other states, and some of them,

over the vigorous protests of railroads, adopted laws similar to the Arizona statute.[1]

This controversy between the railroads and their employees, which was nation-wide, was carried to Congress. Extensive hearings took place. The employees' position was urged by members of the various Brotherhoods. The railroads' viewpoint was presented through representatives of their National Association. In 1937, the Senate Interstate Commerce Committee after its own exhaustive hearings unanimously recommended that trains be limited to 70 cars as a safety measure.[2] The Committee in its Report reviewed the evidence and specifically referred to the large and increasing number of injuries and deaths suffered by railroad employees; it concluded that the admitted danger from slack movement was greatly intensified by the operation of long trains; that short trains reduce this danger; that the added cost of short trains to the railroad was no justification for jeopardizing the safety of railroad employees; and that the legislation would provide a greater degree of safety for persons and property, increase protection for railway employees and the public, and improve transportation services for shippers and consumers. The Senate passed the bill[3] but the House Committee failed to report it out.

During the hearings on that measure, frequent references were made to the Arizona statute. It is significant, however, that American railroads never once asked Congress to exercise its unquestioned power to enact uniform legislation on that subject, and thereby invalidate the

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[1] A résumé of these laws and their reception by the courts is set out in the opinion of the Supreme Court of Arizona in this case, 61 Ariz. 66, 145 P. 2d 530.

[2] Senate Report No. 416, 75th Cong., 1st Sess.

[3] 81 Cong. Rec. 7596. The record does not show any dissenting votes cast against the bill. The debate on the measure appears at pp. 7564–7595.

Arizona law. That which for some unexplained reason they did not ask Congress to do when it had the very subject of train length limitations under consideration, they shortly thereafter asked an Arizona state court to do.

In the state court a rather extraordinary "trial" took place. Charged with violating the law, the railroad admitted the charge. It alleged that the law was unconstitutional, however, and sought a trial of facts on that issue. The essence of its charge of unconstitutionality rested on one of these two grounds: (1) the legislature and people of Arizona erred in 1912 in determining that the running of long trains was dangerous; or (2) railroad conditions had so improved since 1912 that previous dangers did not exist to the same extent, and that the statute should be stricken down either because it cast an undue burden on interstate commerce by reason of the added cost, or because the changed conditions had rendered the Act "arbitrary and unreasonable." Thus, the issue which the court "tried" was not whether the railroad was guilty of violating the law, but whether the law was unconstitutional either because the legislature had been guilty of misjudging the facts concerning the degree of the danger of long trains, or because the 1912 conditions of danger no longer existed.

Before the state trial court finally determined that the dangers found by the legislature in 1912 no longer existed, it heard evidence over a period of 5½ months which appears in about 3,000 pages of the printed record before us. It then adopted findings of fact submitted to it by the railroad, which cover 148 printed pages, and conclusions of law which cover 5 pages. We can best understand the nature of this "trial" by analogizing the same procedure to a defendant charged with violating a state or national safety appliance act, where the defendant comes into court and admits violation of the act. In such cases, the ordinary procedure would be for the court to pass upon

the constitutionality of the act, and either discharge or convict the defendants. The procedure here, however, would justify quite a different trial method. Under it, a defendant is permitted to offer voluminous evidence to show that a legislative body has erroneously resolved disputed facts in finding a danger great enough to justify the passage of the law. This new pattern of trial procedure makes it necessary for a judge to hear all the evidence offered as to why a legislature passed a law and to make findings of fact as to the validity of those reasons. If under today's ruling a court does make findings, as to a danger contrary to the findings of the legislature, and the evidence heard "lends support" to those findings, a court can then invalidate the law. In this respect, the Arizona County Court acted, and this Court today is acting, as a "super-legislature."[4]

[4] The Court today invalidates the Arizona law in accordance with the identical "super-legislature" method (so designated by Justices Brandeis and Holmes) used by the majority to invalidate a Nebraska statute regulating the weights of loaves of bread. *Burns Baking Co.* v. *Bryan,* 264 U. S. 504, 534. For here, as there, this Court has overruled a state legislature's finding that an evil existed, and that the state law would not impose an unconstitutional "burden" upon those regulated. The dissent in the *Burns* case said:

"To decide, as a fact, that the prohibition of excess weights 'is not necessary for the protection of the purchasers against imposition and fraud by short weights'; that it 'is not calculated to effectuate that purpose'; and that it 'subjects bakers and sellers of bread' to heavy burdens, is, in my opinion, an exercise of the powers of a super-legislature—not the performance of the constitutional function of judicial review."

That decision rested on the Due Process Clause while today's decision rests on the Commerce Clause. But that difference does not make inapplicable here the principles invoked by the dissenters in the *Burns* case.

The use of the "super-legislature" technique has been repeated to strike down other statutes. See e. g., *Chicago, M. & St. P. R. Co.* v. *Wisconsin,* 238 U. S. 491, 499; *Weaver* v. *Palmer Bros. Co.,* 270 U. S. 402, dissent at 415. See also dissents in *Schlesinger* v. *Wisconsin,* 270

Even if this method of invalidating legislative acts is a correct one, I still think that the "findings" of the state court do not authorize today's decision. That court did not find that there is no unusual danger from slack movements in long trains. It did decide on disputed evidence that the long train "slack movement" dangers were more than offset by prospective dangers as a result of running a larger number of short trains, since many people might be hurt at grade crossings. There was undoubtedly some evidence before the state court from which it could have reached such a conclusion. There was undoubtedly as much evidence before it which would have justified a different conclusion.

Under those circumstances, the determination of whether it is in the interest of society for the length of trains to be governmentally regulated is a matter of public policy. Someone must fix that policy—either the Congress, or the state, or the courts. A century and a half of constitutional history and government admonishes this Court to leave that choice to the elected legislative representatives of the people themselves, where it properly belongs both on democratic principles and the requirements of efficient government.

I think that legislatures, to the exclusion of courts, have the constitutional power to enact laws limiting train lengths, for the purpose of reducing injuries brought about by "slack movements." Their power is not less because a requirement of short trains might increase grade crossing accidents. This latter fact raises an entirely different

U. S. 230, 241, 242; *New State Ice Co.* v. *Liebmann,* 285 U. S. 262, 284–285. For a case in which this Court declined to review the "economics or the facts" behind a legislative enactment, see *Central Lumber Co.* v. *South Dakota,* 226 U. S. 157, 161; cf. *Standard Oil Co.* v. *Marysville,* 279 U. S. 582, 586. See also *Powell* v. *Pennsylvania,* 127 U. S. 678, 686; dissenting opinion, *Polk Co.* v. *Glover,* 305 U. S. 5, 10–19.

element of danger which is itself subject to legislative regulation. For legislatures may, if necessary, require railroads to take appropriate steps to reduce the likelihood of injuries at grade crossings. *Denver & R. G. R. Co.* v. *Denver,* 250 U. S. 241. And the fact that grade-crossing improvements may be expensive is no sufficient reason to say that an unconstitutional "burden" is put upon a railroad even though it be an interstate road. *Erie R. Co.* v. *Public Utility Commissioners,* 254 U. S. 394, 408-411.

The Supreme Court of Arizona did not discuss the County Court's so-called findings of fact. It properly designated the Arizona statute as a safety measure, and finding that it bore a reasonable relation to its purpose declined to review the judgment of the legislature as to the necessity for the passage of the act. In so doing it was well fortified by a long line of decisions of this Court. Today's decision marks an abrupt departure from that line of cases.

There have been many sharp divisions of this Court concerning its authority, in the absence of congressional enactment, to invalidate state laws as violating the Commerce Clause. See e. g., *Adams Manufacturing Co.* v. *Storen,* 304 U. S. 307; *Gwin, White & Prince* v. *Henneford,* 305 U. S. 434; *McCarroll* v. *Dixie Greyhound Lines,* 309 U. S. 176. That discussion need not be renewed here, because even the broadest exponents of judicial power in this field have not heretofore expressed doubt as to a state's power, absent a paramount congressional declaration, to regulate interstate trains in the interest of safety. For as early as 1913, this Court, speaking through Mr. Justice Hughes, later Chief Justice, referred to "the settled principle that, in the absence of legislation by Congress, the states are not denied the exercise of their power to secure safety in the physical operation of railroad trains within their territory, even though such trains are used in interstate commerce. That has been the law

since the beginning of railroad transportation." *Atlantic Coast Line R. Co.* v. *Georgia,* 234 U. S. 280, 291. Until today, the oft-repeated principles of that case have never been repudiated in whole or in part.

But, it is said today, the principle there announced does not apply because if one state applies a regulation of its own to interstate trains, "uniformity" in regulation or rather non-regulation, is destroyed. Justice Hughes speaking for the Court in the *Atlantic Coast Line* case made short shrift of that same argument. He there referred to the contention that "if state requirements conflict, it will be necessary to carry additional apparatus and to make various adjustments at state lines which would delay and inconvenience interstate traffic." In answer to this argument he reiterated a former declaration of this Court in *New York, N. H. & H. R. Co.* v. *New York,* 165 U. S. 628, on this subject, and added that "If there is a conflict in such local regulations, by which interstate commerce may be inconvenienced—if there appears to be need of standardization of safety appliances and of providing rules of operation which will govern the entire interstate road irrespective of state boundaries—there is a simple remedy; and it cannot be assumed that it will not be readily applied if there be real occasion for it. That remedy does not rest in a denial to the state, in the absence of conflicting federal action, of its power to protect life and property within its borders, but it does lie in the exercise of the paramount authority of Congress in its control of interstate commerce to establish such regulations as in its judgment may be deemed appropriate and sufficient. Congress, when it pleases, may give the rule and make the standard to be observed on the interstate highway." p. 292.

That same statement has in substance been made in many other decisions of this Court, a number of which are cited in the *Atlantic Coast Line* case, and all of them

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are today swept into the discard. In no one of all these previous cases was it more appropriate than here to call attention to the fact that Congress could when it pleased establish a uniform rule as to the length of trains. Congress knew about the Arizona law. It is common knowledge that the Interstate Commerce Committees of the House and the Senate keep in close and intimate touch with the affairs of railroads and other national means of transportation. Every year brings forth new legislation which goes through those Committees, much of it relating to safety. The attention of the members of Congress and of the Senate have been focused on the particular problem of the length of railroad trains. We cannot assume that they were ignorant of the commonly known fact that a long train might be more dangerous in some territories and on some particular types of railroad. The history of congressional consideration of this problem leaves little if any room to doubt that the choice of Congress to leave the state free in this field was a deliberate choice, which was taken with a full knowledge of the complexities of the problems and the probable need for diverse regulations in different localities. I am therefore compelled to reach the conclusion that today's decision is the result of the belief of a majority of this Court that both the legislature of Arizona and the Congress made wrong policy decisions in permitting a law to stand which limits the length of railroad trains. I should at least give the Arizona statute the benefit of the same rule which this Court said should be applied in connection with state legislation under attack for violating the Fourteenth Amendment, that is, that legislative bodies have "a wide range of legislative discretion, . . . and their conclusions respecting the wisdom of their legislative acts are not reviewable by the courts." *Arizona Employers' Liability Cases,* 250 U. S. 400, 419.

When we finally get down to the gist of what the Court today actually decides, it is this: Even though more railroad employees will be injured by "slack action" movements on long trains than on short trains, there must be no regulation of this danger in the absence of "uniform regulations." That means that no one can legislate against this danger except the Congress; and even though the Congress is perfectly content to leave the matter to the different state legislatures, this Court, on the ground of "lack of uniformity," will require it to make an express avowal of that fact before it will permit a state to guard against that admitted danger.

We are not left in doubt as to why, as against the potential peril of injuries to employees, the Court tips the scales on the side of "uniformity." For the evil it finds in a lack of uniformity is that it (1) delays interstate commerce, (2) increases its cost and (3) impairs its efficiency. All three of these boil down to the same thing, and that is that running shorter trains would increase the cost of railroad operations. The "burden" on commerce reduces itself to mere cost because there was no finding, and no evidence to support a finding, that by the expenditure of sufficient sums of money, the railroads could not enable themselves to carry goods and passengers just as quickly and efficiently with short trains as with long trains. Thus the conclusion that a requirement for long trains will "burden interstate commerce" is a mere euphemism for the statement that a requirement for long trains will increase the cost of railroad operations.

In the report of the Senate Committee, *supra,* attention was called to the fact that in 1935, 6,351 railroad employees were injured while on duty, with a resulting loss of more than 200,000 working days, and that injuries to trainmen and enginemen increased more than 29% in 1936.[5] Never-

[5] These figures appear to be considerably less than those later reported. See *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 59, note 4.

theless, the Court's action in requiring that money costs outweigh human values is sought to be buttressed by a reference to the express policy of Congress to promote an "economical national railroad system." I cannot believe that if Congress had defined what it meant by "economical," it would have required money to be saved at the expense of the personal safety of railway employees. Its whole history for the past 25 years belies such an interpretation of its language. Judicial opinions rather than legislative enactments have tended to emphasize costs. See *Tiller* v. *Atlantic Coast Line R. Co., supra,* 58–60. A different congressional attitude has been shown by the passage of numerous safety appliance provisions, a federal employees' compensation act, abolition of the judicially created doctrine of assumption of risk and contributory negligence, and various other types of legislation. Unfortunately, the record shows, as pointed out in the *Tiller* case, that the courts have by narrow and restricted interpretation too frequently reduced the full scope of protection which Congress intended to provide.

This record in its entirety leaves me with no doubt whatever that many employees have been seriously injured and killed in the past, and that many more are likely to be so in the future, because of "slack movement" in trains. Everyday knowledge as well as direct evidence presented at the various hearings, substantiates the report of the Senate Committee that the danger from slack movement is greater in long trains than in short trains. It may be that offsetting dangers are possible in the operation of short trains. The balancing of these probabilities, however, is not in my judgment a matter for judicial determination, but one which calls for legislative consideration. Representatives elected by the people to make their laws, rather than judges appointed to interpret those laws, can best determine the policies which govern the people. That at least is the basic principle on which our demo-

cratic society rests. I would affirm the judgment of the Supreme Court of Arizona.

MR. JUSTICE DOUGLAS, dissenting.

I have expressed my doubts whether the courts should intervene in situations like the present and strike down state legislation on the grounds that it burdens interstate commerce. *McCarroll* v. *Dixie Greyhound Lines,* 309 U. S. 176, 183–189. My view has been that the courts should intervene only where the state legislation discriminated against interstate commerce or was out of harmony with laws which Congress had enacted. p. 184. It seems to me particularly appropriate that that course be followed here. For Congress has given the Interstate Commerce Commission broad powers of regulation over interstate carriers. The Commission is the national agency which has been entrusted with the task of promoting a safe, adequate, efficient, and economical transportation service. It is the expert on this subject. It is in a position to police the field. And if its powers prove inadequate for the task, Congress, which has paramount authority in this field, can implement them.

But the Court has not taken that view. As a result the question presented is whether the total effect of Arizona's train-limit as a safety measure is so slight as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede or burden it. The voluminous evidence has been reviewed in the opinion of the Court and in the dissenting opinion of MR. JUSTICE BLACK. If I sat as a member of the Interstate Commerce Commission or of a legislative committee to decide whether Arizona's train-limit law should be superseded by a federal regulation, the question would not be free from doubt for me. If we had before us the ruling of the Interstate Commerce Commission (*In the Matter of Service Order No. 85,* 256 I. C. C. 523, 534) that Ari-

zona's train-limit law infringes "the national interest in maintaining the free flow of commerce under the present emergency war conditions," I would accept its expert appraisal of the facts, assuming it had the authority to act. But that order is not before us. And the present case deals with a period of time which antedates the war emergency. Moreover, we are dealing here with state legislation in the field of safety where the propriety of local regulation has long been recognized. See *Atlantic Coast Line R. Co.* v. *Georgia,* 234 U. S. 280, 291, and cases collected in *California* v. *Thompson,* 313 U. S. 109, 113–114. Whether the question arises under the Commerce Clause or the Fourteenth Amendment, I think the legislation is entitled to a presumption of validity. If a State passed a law prohibiting the hauling of more than one freight car at a time, we would have a situation comparable in effect to a state law requiring all railroads within its borders to operate on narrow gauge tracks. The question is one of degree and calls for a close appraisal of the facts.[1] I am not persuaded that the evidence adduced by the railroads overcomes the presumption of validity to which this train-limit law is entitled. For the reasons stated by MR. JUSTICE BLACK, Arizona's train-limit law should stand as an allowable regulation enacted to protect the lives and limbs of the men who operate the trains.

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[1] See Biklé, Judicial Determination of Questions of Fact Affecting The Constitutional Validity of Legislative Action, 38 Harv. L. Rev. 6.

ALLEN BRADLEY CO. ET AL. v. LOCAL UNION NO. 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, ET AL.

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

No. 702. Argued March 8, 9, 1945.—Decided June 18, 1945.

1. It is a violation of the Sherman Antitrust Act for labor unions and their members, though furthering their own interests as wage earners, to combine with employers and with manufacturers of goods to restrain competition in, and to monopolize the marketing of, such goods in interstate commerce. Pp. 798, 810.
2. Congress did not intend by the Clayton Act or the Norris-LaGuardia Act that labor unions could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services. P. 808.
3. In § 6 of the Clayton Act, which provides that the Sherman Act is not to be so construed as to forbid the "existence and operation of labor, agricultural, or horticultural organizations instituted for the purpose of mutual help," "the purpose of mutual help" can not be deemed to extend to activities for the purpose of "employer help" in controlling markets and prices. P. 808.
4. Whether particular labor union activities violate the Sherman Act may depend upon whether the union acts alone or in combination with business groups. P. 810.
5. It was the purpose of Congress in the antitrust legislation to outlaw business monopolies; and a business monopoly is no less such because a union participates. P. 811.
6. The injunction against the union and its agents in this case must be limited so as to enjoin only those prohibited activities which were engaged in in combination with a non-labor group. P. 812.

145 F. 2d 215, reversed.

CERTIORARI, 323 U. S. 707, to review a judgment which reversed a judgment for the plaintiffs, 51 F. Supp. 36, in a civil suit to enjoin alleged violations of the Sherman Act and ordered dismissal of the suit.

Mr. Walter Gordon Merritt for petitioners.

Mr. Harold Stern for respondents.

MR. JUSTICE BLACK delivered the opinion of the Court.

The question presented is whether it is a violation of the Sherman Anti-trust Act[1] for labor unions and their members, prompted by a desire to get and hold jobs for themselves at good wages and under high working standards, to combine with employers and with manufacturers of goods to restrain competition in, and to monopolize the marketing of, such goods.

Upon the complaint of petitioners and after a lengthy hearing the District Court held that such a combination did violate the Sherman Act, entered a declaratory judgment to that effect, and entered an injunction restraining respondents from engaging in a wide range of specified activities. 41 F. Supp. 727, 51 F. Supp. 36. The Circuit Court of Appeals reversed the decision and dismissed the cause, holding that combinations of unions and business men which restrained trade and tended to monopoly were not in violation of the Act where the bona fide purpose of the unions was to raise wages, provide better working conditions, and bring about better conditions of employment for their members. 145 F. 2d 215. The Ninth Circuit Court of Appeals having reached a contrary conclusion in a similar case, 144 F. 2d 546, we granted certiorari in both cases.

The facts were sufficiently set out in the opinions below and need not be detailed again. The following summary will suffice for our purposes.

Petitioners are manufacturers of electrical equipment. Their places of manufacture are outside of New York City, and most of them are outside of New York State as well. They have brought this action because of their desire to sell their products in New York City, a market area that has been closed to them through the activities of respondents and others.

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[1] 26 Stat. 209; 50 Stat. 693.

Respondents are a labor union, its officials and its members. The union, Local No. 3 of the International Brotherhood of Electrical Workers, has jurisdiction only over the metropolitan area of New York City. It is therefore impossible for the union to enter into a collective bargaining agreement with petitioners. Some of petitioners do have collective bargaining agreements with other unions, and in some cases even with other locals of the I. B. E. W.

Some of the members of respondent union work for manufacturers who produce electrical equipment similar to that made by petitioners; other members of respondent union are employed by contractors and work on the installation of electrical equipment, rather than in its production.

The union's consistent aim for many years has been to expand its membership, to obtain shorter hours and increased wages, and to enlarge employment opportunities for its members. To achieve this latter goal—that is, to make more work for its own members—the union realized that local manufacturers, employers of the local members, must have the widest possible outlets for their product. The union therefore waged aggressive campaigns to obtain closed-shop agreements with all local electrical equipment manufacturers and contractors. Using conventional labor union methods, such as strikes and boycotts, it gradually obtained more and more closed-shop agreements in the New York City area. Under these agreements, contractors were obligated to purchase equipment from none but local manufacturers who also had closed-shop agreements with Local No. 3; manufacturers obligated themselves to confine their New York City sales to contractors employing the Local's members. In the course of time, this type of individual employer-employee agreement expanded into industry-wide understandings, looking not merely to terms and conditions of employ-

ment but also to price and market control. Agencies were set up composed of representatives of all three groups to boycott recalcitrant local contractors and manufacturers and to bar from the area equipment manufactured outside its boundaries. The combination among the three groups, union, contractors, and manufacturers, became highly successful from the standpoint of all of them. The business of New York City manufacturers had a phenomenal growth, thereby multiplying the jobs available for the Local's members. Wages went up, hours were shortened, and the New York electrical equipment prices soared, to the decided financial profit of local contractors and manufacturers. The success is illustrated by the fact that some New York manufacturers sold their goods in the protected city market at one price and sold identical goods outside of New York at a far lower price. All of this took place, as the Circuit Court of Appeals declared, "through the stifling of competition," and because the three groups, in combination as "co-partners," achieved "a complete monopoly which they used to boycott the equipment manufactured by the plaintiffs." Interstate sale of various types of electrical equipment has, by this powerful combination, been wholly suppressed.

Quite obviously, this combination of business men has violated both §§ 1 and 2 of the Sherman Act,[2] unless its conduct is immunized by the participation of the union. For it intended to and did restrain trade in and monopo-

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[2] Sections 1 and 2 provide in part as follows:

"Sec. 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 . . .

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . ."

lize the supply of electrical equipment in the New York City area to the exclusion of equipment manufactured in and shipped from other states, and did also control its price and discriminate between its would-be customers. *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 512–513. Our problem in this case is therefore a very narrow one—do labor unions violate the Sherman Act when, in order to further their own interests as wage earners, they aid and abet business men to do the precise things which that Act prohibits?

The Sherman Act as originally passed contained no language expressly exempting any labor union activities. Sharp controversy soon arose as to whether the Act applied to unions. One viewpoint was that the only evil at which Congress had aimed was high consumer prices achieved through combinations looking to control of markets by powerful groups; that those who would have a great incentive for such combinations would be the business men who would be the direct beneficiaries of them; therefore, the argument proceeded, Congress drafted its law to apply only to business combinations, particularly the large trusts, and not to labor unions or any of their activities as such. Involved in this viewpoint were the following contentions: that the Sherman Act is a law to regulate trade, not labor, a law to prescribe the rules governing barter and sale, and not the personal relations of employers and employees; that good wages and working conditions helped and did not hinder trade, even though increased labor costs might be reflected in the cost of products; that labor was not a commodity; that laborers had an inherent right to accept or terminate employment at their own will, either separately or in concert; that to enforce their claims for better wages and working conditions, they had a right to refuse to buy goods from their employer or anybody else; that what they could do to aid their cause, they had a right to persuade others to do;

and that the Anti-trust laws designed to regulate trading were unsuitable to regulate employer-employee relations and controversies. The claim was that the history of the legislation supported this line of argument.[3]

The contrary viewpoint was that the Act covered all classes of people and all types of combinations, including unions, if their activities even physically interrupted the free flow of trade or tended to create business monopolies, and that a combination of laborers to obtain a raise in wages was itself a prohibited monopoly. Federal courts adopted the latter view and soon applied the law to unions in a number of cases.[4] Injunctions were used to enforce the Act against unions. At the same time, employers invoked injunctions to restrain labor union activities even where no violation of the Sherman Act was charged.

Vigorous protests arose from employee groups. The unions urged congressional relief from what they considered to be two separate, but partially overlapping evils—application of the Sherman Act to unions, and issuance of injunctions against strikes, boycotts and other labor union weapons. Numerous bills to curb injunctions were

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[3] For a comprehensive discussion of the history of the Sherman Act, see 51 Cong. Rec. 13661–13668, 63rd Cong., 2nd Sess. And see *ibid.*, 13969–13971, 14013–14016, 14020–14023. See also Berman, Labor and The Sherman Act (1930), pp. 1–98; Mason, Organized Labor and The Law, Chapters 7 & 8; Gompers, "The Sherman Law. Amend It or End It," American Federationist, Vol. 17, No. 3, March, 1910, pp. 197, 202. For prior discussions in this Court of the dominant concern of Congress to protect consumers from business combinations, see *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290; *Standard Oil Co.* v. *United States*, 221 U. S. 1; *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469; *United States* v. *Underwriters' Assn.*, 322 U. S. 533.

[4] See note 3, *supra*. See also 51 Cong. Rec. 9068–9077; 9081–9091; *United States* v. *Amalgamated Council*, 54 F. 994 (1893); *Waterhouse* v. *Comer*, 55 F. 149 (1893); *United States* v. *Debs*, 64 F. 724 (1894); *Loewe* v. *Lawlor*, 208 U. S. 274, 235 U. S. 522. And see Appendix to Berman, *op. cit.*, *supra*.

offered. Other proposed legislation was intended to take labor unions wholly outside any possible application of the Sherman Act. All of this is a part of the well known history of the era between 1890 and 1914.[5]

To amend, supplement and strengthen the Sherman Act against monopolistic business practices, and in response to the complaints of the unions against injunctions and application of the Act to them, Congress in 1914 passed the Clayton Act.[6] Elimination of those "trade practices" which injuriously affected competition was its first objective.[7] Each section of the measure prohibiting such trade practices contained language peculiarly appropriate to commercial transactions as distinguished from labor union activities, but there is no record indication in anything that was said or done in its passage which indicates that those engaged in business could escape its or the Sherman Act's prohibitions by obtaining the help of labor unions or others. That this bill was intended to make it all the more certain that competition should be the rule in all commercial transactions is clear from its language and history.

In its treatment of labor unions and their activities the Clayton Act pointed in an opposite direction. Congress in that Act responded to the prolonged complaints[8] concerning application of the Sherman law to labor groups by adopting § 6;[9] for this purpose, and also drastically to

[5] See authorities cited in footnotes 3 and 4, *supra*. And see Frankfurter and Greene, The Labor Injunction (1930); Berman, *op. cit. supra*, pp. 99–117.

[6] 38 Stat. 730.

[7] Senate Report No. 698, 63rd Cong., 2nd Sess.

[8] *Ibid.*, 10–12.

[9] Section 6 reads as follows: "That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for

restrict the general power of federal courts to issue labor injunctions, § 20[10] was adopted. Section 6 declared that labor was neither a commodity nor an article of commerce, and that the Sherman Act should not be "construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help . . ." Section 20 limited the power of courts to issue injunctions in a case "involving or growing out of a labor dispute over terms or conditions of employment . . ." It declared that no restraining order or injunction should prohibit certain specified acts, and further declared that no one of these specified acts should be "held to be violations of any law of the United States." This Act was broadly proclaimed by many as labor's "Magna Carta," wholly exempting labor from any possible inclu-

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the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

[10] Section 20 reads in part as follows: "And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

sion in the Anti-trust legislation; others, however, strongly denied this.

This Court later declined to interpret the Clayton Act as manifesting a congressional purpose wholly to exempt labor unions from the Sherman Act. *Duplex Co.* v. *Deering,* 254 U. S. 443; *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Assn.,* 274 U. S. 37. In those cases labor unions had engaged in a secondary boycott; they had boycotted dealers, by whom the union members were not employed, because those dealers insisted on selling goods produced by the employers with whom the unions had an existing controversy over terms and conditions of employment. This Court held that the Clayton Act exempted labor union activities only insofar as those activities were directed against the employees' immediate employers and that controversies over the sale of goods by other dealers did not constitute "labor disputes" within the meaning of the Clayton Act.

Again the unions went to Congress. They protested against this Court's interpretation, repeating the arguments they had made against application of the Sherman Act to them. Congress adopted their viewpoint, at least in large part, and in order to escape the effect of the *Duplex* and *Bedford* decisions,[11] passed the Norris-LaGuardia Act, 47 Stat. 70. That Act greatly broadened the meaning this Court had attributed to the words "labor dispute," further restricted the use of injunctions in such a dispute, and emphasized the public importance under modern economic conditions of protecting the rights of employees to organize into unions and to engage in "concerted activities for the purpose of collective bargaining or other mutual aid and protection." This congressional purpose found further expression in the Wagner Act, 49 Stat. 449.

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[11] *Milk Wagon Drivers' Union* v. *Lake Valley Farm Products,* 311 U. S. 91; *New Negro Alliance* v. *Sanitary Grocery Co.,* 303 U. S. 552.

We said in *Apex Hosiery Co.* v. *Leader, supra,* 488, that labor unions are still subject to the Sherman Act to "some extent not defined." The opinion in that case, however, went on to explain that the Sherman Act "was enacted in the era of 'trusts' and of 'combinations' of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern"; that its purpose was to protect consumers from monopoly prices, and not to serve as a comprehensive code to regulate and police all kinds and types of interruptions and obstructions to the flow of trade. This was a recognition of the fact that Congress had accepted the arguments made continuously since 1890 by groups opposing application of the Sherman Act to unions. It was an interpretation commanded by a fair consideration of the full history of Anti-trust and labor legislation.

United States v. *Hutcheson,* 312 U. S. 219, declared that the Sherman, Clayton and Norris-LaGuardia Acts must be jointly considered in arriving at a conclusion as to whether labor union activities run counter to the Anti-trust legislation. Conduct which they permit is not to be declared a violation of federal law. That decision held that the doctrine of the *Duplex* and *Bedford* cases was inconsistent with the congressional policy set out in the three "interlacing statutes."

The result of all this is that we have two declared congressional policies which it is our responsibility to try to reconcile. The one seeks to preserve a competitive business economy; the other to preserve the rights of labor to organize to better its conditions through the agency of collective bargaining. We must determine here how far Congress intended activities under one of these policies to neutralize the results envisioned by the other.

Aside from the fact that the labor union here acted in combination with the contractors and manufacturers, the means it adopted to contribute to the combination's purpose fall squarely within the "specified acts" declared by § 20 not to be violations of federal law.[12] For the union's contribution to the trade boycott was accomplished through threats that unless their employers bought their goods from local manufacturers the union laborers would terminate the "relation of employment" with them and cease to perform "work or labor" for them; and through their "recommending, advising, or persuading others by peaceful and lawful means" not to "patronize" sellers of the boycotted electrical equipment. Consequently, under our holdings in the *Hutcheson* case and other cases which followed it,[13] had there been no union-contractor-manufacturer combination the union's actions here, coming as they did within the exemptions of the Clayton and Norris-LaGuardia Acts, would not have been violations of the Sherman Act. We pass to the question of whether unions can with impunity aid and abet business men who are violating the Act.

On two occasions this Court has held that the Sherman Act was violated by a combination of labor unions and business men to restrain trade.[14] In neither of them was

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[12] It has been argued that no labor disputes existed. The argument is untenable. We do not have here, as we did in *Columbia River Packers Assn.* v. *Hinton,* 315 U. S. 143, a dispute between groups of business men revolving solely around the price at which one group would sell commodities to another group. On the contrary, Local No. 3 is a labor union and its spur to action related to wages and working conditions.

[13] *United States* v. *Building Trades Council,* 313 U. S. 539; *United States* v. *Brotherhood of Carpenters,* 313 U. S. 539; *United States* v. *Hod Carriers Council,* 313 U. S. 539; *United States* v. *Federation of Musicians,* 318 U. S. 741.

[14] *United States* v. *Brims,* 272 U. S. 549; *Local 167* v. *United States,* 291 U. S. 293.

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the Court's attention sharply called to the crucial questions here presented. Furthermore, both were decided before the passage of the Norris-LaGuardia Act and prior to our holding in the *Hutcheson* case. It is correctly argued by respondents that these factors greatly detract from the weight which the two cases might otherwise have in the instant case. See *United States* v. *Hutcheson, supra,* 236. Without regard to these cases, however, we think Congress never intended that unions could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services.

Section 6 of the Clayton Act declares that the Sherman Act must not be so construed as to forbid the "existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help . . . ." But "the purpose of mutual help" can hardly be thought to cover activities for the purpose of "employer-help" in controlling markets and prices. And in an analogous situation where an agricultural association joined with other groups to control the agricultural market, we said:

"The right of these agricultural producers thus to unite in preparing for market and in marketing their products, and to make the contracts which are necessary for that collaboration, cannot be deemed to authorize any combination or conspiracy *with other persons* in restraint of trade that these producers may see fit to devise." *United States* v. *Borden Co.,* 308 U. S. 188, 204–205. (Italics supplied.)

We have been pointed to no language in any act of Congress or in its reports or debates, nor have we found any, which indicates that it was ever suggested, considered, or legislatively determined that labor unions should be granted an immunity such as is sought in the present case. It has been argued that this immunity can be inferred

from a union's right to make bargaining agreements with its employer. Since union members can without violating the Sherman Act strike to enforce a union boycott of goods, it is said they may settle the strike by getting their employers to agree to refuse to buy the goods. Employers and the union did here make bargaining agreements in which the employers agreed not to buy goods manufactured by companies which did not employ the members of Local No. 3. We may assume that such an agreement standing alone would not have violated the Sherman Act. But it did not stand alone. It was but one element in a far larger program in which contractors and manufacturers united with one another to monopolize all the business in New York City, to bar all other business men from that area, and to charge the public prices above a competitive level. It is true that victory of the union in its disputes, even had the union acted alone, might have added to the cost of goods, or might have resulted in individual refusals of all of their employers to buy electrical equipment not made by Local No. 3. So far as the union might have achieved this result acting alone, it would have been the natural consequence of labor union activities exempted by the Clayton Act from the coverage of the Sherman Act. *Apex Hosiery Co.* v. *Leader, supra,* 503. But when the unions participated with a combination of business men who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included within the exemptions of the Clayton and Norris-LaGuardia Acts.

It must be remembered that the exemptions granted the unions were special exceptions to a general legislative plan. The primary objective of all the Anti-trust legislation has been to preserve business competition and to proscribe business monopoly. It would be a surprising thing if Congress, in order to prevent a misapplication of that legislation to labor unions, had bestowed upon

such unions complete and unreviewable authority to aid business groups to frustrate its primary objective. For if business groups, by combining with labor unions, can fix prices and divide up markets, it was little more than a futile gesture for Congress to prohibit price fixing by business groups themselves. Seldom, if ever, has it been claimed before, that by permitting labor unions to carry on their own activities, Congress intended completely to abdicate its constitutional power to regulate interstate commerce and to empower interested business groups to shift our society from a competitive to a monopolistic economy. Finding no purpose of Congress to immunize labor unions who aid and abet manufacturers and traders in violating the Sherman Act, we hold that the district court correctly concluded that the respondents had violated the Act.

Our holding means that the same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups. This, it is argued, brings about a wholly undesirable result—one which leaves labor unions free to engage in conduct which restrains trade. But the desirability of such an exemption of labor unions is a question for the determination of Congress. *Apex Hosiery Co.* v. *Leader, supra.* It is true that many labor union activities do substantially interrupt the course of trade and that these activities, lifted out of the prohibitions of the Sherman Act, include substantially all, if not all, of the normal peaceful activities of labor unions. It is also true that the Sherman Act "draws no distinction between the restraints effected by violence and those achieved by peaceful . . . means," *Apex Hosiery Co.* v. *Leader, supra,* 513, and that a union's exemption from the Sherman Act is not to be determined by a judicial "judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of

which the particular union activities are the means." *United States* v. *Hutcheson, supra,* 232. Thus, these congressionally permitted union activities may restrain trade in and of themselves. There is no denying the fact that many of them do so, both directly and indirectly. Congress evidently concluded, however, that the chief objective of Anti-trust legislation, preservation of business competition, could be accomplished by applying the legislation primarily only to those business groups which are directly interested in destroying competition. The difficulty of drawing legislation primarily aimed at trusts and monopolies so that it could also be applied to labor organizations without impairing the collective bargaining and related rights of those organizations has been emphasized both by congressional and judicial attempts to draw lines between permissible and prohibited union activities. There is, however, one line which we can draw with assurance that we follow the congressional purpose. We know that Congress feared the concentrated power of business organizations to dominate markets and prices. It intended to outlaw business monopolies. A business monopoly is no less such because a union participates, and such participation is a violation of the Act.

This brings us to a consideration of the scope of the declaratory judgment and the injunction granted by the district court. We cannot sustain the judgment or the injunction in the form in which they were entered. The judgment and the injunction apply only to the union, its members, and its agents, since they were the only parties against whom relief was asked. The judgment declared that "the combination and conspiracy and the acts done and being done in furtherance thereof all as set forth in the findings of fact herein are unlawful and contrary to the . . . Sherman Anti-Trust Law, as amended and supplemented." There were 374 find-

ings of fact which cover 111 pages of the printed record. These findings were made from 25,000 pages of evidence. The declaratory judgment, which was the foundation for the injunction, is thus almost the equivalent of a statement that each fact "as set forth in the 374 findings" constituted a violation of the Sherman Act. And when we turn to the sweeping commands of the injunction, we find that its terms, directed against the union and its agents alone, restrained the union, even though not acting in concert with the manufacturers, from doing the very things that the Clayton Act specifically permits unions to do. We agree with the following statement of the Circuit Court of Appeals:

"Indeed, the injunction is so far contrary to the statute that its mandate might well have been stated in the converse of the terms of the Clayton Act, § 20, viz., as restraining Local 3 and its officers 'from terminating any relation of employment, or from ceasing to perform any work or labor . . . or from ceasing to patronize . . . any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do.' 29 U. S. C. A., § 52, *supra*. And the vague scope of the declaratory judgment is even more indefinitely inclusive, in terms reaching all the activities of the defendant set forth in the findings."

Respondents objected to the form of the injunction and specifically requested that it be amended so as to enjoin only those prohibited activities in which the union engaged in combination "with any person, firm or corporation which is a non-labor group . . ." Without such a limitation, the injunction as issued runs directly counter to the Clayton and the Norris-LaGuardia Acts. The district court's refusal so to limit it was error.

The judgment of the Circuit Court of Appeals ordering the action dismissed is accordingly reversed and the cause is remanded to the district court for modification and clari-

fication of the judgment and injunction, consistent with this opinion.

Reversed and remanded.

MR. JUSTICE ROBERTS.

While I should reverse the judgment, I am unable to concur in the court's opinion. I think it conveys an incorrect impression of the genesis and character of the conspiracy charged in the complaint, and misapplies recent decisions of the court.

There is no doubt that the programme adopted by Local No. 3 envisaged the exclusion, from the entire New York City area, of any electrical workers, whether engaged in manufacturing or installing electrical devices and equipment, except members of the Local. The organization from time to time increased the classes of members, so as to add to its original membership of workers engaged in fabricating and installing electrical devices, equipment, and apparatus the additional categories of shop employes engaged in manufacturing electrical equipment and all workers employed in alterations, additions, and repairs involving electrical equipment. It succeeded in unionizing and imposing closed shops employing only members of Local 3, not only on all building contractors, but on all repair contractors and their establishments and all manufacturers of electrical equipment. Membership in the union was closely restricted and the campaign eventuated in a situation where no electrical work could be done by persons other than members of the union, no building construction could be done by other than union men, no matter what their trade, and no manufactured electrical appliance or apparatus could be installed in the New York area without the consent of Local No. 3. That consent was given only if the device, appliance or apparatus was manufactured, or work done on it, by members of the Local. Complicated apparatus which had to be manufac-

tured outside New York City, because no establishment making it existed within the city, had to be dismantled and rebuilt by members of the Local before it could be used in the New York area.

It is true that before Local No. 3 obtained this complete control of the industry in its area of operation certain associated building contractors dealt jointly as an association with the union. As respects certain manufacturers which came under the dominance of the union this is not true. Nor is it true of repair businesses. On the contrary, it is the fact that each one of these was individually coerced by the union's power to agree to its terms. It is, therefore, inaccurate to say that the employers used the union to aid and abet them to restrain interstate commerce. Some of the employers, notably the building contractors, did jointly cooperate with the union; other sorts of employers were forced individually to comply with the union's demands, until all of them had succumbed.

There can be no question of the purpose of the union. It was to exclude from use in the City of New York articles of commerce made outside the city and offered for sale to users within the city; it was completely to monopolize the manufacture and sale of all electrical equipment and devices within New York, and to exclude from use in the area every such article manufactured outside the city, whether in a closed union shop or not. The results of this programme are obvious. Interstate commerce between New York City and manufacturers having establishments outside the city was completely broken off, and the monopoly created raised, standardized and fixed the prices of merchandise and apparatus.

As I understand the opinion of the court, such a programme, and such a result, is wholly within the law provided only that employers do not jointly agree to comply with the union's demands. Unless I misread the opinion, the union is at liberty to impose every term and

condition as shown by the record in this case and to enforce those conditions and procure an agreement from each employer to such conditions by calling strikes, by lockout, and boycott, provided only such employer agrees for himself alone and not in concert with any other.

I point out again, as respects certain employers here concerned, that that is the situation, whereas, with respect to the building construction employers, there was mutual agreement with the union. But the opinion takes no note of the distinction in fact. It seems to me that the law as announced by the court creates an impossible situation such as Congress never contemplated and leaves commerce paralyzed beyond escape.

Until *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, was decided I had thought that a conspiracy by laborers to interrupt the free flow of commerce was a violation of the Sherman Act. That case, however, announced a narrower doctrine. Its teaching is that only activity of labor which harms the commercial competitive system through raising prices, restricting production, or otherwise controlling the market, falls within the proscription of the Sherman Act. In that case it was said:

"Furthermore, successful union activity, as for example consummation of a wage agreement with employers, may have some influence on price competition by eliminating that part of such competition which is based on differences in labor standards. Since, in order to render a labor combination effective it must eliminate the competition from non-union made goods, see *American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U. S. 184, 209, an elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act."

It was added that the restraint there under examination was not shown "to have any actual or intended effect on price or price competition." The decision indicated that, in some undefined circumstances, labor organizations might be subject to the statute.

In *United States* v. *Hutcheson*, 312 U. S. 219, secondary boycotts by labor unions to keep out of the market non-union goods, or goods worked on by other unions, were held immune from liability, civil or criminal, under the Sherman Act. It was there said:

"So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means."

Thus, although a conspiracy between laborers is distinguished from one between them and employers, it is intimated, as I think, that a purpose on the part of a labor group to harm the commercial competitive system, to raise prices, to restrict production, or otherwise control the market, would not render the concerted action illegal, provided only that no employer participated. The reservation made in the *Apex* case was discarded in the *Hutcheson* case. This advance in the law was emphasized in *United States* v. *Building Trades Council*, 313 U. S. 539, and *United States* v. *Brotherhood of Carpenters*, 313 U. S. 539, but the court went even farther, in *United States* v. *Federation of Musicians*, 318 U. S. 741, and, as I think, rendered a decision contrary to that now announced. There a motion to dismiss a bill of complaint was granted and this court sustained that action. The complaint charged a conspiracy by the American Federation of Musicians, a nationwide organization, and its officers, to obtain employment for its members by eliminating entirely from interstate commerce all phonograph records

and electrical transcriptions of music and eliminating all competition between transcribed music and that produced by living musicians. The conspiracy charged was absolutely to prevent manufacture or sale of phonograph records and electrical transcriptions; to eliminate from the market all manufacturers, distributors, jobbers or retailers of the same, and to prevent the use of the articles, either in public places or private homes, and, of course, to prevent their sale. In the bill it was charged that the conspiracy did not grow out of or involve any dispute concerning terms or conditions of employment; that the purpose of the conspiracy was to eliminate from the market, manufacture, sale and use of mechanical recordings and records and transcriptions unless the persons engaged in this business should enter into agreements with the union, hiring useless and unnecessary labor, as the union would demand. The further purpose of the conspiracy charged was to exclude from the market competition by anyone who failed exclusively to employ members of the union. The complaint further charged that the purpose and effect of the conspiracy was unlawfully to destroy all manufacture and sale, in interstate commerce, of phonograph records and electrical transcriptions, eliminate all competition between music produced by mechanical means and music produced by living musicians, to deprive the public of an inexpensive means of entertainment in public places and in the home.

This court's affirmance of the dismissal of this complaint can only mean that every businessman who desires to stay in business must, if a union so demands, enter into an agreement with the union eliminating certain articles from his manufacture, from his sales, or from his use. The decision must necessarily mean that it would not be unlawful to enter into such an agreement with the union, otherwise we should have the anomaly that the union's demand for such an agreement is impeccable but the em-

ployer's acquiescence is unlawful. As shown by the opinion of the District Court in that case (47 F. Supp. 304) the Government contended that the union's effort represented "an attempt by the union to force employers to combine with it for the purpose of restraining interstate trade . . ." The District Court shortly answered this contention (p. 309) by saying: "In the court's opinion, *United States* v. *Brims,* 272 U. S. 549, . . . and like cases, are not pertinent." This must mean that each employer, in the instant case, is at liberty to agree with the union on all the terms and conditions which create a complete monopoly, a complete boycott, a complete closing of the market, and a serious price fixing affecting competitive commercial transactions. This is what I understand the court now holds. This is what was accomplished with impunity by the Federation of Musicians. But the situation created by such a holding is unreal.

As I have pointed out, in two branches of the industry, the manufacturers and employers, one by one, succumbed to union pressure and entered into agreements. Was not such an action, in each instance, a conspiracy? Are more than two parties required to conspire, and did not each of those conspiracies, to some extent, hinder and restrain interstate commerce and affect the market and the competitive price situation? As each agreement was consummated the market was, to that extent, closed and the boycott against out-of-the-city manufactures tightened.

But more. The union did not conduct its campaign in a corner. Albeit the findings are that manufacturers and repairers of electrical appliances violently resisted the unionization of their businesses, they, one by one, surrendered and signed. In doing so, many must have had knowledge of what others were doing or had done. And, as the coverage became complete, each one was enabled to stifle out-of-town competition and to raise prices. In any action against them and the union charging conspiracy, it

would be urged that a conspiracy need not consist of a written or verbal agreement but might be inferred from similarity of action. And it would be little protection to the employers concerned that, in each instance, a separate agreement was signed between union and employer.

The course of decision in this court has now created a situation in which, by concerted action, unions may set up a wall around a municipality of millions of inhabitants against importation of any goods if the union is careful to make separate contracts with each employer, and if union and employers are able to convince the court that, while all employers have such agreements, each acted independently in making them,—this notwithstanding the avowed purpose to exclude goods not made in that city by the members of the union; notwithstanding the fact that the purpose and inevitable result is the stifling of competition in interstate trade and the creation of a monopoly.

The only answer I find in the opinion of the court is that Congress has so provided. I think it has not provided any such thing and that the figmentary difference between employers negotiating jointly with the only union with which they can deal,—which imposes like conditions on all employers—and each employer dealing separately with the same union is unrealistic and unworkable. And the language of § 20 of the Clayton Act makes no such distinction.

This court, as a result of its past decisions, is in the predicament that whatever it decides must entail disastrous results. I can understand that the Circuit Court of Appeals felt constrained by the prior decisions of this court to order the judgment of the District Court reversed and the action dismissed. If the present decision is, as I think, a retrogression from earlier holdings, I welcome it; if it is but a limitation of them I concur in the partial

alleviation of an impossible situation. But I would not limit the injunction as the opinion directs.

MR. JUSTICE MURPHY, dissenting.

My disagreement with the Court rests not so much with the legal principles announced as with the application of those principles to the facts of the case.

If the union in this instance had acted alone in its self-interest, resulting in a restraint of interstate trade, the Sherman Act concededly would be inapplicable. But if the union had aided and abetted manufacturers or traders in violating the Act, the union's statutory immunity would disappear. I cannot agree, however, that the circumstances of this case demand the invocation of the latter rule.

The union here has not in any true sense "aided" or "abetted" a primary violation of the Act by the employers. In the words of the union, it has been "the dynamic force which has driven the employer-group to enter into agreements" whereby trade has been affected. The fact that the union has expressed its self-interest with the aid of others rather than solely by its own activities should not be decisive of statutory liability. What is legal if done alone should not become illegal if done with the assistance of others and with the same purpose in mind. Otherwise a premium of unlawfulness is placed on collective bargaining.

Had the employers embarked upon a course of unreasonable trade restraints and had they sought to immunize themselves from the Sherman Act by using the union as a shield for their nefarious practices, we would have quite a different case. The union then could not be said to be acting in its self-interest in combining with the employers to carry out trade restraints primarily for the employers' interests, even though incidental benefits might accrue to the union. Under such conditions the union fairly could

be said to be aiding and abetting a violation of the Act and its immunity would be lost. The facts of this case, however, do not allow such conclusions to be drawn.

I would therefore affirm the judgment of the court below.

HUNT ET AL., CO-PARTNERS TRADING AS HUNT'S MOTOR FREIGHT & FOOD PRODUCTS TRANSPORT, *v.* CRUMBOCH ET AL.

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

No. 570. Argued March 2, 1945.—Decided June 18, 1945.

1. Refusal of a labor union to admit to membership the employees of an interstate motor carrier, and refusal of members of the union to accept employment by the carrier—even though as a result it was impossible for the carrier to continue in business—*held* not a violation of the Sherman Antitrust Act, as amended. P. 823.
2. That the refusal of members of the union to accept employment by the carrier stemmed from personal antagonism toward a partner in the carrier firm—arising out of the killing of a union man, of which the partner was acquitted—did not render such refusal a violation of the Sherman Act. P. 824.
3. The fact that the refusal of the union members to accept employment was related to the business of an interstate carrier did not make such refusal a violation of the Sherman Act. P. 825.
4. A labor union's breach of duty to employees in a collective bargaining group is not, of itself, a violation of the Sherman Act. P. 826.
5. The Sherman Act does not afford a remedy for every tort committed by or against persons engaged in interstate commerce. P. 826.
6. The question whether the conduct of the union and its members is actionable under state law is not here involved. P. 826.

143 F. 2d 902, affirmed.

CERTIORARI, 323 U. S. 704, to review the affirmance of a judgment for the defendants, 47 F. Supp. 571, in a suit for an injunction and treble damages under the Sherman Act.

Messrs. Hirsh W. Stalberg and *Peter P. Zion* for petitioners.

Mr. William A. Gray, with whom *Messrs. Francis Thomas Anderson* and *Walter Stein* were on the brief, for respondents.

MR. JUSTICE BLACK delivered the opinion of the Court.

The question here is whether an organization of laboring men violated the Sherman Act, as amended, 26 Stat. 209, 38 Stat. 730, by refusing to admit to membership petitioner's employees, and by refusing to sell their services to petitioner, thereby making it impossible for petitioner profitably to continue in business.

For about fourteen years prior to 1939, the petitioner, a business partnership engaged in motor trucking, carried freight under a contract with the Great Atlantic & Pacific Tea Co. (A & P). Eighty-five percent of the merchandise thus hauled by petitioner was interstate, from and to Philadelphia, Pennsylvania. The respondent union, composed of drivers and helpers, was affiliated with other A. F. of L. unions whose members worked at loading and hauling of freight by motor truck. In 1937, the respondent union called a strike of the truckers and haulers of A & P in Philadelphia for the purpose of enforcing a closed shop. The petitioner, refusing to unionize its business, attempted to operate during the strike. Much violence occurred. One of the union men was killed near union headquarters, and a member of the petitioner partnership was tried for the homicide and acquitted. A & P and the union entered into a closed-shop agreement, whereupon all contract haulers working for A & P, including the petitioner, were notified that their employees must join and become members of the union. All of the other contractor haulers except petitioner either joined the union or made closed-shop agreements with it. The

union, however, refused to negotiate with the petitioner, and declined to admit any of its employees to membership. Although petitioner's services had been satisfactory, A & P, at the union's instigation, cancelled its contract with petitioner in accordance with the obligations of its closed-shop agreement with the union. Later, the petitioner obtained a contract with a different company, but again at the union's instigation, and upon the consummation of a closed-shop contract by that company with the union, petitioner lost that contract and business. Because of the union's refusal to negotiate with the petitioner and to accept petitioner's employees as members, the petitioner was unable to obtain any further hauling contracts in Philadelphia. The elimination of the petitioner's service did not in any manner affect the interstate operations of A & P or other companies.

The petitioner then instituted this suit in a federal district court against respondents, the union and its representatives, praying for an injunction and asking for treble damages. Demurrers to the complaint were overruled, the case was tried, findings of fact were made, and the district court rendered a judgment for the respondents on the ground that petitioner had failed to prove a cause of action under the Anti-trust laws. 47 F. Supp. 571. The Circuit Court of Appeals affirmed, holding that the fact that respondents' actions had caused petitioner to go out of business was not such a restraint of interstate commerce as would be actionable under the Sherman and Clayton Acts. 143 F. 2d 902. We granted certiorari because of the questions involved concerning the responsibility of labor unions under the Anti-trust laws.

The "destruction" of petitioner's business resulted from the fact that the union members, acting in concert, refused to accept employment with the petitioner, and refused to admit to their association anyone who worked for petitioner. The petitioner's loss of business is therefore

analogous to the case of a manufacturer selling goods in interstate commerce who fails in business because union members refuse to work for him. Had a group of petitioner's business competitors conspired and combined to suppress petitioner's business by refusing to sell goods and services to it, such a combination would have violated the Sherman Act. *Binderup* v. *Pathe Exchange,* 263 U. S. 291, 312; *Fashion Originators' Guild* v. *Federal Trade Commission,* 312 U. S. 457. A labor union which aided and abetted such a group would have been equally guilty. *Allen Bradley Co.* v. *Local Union No. 3, ante,* p. 797. The only combination here, however, was one of workers alone and what they refused to sell petitioner was their labor.

It is not a violation of the Sherman Act for laborers in combination to refuse to work. They can sell or not sell their labor as they please, and upon such terms and conditions as they choose, without infringing the Antitrust laws. *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 502–503. A worker is privileged under congressional enactments, acting either alone or in concert with his fellow workers, to associate or to decline to associate with other workers, to accept, refuse to accept, or to terminate a relationship of employment, and his labor is not to be treated as "a commodity or article of commerce." Clayton Act, 38 Stat. 730, 731; Norris-LaGuardia Act, 47 Stat. 70; see also *American Steel Foundries* v. *Tri-City Council,* 257 U. S. 184, 209. It was the exercise of these rights that created the situation which caused the petitioner to lose its hauling contracts and its business.

It is argued that their exercise falls within the condemnation of the Sherman Act, because the union members' refusal to accept employment was due to personal antagonism against the petitioner arising out of the killing of a union man. But Congress in the Sherman Act and the legislation which followed it manifested no purpose to make *any* kind of refusal to accept personal employment

a violation of the Anti-trust laws. Such an application of those laws would be a complete departure from their spirit and purpose. Cf. *Apex Hosiery Co.* v. *Leader, supra,* 512; *Allen Bradley* v. *Local Union No. 3, supra.* Moreover "So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means." *United States* v. *Hutcheson,* 312 U. S. 219, 232.[1]

It is further argued that the concerted refusal of union members to work for petitioner must be held to violate the Sherman Act because petitioner's business was "an instrumentality of interstate commerce." See *United States* v. *Trans-Missouri Freight Assn.,* 166 U. S. 290, 312. Acceptance of this contention would imply that workers do not possess the same privileges to choose or reject employment with interstate carriers as with other businesses. The entire history of congressional legislation, including the Railway Labor Act, 48 Stat. 1185, belies this argument.

Finally, it is faintly suggested that our decisions in *Steele* v. *L. & N. R. Co.,* 323 U. S. 192; *Tunstall* v. *Brother-*

[1] *Dorchy* v. *Kansas,* 272 U. S. 306, 311, cited here in dissent, has no relevancy to the issues before us. In that case Dorchy was convicted of calling a strike to enforce a stale claim contrary to state law. He attacked the state law on the ground that the right to strike was guaranteed by the Fourteenth Amendment. This Court rejected Dorchy's constitutional contention with the statement that "Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike." The Court had no reason in the *Dorchy* case to consider the Clayton Act, which as we decided in the *Hutcheson* case does recognize an absolute right of employees to work or cease working according to their own judgments. That which Congress has recognized as lawful, this Court has no constitutional power to declare unlawful, by arguing that Congress has accorded too much power to labor organizations.

hood, 323 U. S. 210, and *Wallace Corp.* v. *Labor Board,* 323 U. S. 248, require that we hold that respondents' conduct violated the Sherman Act. Those cases stand for the principle that a bargaining agent owes a duty not to discriminate unfairly against any of the group it purports to represent. But if the record showed discrimination against employees here, it would not even tend to show a violation of the Sherman Act. Congress has indicated no purpose to make a union's breach of duty to employees in a collective bargaining group an infraction of the Sherman Act.

The controversy in the instant case, between a union and an employer, involves nothing more than a dispute over employment, and the withholding of labor services. It cannot therefore be said to violate the Sherman Act, as amended. That Act does not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce. "The maintenance in our federal system of a proper distribution between state and national governments of police authority and of remedies private and public for public wrongs is of far-reaching importance. An intention to disturb the balance is not lightly to be imputed to Congress." *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 513. Whether the respondents' conduct amounts to an actionable wrong subjecting them to liability for damages under Pennsylvania law is not our concern.

Affirmed.

MR. JUSTICE ROBERTS.

I think the judgment should be reversed.

The issue presented in this case, in my judgment, lies wholly outside and beyond any precedent to be found in the decisions of this court, and certainly so as to *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, on which the court relies.

There was a labor dispute as to unionization between motor carriers and the union representing employes. The record demonstrates that the dispute involved in this case was no part of that labor dispute but an off-shoot of it; not involving wages, unionization, closed shop, hours or other conditions of work.

The union, in an effort to organize the employes of motor carriers, resorted to a strike. The petitioners resisted unionization. During the ensuing disorder a man was shot. The union officials attributed the killing to one of the petitioners. In fact he was acquitted by a jury. The respondents decided to punish him. The respondents having succeeded in unionizing the industry in Philadelphia the petitioners could continue in their business of interstate carriage only by having their men join the union and by signing a closed-shop contract. The union determined to punish petitioners by refusing to sign a contract with them and by forbidding the members of the union to work for them. There is no suggestion in the record that they did so because of any labor conditions or considerations, or that petitioners' men would not join the union, or that union men would not work with them, if they did join. It is hardly an accurate description of their attitude to say that the union men decided not to sell their labor to the petitioners. They intended to drive petitioners out of business as interstate motor carriers, and they succeeded in so doing.

The petitioners, for fourteen years, had been carriers of merchandise in interstate commerce. The union compelled A. & P., their principal patron, to break its contract with them and to discharge them from further serving it. The union frustrated efforts of petitioners to obtain contracts with other shippers.

The petitioners had been, and were at the time, in competition with other similar interstate carriers. The sole purpose of the respondents was to drive petitioners out of

business in that field. This they accomplished. Thus they reduced competition between interstate carriers by eliminating one competitor from the field. The conspiracy, therefore, was clearly within the denunciation of the Sherman Act, as one intended, and effective, to lessen competition in commerce, and not within any immunity conferred by the Clayton Act.

THE CHIEF JUSTICE, MR. JUSTICE FRANKFURTER and MR. JUSTICE JACKSON join in this opinion.

MR. JUSTICE JACKSON, dissenting.

The Court concedes that if business competitors alone or in combination with labor had conspired to drive petitioners out of business by refusing goods or services, competitors and labor organization would have violated the Sherman Act. The only question then is whether respondent is exempted from the prohibition of the Act. It is hard to see how this union is excused from the terms of the Act when in the *Allen Bradley* case we hold that labor unions even though furthering their members' interests as wage earners violate the Act when they combine with business to do the things prohibited by the Act. There, too, labor performed its part of the conspiracy by denying or threatening to deny labor to employers. But in that case we hold that no absolute immunity is granted by the statute, and that because of its purpose and its association, the labor union violated the Act. Here too the purpose of the respondent union is such as to remove the union's activities from the protection of the Clayton and Norris-LaGuardia Acts.

We say in the *Allen Bradley* case that, since a labor dispute existed, the refusal of the union to work would not have violated the Sherman Act if it had acted alone. In that case, the Court reviews fully the *conflicting* policies expressed in those Acts intended to preserve competition

and in those which permit labor organizations to pursue their objectives. Those statutes which restricted the application of the Sherman Act against unions were intended only to shield the legitimate objectives of such organizations, not to give them a sword to use with unlimited immunity. The social interest in allowing workers to better their condition by their combined bargaining power was thought to outweigh the otherwise undesirable restriction on competition which all successful union activity necessarily entails. But there is no social interest served by union activities which are directed not to the advantage of union members but merely to capricious and retaliatory misuse of the power which unions have simply to impose their will on an employer.

The *Apex* case is authority only for the principle that a labor organization which employs its power for recognized purposes does not violate the Sherman Act, unless its purpose is to affect and it does affect competition in the marketing of goods and services. That case says nothing of the direct destruction of competition in interstate commerce, as an end in itself, which the respondent union here effectuated. It explicitly declares that to some extent labor unions are subject to the Sherman Act. *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 489. Much of what we said in *American Medical Assn.* v. *United States,* 317 U. S. 519, is applicable here, although that case did not involve a labor union: "The petitioners did not represent present or prospective employes. Their purpose was to prevent anyone from taking employment under Group Health. They were interested in the terms and conditions of the employment only in the sense that they desired wholly to prevent Group Health from functioning by having any employes. Their objection was to its method of doing business. Obviously there was no dispute between Group Health and the doctors it employed or might employ in which petitioners were either directly or indi-

rectly interested." And in that case, we held the Clayton and Norris-LaGuardia Acts inapplicable and sustained convictions under the Sherman Act. It can hardly be said that merely because respondent is a labor union, for that reason alone a labor dispute is involved in the present case.

Respondents contend that, in any event, their conduct is not prohibited by the Sherman Act because prices within the field were not affected and the public did not suffer. *Appalachian Coals* v. *United States,* 288 U. S. 344, and similar cases refusing to apply the Sherman Act held that certain practices were permissible because they did not restrain competition in the industry as a whole, although they did restrain competition among the parties to the agreement. But there is a difference between being a party to consensual restriction of competition within a segment of an industry and being forced out of the industry entirely. Competition within the field has been lessened by the elimination of one of the companies engaged therein. Of course it cannot be said on this record that the destruction of petitioner's business substantially affected market conditions in the services which petitioner was engaged in rendering. Cf. *Apex Hosiery Co.* v. *Leader, supra,* at 512. But, even assuming that such an effect is necessary, the Court does not distinguish between the situation presented in this case and a case in which a union by similar methods and with similar motives would drive out of business a company whose demise would affect prices in the field.

With this decision, the labor movement has come full circle. The working man has struggled long, the fight has been filled with hatred, and conflict has been dangerous, but now workers may not be deprived of their livelihood merely because their employers oppose and they favor unions. Labor has won other rights as well, unemployment compensation, old-age benefits and, what is

most important and the basis of all its gains, the recognition that the opportunity to earn his support is not alone the concern of the individual but is the problem which all organized societies must contend with and conquer if they are to survive. This Court now sustains the claim of a union to the right to deny participation in the economic world to an employer simply because the union dislikes him. This Court permits to employees the same arbitrary dominance over the economic sphere which they control that labor so long, so bitterly and so rightly asserted should belong to no man.

Strikes aimed at compelling the employer to yield to union demands are not within the Sherman Act. Here the employer has yielded, and the union has achieved the end to which all legitimate union pressure is directed and limited. The union cannot consistently with the Sherman Act refuse to enjoy the fruits of its victory and deny peace terms to an employer who has unconditionally surrendered.

Mr. Justice Brandeis, for a unanimous Court, held that a union cannot lawfully strike for an unlawful purpose. "The right to carry on business—be it called liberty or property—has value. To interfere with this right without just cause is unlawful. The fact that the injury was inflicted by a strike is sometimes a justification. But a strike may be illegal because of its purpose, however orderly the manner in which it is conducted. To collect a stale claim due to a fellow member of the union who was formerly employed in the business is not a permissible purpose." *Dorchy* v. *Kansas,* 272 U. S. 306, 311. No more permissible is an exaction of privately-determined punishment for alleged murder. And being unlawful, union activities of this kind are not protected by the Clayton and Norris-LaGuardia Acts.

THE CHIEF JUSTICE and MR. JUSTICE FRANKFURTER join in this opinion.

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THE CHIEF JUSTICE and MR. JUSTICE FRANKFURTER join in this opinion.

DECISIONS PER CURIAM, ETC., FROM APRIL 24, 1945, THROUGH JUNE 18, 1945.*

No. 10, original. UNITED STATES *v.* WYOMING ET AL. April 25, 1945. Nat U. Brown, Esquire, of Yakima, Wash., appointed Special Master.

No. 1076. WOOD *v.* MISSISSIPPI. Appeal from the Supreme Court of Mississippi. April 30, 1945. *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. M. M. Roberts* for appellant. Reported below: 20 So. 2d 661.

No. 1059. SECURITIES & EXCHANGE COMMISSION *v.* LONG ISLAND LIGHTING CO. Certiorari, 324 U. S. 837, to the Circuit Court of Appeals for the Second Circuit. April 30, 1945. *Per Curiam:* It appearing that the cause has become moot, the judgment of the Circuit Court of Appeals is vacated and the case is remanded to the District Court with directions to dismiss the complaint. *Solicitor General Fahy, Messrs. Roger S. Foster, David K. Kadane* and *Theodore L. Thau* for petitioner. *Mr.*

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*MR. JUSTICE JACKSON took no part in the consideration or decision of the orders announced on May 28th.

MR. JUSTICE ROBERTS took no part in the consideration or decision of the orders announced on June 18th.

For decisions on applications for certiorari, see *post*, pp. 843, 850; rehearing, *post*, p. 891; cases disposed of without consideration by the Court, *post*, p. 891.

Harold R. Medina for respondent. Reported below: 148 F. 2d 252.

No. —. MORTON *v.* UNITED STATES. April 30, 1945. The motion for leave to file petition for writ of mandamus is denied.

No. 296. PANHANDLE EASTERN PIPE LINE CO. ET AL. *v.* FEDERAL POWER COMMISSION ET AL. April 30, 1945. Order entered amending opinion. The petition for rehearing is denied.

Opinion reported as amended, 324 U. S. 635.

No. 665. LINE MATERIAL CO. ET AL. *v.* COE, COMMISSIONER OF PATENTS. On petition for writ of certiorari to the United States Court of Appeals for the District of Columbia. May 7, 1945. *Per Curiam:* The petition for writ of certiorari is granted. The judgment is reversed on the authority of *Hoover Co.* v. *Coe, ante,* p. 79, and the cause is remanded to the said Court of Appeals for further proceedings. *Messrs. Charles F. Meroni, Carlton Hill, William A. Smith, Jr.* and *Donald A. Gardiner* for petitioners. *Solicitor General Fahy* and *Assistant Attorney General Shea* for respondent. Reported below: 144 F. 2d 518.

No. —. EX PARTE WILLIAM H. ALEXANDER;

No. —. EX PARTE EARL WATSON; and

No. —. BUTZ *v.* STUBBLEFIELD ET AL. May 7, 1945. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —. NEWMAN *v.* STUBBLEFIELD. May 7, 1945. The motion for leave to file petition for writ of certiorari is denied.

No. 1141. FUHS *v.* ILLINOIS. See *post*, p. 858.

No. 1204. SAYLOR, DOING BUSINESS AS BELL COACH LINES, *v.* STRAIGHT CREEK BUS, INC. ET AL. Appeal from the Court of Appeals of Kentucky. May 21, 1945. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Savage* v. *Jones,* 225 U. S. 501, 533; *Carey* v. *South Dakota,* 250 U. S. 118, 122; *Townsend* v. *Yeomans,* 301 U. S. 441, 454; *Allen-Bradley Local* v. *Board,* 315 U. S. 740, 749. *Mr. Samuel M. Rosenstein* for appellant. *Mr. Leslie W. Morris* for appellees. Reported below: 299 Ky. 309, 185 S. W. 2d 253.

No. 1218. DOSS *v.* LINDSLEY, SHERIFF. Appeal from the Supreme Court of Illinois. May 21, 1945. *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. Richard E. Westbrooks* for appellant. Reported below: 382 Ill. 307, 46 N. E. 2d 984.

No. —. EX PARTE VERGIL D. MCMILLAN;
No. —. EX PARTE WOOD *v.* SWYGERT, JUDGE; and
No. —. WILSON *v.* HINMAN. May 21, 1945. Applications denied.

No. —. EX PARTE RAYMOND O. DEMAUREZ; and
No. —. WALEY *v.* JOHNSTON, WARDEN. May 21, 1945. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —. SNOW *v.* JOHNSTON, WARDEN. May 21, 1945. The motion for leave to file petition for writ of certiorari is denied.

No. —. HOUSE *v.* MAYO, STATE PRISON CUSTODIAN. May 21, 1945. The application for bail and for other relief is denied.

No. 9, original. ILLINOIS *v.* INDIANA ET AL. May 21, 1945. The motion for leave to file the amended bill of complaint is granted and process is ordered to issue returnable on or before August 1, next. The answers heretofore filed to the original bill may stand as answers to the amended bill if the parties filing them are so advised.

No. 1253. DAVIS *v.* UNITED STATES. May 21, 1945. The application for bail is denied.

No. 85. CENTRAL STATES ELECTRIC CO. *v.* CITY OF MUSCATINE ET AL. May 21, 1945. Ordered that the mandate be recalled and that the judgment and mandate of this court be amended so as to provide that the costs of Central States Electric Company be paid from the $25,708.54 which was separated from the fund paid into the Circuit Court of Appeals for the Seventh Circuit by the Natural Gas Pipeline Company of America, rather than by the City of Muscatine, Iowa.

No. 431. UNITED STATES *v.* BEUTTAS ET AL., TRADING AS B-W CONSTRUCTION CO. May 21, 1945. Order entered amending opinion. The judgment will be amended accordingly.

Opinion reported as amended, 324 U. S. 768.

No. 177. Ledbetter, Administrator, et al. *v.* Farmers Bank & Trust Co. et al. May 21, 1945. The motion for leave to file motion to vacate order denying certiorari, 323 U.S. 719, is granted. The motion to vacate the order is denied.

No. 823. Hotel Astor, Inc. et al. *v.* United States et al. Appeal from the District Court of the United States for the Southern District of New York. May 28, 1945. *Per Curiam:* The judgment is affirmed. *Ambassador, Inc.* v. *United States, ante,* p. 317. *Messrs. George deF. Lord, Leonard G. Bisco, Frederick L. Wheeler* and *Parker McCollester* for appellants. *Messrs. John B. King* and *Ralph W. Brown* for the New York Telephone Co., appellee. Reported below: 57 F. Supp. 451.

No. 866. Twisp Mining & Smelting Co. *v.* Chelan Mining Co. et al. Appeal from and petition for writ of certiorari to the Supreme Court of Washington. May 28, 1945. *Per Curiam:* 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. Lucius G. Nash* for appellant-petitioner. Reported below: 16 Wash. 2d 264, 133 P. 2d 300.

No. 1229. Alabama Highway Express, Inc. *v.* United States et al. Appeal from the District Court of the United States for the Northern District of Alabama. May 28, 1945. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. (1) *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 480–82; *Howard Hall Co.* v. *United States,* 315 U. S. 495, 498–9; (2) *United States* v. *Pan American Corp.*, 304 U. S. 156, 158. *Mr. Leo P. Kitchen* for appellant. *Solicitor General Fahy* and *Mr. Daniel W. Knowlton* for appellees.

No. —. McCoy *v.* Hunter, Warden;

No. —. Welch *v.* Brady, Warden; and

No. —. Blake *v.* Brady, Warden. May 28, 1945. The motions for leave to file petitions for writs of habeas corpus are denied.

No. —. Sweet *v.* Swygert, Judge. May 28, 1945. Application denied.

No. 506. Mosher *v.* Hunter, Warden. May 28, 1945. Leave is granted petitioner to file a second petition for rehearing by September 1, next. The motion for other relief is denied.

No. 1219. S. Buchsbaum & Co. et al. *v.* Gordon, Director of Labor. Appeal from the Supreme Court of Illinois. June 4, 1945. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Carmichael* v. *Southern Coal Co.,* 301 U. S. 495, 509–12, 520–21, 525, and cases cited. *Messrs. Walter H. Moses* and *Walter Bachrach* for appellants. *George F. Barrett,* Attorney General of Illinois, for appellee. Reported below: 389 Ill. 493, 59 N. E. 2d 832.

No. 1236. National Labor Relations Board *v.* Federal Motor Truck Co.;

No. 1237. National Labor Relations Board *v.* Jones & Laughlin Steel Corp. On petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit; and

No. 1238. National Labor Relations Board *v.* E. C. Atkins & Co. On petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit. June 4, 1945. *Per Curiam:* The petition for writs of certiorari is granted. The judgments are vacated and the cases are

remanded to the respective Circuit Courts of Appeals for further consideration of the alleged changed circumstances with respect to the demilitarization of the employees involved, and the effect thereof on the Board's orders. *Assistant Solicitor General Cox* and *Mr. Alvin J. Rockwell* for petitioner. *Mr. Percy J. Donovan* for respondent in No. 1236. *Messrs. William A. Seifert* and *John C. Bane, Jr.* for respondent in No. 1237. *Messrs. Roscoe Pound* and *Kurt F. Pantzer* for respondent in No. 1238. Reported below: Nos. 1236 and 1237, 146 F. 2d 718; No. 1238, 147 F. 2d 730.

No. —. Hinkle *v.* Swygert, Judge; and

No. —. Sinclair *v.* Swygert, Judge. June 4, 1945. The motions for leave to file petitions for writs of mandamus are denied.

No. —. Mason *v.* Smith, Superintendent; and

No. —. Ex parte Garfield J. Kelly. June 4, 1945. The motions for leave to file petitions for writs of certiorari are denied.

No. —. Watson, Attorney General, *v.* Holland, Governor, et al. June 4, 1945. The application for an extension of time within which to file petition for writ of certiorari is denied. *Finn* v. *Railroad Commission*, 286 U. S. 559.

No. —. Jennings *v.* Smith, Warden. June 11, 1945. The motion for leave to file petition for writ of habeas corpus is denied.

No. 1097. Automatic Paper Machinery Co., Inc. *v.* Marcalus Manufacturing Co., Inc. et al. June 11, 1945. Scott Paper Co. substituted as the party petitioner.

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No. 63. Northwestern Bands of Shoshone Indians *v.* United States. June 11, 1945. The motion to recall and amend the mandate and for other relief is denied.

No. 953. Finn, Trustee, *v.* Meighan, Substituted Trustee. June 11, 1945. Order entered amending opinion.

Opinion reported as amended, *ante,* p. 300.

No. 1287. Ashland Coal & Ice Co., Inc. et al. *v.* United States et al. Appeal from the District Court of the United States for the Eastern District of Virginia. June 18, 1945. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. *Standard Oil Co.* v. *United States,* 283 U. S. 235, 240–41; *George Allison & Co.* v. *United States,* 296 U. S. 546. Dissenting: Mr. Justice Black and Mr. Justice Douglas. *Messrs. Walter M. Evans* and *Harry C. Ames* for appellants. *Solicitor General Fahy* and *Mr. Daniel W. Knowlton* for the United States et al., and *Messrs. Frank W. Gwathmey, Horace L. Walker, D. Lynch Younger, Charles Clark* and *John C. Donnally* for the Atlantic Coast Line Railroad Co. et al., appellees. Reported below: 61 F. Supp. 708.

No. 1245. Okin *v.* Securities & Exchange Commission. On petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit. June 18, 1945. *Per Curiam:* On consideration of the suggestion of a diminution of the record and a motion for a writ of certiorari in that relation, the motion for certiorari is granted. The petition for writ of certiorari is granted limited to the question whether that part of the Commission's order which licensed Electric Bond and Share Company's use of the proceeds derived from the plan of reorganization can be reviewed only under § 24 (a) of the Public Utility Hold-

ing Company Act. The judgment is vacated and the cause is remanded to the Circuit Court of Appeals for consideration of that question. *Mr. Samuel Okin* for petitioner. *Assistant Solicitor General Cox* and *Mr. Roger S. Foster* for respondent. *Messrs. James L. Boone* and *Daniel James* for the United Gas Corporation et al., petitioning for writ of certiorari to correct diminution of the record. Reported below: 145 F. 2d 206.

No. 1383. Coy *v.* United States. On motion for leave to file petition for writ of certiorari. June 18, 1945. *Per Curiam:* Petitioner moves for leave to file a petition for certiorari under § 262 of the Judicial Code, to review an order of the Circuit Court of Appeals for the Sixth Circuit. The order denied his petition for leave to proceed with his appeal *in forma pauperis* from an order of the district court denying his motion to vacate sentence upon a conviction on one count of an indictment for violation of § 2 (a) and (b) of the Bank Robbery Act, 12 U. S. C. 588b (a) and (b).

Petitioner filed, with the district court, notice of appeal from its order and an application for leave to appeal *in forma pauperis,* which the district court allowed. On the same day, petitioner filed his petition for leave to proceed with his appeal *in forma pauperis* with the circuit court of appeals, which later denied his petition. As the appeal allowed by the district court was already properly before the circuit court of appeals, it should have allowed petitioner to proceed upon the appeal *in forma pauperis,* as provided by the district court's order. 28 U. S. C. 832; *Steffler* v. *United States,* 319 U. S. 38, 41.

The Government confesses error. The motion for leave to proceed here *in forma pauperis* is granted. The motion for leave to file the petition for certiorari is granted and the petition for writ of certiorari is also granted. The

order of the circuit court of appeals is vacated and the cause is remanded to that court in order that it may make appropriate disposition of the appeal allowed by the district court.

Bernard Paul Coy, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl and *Irving S. Shapiro* for the United States.

No. —. BOZELL *v.* BIDDLE ET AL. June 18, 1945. The motion for leave to file petition for writ of certiorari is denied.

No. —. EX PARTE WILLIAM M. LEE;

No. —. TEGTMEYER *v.* TEGTMEYER; and

No. —. BLOOD *v.* RHODE ISLAND. June 18, 1945. Applications denied.

No. —. KENNEDY *v.* LAINSON, WARDEN. June 18, 1945. The motion for leave to file petition for writ of habeas corpus is denied.

No. 699. GOLDSTONE ET AL., EXECUTORS, *v.* UNITED STATES. June 18, 1945. Order entered amending opinion.

Opinion reported as amended, *ante*, p. 687.

No. 1213. GLICK BROTHERS LUMBER CO. ET AL. *v.* BOWLES, PRICE ADMINISTRATOR; and

No. 1224. RAY ET AL., DOING BUSINESS AS SUPERIOR UNIFORM CAP & SHIRT MFG. CO., *v.* BOWLES, PRICE ADMINISTRATOR. June 18, 1945. The application for a stay is denied.

No. 1368. STEWART *v.* RAGEN, WARDEN. See *post*, p. 890.

No. 661, October Term, 1934. Awotin *v.* Atlas Exchange National Bank of Chicago. June 18, 1945. Petition to set aside the judgment and for other relief denied.

No. 377. Precision Instrument Manufacturing Co. et al. *v.* Automotive Maintenance Machinery Co. June 18, 1945. Petition for clarification of the opinion (324 U. S. 806) denied.

No. 470. American Power & Light Co. *v.* Securities & Exchange Commission; and

No. 815. Securities & Exchange Commission *v.* Okin. June 18, 1945. Order entered amending opinion. The motion for rehearing in No. 815 is otherwise denied. Opinion reported as amended, *ante,* p. 385.

DECISIONS GRANTING CERTIORARI, FROM APRIL 24, 1945, THROUGH JUNE 18, 1945.

No. 1097. Automatic Paper Machinery Co., Inc. *v.* Marcalus Manufacturing Co., Inc. et al. April 30, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. George E. Middleton* for petitioner. *Messrs. Samuel E. Darby, Jr.* and *Donald J. Overocker* for respondents. Reported below: 147 F. 2d 608.

No. 948. John Kelley Co. *v.* Commissioner of Internal Revenue. April 30, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Frank J. Albus* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key, J. Louis Monarch* and *Mrs. Maryhelen Wigle* for respondent. Reported below: 146 F. 2d 466.

No. 1070. Talbot Mills *v.* Commissioner of Internal Revenue. April 30, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Mr. Melville F. Weston* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key, J. Louis Monarch* and *Harry Baum* for respondent. Reported below: 146 F. 2d 809.

No. 1089. Better Business Bureau of Washington, D. C., Inc. *v.* United States. April 30, 1945. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia granted. *Messrs. Simon Lyon* and *R. B. H. Lyon* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key* and *J. Louis Monarch* for the United States. Reported below: 148 F. 2d 14.

No. 665. Line Material Co. et al. *v.* Coe, Commissioner of Patents. See *ante,* p. 834.

No. 1082. Glass City Bank *v.* United States. May 7, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. Fred B. Trescher* for petitioner. *Assistant Solicitor General Cox, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key, J. Louis Monarch, Homer R. Miller* and *Walter J. Cummings, Jr.* for the United States. Reported below: 146 F. 2d 831.

No. 1085. Levers, Administrator, *v.* Anderson, District Supervisor, Alcohol Tax Unit. May 7, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Messrs. Huston Thompson* and *Hugh H. Obear* for petitioner. *Assistant Solicitor General Cox* and *Mr. Robert L. Stern* for respondent. Reported below: 147 F. 2d 547.

No. 1139. KIRBY PETROLEUM CO. *v.* COMMISSIONER OF INTERNAL REVENUE. May 21, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Homer L. Bruce* for petitioner. *Assistant Solicitor General Cox, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key, Hilbert P. Zarky* and *Miss Helen R. Carloss* for respondent. Reported below: 148 F. 2d 80.

No. 1171. OKLAHOMA PRESS PUBLISHING CO. *v.* WALLING, ADMINISTRATOR. May 21, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Messrs. Elisha Hanson, Joseph C. Stone* and *Charles A. Moon* for petitioner. *Assistant Solicitor General Cox, Mr. Douglas B. Maggs* and *Miss Bessie Margolin* for respondent. Reported below: 147 F. 2d 658.

No. 1179. NEWS PRINTING CO., INC. *v.* WALLING, ADMINISTRATOR. May 21, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. Elisha Hanson* and *Miss Letitia Armistead* for petitioner. *Assistant Solicitor General Cox, Mr. Douglas B. Maggs* and *Miss Bessie Margolin* for respondent. Reported below: 148 F. 2d 57.

No. 1152. MABEE ET AL. *v.* WHITE PLAINS PUBLISHING CO., INC. May 21, 1945. Petition for writ of certiorari to the Court of Appeals of New York granted. *Mr. Morton Lexow* for petitioners. *Mr. Elisha Hanson* and *Miss Letitia Armistead* for respondent. Reported below: 294 N. Y. 701, 60 N. E. 2d 848.

No. 166. American Power & Light Co. *v.* Securities & Exchange Commission; and

No. 167. Electric Power & Light Corp. *v.* Securities & Exchange Commission. May 28, 1945. The petitions for writs of certiorari to the Circuit Court of Appeals for the First Circuit are granted. *Messrs. Arthur A. Ballantine, John F. MacLane* and *Frank A. Reid* for petitioner in No. 166. *Messrs. Daniel James, James F. MacLane* and *Frank A. Reid* for petitioner in No. 167. *Solicitor General Fahy* and *Mr. Roger S. Foster* for respondent. Reported below: 141 F. 2d 606.

No. 295. Atkins *v.* Atkins. May 28, 1945. Petition for writ of certiorari to the Supreme Court of Illinois granted. *Messrs. Harry F. Gillis* and *A. Rea Williams* for petitioner. *Mr. Harold F. Trapp* for respondent. Reported below: 386 Ill. 345, 54 N. E. 2d 488.

No. 1167. Markham, Alien Property Custodian, *v.* Allen et al. May 28, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Solicitor General Fahy* for petitioner. *Mr. Joseph Wahrhaftig* for respondents. Reported below: 147 F. 2d 136.

No. 1196. Ashbacker Radio Corp. *v.* Federal Communications Commission. May 28, 1945. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia granted. *Messrs. Paul M. Segal* and *Philip J. Hennessey, Jr.* for petitioner. *Assistant Solicitor General Cox, Messrs. Walter J. Cummings, Jr., Harry M. Plotkin* and *Joseph M. Kittner* for respondent.

No. 1201. Smith *v.* United States. May 28, 1945. Petition for writ of certiorari to the Circuit Court of Ap-

peals for the Fourth Circuit granted. *Mr. Hayden C. Covington* for petitioner. *Assistant Solicitor General Cox, Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 148 F. 2d 288.

No. 1236. NATIONAL LABOR RELATIONS BOARD *v.* FEDERAL MOTOR TRUCK CO.;

No. 1237. NATIONAL LABOR RELATIONS BOARD *v.* JONES & LAUGHLIN STEEL CORP.; and

No. 1238. NATIONAL LABOR RELATIONS BOARD *v.* E. C. ATKINS & CO. See *ante*, p. 838.

No. 1206. THOMAS PAPER STOCK CO. ET AL. *v.* BOWLES, PRICE ADMINISTRATOR. June 4, 1945. Petition for writ of certiorari to the United States Emergency Court of Appeals granted. *Mr. Claude A. Roth* for petitioners. *Assistant Solicitor General Cox* and *Mr. Richard H. Field* for respondent. Reported below: 148 F. 2d 831.

No. 1271. MARKHAM, ALIEN PROPERTY CUSTODIAN, ET AL. *v.* CABELL. June 4, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Assistant Solicitor General Cox* for petitioners. *Messrs. Charlton Ogburn* and *Hartwell Cabell* for respondent. Reported below: 148 F. 2d 737.

No. 1254. BOEHM *v.* COMMISSIONER OF INTERNAL REVENUE. June 11, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Louis Boehm* for petitioner. *Assistant Solicitor General Cox, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key, Robert N. Anderson* and *William Robert Koerner* for respondent. Reported below: 146 F. 2d 553.

No. 1324. Railroad Retirement Board et al. *v.* Duquesne Warehouse Co.; and

No. 1338. Duquesne Warehouse Co. *v.* Railroad Retirement Board et al. June 11, 1945. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit and to the United States Court of Appeals for the District of Columbia, respectively, granted. *Assistant Solicitor General Cox, Messrs. Myles F. Gibbons, Frank L. Mulholland, Clarence M. Mulholland* and *Willard H. McEwen* for petitioners in No. 1324. *Messrs. George R. Allen, John S. Flannery* and *R. Aubrey Bogley* for petitioner in No. 1338. Reported below: 148 F. 2d 473.

No. 1245. Okin *v.* Securities & Exchange Commission. See *ante*, p. 840.

No. 1383. Coy *v.* United States. See *ante*, p. 841.

No. 1272. United States *v.* Petty Motor Co.;

No. 1273. United States *v.* Brockbank;

No. 1274. United States *v.* Grimsdell, doing business as Grocer Printing Co.;

No. 1275. United States *v.* Wiggs, doing business as Chicago Flexible Shaft Co.;

No. 1276. United States *v.* Independent Pneumatic Tool Co.;

No. 1277. United States *v.* Galigher Company; and

No. 1278. United States *v.* Gray-Cannon Lumber Co. June 18, 1945. Petition for writs of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Assistant Solicitor General Cox* for the United States. *Mr. Charles D. Moore* for respondents. Reported below: 147 F. 2d 912.

No. 952. Order of Railway Conductors of America et al. *v.* Pitney et al., Trustees, et al. June 18, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. V. C. Shuttleworth, Rufus G. Poole* and *James D. Carpenter, Jr.* for petitioners. *Messrs. Harry Lane* and *Robert Carey* for respondents. Reported below: 145 F. 2d 351.

No. 1033. Roland Electrical Co. *v.* Walling, Administrator. June 18, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Mr. O. R. McGuire* for petitioner. *Solicitor General Fahy, Messrs. Robert L. Stern, Douglas B. Maggs, George M. Szabad* and *Miss Bessie Margolin* for respondent. Reported below: 146 F. 2d 745.

No. 849. Martino *v.* Michigan Window Cleaning Co. June 18, 1945. The order denying certiorari, 324 U. S. 849, is vacated and the petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit is granted. *Mr. Daniel D. Carmell* for petitioner. *Mr. Larry S. Davidow* for respondent. Reported below: 145 F. 2d 163.

No. 1266. Boutell et al. *v.* Walling, Administrator. June 18, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Mr. Harry G. Gault* for petitioners. *Assistant Solicitor General Cox, Mr. Douglas B. Maggs* and *Miss Bessie Margolin* for respondent. Reported below: 148 F. 2d 329.

DECISIONS DENYING CERTIORARI, FROM APRIL 24, 1945, THROUGH JUNE 18, 1945.

No. 1076. WOOD *v.* MISSISSIPPI. See *ante*, p. 833.

No. 1049. KINNE ET AL. *v.* STARR KING SCHOOL FOR THE MINISTRY. April 30, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. W. N. Mullen* for petitioners. *Messrs. O. K. Cushing, Eustace Cullinan* and *Delger Trowbridge* for respondent. Reported below: 146 F. 2d 8.

No. 1057. MERGNER *v.* UNITED STATES. April 30, 1945. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. John H. Burnett* and *John J. Sirica* 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: 147 F. 2d 572.

No. 1061. HINCHLIFFE *v.* TEXAS COMPANY ET AL. April 30, 1945. Petition for writ of certiorari to the Court of Civil Appeals, 3d Supreme Judicial District, of Texas, denied. *Mr. W. Dewey Lawrence* for petitioner. *Messrs. W. F. Semple* and *J. A. Rauhut* for the Texas Company et al., and *Mr. Ireland Graves* for the Ohio Oil Co., respondents. Reported below: 182 S. W. 2d 368.

No. 1062. HANCOCK *v.* STOUT. April 30, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Alfred F. Burgess* and *Thomas A. Wofford* for petitioner. *Assistant Solicitor General Cox, Assistant Attorney General Tom C.*

Clark, Judge Advocate General Cramer, Messrs. Robert S. Erdahl, Leon Ulman, William A. Rounds and *Wm. J. Hughes, Jr.* for respondent. Reported below: 146 F. 2d 741.

No. 1071. Rinko *v.* United States. April 30, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Hayden C. Covington* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 147 F. 2d 1.

No. 1072. Flakowicz *v.* United States. April 30, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Hayden C. Covington* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 146 F. 2d 874.

No. 1073. Parsons *v.* United States; and

No. 1074. Jensen *v.* United States. April 30, 1945. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Hayden C. Covington* for petitioners. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 146 F. 2d 874.

No. 1075. Metzinger *v.* Metzinger. April 30, 1945. Petition for writ of certiorari to the Supreme Court of Michigan denied. *Mr. John R. Rood* for petitioner. *Mr. Edward Pokorny* filed a brief, as *amicus curiae*, in opposition. Reported below: 310 Mich. 335, 17 N. W. 2d 203.

No. 1083. Cohen *v.* United States. April 30, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Thomas I. Sheridan* 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: 148 F. 2d 94.

No. 1087. International Ladies' Garment Workers' Union et al. *v.* Donnelly Garment Co. et al. April 30, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Charles A. Horsky* and *Emil Schlesinger* for petitioners. *Messrs. Robert J. Ingraham, William S. Hogsett* and *Frank E. Tyler* for respondents. Reported below: 147 F. 2d 246.

No. 1088. Deutsch, doing business as Unity Sanitary Supply Co., *v.* Hoge et al. April 30, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Irving H. Saypol* for petitioner. *Mr. Meyer Kraushaar* for respondents. Reported below: 146 F. 2d 201.

No. 1122. Brotherhood of Locomotive Firemen & Enginemen et al. *v.* Chicago, North Shore & Milwaukee Railroad Co. et al. April 30, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Leo J. Hassenauer* and *Everett L. Gordon* for petitioners. *Mr. Ralph R. Bradley* for respondents. Reported below: 147 F. 2d 723.

No. 548. Velasco *v.* Ragen, Warden;
No. 615. Gooch *v.* Niersheimer, Warden;
No. 617. Walker *v.* Ragen, Warden;

No. 1118. Stewart *v.* Ragen, Warden;
No. 1133. Levanowicz *v.* Ragen, Warden;
No. 1134. Jablonski *v.* Ragen, Warden;
No. 1135. Napue *v.* Ragen, Warden;
No. 1136. Banks *v.* Ragen, Warden;
No. 1137. Harp *v.* Ragen, Warden;
No. 1142. Woods *v.* Ragen, Warden;
No. 1153. Annuzio *v.* Nierstheimer, Warden;
No. 1156. Singer *v.* Ragen, Warden;
No. 1164. Haines *v.* Nierstheimer, Warden; and
No. 1173. McGregor *v.* Ragen, Warden. April 30, 1945. Petitions for writs of certiorari to the Supreme Court of Illinois denied. *Dewey Gooch,* petitioner in No. 615, *pro se. George F. Barrett,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondent in No. 615.

No. 695. DeJordan *v.* Hunter, Warden. April 30, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Charles F. DeJordan, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl* and *Leon Ulman* for respondent. Reported below: 145 F. 2d 287.

No. 908. Moses *v.* Johnston, Warden. April 30, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Joseph E. Moses, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl* and *Leon Ulman* for respondent. Reported below: 145 F. 2d 831.

No. 1025. Ator *v.* Illinois. April 30, 1945. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 1042. Sullivan *v.* Florida. April 30, 1945. Petition for writ of certiorari to the Supreme Court of Florida denied. *Mr. Z. H. Douglas* for petitioner. Reported below: 154 Fla. 496, 18 So. 2d 163.

No. 1056. Catovolo *v.* Hibbs, Commanding General, et al. April 30, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. Reported below: 145 F. 2d 866.

No. 1078. Mayborn *v.* Heflebower. April 30, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Hayden C. Covington* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl* and *Irving S. Shapiro* for respondent. Reported below: 145 F. 2d 864.

No. 1086. Hoelscher *v.* Indiana. April 30, 1945. Petition for writ of certiorari to the Supreme Court of Indiana denied. *Mr. Oscar B. Thiel* for petitioner. Reported below: 57 N. E. 2d 770.

No. 1155. Carter *v.* Illinois. April 30, 1945. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 1180. Medley *v.* Missouri. April 30, 1945. Petition for writ of certiorari to the Supreme Court of Missouri denied. Reported below: 353 Mo. 925, 185 S. W. 2d 633.

No. 1098. Hinkle *v.* Indiana. April 30, 1945. The petition for writ of certiorari to the Supreme Court of Indiana 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. 1029. MARYLAND CASUALTY CO. *v.* COUNTY OF ALLEGHENY; and

No. 1099. COUNTY OF ALLEGHENY *v.* MARYLAND CASUALTY CO. May 7, 1945. Petitions for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Duane R. Dills* and *George W. Dexter* for the Maryland Casualty Co. *Messrs. John J. O'Connell* and *Edward G. Bothwell* for Allegheny County. Reported below: 146 F. 2d 633.

No. 1043. O'HARA *v.* DISTRICT OF COLUMBIA. May 7, 1945. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. William J. O'Mahony* for petitioner. *Messrs. Richmond B. Keech* and *Vernon E. West* for respondent. Reported below: 147 F. 2d 146.

No. 1047. PASQUA ET AL. *v.* UNITED STATES. May 7, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. G. Wray Gill* for petitioners. *Assistant Solicitor General Cox, Assistant Attorney General Tom C. Clark, Mr. Robert S. Erdahl* and *Miss Beatrice Rosenberg* for the United States. Reported below: 146 F. 2d 522.

No. 1063. MCLAIN ET AL. *v.* LANCE ET AL. May 7, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Douglas W. McGregor* for petitioners. Reported below: 146 F. 2d 341.

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No. 1077. 75 Cases of Peanut Butter et al. *v.* United States. May 7, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Raymond M. Hudson* and *J. Charles Fagan* for petitioners. *Assistant Solicitor General Cox, Assistant Attorney General Tom C. Clark* and *Mr. Robert S. Erdahl* for the United States. Reported below: 146 F. 2d 124.

No. 1084. Kraft Cheese Co. *v.* Coe, Commissioner of Patents. May 7, 1945. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. Cyril A. Soans* for petitioner. *Assistant Solicitor General Cox, Assistant Attorney General Shea, Messrs. Paul A. Sweeney, Jerome H. Simonds, W. W. Cochran* and *R. F. Whitehead* for respondent. Reported below: 146 F. 2d 313.

No. 1103. Fantini, Administratrix, *v.* Reading Company. May 7, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Herbert Zelenko* for petitioner. *Mr. George Gildea* for respondent. Reported below: 147 F. 2d 543.

No. 1117. Kasishke et al. *v.* Baker. May 7, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Seth W. Richardson* and *Warren E. Magee* for petitioners. *Mr. Conn Linn* for respondent. Reported below: 146 F. 2d 113.

No. 1121. Finn, Trustee, *v.* 415 Fifth Avenue Co., Inc. May 7, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied.

Mr. Joseph Lorenz for petitioner. *Messrs. Lowell M. Birrell* and *Theodore E. Larson* for respondent. Reported below: 146 F. 2d 592.

No. 1124. NATIONAL HOMEOPATHIC HOSPITAL ASSOCIATION ET AL. *v.* BRITTON, DEPUTY COMMISSIONER. May 7, 1945. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. James E. McCabe* for petitioners. *Assistant Solicitor General Cox, Assistant Attorney General Shea, Messrs. Paul A. Sweeney* and *Max Goldman* for respondent. Reported below: 147 F. 2d 561.

No. 1090. DIUGUID *v.* UNITED STATES. May 7, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Harold Shapero* for petitioner. *Assistant Solicitor General Cox, Assistant Attorney General Tom C. Clark* and *Mr. Robert S. Erdahl* for the United States. Reported below: 146 F. 2d 848.

No. 1100. ENGLER *v.* GENERAL ELECTRIC CO. May 7, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Carl E. Ring* for petitioner. *Mr. Alexander C. Neave* for respondent. Reported below: 146 F. 2d 723.

No. 1101. MILLER *v.* MISSISSIPPI & SKUNA VALLEY RAILROAD; and

No. 1102. OAKLEY *v.* MISSISSIPPI & SKUNA VALLEY RAILROAD. May 7, 1945. Petition for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Walter P. Armstrong* for petitioners. *Mr. J. W. Canada* for respondent. Reported below: 146 F. 2d 550.

No. 1184. HAIGES *v.* RAGEN, WARDEN; and

No. 1202. SWOLLEY *v.* RAGEN, WARDEN. May 7, 1945. Petitions for writs of certiorari to the Supreme Court of Illinois denied.

No. 1141. FUHS *v.* ILLINOIS. May 7, 1945. 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. Reported below: 390 Ill. 67, 60 N. E. 2d 205.

No. 1218. DOSS *v.* LINDSLEY, SHERIFF. See *ante,* p. 835.

No. 1126. COX *v.* UNITED STATES; and

No. 1127. RAMBO *v.* UNITED STATES. May 21, 1945. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Asa S. Chapman* for petitioners. *Assistant Solicitor General Cox, Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 147 F. 2d 587.

No. 1128. UNITED STATES EX REL. DOSS *v.* LINDSLEY, SHERIFF. May 21, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Richard E. Westbrooks* for petitioner. Reported below: 148 F. 2d 22.

No. 1143. JESKOWITZ *v.* CARTER, TRUSTEE IN BANKRUPTCY. May 21, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Archibald Palmer* for petitioner. *Mr. Joseph Glass* for respondent.

No. 1144. JOHN N. PRICE & SONS *v.* MARYLAND CASUALTY CO. May 21, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Aaron Heller* for petitioner. *Mr. DeVoe Tomlinson* for respondent. Reported below: 146 F. 2d 807.

No. 1147. BURTON, ADMINISTRATRIX, *v.* FREEMAN COAL MINING CORP. ET AL. May 21, 1945. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. John J. Dowdle* for petitioner. *Mr. Henry S. Blum* for respondents. Reported below: 388 Ill. 604, 58 N. E. 2d 589.

No. 1161. CALEY *v.* RYAN DISTRIBUTING CORP. May 21, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Wm. Steell Jackson* and *Leonard L. Kalish* for petitioner. *Mr. Cedric W. Porter* for respondent. Reported below: 147 F. 2d 138.

No. 1104. MONJAR *v.* UNITED STATES;
No. 1105. MONJAR *v.* UNITED STATES;
No. 1106. COOK *v.* UNITED STATES;
No. 1107. JONES *v.* UNITED STATES;
No. 1108. DREW *v.* UNITED STATES;
No. 1109. MOORE *v.* UNITED STATES;
No. 1110. LINDH *v.* UNITED STATES;
No. 1111. FITZPATRICK *v.* UNITED STATES;
No. 1112. WILLARD *v.* UNITED STATES;
No. 1113. CANDLIN *v.* UNITED STATES;
No. 1114. CRUSER *v.* UNITED STATES; and
No. 1115. MADDAMS *v.* UNITED STATES. May 21, 1945. Petitions for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. William D. Donnelly, Daniel O. Hastings, William A. Gray* and

Homer Cummings for petitioners. *Assistant Solicitor General Cox, Assistant Attorney General Tom C. Clark, Mr. Robert S. Erdahl* and *Miss Beatrice Rosenberg* for the United States. Reported below: 147 F. 2d 916; No. 1110, 148 F. 2d 332.

No. 1131. McAllister *v.* City of Riesel. May 21, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Will A. Morriss* for petitioner. Reported below: 146 F. 2d 131.

No. 1132. McAllister *v.* City of Moody. May 21, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Will A. Morriss* for petitioner. Reported below: 146 F. 2d 130.

No. 1138. Brotherhood of Locomotive Firemen & Enginemen et al. *v.* Interstate Commerce Commission. May 21, 1945. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Frank L. Mulholland, Clarence M. Mulholland* and *Willard H. McEwen* for petitioners. Reported below: 147 F. 2d 312.

No. 1165. Shenko et al., Administrators, *v.* Jack Cole Transportation Co. May 21, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. B. Nathaniel Richter* for petitioners. *Mr. Austin F. Canfield* for respondent. Reported below: 147 F. 2d 361.

No. 1166. Greater New York Broadcasting Corp. *v.* National Labor Relations Board. May 21, 1945. Petition for writ of certiorari to the Circuit Court of

Appeals for the Second Circuit denied. *Mr. Sanford H. Cohen* for petitioner. *Assistant Solicitor General Cox, Messrs. Alvin J. Rockwell, Willard Cass, Misses Ruth Weyand* and *Fannie M. Boyls* for respondent. Reported below: 147 F. 2d 337.

No. 1168. DULANEY *v.* COPPARD, TRUSTEE. May 21, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Albert C. Dulaney* for petitioner. *Mr. Nat L. Hardy* for respondent. Reported below: 145 F. 2d 468.

No. 1182. MOSS, ADMINISTRATRIX, *v.* PENNSYLVANIA RAILROAD CO. May 21, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Jay E. Darlington* for petitioner. *Messrs. G. Bowdoin Craighill* and *R. Aubrey Bogley* for respondent. Reported below: 146 F. 2d 673.

No. 1183. NORTON, TRUSTEE, *v.* TOM GREEN COUNTY. May 21, 1945. Petition for writ of certiorari to the Court of Civil Appeals, 3d Supreme Judicial District, of Texas, denied. *Messrs. Scott Snodgrass, W. P. Dumas* and *John D. McCall* for petitioner. *Mr. Victor W. Bouldin* for respondent. Reported below: 182 S. W. 2d 849.

No. 1186. MADEIRENSE DO BRASIL, S/A *v.* STULMAN-EMRICK LUMBER CO. May 21, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Albert M. Parker* for petitioner. *Mr. Murry C. Becker* for respondent. Reported below: 147 F. 2d 399.

No. 1188. SUNRAY OIL CO. *v.* COMMISSIONER OF INTERNAL REVENUE. May 21, 1945. Petition for writ of

certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. John M. Wheeler* and *Edward Howell* for petitioner. *Assistant Solicitor General Cox, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key* and *J. Louis Monarch* for respondent. Reported below: 147 F. 2d 962.

No. 1211. MASON *v.* IMPERIAL IRRIGATION DISTRICT ET AL. May 21, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. Reported below: 146 F. 2d 1002.

No. 1223. COMMISSIONER OF INTERNAL REVENUE *v.* REPUBLIC COTTON MILLS. May 21, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Assistant Solicitor General Cox* for petitioner. *Messrs. John W. Townsend* and *J. Craig Peacock* for respondent. Reported below: 147 F. 2d 278.

No. 1227. RUSSELL, RECEIVER, *v.* ATLANTA FLOORING & INSULATION CO., INC. ET AL. May 21, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. H. A. Alexander* for petitioner. Reported below: 146 F. 2d 884.

No. 1140. BROOKS ET UX. *v.* DEWITT ET UX. May 21, 1945. Petition for writ of certiorari to the Supreme Court of Texas denied. *Mr. J. C. Hall* for petitioners. Reported below: 143 Tex. 122, 182 S. W. 2d 687.

No. 1146. HEARST MAGAZINES, INC. *v.* DE ACOSTA; and

No. 1157. BROWN *v.* DE ACOSTA. May 21, 1945. Petitions for writs of certiorari to the Circuit Court of Ap-

peals for the Second Circuit denied. MR. JUSTICE MURPHY is of opinion that certiorari should be granted. *Mr. Alfred H. Wasserstrom* for petitioner in No. 1146. *Messrs. Benjamin J. Rabin* and *Milton Diamond* for petitioner in No. 1157. *Messrs. Carl J. Austrian* and *Saul J. Lance* for respondent. Reported below: 146 F. 2d 408.

No. 1149. UNITED STATES *v.* WINEBRENNER; and
No. 1150. UNITED STATES *v.* LOOSE. May 21, 1945. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. MR. JUSTICE BLACK is of opinion that certiorari should be granted. *Solicitor General Fahy* for the United States. *Messrs. John G. Madden* and *Haveth E. Mau* for respondent in No. 1150. Reported below: 147 F. 2d 322.

No. 1160. FISHER *v.* MEDWEDEFF, TRUSTEE. May 21, 1945. Petition for writ of certiorari to the Court of Appeals of Maryland denied for the reason that application therefor was not made within the time provided by law. § 8 (a), Act of February 13, 1925 (43 Stat. 936, 940), 28 U. S. C. § 350. *Messrs. Leonard Weinberg* and *J. Paul Schmidt* for petitioner. Reported below: 40 A. 2d 360.

No. 1181. DISMAN *v.* SECURITIES & EXCHANGE COMMISSION. May 21, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Mr. Armwell L. Cooper* for petitioner. *Assistant Solicitor General Cox, Messrs. Chester T. Lane, Roger S. Foster, David K. Kadane* and *Arnold R. Ginsburg* for respondent. Reported below: 147 F. 2d 679.

No. 1205. Stubbs, Trustee in Bankruptcy, *v.* Fulton National Bank. May 21, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. Mr. Justice Douglas took no part in the consideration or decision of this application. *Mr. William A. Sutherland* for petitioner. *Mr. Marion Smith* for respondent. Reported below: 146 F. 2d 558.

No. 1129. Quinn *v.* Heinze, Warden. May 21, 1945. Petition for writ of certiorari to the Supreme Court of California denied. Reported below: 25 Cal. 2d 799, 154 P. 2d 875.

No. 1130. United States ex rel. McCann *v.* Thompson, Warden. May 21, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Gene McCann, pro se. Assistant Solicitor General Cox, Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl* and *Irving S. Shapiro* for respondent. Reported below: 148 F. 2d 341.

No. 1145. Sorenson *v.* Lee County District Court. May 21, 1945. Petition for writ of certiorari to the Supreme Court of Iowa denied.

No. 1151. Moore *v.* Bailey. May 21, 1945. Petition for writ of certiorari to the Supreme Court of Tennessee denied. *Mollie Moore, pro se. Mr. Campbell Yerger* for respondent.

No. 1154. Redmon *v.* Squier, Warden. May 21, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Danial Jay Redmon, pro se. Assistant Solicitor General Cox, Assistant*

Attorney General Tom C. Clark, Messrs. Robert S. Erdahl and *Irving S. Shapiro* for respondent. Reported below: 147 F. 2d 605.

No. 1232. CROCKETT *v.* ILLINOIS. May 21, 1945. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 1116. BONGIORNO *v.* RAGEN, WARDEN. May 21, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Charles Liebman* for petitioner. *George F. Barrett,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondent. Reported below: 146 F. 2d 349.

No. 1162. SPRUILL *v.* BALLARD ET AL. May 21, 1945. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied.

No. 866. TWISP MINING & SMELTING CO. *v.* CHELAN MINING CO. ET AL. See *ante,* p. 837.

No. —. ILLINOIS EX REL. PRICE *v.* RAGEN, WARDEN. May 28, 1945. Petition for writ of certiorari denied.

No. 1096. PIERCE OIL CORP. ET AL. *v.* UNITED STATES. May 28, 1945. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Eugene Untermyer, Edgar J. Goodrich* and *John A. Gage* for petitioners. *Assistant Solicitor General Cox, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key* and *J. Louis Monarch* for the United States. Reported below: 102 Ct. Cls. 360, 58 F. Supp. 648.

No. 1169. Massman Construction Co. *v.* United States. May 28, 1945. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Phil D. Morelock* and *Temple W. Seay* for petitioner. *Assistant Solicitor General Cox, Assistant Attorney General Shea, Messrs. Paul A. Sweeney* and *Jerome H. Simonds* for the United States. Reported below: 102 Ct. Cls. 699.

No. 1172. Laughlin *v.* Chief Justice and Associate Justices of the District Court of the United States for the District of Columbia. May 28, 1945. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. James J. Laughlin* for petitioner. *Assistant Solicitor General Cox, Assistant Attorney General Tom C. Clark, Mr. Robert S. Erdahl* and *Miss Beatrice Rosenberg* for respondents. Reported below: 145 F. 2d 700.

No. 1175. Union Pacific Railroad Co. *v.* Leet, Administratrix. May 28, 1945. Petition for writ of certiorari to the Supreme Court of California denied. *Messrs. Malcolm Davis* and *Thomas W. Bockes* for petitioner. *Messrs. George M. Naus* and *Clifton Hildebrand* for respondent. Reported below: 25 Cal. 2d 605, 155 P. 2d 42.

No. 1176. Union Pacific Railroad Co. *v.* Leet, Administratrix. May 28, 1945. Petition for writ of certiorari to the Supreme Court of California denied. *Messrs. Malcolm Davis* and *Thomas W. Bockes* for petitioner. *Messrs. George M. Naus* and *Clifton Hildebrand* for respondent. Reported below: 25 Cal. 2d 605, 155 P. 2d 42.

No. 1187. Kalodner, Judge, *v.* Webster Eisenlohr, Inc. May 28, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Hirsh W. Stalberg* for petitioner. *Mr. Paul D. Miller* for respondent. *Assistant Solicitor General Cox, Messrs. Roger S. Foster, Milton V. Freeman, Theodore L. Thau* and *David Ferber* filed a memorandum on behalf of the Securities & Exchange Commission, as *amicus curiae,* in support of the petition. Reported below: 145 F. 2d 316.

No. 1194. Black *v.* Richfield Oil Corp. May 28, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. John W. Preston, Oliver O. Clark* and *Irving M. Walker* for petitioner. *Mr. Leonard S. Lyon* for respondent. Reported below: 146 F. 2d 801.

No. 1195. North Kansas City Development Co. et al. *v.* Chicago, Burlington & Quincy Railroad Co. et al. May 28, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Henry N. Ess* and *Elton L. Marshall* for petitioners. *Messrs. J. L. Rice, W. S. Hogsett, Hale Houts, Andrew C. Scott, J. C. James, Walter McFarland* and *Eldon Martin* for respondents. Reported below: 147 F. 2d 161.

No. 1197. Miami Bridge Co. *v.* Railroad Commission of Florida. May 28, 1945. Petition for writ of certiorari to the Supreme Court of Florida denied. *Mr. Mitchell D. Price* for petitioner. *Mr. Lewis W. Petteway* for respondent. *Messrs. Robert H. Anderson* and *Alfred L. McCarthy* filed a brief, as *amici curiae,* in opposition. Reported below: 154 Fla. 906, 20 So. 2d 356.

No. 1200. Heller *v.* Commissioner of Internal Revenue. May 28, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Sidney M. Ehrman* for petitioner. *Assistant Solicitor General Cox, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key, J. Louis Monarch* and *Harold C. Wilkenfeld* for respondent. Reported below: 147 F. 2d 376.

No. 1210. Tamesa *v.* United States. May 28, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. A. L. Wirin* for petitioner. *Assistant Solicitor General Cox, Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 148 F. 2d 298.

No. 1222. Alsop et al. *v.* Pascucci. May 28, 1945. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Thomas M. Baker* and *Milton Conn* for petitioners. *Messrs. David A. Hart* and *George C. Gertman* for respondent. Reported below: 147 F. 2d 880.

No. 1225. Approved Dehydrating Co., Inc. *v.* Golden Eagle Farm Products, Inc. May 28, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. J. Bertram Wegman* for petitioner. *Mr. Maurice Rubinger* for respondent. Reported below: 147 F. 2d 359.

No. 1208. Mays *v.* Burgess et al. May 28, 1945. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. Mr. Jus-

tice Murphy and Mr. Justice Rutledge are of opinion that certiorari should be granted. Mr. Justice Reed and Mr. Justice Jackson took no part in the consideration or decision of this application. *Messrs. James A. Cobb, George E. C. Hayes, Leon A. Ransom, William H. Hastie* and *Thurgood Marshall* for petitioner. *Mr. Henry Gilligan* for respondents. Reported below: 147 F. 2d 869.

No. 1177. Mackall *v.* Washington Gas Light Co. May 28, 1945. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia. *Messrs. A. M. Goldstein* and *W. C. Sullivan* for petitioner. Reported below: 147 F. 2d 149.

No. 1185. Telfian *v.* Sanford, Warden. May 28, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Charles Telfian, pro se. Assistant Solicitor General Cox, Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl* and *Leon Ulman* for respondent. Reported below: 147 F. 2d 945.

No. —. Illinois ex rel. White *v.* Ragen, Warden. June 4, 1945. Petition for writ of certiorari denied.

No. 1092. California (In the matter of Estate of Lindquist) *v.* United States;

No. 1093. California (In the matter of the Estate of Walker) *v.* United States;

No. 1214. United States (In the matter of Estate of Lindquist) *v.* California; and

No. 1215. United States (In the matter of Estate of Walker) *v.* California. June 4, 1945. Petitions for writs of certiorari to the Supreme Court of California

denied. *Robert W. Kenny,* Attorney General of California, and *Clarence A. Linn,* Deputy Attorney General, for petitioner in Nos. 1092 and 1093. *Assistant Solicitor General Cox, Assistant Attorney General Shea, Messrs. Paul A. Sweeney* and *Walter J. Cummings, Jr.* for the United States. Reported below: Nos. 1092 and 1214, 25 Cal. 2d 697, 154 P. 2d 879; Nos. 1093 and 1215, 25 Cal. 2d 719, 154 P. 2d 891.

No. 1095. CREECH ET AL. *v.* UNITED STATES. June 4, 1945. Petition for writ of certiorari to the Court of Claims denied. *Mr. W. H. Poe* for petitioners. *Assistant Solicitor General Cox, Messrs. Joseph Edward Williams, Roger P. Marquis* and *Robert L. Stern* for the United States. Reported below: 102 Ct. Cls. 301.

No. 1123. STANDARD ACCIDENT INSURANCE CO. *v.* UNITED STATES. June 4, 1945. Petition for writ of certiorari to the Court of Claims denied. *Mr. Frank H. Myers* for petitioner. *Assistant Solicitor General Cox, Assistant Attorney General Shea* and *Mr. Paul A. Sweeney* for the United States. Reported below: 59 F. Supp. 407.

No. 1203. DILLMAN ET AL. *v.* UNITED STATES. June 4, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Riley Strickland* for petitioners. *Assistant Solicitor General Cox, Messrs. Joseph Edward Williams, Roger P. Marquis, John C. Harrington* and *Walter J. Cummings, Jr.* for the United States. Reported below: 146 F. 2d 572.

No. 1207. CITY OF PHILADELPHIA ET AL. *v.* UNITED STATES. June 4, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied.

Mr. Ernest Lowengrund for petitioners. *Assistant Solicitor General Cox, Messrs. Joseph Edward Williams, Roger P. Marquis* and *Robert L. Stern* for the United States. Reported below: 147 F. 2d 291.

No. 1216. 42ND ST. FOTO SHOP, INC. ET AL. *v.* NEW YORK STATE LABOR RELATIONS BOARD. June 4, 1945. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. Sol. A. Herzog* for petitioners. *Mr. Philip Feldblum* for respondent. Reported below: 268 App. Div. 849, 50 N. Y. S. 2d 674.

No. 1220. ARMOUR & CO. *v.* BOWLES, PRICE ADMINISTRATOR. June 4, 1945. Petition for writ of certiorari to the United States Emergency Court of Appeals denied. *Messrs. Donald R. Richberg, Charles J. Faulkner* and *George E. Leonard, Jr.* for petitioner. *Assistant Solicitor General Cox, Messrs. Richard H. Field, Nathaniel L. Nathanson* and *Jacob D. Hyman* for respondent. Reported below: 148 F. 2d 529.

No. 1221. OSWALD & HESS CO. *v.* BOWLES, PRICE ADMINISTRATOR. June 4, 1945. Petition for writ of certiorari to the United States Emergency Court of Appeals denied. *Mr. Benjamin M. Becker* for petitioner. *Assistant Solicitor General Cox* and *Mr. Richard H. Field* for respondent. Reported below: 148 F. 2d 543.

No. 1226. BATTLES, RECEIVER, *v.* BRANIFF AIRWAYS, INC. June 4, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Charles D. Turner* for petitioner. Reported below: 146 F. 2d 336.

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No. 1231. Wertz *v.* Village of Solon. June 4, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. R. A. Argabright* and *John M. Sprigg* for petitioner. *Mr. Ralph W. Jones* for respondent. Reported below: 148 F. 2d 63.

No. 1233. National Bronx Bank *v.* Commissioner of Internal Revenue. June 4, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Meyer D. Siegel* for petitioner. *Assistant Solicitor General Cox, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key, J. Louis Monarch* and *Mrs. Maryhelen Wigle* for respondent. Reported below: 147 F. 2d 651.

No. 1235. Nathanson *v.* Illinois. June 4, 1945. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. Wm. Scott Stewart* for petitioner. Reported below: 389 Ill. 311, 59 N. E. 2d 677.

No. 1240. Lorenza *v.* City of Cleveland. June 4, 1945. Petition for writ of certiorari to the Supreme Court of Ohio denied. *Mr. Harold T. Gassaway* for petitioner. *Mr. Joseph F. Smith* for respondent. Reported below: 144 Ohio St. 325, 58 N. E. 2d 771.

No. 1246. Estate of Marshall et al. *v.* Commissioner of Internal Revenue. June 4, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. James Marshall, Mark Eisner* and *Ferdinand Tannenbaum* for petitioners. *Assistant Solicitor General Cox, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key* and *J. Louis Monarch* for respondent. Reported below: 147 F. 2d 75.

No. 1248. Gault et al. *v.* Oklahoma ex rel. Cobb, Attorney General. June 4, 1945. Petition for writ of certiorari to the Criminal Court of Appeal of Oklahoma denied. *Mr. William Joseph Hulsey* and *Mrs. Lena Hulsey* for petitioners. Reported below: 146 P. 2d 133.

No. 1251. Western States Machine Co. *v.* S. S. Hepworth Co. June 4, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Albert C. Johnston* and *Nelson Littell* for petitioner. *Mr. Charles H. Howson* for respondent. Reported below: 147 F. 2d 345.

No. 1252. Texas & Pacific Railway Co. *v.* Riley, Administratrix. June 4, 1945. Petition for writ of certiorari to the Court of Civil Appeals, Sixth Supreme Judicial District, of Texas, denied. *Messrs. Henry D. Akin, M. E. Clinton* and *J. T. Suggs* for petitioner. *Mr. S. P. Jones* for respondent. Reported below: 183 S. W. 2d 991.

No. 1256. Boston & Maine Railroad *v.* Cabana. June 4, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Francis P. Garland* for petitioner. *Mr. Philip Nichols* for respondent. Reported below: 148 F. 2d 150.

No. 1268. Dudley et al., constituting the Stockholders' Protective Committee, *v.* Mealey, Trustee, et al. June 4, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. George C. Vournas* for petitioners. *Mr. Charles E. Nichols* for respondents. Reported below: 147 F. 2d 268.

No. 1255. Bank of New York *v.* Griffith. June 4, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. The Chief Justice took no part in the consideration or decision of this application. *Mr. George W. Martin* for petitioner. *Louise A. Griffith, pro se.* Reported below: 147 F. 2d 899.

No. 1262. Wills *v.* Supreme Court of Iowa. June 4, 1945. Petition for writ of certiorari to the Supreme Court of Iowa denied. Reported below: 18 N. W. 2d 81.

No. 1290. Flannigan *v.* Ragen, Warden. June 4, 1945. Petition for writ of certiorari to the Circuit Court of Will County, Illinois, denied.

No. 1325. Brigance *v.* California; and
No. 1333. Whitson *v.* California. June 4, 1945. The petitions for writs of certiorari to the Supreme Court of California are denied. The stay orders heretofore granted are vacated. Reported below: 25 Cal. 2d 593, 154 P. 2d 867.

No. —. Gobin *v.* Clarke. June 11, 1945. Petition for writ of certiorari denied.

No. 1192. Lount et al. *v.* Hiner et al. June 11, 1945. Petition for writ of certiorari to the Supreme Court of Arizona denied. *Mr. Thomas O. Marlar* for petitioners. *Mr. Charles L. Strouss* for respondents. Reported below: 154 P. 2d 372.

No. 1217. Ward *v.* Auctioneers Association of Southern California et al. June 11, 1945. Petition

for writ of certiorari to the District Court of Appeal, 2nd Appellate District, of California, denied. *Messrs. Clarence A. Linn* and *Max Radin* for petitioner. *Mr. Maurice Schulman* for respondents. *Robert W. Kenny,* Attorney General of California, as *amicus curiae,* in support of the petition. Reported below: 67 Cal. App. 2d 183, 153 P. 2d 765.

No. 1224. Ray et al., doing business as Superior Uniform Cap & Shirt Mfg. Co., *v.* Bowles, Price Administrator. June 11, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Morris Lavine* for petitioners. *Assistant Solicitor General Cox* and *Mr. David London* for respondent. Reported below: 146 F. 2d 652.

No. 1239. Sohmer *v.* United States. June 11, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Max Chopnick* for petitioner. *Assistant Solicitor General Cox, Assistant Attorney General Tom C. Clark, Mr. Robert S. Erdahl* and *Miss Beatrice Rosenberg* for the United States.

No. 1247. Vandenberge et al. *v.* Commissioner of Internal Revenue. June 11, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Leroy G. Denman* for petitioners. *Assistant Solicitor General Cox, Assistant Attorney General Samuel O. Clark Jr., Messrs. Sewall Key* and *J. Louis Monarch* for respondent. Reported below: 147 F. 2d 167.

No. 1258. Carothers et al., doing business as All-right Parking System, Ltd. *v.* Bowles, Price Administrator. June 11, 1945. Petition for writ of certiorari to

the United States Emergency Court of Appeals denied. *Mr. Walter F. Brown* for petitioners. *Assistant Solicitor General Cox* and *Mr. Richard H. Field* for respondent. Reported below: 148 F. 2d 554.

No. 1265. CHAPMAN PRICE STEEL CO. *v.* COMMISSIONER OF INTERNAL REVENUE. June 11, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Loren E. Souers* and *Albert B. Arbaugh* for petitioner. *Assistant Solicitor General Cox, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key, J. Louis Monarch* and *Newton K. Fox* for respondent. Reported below: 146 F. 2d 189.

No. 1170. IN RE SLATTERY. June 11, 1945. Petition for writ of certiorari to the Supreme Court of Michigan denied. *Mr. Wm. Henry Gallagher* for petitioner. *Messrs. Kim Sigler, Victor C. Anderson* and *H. H. Warner* were on a brief in opposition. Reported below: 310 Mich. 458, 17 N. W. 2d 251.

No. 1193. WISCONSIN ALUMNI RESEARCH FOUNDATION *v.* VITAMIN TECHNOLOGISTS, INC. ET AL. June 11, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. George I. Haight* and *Frank Parker Davis* for petitioner. *Messrs. R. Welton Whann* and *Robert M. McManigal* for respondents. Reported below: 146 F. 2d 941.

No. 1249. LEHRER *v.* NICKOLOPULOS. June 11, 1945. Petition for writ of certiorari to the Court of Errors and Appeals of New Jersey denied for the reason that application therefor was not made within the time provided by law. § 8 (a), Act of February 13, 1925 (43 Stat. 936, 940),

28 U.S.C. § 350. *Mr. Joseph Steiner* for petitioner. *Mr. Ernest C. Lum* for respondent. Reported below: 132 N. J. L. 461, 40 A. 2d 794.

No. 1260. Sheridan et al. *v.* Evans et al. June 11, 1945. Petition for writ of certiorari to the Supreme Court of Tennessee denied. Reported below: 186 S. W. 2d 911.

No. 1332. Greenberg *v.* New York. June 11, 1945. The application for a stay is denied. Petition for writ of certiorari to the Appellate Division of the Supreme Court of New York denied. *Messrs. Herbert Goldmark* and *Joseph K. Guerin* for petitioner. Reported below: 268 App. Div. 1028, 52 N. Y. S. 2d 942.

No. 1213. Glick Brothers Lumber Co. et al. *v.* Bowles, Price Administrator. June 11, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied for failure to comply with par. 2 of Rule 38 of the Rules of this Court. The brief filed in support of the petition is not "direct and concise" as required by that rule. *Mr. Morris Lavine* for petitioners. *Assistant Solicitor General Cox* and *Mr. David London* for respondent. Reported below: 146 F. 2d 566.

No. 1038. Williams *v.* Olson, Warden. June 11, 1945. Petition for writ of certiorari to the Supreme Court of Nebraska denied. *Leslie Williams, pro se. Walter R. Johnson,* Attorney General of Nebraska, *H. Emerson Kokjer,* Deputy Attorney General, and *Robert A. Nelson,* Assistant Attorney General, for respondent. Reported below: 145 Neb. 282, 16 N. W. 2d 178.

No. 1178. Clark *v.* State of Washington. June 11, 1945. Petition for writ of certiorari to the Supreme Court of Washington denied. *Mr. Lucius G. Nash* for petitioner. Reported below: 21 Wash. 2d 774, 153 P. 2d 297.

No. 1198. Palmer *v.* Sanford, Warden. June 11, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Richard Alfred Palmer, pro se. Assistant Solicitor General Cox, Assistant Attorney General Tom C. Clark, Mr. Robert S. Erdahl* and *Miss Beatrice Rosenberg* for respondent. Reported below: 147 F. 2d 549.

No. 1230. Mrozik *v.* Johnston, Warden. June 11, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Edward R. Mrozik, pro se. Assistant Solicitor General Cox, Assistant Attorney General Tom C. Clark, Mr. Robert S. Erdahl* and *Miss Beatrice Rosenberg* for respondent. Reported below: 148 F. 2d 149.

No. 1318. Shaw *v.* Illinois. June 11, 1945. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 1319. De Freitas *v.* Martin, Warden. June 11, 1945. Petition for writ of certiorari to the Court of Appeals of New York denied.

No. 1334. Haines *v.* Illinois. June 11, 1945. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 1163. GUERTLER *v.* UNITED STATES. June 11, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Peter Guertler, pro se. Assistant Solicitor General Cox, Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl* and *Leon Ulman* for the United States. Reported below: 147 F. 2d 796.

No. 884. REILLY ET AL. *v.* MILLIS. June 18, 1945. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Robert E. Lynch, Nicholas J. Chase* and *Frank Michels* for petitioners. *Solicitor General Fahy, Messrs. Alvin J. Rockwell, David Findling, Dominick L. Manoli* and *Miss Ruth Weyand* for respondent. Reported below: 144 F. 2d 259.

No. 1241. D. AND W. LINES, INC. *v.* GARFIELD, ADMINISTRATRIX;

No. 1242. D. AND W. LINES, INC. *v.* BAKER; and

No. 1243. D. AND W. LINES, INC. *v.* WARD. June 18, 1945. Petition for writs of certiorari to the Superior Court of Massachusetts denied. *Mr. Herbert S. Avery* for petitioner. Reported below: See 317 Mass. 674, 59 N. E. 2d 287.

No. 1261. HOLT *v.* TEXAS-NEW MEXICO PIPELINE CO. June 18, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Theodore Mack* for petitioner. *Mr. Maury Kemp* for respondent. Reported below: 145 F. 2d 862.

No. 1279. EMERY ET AL. *v.* ORLEANS LEVEE BOARD. June 18, 1945. Petition for writ of certiorari to the Supreme Court of Louisiana denied. *Mr. W. H. Talbot* for

petitioners. *Messrs. Hugh M. Wilkinson* and *Severn T. Darden* for respondent. Reported below: 207 La. 386, 21 So. 2d 418.

No. 1280. Lukin, Administratrix, et al. *v.* Chatterton. June 18, 1945. Petition for writ of certiorari to the Supreme Court of Montana denied. *Mr. E. J. McCabe* for petitioners. *Mr. H. C. Hall* for respondent. Reported below: 154 P. 2d 798.

No. 1281. Martin et al. *v.* Schillo et al. June 18, 1945. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. Edward H. S. Martin* for petitioners. *Mr. S. Ashley Guthrie* for respondents. Reported below: 389 Ill. 607, 60 N. E. 2d 392.

No. 1283. Jerry Vogel Music Co., Inc. *v.* Forster Music Publishers, Inc. June 18, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Arthur F. Driscoll* for petitioner. *Mr. Edwin P. Kilroe* for respondent. Reported below: 147 F. 2d 614.

No. 1284. Stonesifer et vir *v.* Swanson et al., Executors, et al. June 18, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Charles R. Aiken* for petitioners. *Mr. Matthias Concannon* for respondents. Reported below: 146 F. 2d 671.

No. 1286. Wisconsin Public Service Corp. *v.* Federal Power Commission; and

No. 1297. Wisconsin *v.* Federal Power Commission. June 18, 1945. Petitions for writs of certiorari to

the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. J. G. Hardgrove* and *Bert Vandervelde* for petitioner in No. 1286. *John E. Martin,* Attorney General of Wisconsin, and *H. T. Ferguson,* Assistant Attorney General, for petitioner in No. 1297. *Assistant Solicitor General Cox, Assistant Attorney General Shea, Messrs. Chester T. Lane, Paul A. Sweeney, Charles V. Shannon* and *Howard E. Wahrenbrock* for respondent. Reported below: 147 F. 2d 743.

No. 1289. UNITED STATES EX REL. ZUCKER *v.* OSBORNE, DIRECTOR. June 18, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Julien Cornell* for petitioner. *Assistant Solicitor General Cox, Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl* and *Irving S. Shapiro* for respondent. Reported below: 147 F. 2d 135.

No. 1291. ROBERTS *v.* UNITED STATES. June 18, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. G. Ernest Jones* for petitioner. *Assistant Solicitor General Cox, Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 148 F. 2d 140.

No. 1295. CLARION OIL CO. *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 1371. COMMISSIONER OF INTERNAL REVENUE *v.* CLARION OIL CO. June 18, 1945. Petitions for writs of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Ellsworth C. Alvord* and *Floyd F. Toomey* for petitioner in No. 1295. *Assistant Solicitor General Cox, Assistant Attorney Gen-*

eral Samuel O. Clark, Jr., Messrs. Sewall Key, J. Louis Monarch and *Hilbert P. Zarky* for the Commissioner of Internal Revenue. Reported below: 148 F. 2d 671.

No. 1296. WAREHIME, DOING BUSINESS AS NEZEN MILK FOOD CO., ET AL. *v.* VARNEY, MILK MARKET AGENT, WAR FOOD ADMINISTRATION, ET AL. June 18, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Paul W. Walter* for petitioners. *Assistant Solicitor General Cox, Assistant Attorney General Tom C. Clark, Mr. Robert S. Erdahl* and *Miss Beatrice Rosenberg* for respondents. Reported below: 147 F. 2d 238.

No. 1298. ESTATE OF CHEW *v.* COMMISSIONER OF INTERNAL REVENUE. June 18, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Robert A. Littleton* and *Clare C. Clark* for petitioner. *Assistant Solicitor General Cox, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key, J. Louis Monarch, F. E. Youngman* and *Walter J. Cummings, Jr.* for respondent. Reported below: 148 F. 2d 76.

No. 1299. THE JULIUS H. BARNES ETC. *v.* THE CALATCO NO. 2 ET AL.; and

No. 1300. ERIE & ST. LAWRENCE CORP. ETC. *v.* THE CALATCO NO. 2 ET AL. June 18, 1945. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Wilbur E. Dow, Jr.* and *William G. Symmers* for petitioner. *Messrs. Christopher E. Heckman* and *James A. Martin* for respondents. Reported below: 147 F. 2d 545.

No. 1302. ELINE'S, INC. *v.* GAYLORD CONTAINER CORP. June 18, 1945. Petition for writ of certiorari to

the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Van B. Wake* for petitioner. *Mr. Malcolm K. Whyte* for respondent. *Solicitor General Fahy, Messrs. J. Edward Williams, Chester T. Lane* and *Roger P. Marquis* filed a memorandum for the United States, as *amicus curiae*. Reported below: 148 F. 2d 33.

No. 1303. ELINE'S, INC. *v.* LAKESIDE LABORATORIES, INC. June 18, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Van B. Wake* for petitioner. *Mr. Malcolm K. Whyte* for respondent. *Solicitor General Fahy, Messrs. J. Edward Williams, Chester T. Lane* and *Roger P. Marquis* filed a memorandum for the United States, as *amicus curiae*. Reported below: 148 F. 2d 33.

No. 1306. HUMBLE OIL & REFINING CO. *v.* EIGHTH REGIONAL WAR LABOR BOARD ET AL. June 18, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Rex G. Baker* and *John H. Crooker* for petitioner. *Assistant Solicitor General Cox, Assistant Attorney General Shea, Messrs. Paul A. Sweeney* and *Abraham J. Harris* for respondents. Reported below: 145 F. 2d 462.

No. 1312. JOHN A. WATHEN DISTILLERY CO. *v.* COMMISSIONER OF INTERNAL REVENUE. June 18, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Robert N. Miller, Homer Hendricks* and *John E. Tarrant* for petitioner. *Solicitor General Fahy, Assistant Attorney General Samuel O. Clark, Jr., Messrs. Sewall Key, Chester T. Lane, Robert N. Anderson* and *Mrs. Muriel S. Paul* for respondent. Reported below: 147 F. 2d 998.

No. 1314. Ascher *v.* United States. June 18, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Denis M. Hurley* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl* and *Leon Ulman* for the United States. Reported below: 147 F. 2d 544.

No. 1285. Fournace *v.* Bowles, Price Administrator. June 18, 1945. Petition for writ of certiorari to the United States Emergency Court of Appeals denied. *Messrs. Clyde P. Miller* and *Albert Stump* for petitioner. *Solicitor General Fahy* and *Mr. Richard H. Field* for respondent. Reported below: 148 F. 2d 97.

No. 1315. Massachusetts et al. *v.* New York, New Haven & Hartford Railroad Co.; and

No. 1316. Chapin et al., Executive Committee for Institutional Group, *v.* New York, New Haven & Hartford Railroad Co. et al. June 18, 1945. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Clarence A. Barnes,* Attorney General of Massachusetts, *George P. Drury,* Assistant Attorney General, and *Mr. Jacob Spiegel* for the State of Massachusetts, and *Messrs. Henry E. Foley* and *Robert H. Davison* for the City of Boston et al., petitioners in No. 1315. *Messrs. Henry W. Anderson* and *Curtiss K. Thompson* for petitioners in No. 1316. *Messrs. John W. Davis, Edwin S. S. Sunderland, Judson C. McLester, Jr., James L. Homire, John L. Hall, James Garfield, Fred N. Oliver, Willard P. Scott, William A. W. Stewart, M'Cready Sykes, H. C. McCollom, Edward E. Watts, Jr., George E. Beers, Jesse E. Waid* and *Edmund Ruffin Beckwith* for respondents. Reported below: 147 F. 2d 40.

No. 1320. MILLARD *v.* UNITED STATES. June 18, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Jno. W. Harrell* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 148 F. 2d 154.

No. 1327. SAVAGE ET AL. *v.* LORRAINE ET AL. June 18, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Earl C. Demoss* for petitioners. *Messrs. Oliver O. Clark* and *Mark L. Herron* for respondents. Reported below: 148 F. 2d 818.

No. 1331. HEINE *v.* UNITED STATES. June 18, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. George Boochever* 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: 149 F. 2d 485.

No. 1342. RANDALL *v.* UNITED STATES. June 18, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. G. Ernest Jones* for petitioner. Reported below: 148 F. 2d 234.

No. 1369. BRATCHER *v.* UNITED STATES. June 18, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Milton Kramer* and *Joseph A. Fanelli* for petitioner. Reported below: 149 F. 2d 742.

No. 1374. Di Melia *v.* Bowles, Price Administrator, et al. June 18, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. John P. Brennan* for petitioner. Reported below: 148 F. 2d 725.

No. 1282. Hottenstein et al. *v.* York Ice Machinery Corp. June 18, 1945. On consideration of the suggestion of a diminution of the record and a motion for a writ of certiorari in that relation, the motion for certiorari is denied. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Arthur Garfield Hays* and *George D. Hornstein* for petitioners. *Messrs. Robert H. Richards* and *Aaron Finger* for respondent. Reported below: 146 F. 2d 835.

No. 1294. Jones & Laughlin Steel Corp. *v.* National Labor Relations Board. June 18, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. The Chief Justice and Mr. Justice Roberts took no part in the consideration or decision of this application. *Messrs. Alfred C. Kammer* and *John C. Bane, Jr.* for petitioner. *Assistant Solicitor General Cox, Mr. Alvin J. Rockwell, Misses Ruth Weyand* and *Ida Klaus* for respondent. Reported below: 146 F. 2d 833.

No. 1270. Spriggs *v.* State Board of Law Examiners. June 18, 1945. The application for a stay is denied. Petition for writ of certiorari to the Supreme Court of Wyoming denied. Reported below: 155 P. 2d 285.

No. 1199. Young *v.* Sanford, Warden. June 18, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Louis David*

Young, pro se. Assistant Solicitor General Cox, Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl and *Leon Ulman* for respondent. Reported below: 147 F. 2d 1007.

No. 1209. BURALL *v.* JOHNSTON, WARDEN. June 18, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Wayne M. Collins* for petitioner. *Assistant Solicitor General Cox, Assistant Attorney General Tom C. Clark, Mr. Robert S. Erdahl* and *Miss Beatrice Rosenberg* for respondent. Reported below: 146 F. 2d 230.

No. 1212. BANGHART *v.* UNITED STATES. June 18, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Basil Banghart, pro se. Assistant Solicitor General Cox, Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 148 F. 2d 521.

No. 1228. COFFIN *v.* REICHARD. June 18, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Lyman Glover Coffin, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Mr. Robert S. Erdahl* and *Miss Beatrice Rosenberg* for respondent. Reported below: 148 F. 2d 278.

No. 1244. OXMAN *v.* UNITED STATES. June 18, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Maxwell P. Oxman, pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl* and *Leon Ulman* for the United States. Reported below: 148 F. 2d 750.

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No. 1250. Coghlan *v.* United States. June 18, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Donald H. Latshaw* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl* and *Leon Ulman* for the United States. Reported below: 147 F. 2d 233.

No. 1253. Davis *v.* United States. June 18, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Weldon G. Starry* for petitioner. *Assistant Solicitor General Cox, Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 148 F. 2d 203.

No. 1288. Noble *v.* Botkin, Superintendent. June 18, 1945. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. James J. Laughlin* for petitioner. *Assistant Solicitor General Cox, Assistant Attorney General Tom C. Clark, Mr. Robert S. Erdahl* and *Miss Beatrice Rosenberg* for respondent.

No. 1292. Williams *v.* United States. June 18, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *James Nevils Williams, pro se. Assistant Solicitor General Cox, Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl* and *Irving S. Shapiro* for the United States. Reported below: 148 F. 2d 923.

No. 1301. Lee *v.* Alabama. June 18, 1945. Petition for writ of certiorari to the Supreme Court of Alabama denied. Reported below: 246 Ala. 343, 20 So. 2d 471.

No. 1304. DIGGS *v.* WELCH, SUPERINTENDENT. June 18, 1945. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. Reported below: 148 F. 2d 667.

No. 1311. DUNBAR *v.* UNITED STATES. June 18, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Floyd Dunbar, 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: 149 F. 2d 151.

No. 1340. WOODWARD *v.* RAGEN, WARDEN. June 18, 1945. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 1341. THUNDER *v.* HUNTER, WARDEN. June 18, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. Reported below: 149 F. 2d 578.

No. 1353. DE MARCOS *v.* OVERHOLSER, SUPERINTENDENT. June 18, 1945. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Wm. E. Leahy, Nicholas J. Chase* and *James F. Reilly* for petitioner. *Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Mr. Robert S. Erdahl* and *Miss Beatrice Rosenberg* for respondent. Reported below: 149 F. 2d 23.

No. 1356. BONHAM *v.* RAGEN, WARDEN. June 18, 1945. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 1358. Bailey *v.* Florida. June 18, 1945. Petition for writ of certiorari to the Supreme Court of Florida denied. Reported below: 154 Fla. 819, 21 So. 2d 714.

No. 1363. Dorsey *v.* Gill, Superintendent. June 18, 1945. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Ernest F. Dorsey, Jr., pro se. Solicitor General Fahy, Assistant Attorney General Tom C. Clark, Messrs. Robert S. Erdahl* and *Irving S. Shapiro* for respondent. Reported below: 148 F. 2d 857.

No. 1370. Nichols *v.* Niierstheimer, Warden. June 18, 1945. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 1378. Swanson *v.* Ragen, Warden. June 18, 1945. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 1368. Stewart *v.* Ragen, Warden. June 18, 1945. 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. 1377. Roscoe *v.* United States. June 18, 1945. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied for the reason that application therefor was not made within the time provided by law. Rule XI of the Criminal Appeals Rules, 292 U. S. 665–66; *Coy* v. *United States,* 316 U. S. 342. *George Roscoe, pro se. Solicitor General Fahy* for the United States. Reported below: 148 F. 2d 333.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM APRIL 24, 1945, THROUGH JUNE 18, 1945.

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No. 907. PARK, CHAIRMAN, *v.* GROUP OF INSTITUTIONAL INVESTORS ET AL. June 11, 1945. MR. JUSTICE JACKSON and MR. JUSTICE RUTLEDGE took no part in the consideration or decision of these applications. 324 U. S. 857.

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No. 1208. Mays *v.* Burgess et al. June 18, 1945. Mr. Justice Roberts, Mr. Justice Reed, and Mr. Justice Jackson took no part in the consideration or decision of this application.

No. 661, October Term, 1934. Awotin *v.* Atlas Exchange National Bank. See *ante,* p. 843.

No. 663. United States et al. *v.* Capital Transit Co. et al. June 18, 1945. The petitions for rehearing and the petition for a modification of the opinion are denied. *Ante,* p. 357.

No. 815. Securities & Exchange Commission *v.* Okin. See *ante,* p. 843.

No. 950. Superior Coal Co. *v.* Commissioner of Internal Revenue. June 18, 1945. The motion for leave to file petition for rehearing is denied for want of jurisdiction. *R. Simpson & Co.* v. *Commissioner,* 321 U. S. 225. 324 U. S. 864.

No. 721. Jewell Ridge Coal Corporation *v.* Local No. 6167, United Mine Workers of America. June 18, 1945. Petition for rehearing denied.

Mr. Justice Jackson, concurring:

Since announcement of a mere denial of this petition for rehearing might be interpreted to rest upon any one of several grounds, I consider it appropriate to disclose the limited grounds on which I concur.

The unusual feature of the petition in this case is that it suggests to the Court a question as to the qualification of one of the Justices to take part in the decision of the cause. This petition is addressed to all of the Court and must either be granted or denied in the name of the Court and on the responsibility of all of the Justices. In my opinion the complaint is one which cannot properly be addressed to the Court as a whole and for that reason I concur in denying it.

No statute prescribes grounds upon which a Justice of this Court may be disqualified in any case. The Court itself has never undertaken by rule of Court or decision to formulate any uniform practice on the subject. Because of this lack of authoritative standards it appears always to have been considered the responsibility of each Justice to determine for himself the propriety of withdrawing in any particular circumstances. Practice of the Justices over the years has not been uniform, and the diversity of attitudes to the question doubtless leads to some confusion as to what the bar may expect and as to whether the action in any case is a matter of individual or collective responsibility.

There is no authority known to me under which a majority of this Court has power under any circumstances to exclude one of its duly commissioned Justices from sitting or voting in any case. As to the other and usual grounds, applications for rehearing in this Court, as in other bodies,

are addressed to the majority which promulgated the decision. This is so formulated by our Rule 33. It is always obvious that unless one or more of them is willing to reconsider his position no good can come of reargument. Hence, being in dissent, I have no voice as to rehearing, except that I continue to adhere to the dissent.

Because of these considerations I concur in denial of the petition.

MR. JUSTICE FRANKFURTER concurs in this statement.

No. 467. ESTATE OF GARRETT ET AL. *v.* GREENBERG, TRUSTEE, ET AL. June 18, 1945. 323 U. S. 766.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS, AT CONCLUSION OF OCTOBER TERMS—1942, 1943 AND 1944

	ORIGINAL			APPELLATE			TOTALS		
Terms	1942	1943	1944	1942	1943	1944	1942	1943	1944
Number of cases on dockets	15	11	11	1,103	1,107	1,382	1,118	1,118	1,393
Cases disposed of during terms	4	1	0	992	960	1,249	997	961	1,249
Number of cases remaining on dockets	10	10	11	111	147	133	121	157	144

	TERMS		
	1942	1943	1944
Distribution of cases disposed of during terms:			
Original cases	5	1	0
Appellate cases on merits	261	211	278
Petitions for certiorari	731	749	971
Distribution of cases remaining on dockets:			
Original cases	10	10	11
Appellate cases on merits	75	85	86
Petitions for certiorari	36	62	47

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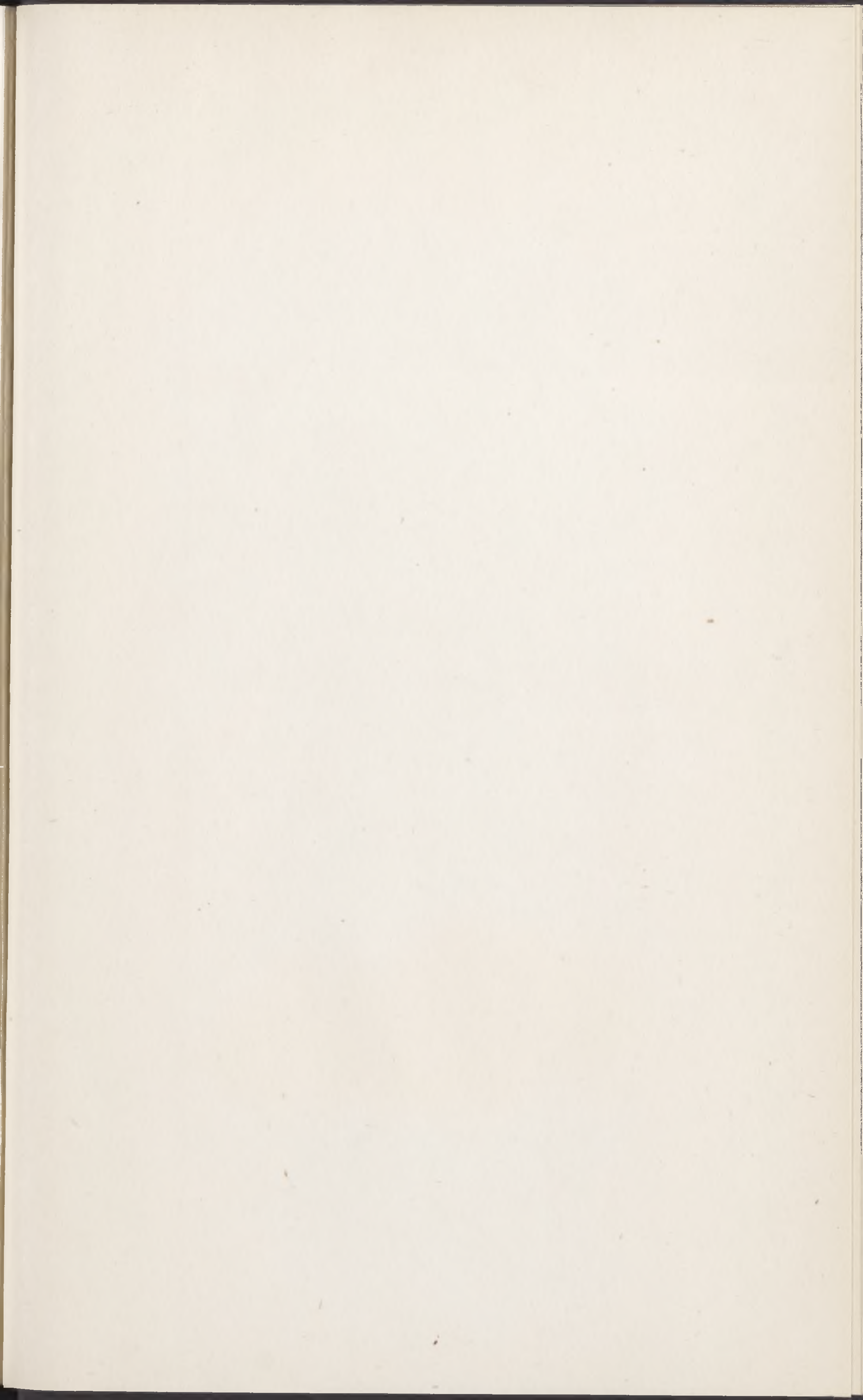

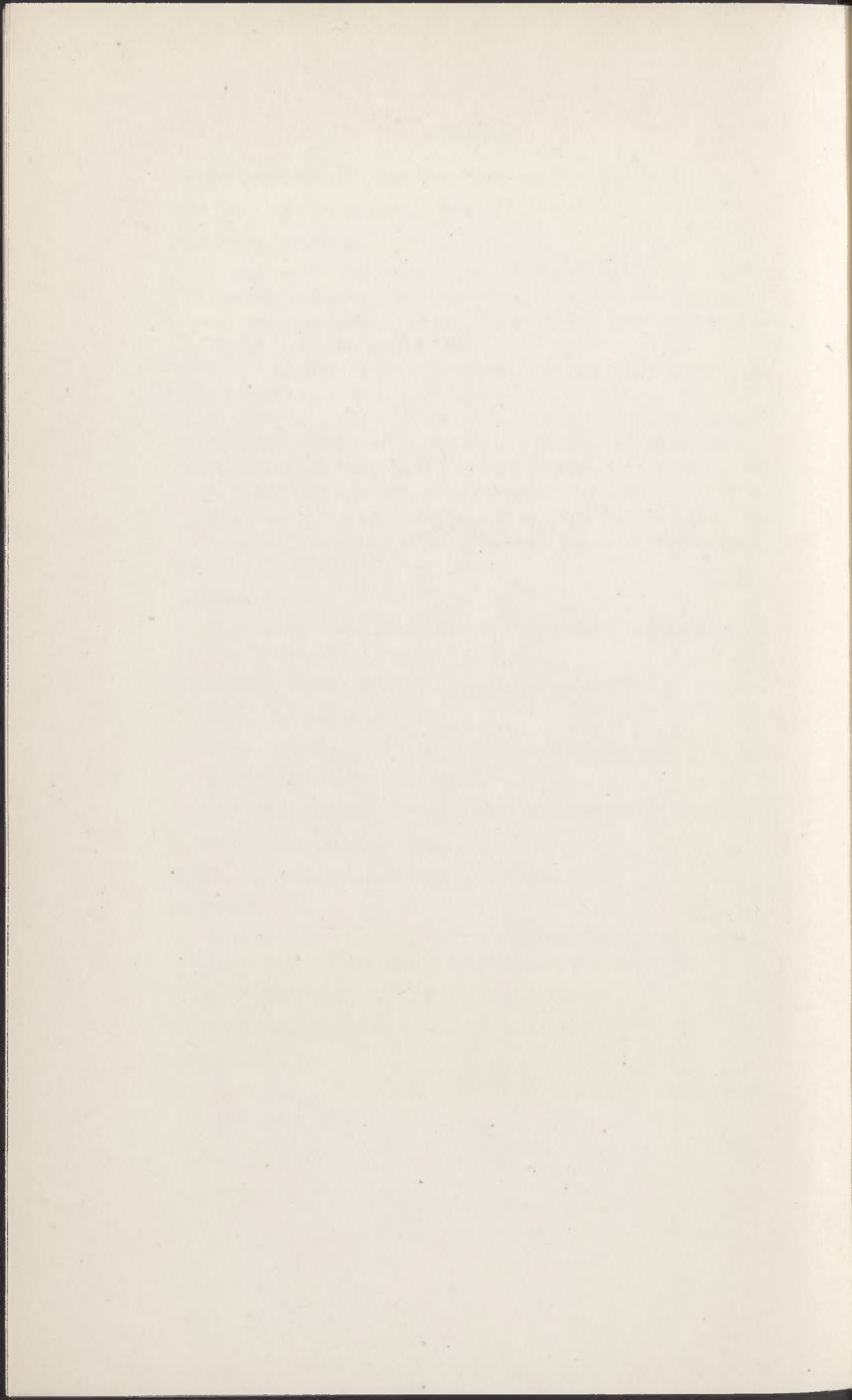

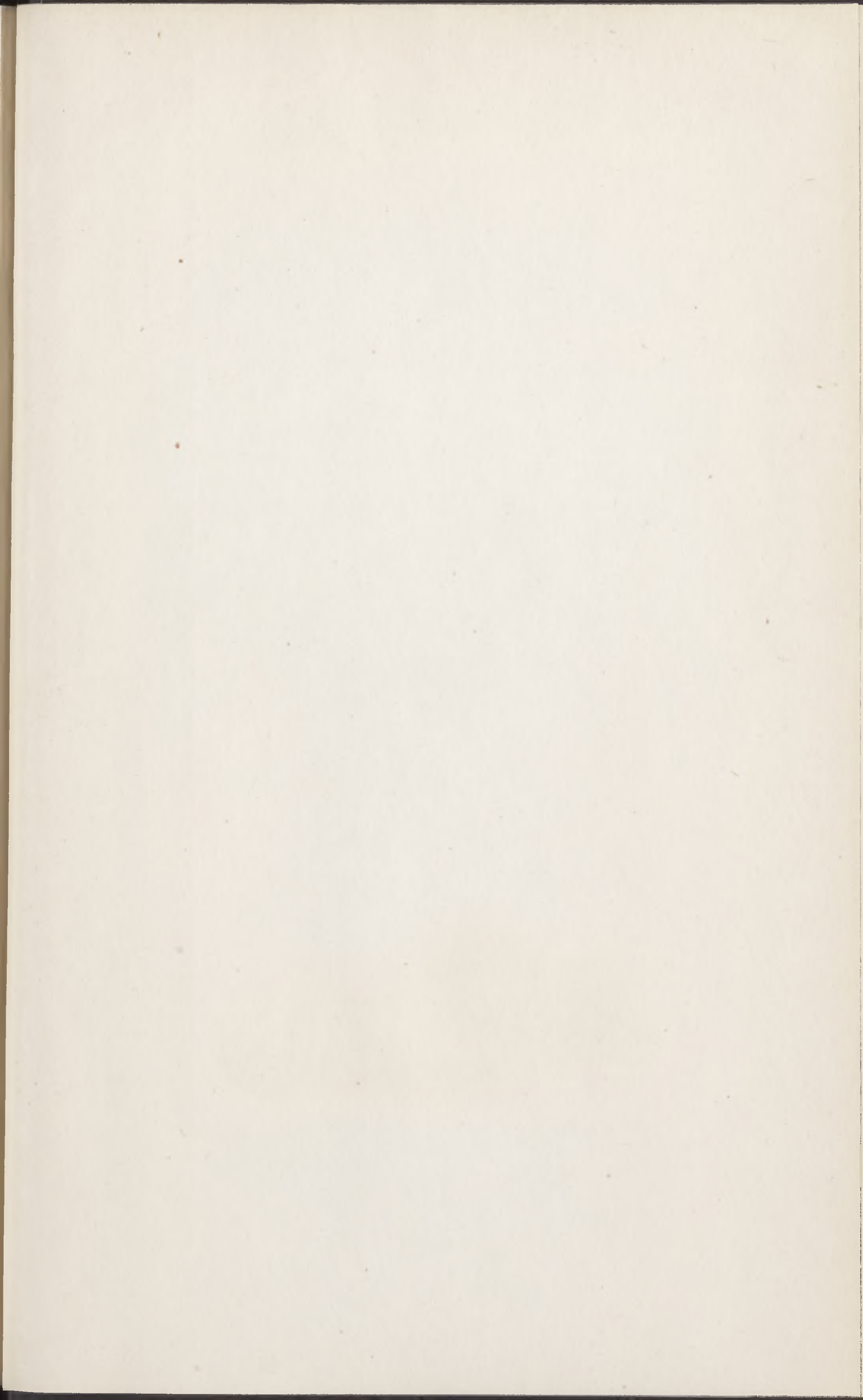

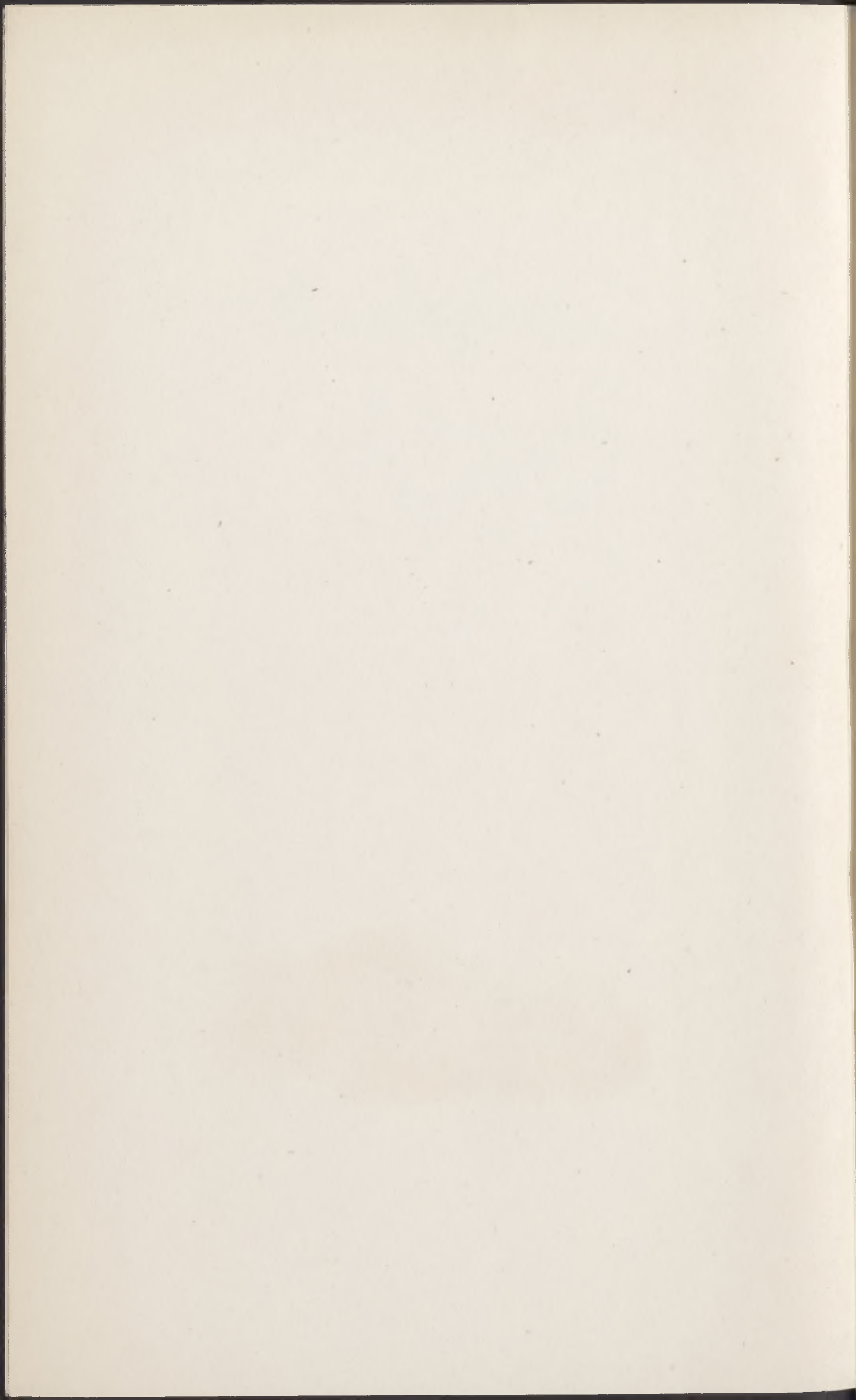

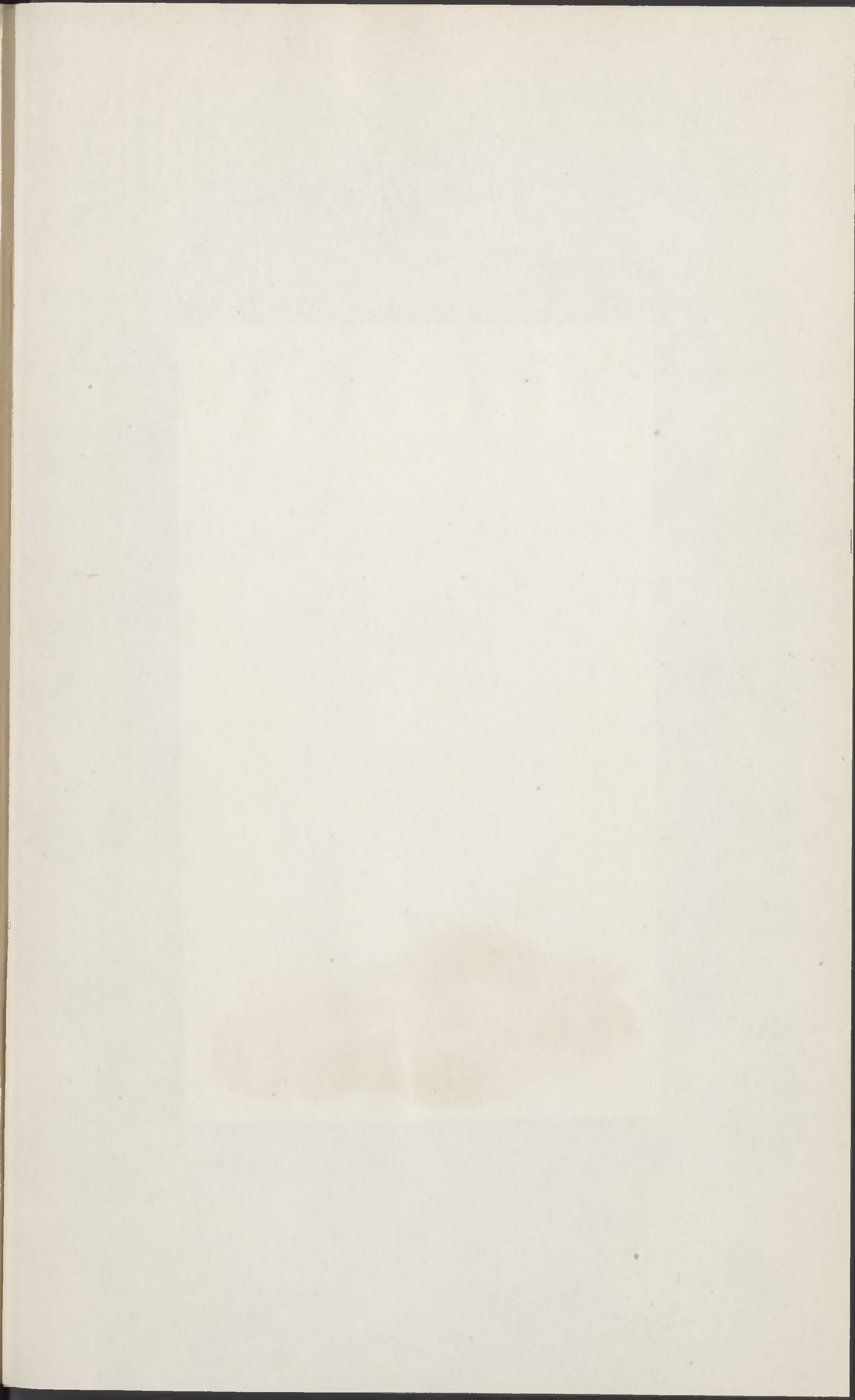

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