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UNITED STATES REPORTS

VOLUME 336

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1948

FROM JANUARY 17, 1949 (CONCLUDED) THROUGH MAY 9, 1949

WALTER WYATT
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ERRATUM.

308 U. S. 189, third line from bottom of page, "28 F. 2d" should be "28 F. Supp."

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

FRED M. VINSON, Chief 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.
HAROLD H. BURTON, Associate Justice.

TOM C. CLARK, Attorney General.
PHILIP B. PERLMAN, Solicitor General.
CHARLES ELMORE CROPLEY, Clerk.
WALTER WYATT, Reporter.
THOMAS ENNALLS WAGGAMAN, Marshal.
HELEN NEWMAN, Librarian.

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, HAROLD H. BURTON, Associate Justice.

For the Fourth Circuit, FRED M. VINSON, 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, FRED M. VINSON, Chief Justice.

October 14, 1946.

(For next previous allotment, see 328 U. S. p. IV.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1948.

LEIMAN ET AL. *v.* GUTTMAN ET AL.

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

No. 88. Argued December 13, 1948.—Decided January 17, 1949.

1. Under § 221 (4) of Ch. X of the Bankruptcy Act, 11 U. S. C. § 621, the bankruptcy court has exclusive jurisdiction over claims for services as attorneys for a stockholders' protective committee in a corporate reorganization proceeding—including claims under a private escrow agreement for services which benefited a single class of security holders and are compensable by them and not from the estate. Pp. 2–10.

   (a) The control of the bankruptcy court is not limited to fees and allowances payable out of the estate. P. 5.

   (b) Section 221 (4) applies to "all payments" for services "in connection with" the proceeding or "in connection with" the plan and "incident to" the reorganization, whoever pays them. Pp. 5–8.

   (c) Payments under a private arrangement expressed in an escrow agreement with a committee representing a smaller or more intimate group than a conventional committee are not excepted. P. 8.

2. Since the determination of allowances has been made an integral part of the process of confirmation of a corporate reorganization which is exclusively entrusted to the bankruptcy court under Chapter X, it may not be delegated to a state court. P. 9.

3. In a reorganization proceeding under Chapter X, the bankruptcy court erroneously ruled that it had no jurisdiction over legal fees arising out of private arrangements with a stockholders' protective committee and not payable out of the estate. No appeal was taken and the time allowed for appeal had expired. *Held:* The

claimants may still apply to the bankruptcy court for an allowance, whether or not the final decree under § 228 has been entered. Pp. 9–10.

297 N. Y. 201, 78 N. E. 2d 472, affirmed.

In a corporate reorganization proceeding under Chapter X of the Bankruptcy Act, the bankruptcy court allowed petitioners certain fees for legal services rendered to and payable out of the estate but held that it had no jurisdiction over certain additional fees to be paid under the terms of a private escrow agreement between them and a committee representing a group of stockholders. 69 F. Supp. 656. Without appealing from this ruling, petitioners sued in a state court for specific performance of the escrow agreement. The trial court denied a motion to dismiss for lack of jurisdiction. 71 N. Y. S. 2d 200. The Appellate Division affirmed. 272 App. Div. 896, 72 N. Y. S. 2d 406. The Court of Appeals reversed. 297 N. Y. 201, 78 N. E. 2d 472. This Court granted certiorari. 335 U. S. 808. *Affirmed,* p. 10.

Samuel Marion argued the cause and filed a brief for petitioners.

Leo Praeger and *Barney Rosenstein* argued the cause and filed a brief for respondents.

Solicitor General Perlman, Roger S. Foster and *George Zolotar* filed a brief for the Securities & Exchange Commission, as *amicus curiae,* urging affirmance.

Mr. Justice Douglas delivered the opinion of the Court.

Section 221 of Ch. X of the Bankruptcy Act, 52 Stat. 897, 11 U. S. C. § 621, provides:

> "The judge shall confirm a plan if satisfied that . . . .
>
> "(4) all payments made or promised by the debtor or by a corporation issuing securities or acquiring

> property under the plan or by any other person, for services and for costs and expenses in, or in connection with, the proceeding or in connection with the plan and incident to the reorganization, have been fully disclosed to the judge and are reasonable or, if to be fixed after confirmation of the plan, will be subject to the approval of the judge . . . ."

The question presented by this case is whether that provision gives the bankruptcy court exclusive jurisdiction over petitioners' claim for services as attorneys in the reorganization of Pittsburgh Terminal Coal Corp., the debtor.

Petitioners were attorneys for a protective committee representing public holders of the preferred stock of the debtor. The committee had on deposit 584 shares of the preferred stock from four stockholders. The committee agreed to hold those shares in escrow for the purpose of affording petitioners "additional compensation" for their services in the reorganization proceedings of the debtor.[1]

Petitioners rendered valuable service in connection with the reorganization. When the plan was confirmed, they applied to the bankruptcy court for an allowance. That

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[1] The relevant part of the escrow agreement provided:

"These shares are held in escrow by this Committee pending the termination of all proceedings in the matter of the Pittsburgh Terminal Coal Corporation.

"This Committee has secured these shares from the stockholders listed above for the purpose of affording to you additional compensation for your services in the above matter. They have been obtained and are held in escrow on the condition that they be delivered to you only at such time as the reorganization proceedings in the matter of Pittsburgh Terminal Coal Corporation are finally terminated and a final settlement of all suits and claims made by this Committee in behalf of the preferred stockholders have been settled. It is further conditioned upon faithful and satisfactory performance of your duties as counsel to this Committee until the termination of all proceedings."

court allowed them $37,500 out of the estate. It concluded that, while that amount was all the estate should bear, their services were worth more than the allowance. But it held that it had no jurisdiction to pass on the amount of the allowance which should be paid under the escrow agreement. *In re Pittsburgh Terminal Coal Corp.*, 69 F. Supp. 656.

Since in their view that court did not have jurisdiction of the claim, petitioners did not appeal from that order but brought instead the present suit in the New York courts for specific performance of the escrow agreement and for delivery of the deposited stock in accordance with the terms of that agreement. The Court of Appeals answered in the negative the following certified question:

> "Has the Supreme Court of the State of New York jurisdiction over the subject matter of this action to recover for legal services rendered to the stockholders committee which are not compensable out of the assets of the Debtor's estate, in a Chapter X reorganization proceeding under the United States Bankruptcy Act?" 297 N. Y. at 204.

The case is here on a petition for certiorari which we granted because of the importance of the question in administration of the Act.

We reviewed in *Woods* v. *City Bank Co.*, 312 U. S. 262, and *Brown* v. *Gerdes*, 321 U. S. 178, the design of Ch. X insofar as fees and allowances are concerned. There we were dealing with fees and allowances payable out of the estate. Here we are dealing with fees which are incident to the reorganization but not payable out of the estate. Under the less comprehensive language of § 77B the leading authority was that the bankruptcy court had jurisdiction over the latter claims as well. *In re McCrory Stores Corp.*, 91 F. 2d 947. We would be unmindful of history and heedless of statutory language if we held

that the power of the bankruptcy court in this respect had been contracted [2] as a result of Ch. X.

The control of the judge is not limited to fees and allowances payable out of the estate. Section 221 (4) places under his control "all payments made or promised" (1) by "the debtor" or (2) "by a corporation issuing securities or acquiring property under the plan" or (3) "by any other person" for services rendered "in connection with" the proceeding or "in connection with" the plan and "incident to" the reorganization. The services of petitioners concededly met those requirements; and the committee against whose stock a lien is sought to be asserted would plainly be included within the words "any other person." Moreover, these petitioners are included in the classes of claimants to whom the judge is empowered to allow reasonable compensation.[3] To lift petitioners' claim from § 221 (4) would therefore be to rewrite it or to hold that when extended so far it was unconstitutional. The latter has not even been intimated. The former is not permissible.

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[2] The indicated purpose was to strengthen, not to impair, the existing controls which § 77B established in regard to allowances. See Sen. Rep. No. 1916, 75th Cong., 3d Sess. 22 (1938); H. R. Rep. No. 1409, 75th Cong., 1st Sess. 45 (1937).

[3] Section 242 provides:

"The judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred in connection with the administration of an estate in a proceeding under this chapter or in connection with a plan approved by the judge, whether or not accepted by creditors and stockholders or finally confirmed by the judge—

"(1) by indenture trustees, depositaries, reorganization managers, and committees or representatives of creditors or stockholders;

"(2) by any other parties in interest except the Securities and Exchange Commission; and

"(3) by the attorneys or agents for any of the foregoing except the Securities and Exchange Commission."

The aim of the expanded controls over reorganization fees and expenses is clear. The practice had been to fix them by private arrangement outside of court.[4] The deposit agreement under which committees commonly functioned was viewed as a private contract,[5] which granted the committee a lien on the deposited securities for its fees and expenses. By terms of the agreement the committee was normally the sole judge of their amount.[6]

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[4] See Part VIII, Protective Committee Report, Securities and Exchange Commission (1940), pp. 232 *et seq.*

[5] See *Habirshaw Elec. Cable Co.* v. *Habirshaw Electric Cable Co., Inc.*, 296 F. 875, 879.

[6] See Part I, Protective Committee Report, Securities and Exchange Commission (1937), pp. 642, 644, 645, 646–647:

"An examination of the 846 deposit agreements received with replies to the Commission's questionnaire reveals that 841 agreements, or 99.4 percent, provided that the committee should be entitled to fees or expenses or both. Of those 841 deposit agreements, 672 agreements, or 79.9 percent, gave the committee an express lien upon the deposited securities, for expenses or compensation, or both. 742, or 88.2 percent, clothed the committee with power to pledge deposited securities to secure loans to finance its activities. These powers commonly may be exercised by the committee in its sole discretion free from supervision by any independent agency or by the depositors."

. . . . . .

"The deposit agreements provide little check upon the amounts the committees may charge for fees and expenses. As we have stated above, 841 of the 846 deposit agreements that we examined provided that the committee should be entitled to payment of its fees or expenses or both. In 469 the amount of compensation and expenses which the committee might charge against the deposited securities was unlimited. That is to say, in 55.4 percent of the cases neither the aggregate amount nor the amount per unit of securities which committees could claim for their expenses and services was limited.

. . . . . .

"in the 705 cases not associated with Section 77 or Section 77B proceedings machinery was provided for having some independent

This gave rise to serious abuses. There was the spectacle of fiduciaries fixing the worth of their own services and exacting fees which often had no relation to the value of services rendered.[7] The result was that the effective amount received by creditors and stockholders under the plan was determined not by the court but by reorganization managers and committees.

Hence Congress instituted controls, controls which became more pervasive as § 77B was evolved into Ch. X. Section 211 requires that a committee file with the court a statement disclosing specified information, including the agreement under which it operates.[8] The scrutiny clause of § 212 gives the court power to set aside any of

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person or agency review the amount of the fees and expenses of these committees in only 2.13 percent of the cases. In the balance of the cases, numbering 690, the committee had reserved to itself the right to determine, within the limits prescribed by the agreement, the amount which it could charge for fees and expenses. And in 403 of these 690 cases, the agreements prescribed no limitations. These fiduciaries, therefore, had in the vast majority of the cases provided machinery whereby they became the sole arbiters of the worth of their own services and of the propriety of their expenses. As we have pointed out, it was usually provided that the compensation to be fixed by the committee must be 'reasonable.' But this restriction in and of itself would mean little, since the committee and the committee alone was to determine what was 'reasonable.' And it is no answer to say that a court of equity would review these fees on complaint of a depositor and disallow sums beyond a 'reasonable' amount or disallow improper items of expense. Such relief would necessitate litigation by the depositors. Considering the time, expense, and difficulty of legal questions involved, such a remedy would for all practical purposes furnish no check whatsoever on the extravagance of committee members."

[7] See Part II, Protective Committee Report, Securities and Exchange Commission (1937), pp. 351 *et seq.*

[8] It is to be noted that while this provision only applies to committees representing more than twelve creditors or stockholders, the scrutiny clause contained in § 212 and the power to control allowances contained in § 221 (4) is not so restricted.

the provisions of such an agreement which it finds to be "unfair or not consistent with public policy." And § 221 (4) is written in pervasive terms—it applies to "all payments" for services "in connection with" the proceeding or "in connection with" the plan and "incident to" the reorganization, whoever pays them.[9] A statute establishing such broad supervision over committees cannot be presumed to be niggardly in its grant of authority when it deals with the matter which of all the others has the most direct impact on those whom it aims to protect.

We can find in this language no exemption for the kind of committee that petitioners represented. The fact that the committee may have represented a smaller or more intimate group than a conventional committee is irrelevant. The statute was designed to police the return which all security holders obtain from reorganization plans. The net return cannot be kept under supervision if private arrangements expressed in escrow agreements are to control. For the impact of excessive fee claims is the same whether they are charged directly against the estate or against the claim which represents a proportionate interest in the estate.

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[9] Sen. Rep. No. 1916, *supra*, note 2, at 36, explains § 221 (4) as follows:

"Subsection (4) of section 221, derived from section 77B (f) (5), requires full disclosure and the approval by the judge of all payments for services, and for costs and expenses, in connection with the plan or the proceedings, whether such payments are made or promised by the debtor, or by any corporation succeeding to it, or by any other person."

Section 77B (f) (5) provided that "the judge shall confirm the plan if satisfied that . . . (5) all amounts to be paid by the debtor or by any corporation or corporations acquiring the debtor's assets, and all amounts to be paid to committees or reorganization managers, whether or not by the debtor or any such corporation for services or expenses incident to the reorganization, have been fully disclosed and are reasonable, or are to be subject to the approval of the judge . . . ." 48 Stat. 919.

Nor is it an answer to say that state courts can supervise allowances of this nature if the bankruptcy court is disallowed authority to do so. The happenstance of litigation in the state courts is not the equivalent of the administrative rule adopted by Congress when it asked that committee claimants submit their requests to the bankruptcy court. The incidence of fees on reorganization plans is so great that control over them is deemed indispensable to the court's determination whether the plan should be confirmed. Section 221 (4) provides, indeed, one of the standards by which the court makes that determination. Since the determination of allowances has been made an integral part of the process of confirmation which is exclusively entrusted to the bankruptcy court, we cannot infer that it may be delegated to a state court. Moreover, it is the bankruptcy court that is in the best position to know what work was done by the fee claimant, how important and involved it was, how much it benefited the whole group of security holders and how much it benefited the one class alone, how much of it was necessary, how much of it was effective. That court has already determined what the estate should pay. The question that remains is how much of a charge should be made against the escrowed stock and whether the state court or the bankruptcy court should determine what that charge should be. Certainly where, as in this case, the services benefited in part the estate and in part one class of security holders, it is the bankruptcy court that is in the position to weigh the interrelated issues of fact and make a fair allocation between the two.

These practical considerations support the literal reading of § 221 (4) that it is the bankruptcy court that has jurisdiction to pass on these fees. Its jurisdiction is therefore exclusive. See *Brown* v. *Gerdes, supra.*

Petitioners did not appeal from the order of the District Court holding that it had no jurisdiction over these

claims. But no reason is apparent why the petitioners may not apply to the District Court for an allowance even at this date. We were advised during the course of argument that the final decree under § 228 has not been entered.[10] Yet though it has been, there is no reason in view of the special circumstances of this case why application cannot be made at the foot of the decree.

Affirmed.

MR. JUSTICE JACKSON, dissenting in part.

I agree with the opinion of the Court insofar as it holds that a committee of stockholders constituted under the Bankruptcy Act may not disburse or commit fiduciary funds in its own hands under general deposit agreement, nor funds of the estate, to pay attorneys' fees except as allowed by the federal court, and a contract to pay more from such funds would not be enforceable. But the opinion goes beyond that. As to agreements between stockholders and counsel which do not affect funds of the estate or of the committee, I see no reason to say that such contracts are subject to control by the Bankruptcy Court, or indeed, that in such a case as this, that there is any practical way in which the Bankruptcy Court can effectively assert such a jurisdiction as the opinion bestows upon it.

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[10] Section 228 provides:

"Upon the consummation of the plan, the judge shall enter a final decree—

"(1) discharging the debtor from all its debts and liabilities and terminating all rights and interests of stockholders of the debtor, except as provided in the plan or in the order confirming the plan or in the order directing or authorizing the transfer or retention of property;

"(2) discharging the trustee, if any;

"(3) making such provisions by way of injunction or otherwise as may be equitable; and

"(4) closing the estate."

1 JACKSON, J., dissenting in part.

It seems to me that the Court is converting a provision of the Bankruptcy Act designed to prevent lawyers from overreaching stockholders into an authority for stockholders to swindle lawyers. It may appear like an instance of man biting dog, but the case before us is actually one of client snaring lawyer. The Court's opinion is a rather abstract declaration and my difficulty with it can be understood only from fuller recital of the facts.

This case has not been tried nor even been at issue. It was decided on motion to dismiss in the trial and intermediate appellate courts of New York State. All that was before the New York Court of Appeals was a certified abstract question to which I think it returned a correct abstract answer. But that question was not the only or the basic question presented by the case.

From a record that is unsatisfactory for decision of issues so important to the bar and to those interested in reorganizations, the following facts appear.

Pittsburgh Terminal Coal Corporation, as debtor, was in reorganization under Chapter X of the Bankruptcy Act. Three of these defendants, in a manner and with powers and duties not disclosed, became a "Committee for Preferred Stockholders." Whether any stock was deposited with them as such does not appear and the Committee seems to have represented only the interests of a family group, heavily interested in preferred stock, which comprised and dominated the Committee. The Committee originally retained these lawyers.

The situation appears to have been one of those in which existence of any estate, and hence of any value to the preferred stock, depended upon the outcome of a lawsuit for "uncovering mismanagement and malfeasance." Remuneration for the lawyers who were to press the suit was contingent upon their creating an estate; but in such cases courts are properly reluctant after the event

to include in allowances, compensation for the risk of doing much work for nothing.

These lawyers faced so slim a chance of fair compensation that they proposed to withdraw. To induce them to continue, four individual stockholders put 20% of their preferred stock in escrow with the defendant Committee under a separate written contract. This stock does not appear to have been previously deposited with the Committee, nor was it deposited at this time under the general stockholders' agreement but only under the special escrow agreement. The agreement with the lawyers recited, "This Committee has secured these shares from the stockholders listed above for the purpose of affording to you additional compensation for your services in the above matter. They have been obtained and are held in escrow on the condition that they be delivered to you only at such time as the reorganization proceedings" are terminated and final settlement of claims made, and delivery was conditioned on faithful and satisfactory service by the lawyers.

After an estate was created by the efforts of the lawyers, the stockholders repudiated the agreement and contended that counsel's services were only compensable from the estate without resort to the escrow contract. The attorneys thereupon sought compensation by an allowance from the estate. Judge Gibson's final opinion on the application recites facts among which are the following:

The chairman of the Committee for Preferred Stockholders, "while not denying that claimants had rendered services which could not be charged against the Debtor, and which were rendered at a time when any such compensation from the debtor's estate seemed improbable, asserted that the deposit of stock in escrow was to be effective only in case no considerable award should be made from the debtor's estate." He indicates that the mismanagement litigation was "the source of the

ultimate fortunate recovery of the fund for distribution." But he finds "that the claimants rendered services *to the preferred stockholders named in the escrow agreement* which were not compensable from the fund distributed by order of the court. Among such services were those rendered in connection with the sinking fund claims, Guttman's criticism of the Trustee's sales of machinery and his management of the real estate, his rent collections and the repair of the debtor's houses and other property."

The Debtor, the Committee and the Securities and Exchange Commission joined and "contended that in a Chapter X proceeding the court has the duty of determining the reasonableness of all fees, whether compensable fees chargeable to the estate or for those which are non-compensable and which cannot be so charged." But Judge Gibson held otherwise and I think very properly concluded, "In the instant case no sufficient fund has been credited to the depositing stockholders against which any allowance to claimants could be charged. *The judgment, if any were entered, would be directly against the stockholders.*" [All emphasis supplied.] This he thought "seems to stretch the interpretative powers of the court too far."

Thus denied compensation on a *quantum meruit* basis for services admittedly rendered for and of value to these stockholders, and the Bankruptcy Court holding itself without jurisdiction to enforce their contract, these lawyers then went into the courts of the State of New York to enforce it. They named members of the Committee as such as defendants. This was quite proper, for it was the "Committee" which, as escrow agent, held the stock in question. The complaint asked judgment that the Committee deliver up the property of which it was stakeholder but asked no judgment against the Committee that would be payable from any other fund or property in its hands. The suit also made parties defendant

the individual preferred stockholders in whose behalf the agreement was made and who became parties to it individually by putting up their stocks and against whom Judge Gibson held he had no power in the bankruptcy proceeding to enter judgment. This action is thus against both individuals and the Committee.

However, the question which was certified to the Court of Appeals, and which is all that we took for review on certiorari to that court, ignores any question of individual liability and only asks, "Has the Supreme Court of the State of New York jurisdiction over the subject matter of this action to recover for legal services rendered to the stockholders committee which are not compensable out of the assets of the Debtor's estate, in a Chapter X reorganization proceeding under the United States Bankruptcy Act?"

Read literally, I agree that the answer to that abstract question is "No." A committee organized under the Act is a fiduciary whose commitments are made subject to the supervision of the court. I do not think it can undertake, out of its trust funds or out of stocks deposited only under the general agreement provided for by the Act, to pay for services that are beyond the power of the court to supervise.

But this Court, if I read aright, holds that no contract between any person and a lawyer for services in a reorganization proceeding can fix the basis or amount of the fee even if such fees are not payable out of the estate or out of any funds in the court's control, because "The statute was designed to police the return which all security holders obtain from reorganization plans. The net return cannot be kept under supervision if private arrangements expressed in escrow agreements are to control."

I had not understood that the Bankruptcy Act in reorganization cases disables anybody, even if a stock-

holder, from employing his own lawyer on such terms as he sees fit to fix by contract or that it disables lawyers from accepting such retainers. To invalidate them, so far as compensation is concerned, is the effect and, as I understand it, the intent of this decision. If one privately may retain a lawyer, I know of no reason why he may not fix his fee, contingent or otherwise, and secure the promised compensation by pledge of stock in the company being reorganized, or pay the fee in such stock.

I am unaware of any public interests protected by this denial of the right to hire one's own counsel for a fixed or determinable fee in such cases. The good served by court supervision in preventing lawyer raids on fiduciary funds is not advanced by this ruling. These shares were put up by individual stockholders, presumably mentally competent adults, in what proved to be a good bargain, even if they have to perform it, and a windfall if they do not. Are people situated as they were to be disabled from agreeing upon a fee that will induce counsel to expose mismanagement of the bankrupt or the trustee in cases where, as here, the chances of compensation otherwise are doubtful?

This Court seems to recognize unfairness in the situation it is creating and suggests that it may be remedied by a new application for larger fees to the Bankruptcy Court. But we do not tell the court what to do with the new application nor where it went wrong as to the former one. Indeed, we could not tell it of its mistake, if any, for we have only scattered bits of information about the evidence on which the previous order was made. If we would but put ourselves in the position of that court, I think it will at once appear how impractical is today's decision.

Judge Gibson apparently agreed that the services *for which either the estate or the Committee, as such, should pay* are adequately compensated by the allowance of

$37,500. The reason he did not allow more was that services above that value were performed for neither the estate nor the Committee but for the individual stockholders who employed and agreed to pay the lawyers. Do we, without seeing the record, reverse this finding? If so, do we hold that the services Judge Gibson enumerated as not rendered for benefit of the estate or the Committee were rendered for one or the other instead of for the individuals? Or do we say that, even if such services were rendered to individuals, the estate should pay for them? From what fund is the additional compensation we are suggesting to be paid? Would not other parties in interest have a just grievance if the estate of the bankrupt is burdened with paying for extra-estate services? And what other fund is there in reach of the court's order?

What we seem to be saying is that an Act whose purpose is to give the Bankruptcy Court ample powers to see that no improper fees are charged on the estate really compels it to make the estate pay fees of lawyers for private parties in connection with reorganization. I cannot follow this.

But if we do not mean they shall be paid from the estate or the Committee, Judge Gibson has already pointed out that there is no other fund. Can this Court say he is wrong and that we know of one? It is suggested that the Bankruptcy Court may make an allowance to counsel for the individual services and charge them against the escrowed stock. I am not aware of anything which gives the Bankruptcy Court power to adjudicate the controversy, which is essentially a contract action between the individual stockholders and their lawyers, merely because the services involved appearing in the reorganization case. Clearly the Court is holding that the contract is not valid insofar as it fixed the fee. Is it then valid as basis for allowing some fee, but invalid as to the one agreed upon? If on *quantum meruit* basis

the allowed fee exceeds the present value of the stock, may the Bankruptcy Court grant a personal judgment for the deficiency? If not, the contract is good to limit the lawyer's fee but not good to assure payment of it. And if valuable services have been rendered under the contract for which an allowance might otherwise be proper, should it be denied if other conditions of the contract are not fulfilled?

I am unable to find any basis in law for saying that the Bankruptcy Court has anything whatever to do with a private contract to employ and pay a lawyer to guard personal interests in a reorganization case, unless it is sought to charge the fee against the estate, or against stock deposited under a general agreement with the Committee formed under the Act. This situation involves neither, but only stock specially placed in a stakeholder's hands under the escrow contract with counsel.

An experienced and able District Judge knew all the facts and we do not. The lawyers involved made a complete disclosure, as should any lawyer who applies to the court for an allowance. Judge Gibson approved the fees so fixed that the estate paid its share and only its share, which seems to fulfill the purposes of the Federal Act.

But he set apart certain items of services for which he made no allowance because they were rendered for private parties. Those parties had a contract as to what, under the peculiar circumstances, should be paid for those services. Judge Gibson left the controversy as to that contract to the state courts to adjudicate. An action has been brought to require delivery of the stock put in escrow by the individuals to compensate their lawyers. The action seeks no money judgment and no relief that would affect or could affect the estate in the hands of the Bankruptcy Court.

I should remand the case to the courts of New York for such further proceedings as state law provides for

its adjudication and not inconsistent with our holding that fiduciary funds cannot be committed except by the Bankruptcy Court.

THE CHIEF JUSTICE and MR. JUSTICE FRANKFURTER join in this opinion.

LA CROSSE TELEPHONE CORP. *v.* WISCONSIN EMPLOYMENT RELATIONS BOARD ET AL.

NO. 38. APPEAL FROM THE SUPREME COURT OF WISCONSIN.*

Argued November 18–19, 1948.—Decided January 17, 1949.

1. A certification by the Wisconsin Employment Relations Board of a union as the collective bargaining representative of the employees of an employer engaged in interstate commerce, which certification has been reviewed and sustained by the highest court of the State, *held*, in view of the effect of the certification under the state law, a "final judgment" within the meaning of § 237 (a) of the Judicial Code and reviewable here, although the certification was not in the form of a command. Pp. 21–24.
2. In a proceeding under state law, the Wisconsin Employment Relations Board certified that the employees in the plant and traffic departments of a telephone company had elected to combine in a single bargaining unit and had chosen a certain labor organization as their collective bargaining representative, and that the employees in the office department had elected to constitute themselves as a separate unit and had chosen not to have any collective bargaining representative. The National Labor Relations Board had not undertaken, under the National Labor Relations Act, to determine the appropriate bargaining representative or unit of representation of the employees. The company concededly was engaged in interstate commerce and the industry was one over which the National Labor Relations Board had consistently exercised jurisdiction. *Held:* The State Board's certification is invalid as in conflict with the National Labor Relations Act. *Bethlehem Steel Co.* v. *New*

*Together with No. 39, *International Brotherhood of Electrical Workers, Local B–953, A. F. of L.* v. *Wisconsin Employment Relations Board et al.*, also on appeal from the same court.

York State Labor Relations Board, 330 U. S. 767, followed. Pp. 24–26.

3. The Labor Management Relations Act of 1947, which authorizes the National Board under specified conditions to cede its jurisdiction to a state agency, does not require a result different from that here reached. Pp. 26–27.

251 Wis. 583, 30 N. W. 2d 241, reversed.

The appellant telephone company and the appellant union each brought an action in a state court to set aside a certification by the Wisconsin Employment Relations Board. The State Circuit Court held that the State Board was without jurisdiction to issue the certification. The State Supreme Court reversed. 251 Wis. 583, 30 N. W. 2d 241. On appeals to this Court, *reversed,* p. 27.

Thomas H. Skemp argued the cause for appellant in No. 38. With him on the brief was *Quincy H. Hale.*

Louis Sherman argued the cause for appellant in No. 39. With him on the brief was *Philip R. Collins.*

Beatrice Lampert, Assistant Attorney General of Wisconsin, argued the cause for appellees. With her on the brief were *Grover L. Broadfoot,* Attorney General, and *Stewart G. Honeck,* Deputy Attorney General. *John E. Martin,* then Attorney General, was on a statement opposing jurisdiction.

Solicitor General Perlman, David P. Findling, Ruth Weyand and *Mozart G. Ratner* filed a brief for the United States, as *amicus curiae,* supporting appellants.

T. McKeen Chidsey, Attorney General, *M. Louise Rutherford,* Deputy Attorney General, and *George L. Reed,* Solicitor, Labor Relations Board, filed a brief for the Commonwealth of Pennsylvania, as *amicus curiae,* in No. 39, urging affirmance.

Donald J. Martin filed a brief for the Communication Workers of America, Division 23, supporting appellees.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

These cases, here on appeal from the Wisconsin Supreme Court, 28 U. S. C. § 344 (a), 43 Stat. 937, 45 Stat. 54, present the question whether a certification of a union by the Wisconsin Employment Relations Board, Wis. Stats. 1947, ch. 111, as the collective bargaining representative of the employees of appellant company, conflicts with the National Labor Relations Act, 49 Stat. 449, 29 U. S. C. §§ 151 *et seq.*

Prior to 1945 the appellant company recognized the appellant union as the collective bargaining representative of its plant and traffic department employees. The company and the union entered into a collective bargaining agreement which by its terms was to continue from year to year unless terminated by either party on a specified notice. At a time when certain provisions of that agreement were being renegotiated a rival union, the Telephone Guild, filed a petition with the National Board asking that it certify the collective bargaining representative of these employees. Before the National Board acted, the Guild withdrew its petition and filed a petition with the Wisconsin Board seeking the same relief.

The Wisconsin Board held a hearing and directed that separate elections be held among the employees in the plant, traffic, and office departments of the company to determine whether they desired to be grouped in a single unit or in departmental units and what representative, if any, they desired to elect. After the election the Wisconsin Board certified that the employees in the plant and traffic departments had elected to combine in a single bargaining unit and had chosen the Guild as their collective bargaining representative, and that the employees in the office department had elected to constitute themselves as a separate unit and had chosen not to have any collective bargaining representative.

Each appellant brought an action in the Wisconsin courts to have the certification set aside. The Circuit Court, relying on *Bethlehem Steel Co.* v. *New York Labor Relations Board,* 330 U. S. 767, held that the Wisconsin Board was without jurisdiction to issue the certification. The Supreme Court of Wisconsin reversed. 251 Wis. 583, 30 N. W. 2d 241.

First. We are met at the outset with a contention that the certification of the Wisconsin Board which has been sustained by the Wisconsin Supreme Court is not a "final judgment" within the meaning of § 237 (a) of the Judicial Code, 28 U. S. C. § 344. The argument is that under Wisconsin law the certification is no more than a report on the results of an investigation made known to the parties for such use as they may desire, that nothing can be done by any state agency to enforce observance of the certification, that the company cannot be required to bargain with the certified union until and unless an unfair practice charge is lodged against it, and that in such proceeding all the issues involved in the certification proceeding can be relitigated. If that contention is correct, the case is of course not ripe for the intervention of the federal judicial power. See *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 130–131 and cases cited.

But it has not been shown that the Wisconsin law gives such slight force to the certification. The statute provides that the representative chosen by the employees shall be the exclusive one for purposes of collective bargaining. § 111.05 (1). Provision is made for the board to take a secret ballot of the employees and to certify the results thereof, whenever a question arises concerning the representation of employees in a collective bargaining unit. § 111.05 (3). And the statute contains the following direction: "The board's certification of the results of any election shall be conclusive as to the findings in-

cluded therein unless reviewed in the same manner as provided by subsection (8) of section 111.07 for review of orders of the board." [1] § 111.05 (3). The certification in these cases has been reviewed and sustained by the highest court of Wisconsin. While that certification is not irrevocable for all time,[2] it fixes a status to which Wisconsin provides a sanction. For it is an unfair labor practice for an employer to refuse to bargain with the representative of a majority of the employees.[3] § 111.06 (d). And since § 111.05 (3) makes the certification, subject to judicial review, "conclusive as to the findings included therein," it would seem that the certification cannot be collaterally attacked in that proceeding or heard *de novo*. We are pointed to no Wisconsin authority to the effect that it can be.

On this phase of the case we are, indeed, referred to only one Wisconsin authority and that is *United R. & W. D. S. E.* v. *Wisconsin Board*, 245 Wis. 636, 15 N. W. 2d 844. But that case merely held that an order of the Wisconsin Board that a referendum of employees by secret ballot be held to determine whether an "all union" agreement was desired was not reviewable. It did not

[1] That review extends to administrative decisions affecting legal rights, duties, and privileges whether affirmative or negative in form, § 227.15, and is allowed any person aggrieved and directly affected by the administrative decision. § 227.16.

[2] Section 111.05 (4) provides "The fact that one election has been held shall not prevent the holding of another election among the same group of employes, provided that it appears to the board that sufficient reason therefor exists."

[3] Section 111.06 (d) also provides that where an employer files with the board a petition requesting a determination as to majority representation "he shall not be deemed to have refused to bargain until an election has been held and the result thereof has been certified to him by the board." But we are pointed to no authority holding that where a certification has already been made, a recertification can be demanded. Section 111.05 (3), indeed, makes the certification "conclusive."

deal with a certificate which was in fact reviewed and sustained by the same court as in the present cases. It is true that in the opinion below, the Wisconsin Supreme Court said that the "mere fact-finding procedure" of the Wisconsin Board in ascertaining the facts, in ordering an election, and in certifying the result "constitutes action in merely its ministerial capacity." 251 Wis. at 592, 30 N. W. 2d at 245. But that comment was directed to the lack of discretion which the state statute had left the Wisconsin Board. It had no relevance to the effect of the certification under Wisconsin law.

While the Wisconsin Employment Relations Board seems readier than some to reexamine the status of a bargaining representative on the ground that it has lost the support of a majority,[4] it nevertheless appears to be Wisconsin law that a certification is binding upon an employer so long as it stands.[5]

We assumed in *Allegheny Ludlum Steel Corp.* v. *Kelley,* 330 U. S. 767, that the certification of a collective bargaining representative, sustained by the highest court of the state, was a final judgment, although it did not of itself command action but like the certification here was enforcible in law only by another proceeding.[6]

We think that is the correct view. The fact that Wisconsin's certification was not in the form of a command

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[4] See § 111.05 (4), *supra,* note 2; *Rydahl's Launderers & Cleaners,* Wis. E. R. B. Decision No. 677 (1944); *UAW-CIO and Four Wheel Drive Auto Co.,* Wis. E. R. B. Decision No. 687 (1944); cf. *AUA and Garton Toy Co.,* Wis. E. R. B. Decision No. 1238 (1947); Killingsworth, State Labor Relations Acts 161–62 (1948).

[5] See *In re United Brotherhood of Carpenters & Joiners,* 2 L. R. R. M. 894 (Wis. County Cir. Ct., 1938); *In re Charles Abresch Co.,* 3 L. R. R. M. 639 (Wis. E. R. B. Decision No. 744, 1938); cf. *Wisconsin Board* v. *Hall Garage Corp.,* 18 L. R. R. M. 2419 (Wis. County Cir. Ct., 1946).

[6] In *Allegheny Ludlum Steel Corp.* v. *Kelley, supra,* suit had been brought in the state court for a declaratory judgment to restrain

is immaterial. See *American Federation of Labor* v. *Labor Board,* 308 U. S. 401, 408. It was not an abstract determination of status. Nor was it merely an interim adjudication in an uncompleted administrative process. It established legal rights and relationships. It told the employer, subject to judicial review, with whom he could not refuse to negotiate without risk of sanctions. The character of the certification was therefore such as to make it reviewable under the appropriate standards for exercise of the federal judicial power.

Second. The Wisconsin Supreme Court concluded that the Wisconsin Board could exercise jurisdiction here until and unless the National Board undertook to determine the appropriate bargaining representative or unit of representation of these employees. That view was urged on us in the like cases coming here under a New York statute. In *Bethlehem Steel Co.* v. *New York Labor Relations Board, supra,* at 776, we rejected that argument, saying:

> "The State argues for a rule that would enable it to act until the federal board had acted in the same case. But we do not think that a case by case test of federal supremacy is permissible here."

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the state labor board from determining a representative of plaintiff's supervisory employees to bargain collectively with the plaintiff. Under New York law the labor board had authority to hold elections to determine employee representation and to certify the results. 30 McKinney's Cons. Laws § 705. Certification in itself, as in the instant case, did not impose a legal penalty. Suit had to be brought in an unfair labor practice proceeding to accomplish such result. 30 *Ibid.* § 706. Refusal to bargain with the representative of the employees was an unfair labor practice. 30 *Ibid.* § 704 (6). Even though the New York law did not state, as does the Wisconsin law, that certification by the board was conclusive, we considered a decision of the New York court approving the jurisdiction of the state board to conduct a representative proceeding a final judgment ripe for our consideration.

We went on to point out that the National Board had jurisdiction of the industry in which those particular employers were engaged and had asserted control of their labor relations in general. Both the state and the federal statutes had laid hold of the same relationship and had provided different standards for its regulation. Since the employers in question were subject to regulation by the National Board, we thought the situation too fraught with potential conflict to permit the intrusion of the state agency, even though the National Board had not acted in the particular cases before us.

Those considerations control the present cases. This employer is concededly engaged in interstate commerce; and the industry is one over which the National Board has consistently exercised jurisdiction.[7] The Wisconsin Act provides that a majority of employees in a single craft, division, department or plant of an employer may elect to constitute that group a separate bargaining unit. § 111.02 (6). The federal act leaves that matter to the discretion of the board.[8] When under those circumstances the state board puts its imprimatur on a particular group as the collective bargaining agent of employees, it freezes into a pattern that which the federal act has left

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[7] See *Elyria Telephone Co.*, 58 N. L. R. B. 402; *Newark Telephone Co.*, 59 N. L. R. B. 1408; *People's Telephone Corp.*, 69 N. L. R. B. 540; *Ohio Telephone Service Co.*, 72 N. L. R. B. 488.

The appellant company operates a telephone business in La Crosse County, Wisconsin. It is a subsidiary of the Central Telephone Co., whose subsidiaries operate telephone businesses in many states. The concession that the company is engaged in interstate commerce is based on the interstate telephone calls which it handles.

[8] "The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."

fluid.[9] In practical effect the true measure of conflict between the state and federal scheme of regulation may not be found only in the collision between the formal orders that the two boards may issue. We know that administrative practice also disposes of cases in which no order has been entered. Disposition of controversies on an administrative as distinguished from a formal basis will often reflect the attitudes of the National Board which have not been reduced to orders in those specific cases. A certification by a state board under a different or conflicting theory of representation may therefore be as readily disruptive of the practice under the federal act as if the orders of the two boards made a head-on collision. These are the very real potentials of conflict which lead us to allow supremacy [10] to the federal scheme even though it has not yet been applied in any formal way to this particular employer. The problem of employee representation is a sensitive and delicate one in industrial relations. The uncertainty as to which board is master and how long it will remain such can be as disruptive of peace between various industrial factions as actual competition between two boards for supremacy. We are satisfied with the wisdom of the policy underlying the *Bethlehem* case and adhere to it.

The result we have reached is not changed by the Labor Management Relations Act of 1947, 61 Stat. 136, 29

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[9] Moreover, the Wisconsin Act excludes from the definition of employee those working in a supervisory capacity. § 111.02 (3). They were, however, included under the protection of the federal act as then written. *Packard Motor Co.* v. *Labor Board*, 330 U. S. 485. The definition of employee under the Wisconsin Act also excludes certain strikers and others who have not been at work for certain periods. § 111.02 (3). These latter exceptions likewise do not in the main square with the definition of employee contained in § 2 (3) of the federal act.

[10] U. S. Const. Art. VI.

U. S. C. Supp. I, §§ 141 *et seq.* That Act grants the National Board authority under specified conditions to cede its jurisdiction to a state agency.[11] But it does not appear that there has been any cession of jurisdiction to Wisconsin by the National Board in representation proceedings.[12]

Reversed.

MR. JUSTICE RUTLEDGE, having joined in the dissent in *Bethlehem Steel Co.* v. *New York Labor Relations Board,* 330 U. S. 767, see p. 777, acquiesces in the Court's opinion and judgment in this case.

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[11] Section 10 (a) of the National Labor Relations Act, as amended, now provides in part: "the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

[12] The agreement of August 27, 1948, between the National Board and the Wisconsin Board is restricted to the implementation of § 14 (b) of the federal act. See 22 L. R. R. 268.

COMMISSIONER OF INTERNAL REVENUE *v.* JACOBSON.

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

Nos. 32 and 33. Argued November 8, 1948.—Decided January 17, 1949.

In 1938, 1939 and 1940, an individual taxpayer, in straitened financial circumstances but solvent, purchased at less than their face amount certain secured negotiable bonds originally issued by him at face value for cash. Some of the purchases were directly from the bondholders, others were through agents of the taxpayer or of the bondholders. Although each seller knew that the bonds were being bought by or for the maker, there was nothing to indicate that any seller intended to transfer or release something for nothing or to make a gift of any part of his claim, as distinguished from making a sale and assignment of his whole claim for the highest available price. *Held:* Under § 22 (a) of the Revenue Act of 1938 and of the Internal Revenue Code, the gain to the taxpayer from each purchase was includible in gross income for the year in which he made the purchase, and was not excludible as a "gift" under § 22 (b) (3) of that Act and Code. Pp. 29–52.

1. The taxpayer's gains from such transactions must be included in his gross income under § 22 (a). Pp. 38–47.

(a) On the facts of this case, the taxpayer realized an immediate financial gain from his purchase of these bonds at a discount. Pp. 38–41.

(b) The amendments to § 22 (b) of the Internal Revenue Code by the Revenue Act of 1939, though relating to corporate taxpayers, are persuasive that a natural person is obliged to include in his gross income under § 22 (a) gains of the kind here involved. Pp. 41–47.

2. Gains of this type are not excluded from the taxpayer's gross income by the general exemption of "gifts" from taxation prescribed by § 22 (b) (3). Pp. 47–52.

(a) The provision of the Internal Revenue Code for the exclusion of "gifts" from gross income is to be construed with restraint in the light of the purpose of Congress to tax income comprehensively. Pp. 47–49.

(b) On the facts of this case, there is nothing to indicate that the bondholders intended to transfer or did transfer something for nothing. Pp. 50–51.

(c) The decision in this case is not rested on the fact that the sale was made before maturity or that the seller may have received valid consideration for a total release of his claim because the debtor's payment was made before maturity. P. 51.

(d) *Helvering* v. *American Dental Co.*, 318 U. S. 322, distinguished. P. 51.

3. The situation in each transaction is a factual one, turning upon whether the transaction is in fact a transfer of something for the best price available or is a transfer or release of only a part of a claim for cash and of the balance "for nothing." Pp. 51–52.

164 F. 2d 594, reversed.

From a decision of the Tax Court redetermining deficiencies in income tax of the respondent, 6 T. C. 1048, the Commissioner and the respondent both petitioned for review. The Court of Appeals decided against the Commissioner on both petitions. 164 F. 2d 594. This Court granted certiorari. 333 U. S. 866. *Reversed,* p. 52.

Arnold Raum argued the cause for petitioner. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Lee A. Jackson, Hilbert P. Zarky, Morton K. Rothschild* and *Philip Elman.*

Theodore R. Colborn argued the cause for respondent. With him on the brief were *Wm. B. Cockley* and *Walter A. Marting.*

Mr. Justice Burton delivered the opinion of the Court.

This decision applies the federal income tax to gains derived by a debtor from his purchase of his own obligations at a discount and his consequent control over their discharge. It presents the specific question whether a

solvent natural person, in straitened financial circumstances, must include in his gross income for federal income tax purposes the difference between (1) the face amount of his personal indebtedness as the maker of secured bonds, originally issued by him at face value for cash, and (2) a lesser amount paid by him for their purchase. The debtor's obligations were not unpaid balances of purchase prices which could be readjusted by the discharge of the obligations. The proceeds of the obligations were not traced into identifiable losses offsetting the debtor's realized gains from the discharge of these obligations. Each seller knew that the bonds he sold were being bought by or for the maker of them. In each sale the bondholder sought to minimize his probable loss by getting as much as possible, directly or indirectly, from the maker of the bonds as the one available purchaser of them. The maker of the bonds, at the same time, sought to reduce his obligations as much as possible by buying the bonds as cheaply as he could. While each seller thus knew that he was receiving from the maker of the bonds less than their face amount, there is no finding that any seller intended to transfer or release something for nothing or to make a gift of any part of his claim, as distinguished from making a sale and assignment of his whole claim for the highest available price. The maker thus realized a gain from each purchase and the Commissioner of Internal Revenue found correctly that, for federal income tax purposes, the maker must include that gain in his gross income for the tax year in which he made the purchase.

The respondent, Lewis F. Jacobson, in 1938, 1939 and 1940 resided, practiced law and owned or controlled substantial property interests in Chicago, Illinois. In 1943 the petitioner, Commissioner of Internal Revenue, found deficiencies in the income taxes paid by the respondent for

each of those years. Those deficiencies totaled $3,967.97, of which about $2,500 are now before us. This case arose from the Commissioner's addition to the reported gross income of the respondent of the differences between (1) the principal face amounts of certain leasehold bonds executed by the respondent and (2) the lesser amounts paid by him for their purchase. Such purchases were made by or for him substantially as follows:

Date of purchase	Purchased D—Direct B—Through broker C—Through bondholders' committee	Principal face amount	Purchase price	Percentage of face amount paid by purchaser-maker-taxpayer
1938				
Apr. 9, 1938	D	$450.00	$202.50	45
June 9, 1938	D	3,600.00	1,620.00	45
Aug. 17, 1938	D	900.00	405.00	45
1939				
Feb. 15, 1939	B	1,800.00	900.00	50
June 16, 1939	D	450.00	225.00	50
Oct. 23, 1939	B	180.00	86.50	48
1940				
Apr. 4, 1940	C	270.00	130.00	48
May 21, 1940	C	450.00	210.00	47
May 23, 1940	C	2,700.00	1,080.00	40
June 19, 1940	C	1,800.00	720.00	40
July 1, 1940	B	450.00	200.00	45
July 3, 1940	B	450.00	200.00	45
July 10, 1940	B	450.00	184.50	41
Sept. 23, 1940	B	450.00	185.00	41
Total		$14,400.00	$6,348.50	

Upon the respondent's petition, the Tax Court reviewed the Commissioner's findings and—

> "*Held* that, as to the bonds acquired by petitioner [Jacobson, the respondent here] through direct negotiations with the bondholders, he is not taxable on the gain therefrom under the doctrine of *Helvering* v. *American Dental Co.*, 318 U. S. 322; *held, further,* that petitioner is taxable on the gain realized

in the purchases from bondholders through the secretary of the bondholders' committee and the security dealers, under the doctrine of the Supreme Court in *United States* v. *Kirby Lumber Co.*, 284 U. S. 1, he being at all times solvent." 6 T. C. 1048.

Six of the sixteen judges dissented and five of those six voted to uphold the Commissioner completely, on the ground that none of the transactions were gratuitous. 6 T. C. 1048, 1057–1059. The Commissioner petitioned the Court of Appeals for the Seventh Circuit to review that part of the judgment which was unfavorable to him. The respondent did the same as to the remainder of the judgment. That court decided against the Commissioner on both petitions. It held that, because the respective sellers knew that the bonds they sold were being bought by or for the respondent, as the maker of them, any excess of the face values of the bonds over their sales prices should be treated as gifts to the respondent and as exempt from income tax. 164 F. 2d 594. Due to the importance of the issues in the unsettled field of the taxability of gains derived by a debtor from his discharge of his own obligations at a discount, we granted certiorari in both cases. 333 U. S. 866. We have heard and decided them together.

The further material facts, as found by the Tax Court or as shown by undisputed evidence, are as follows:

By purchases made in 1922 and 1923 the respondent acquired a 99-year lease, running from May 1, 1914, together with a two-story store, office and apartment building on the leased premises in Chicago. On or about May 1, 1925, he borrowed $90,000 from a nearby bank and, together with his wife, executed in return 200 bonds secured by a trust deed mortgaging to that bank the leasehold and the improvements thereon. The bonds bore interest at 6½ per cent per annum and were for

the total principal amount of $90,000, with $2,500 maturing semiannually up to and including November 1, 1931. The balance of the bonds, totalling $57,500, were to mature May 1, 1932. The original proceeds were used by the respondent to retire the existing encumbrance, of an undisclosed amount, on the property, pay for a $16,250 addition made by him to the building on the leasehold and pay the necessary brokerage commission of approximately 10 per cent of the loan, plus the cost of printing the bonds and other expenses in connection with the loan. A remaining "small surplus" was paid to the respondent. In 1925 the respondent, for the purposes of computing depreciation, allocated $76,580.56 to the improvements, including the new addition, and $40,000 to the leasehold, out of their total cost to him of $116,580.56.

The bonds due on or before November 1, 1931, were paid at or about their maturities. The debtor has never been in default on any interest payment. However, after the trustee bank closed on June 8, 1931, a committee was formed to represent the holders of this issue of bonds. May 1, 1932, the respondent secured from the committee and individual bondholders a five-year extension of the maturity on all of the bonds and a reduction in the interest rate from 6½ to 5 per cent. During this extension the respondent issued his checks in the names of the respective bondholders to cover interest due them. The checks were delivered by the secretary of the bondholders' committee, the respondent kept himself fully informed as to the identity and location of the respective bondholders and they, in turn, frequently visited him to learn about his financial condition and that of the trusteed property. In 1937 he procured a further extension of the maturity of the bonds to May 1, 1942, and, in that connection, paid 10 per cent on

the principal of each bond, leaving a total outstanding balance of $51,750 payable on these bonds.

The Tax Court found that in 1938 the fair market value of the leasehold and the improvements thereon was $80,000 and that in 1939 and 1940 it was the same, less accrued depreciation. The respondent testified that he valued it at considerably less, even as low as twice the amount of its gross income, or about $32,000. The gross and net income from the trusteed property, after deduction of expenses, depreciation and also the interest on the bonds, was:

Year	*Gross income*	*Net income*
1938.....	$16, 550. 00	$1, 233. 95
1939.....	16, 520. 75	1, 107. 11
1940.....	15, 578. 50	1, 719. 41

The respondent received from his law practice and other sources the following additional gross income: 1938, $38,390.85; 1939, $35,644.78; and 1940, $35,279.59. The Tax Court said that: "On the strength of the showing of petitioner's assets and liabilities, we find petitioner was solvent during each of the taxable years 1938, 1939, and 1940." 6 T. C. at p. 1053. The Court of Appeals said: "The Tax Court found that the taxpayer was solvent during each of the taxable years 1938, 1939 and 1940, and we accept the finding, although a perusal of the record makes it quite apparent that he was in straitened financial circumstances." 164 F. 2d at p. 596.

In his petition to the Tax Court the respondent stated, and it has not been disputed, that the value of the leasehold and building had sharply depreciated since his acquisition of them. The neighborhood had changed, stores were vacant or paid less than half of their previous rents, from 1932 to 1938 the value of the property was substantially less than its cost to him, conditions were

getting worse and he felt certain that he would sustain a large loss in connection with the property.[1]

The Tax Court's findings describe each bond sale that is material. Some were to the respondent personally and some to his law partner, acting on his behalf. The rest were made indirectly to the respondent through brokers or through the bondholders' committee. The Tax Court said that each sale that was made through a broker or

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[1] In his petition to the Tax Court, the respondent, in describing the sale of bonds to him at a discount in 1939, said:

"It was self interest and good business judgment exercised by all prudent persons to take cash settlements, when otherwise greater losses might be incurred. I have done that very thing myself, and have advised clients to do so in similar circumstances. Most real estate bonds in Chicago were selling from 5c to 25c on the dollar in 1932 to 1940."

In the instant case the respondent was found to have been solvent before, as well as after, his realization of the gains in question. The payment of the bonds purchased by him was secured by the mortgage of his leasehold property which property had a fair market value substantially in excess of the face amount of the bonds. The record fails to establish any sufficient basis for a claim that the respondent had suffered losses which, for tax purposes, offset his gains from his purchase of the bonds. Little of the $90,000 originally received by him for the bonds was used to purchase property. There is no finding or substantial evidence showing specifically how those funds were invested. Even if they are traced, in part, into the addition made to the building on the leasehold premises and into the discharge of the then existing encumbrance on those premises, the total so used is not shown and the shrinkage in the value of those investments is not clearly ascertained in the taxable years in question. The ratio of the loss in value of the leasehold property indicated by the Tax Court findings is about 32 per cent of its cost in 1925 but this loss is merely based upon estimates. The respondent claims a larger shrinkage but there is not a sufficient ascertainment of it to permit consideration of its use as an offset to the respondent's gains in 1938, 1939 or 1940. See 2 Mertens, Law of Federal Income Taxation, § 11.20 and n. 99 (1942).

the committee was closely akin to an open market transaction. It made no finding that any seller intended to transfer or release something for nothing. It referred to all of the respondent's acquisitions of bonds as purchases. Apparently the bonds were payable to bearer and the Tax Court referred to them as negotiable bonds. Each seller made a complete transfer to the respondent of all the seller's rights to or under the bonds. Each seller thus determined the amount of his own loss on his investment. Each knew that the maker of the bond would acquire or secure control over it and would thus be enabled to reduce his liabilities by its face amount. Except for the 10 per cent paid on each bond in 1937, there is no evidence that any bondholder at any time received any partial payment on any bond or consented to a reduction of the indebtedness evidenced by the bond. There is no suggestion that any of the respondent's payments made in 1938, 1939 or 1940 were made specifically in partial reduction of the respondent's obligation as evidenced by a bond or that any bondholder specifically discharged him from any part of the balance of that obligation. On the other hand, it does appear that each of such payments was made in consideration of the transfer to the respondent of title to the entire bond. Each bond was delivered to the respondent evidencing his obligation for its full original face amount, less only the 10 per cent payment made, on account, in 1937. At the time of the trial, the respondent apparently still held the purchased bonds "intact." The Court of Appeals repudiated any distinction made by the Tax Court for present purposes between the direct and indirect sales to the respondent. The Court of Appeals based its decision on each seller's knowledge that he was transferring his bond to the maker of it. Thus far we agree. The Court of Appeals, however, without any finding of intent by the respective sellers to transfer or release something

for nothing, as distinguished from an intent to get the highest available price for their entire claims, treated the respondent's gain from each purchase as exempt from the taxation imposed by § 22 (a) of the Revenue Act of 1938 [2] and of the Internal Revenue Code, because that court felt itself obliged by precedent to classify each such gain as a "gift" under § 22 (b) (3) of that Act [3] and Code. We hold, however, that those Sections do not, in the light of the decisions of this Court, permit that result.

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[2] "SEC. 22. GROSS INCOME.

"(a) GENERAL DEFINITION.—'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. . . ." 52 Stat. 457.

This was re-enacted as § 22 (a), I. R. C., 53 Stat. 9, and amended in a manner not material here in 53 Stat. 574–575, 26 U. S. C. (1940 ed.) § 22 (a). The Revenue Act of 1938 applied to the respondent's income in 1938 and the Internal Revenue Code to that in 1939 and 1940.

[3] "SEC. 22. GROSS INCOME.

. . . . . .

"(b) EXCLUSIONS FROM GROSS INCOME.—The following items shall not be included in gross income and shall be exempt from taxation under this title:

. . . . . .

"(3) GIFTS, BEQUESTS, AND DEVISES.—The value of property acquired by gift, bequest, devise, or inheritance (but the income from such property shall be included in gross income);"

. . . . . .

52 Stat. 458.

This was re-enacted as § 22 (b) (3), I. R. C., 53 Stat. 10, 26 U. S. C. (1940 ed.) § 22 (b) (3), without material change.

The first test of the taxability of such gains relates to their inclusion within the gross income of the taxpayer under § 22 (a), without reference to the specific exclusions made from it by § 22 (b). The other test consists of the application to such gains of any of those specific exclusions. We hold that these gains come within § 22 (a) but not within any of the exclusions from gross income stated in § 22 (b).

The respondent realized an immediate financial gain from his purchase of these bonds at a discount. By that acquisition he was enabled, at will, to cancel them and thus discharge himself from liability to pay them. While the record indicates that he held them "intact," apparently without crediting released indebtedness on them or otherwise physically cancelling them in whole or in part (except for the 10 per cent payments made by him on each bond in 1937), his possession of them and control over them is not disputed and the petitioner has properly treated their acquisition as constituting a reduction of the respondent's debts to the extent of their face amount. At the time of their purchase the respondent was unconditionally and primarily bound to pay their face amounts on May 1, 1942, with interest. Although in straitened financial circumstances he was solvent, both before and after his acquisition of the bonds, and the bonds apparently were collectible from him in full through appropriate enforcement proceedings. His acquisition, and consequent control over the discharge of these bonds, therefore, improved his net worth by the difference between their face amount and the price he paid for them. It also relieved him of the semiannual interest payments on them of 5 per cent per annum. His acquisition of them likewise reduced the face amount of the lien held by others upon his leasehold property. In the first instance he had received the full face amount in cash for these bonds so that his repurchase of them for 50 per

cent, or less, of that amount reflected a substantial benefit which he had derived from the use of that borrowed money.[4] These were not purchase money bonds. The gains from their cancellation were not akin to reductions in balances due on the prices of previously acquired property. The respective sellers of the bonds bore no relation to the respondent other than that of creditors. The gains derived by the respondent through these purchases were comparable to those he would have realized if he had purchased, at the same discount, like bonds issued by a third party and had resold them at full face value or had turned them in at full value as a credit upon some other indebtedness of the respondent. His gains were comparable in their nature to those which he would have realized if a third party, pursuant to a contract, had paid off his indebtedness on these bonds for him to the extent of the discount at which he purchased them.[5] The nature

[4] See note 1, *supra,* showing the varied uses to which the respondent applied these proceeds and showing that it is not practicable in this case to determine his losses from his resulting investments, and much less to offset them against his gains now at issue. His tax benefits from those losses are thus postponed until some such occasion as the sale of the properties reflecting them makes it possible to ascertain the losses clearly.

[5] Such discharges of a taxpayer's debts by payments made for his benefit are realizable income to him. In *Douglas* v. *Willcuts,* 296 U. S. 1, 9, this Court said:

"The question is one of statutory construction. We think that the definitions of gross income (Revenue Acts, 1926, § 213; 1928, § 22) are broad enough to cover income of that description. They are to be considered in the light of the evident intent of the Congress 'to use its power to the full extent.' *Irwin* v. *Gavit,* 268 U. S. 161; *Helvering* v. *Stockholms Bank,* 293 U. S. 84, 89. We have held that income was received by a taxpayer, when, pursuant to a contract, a debt or other obligation was discharged by another for his benefit. The transaction was regarded as being the same in substance as if the money had been paid to the taxpayer and he had transmitted it to his creditor. *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716; *United States* v. *Boston & Maine Railroad,* 279 U. S. 732."

of the gain derived by a debtor from his purchase of his own obligations at a discount is the same whether the debtor is a corporation or a natural person. That such a gain comes within the meaning of gross income as used in federal income tax laws was long ago recognized by the Treasury Department's Regulations and by this Court in the leading cases in this field.[6] *United States* v. *Kirby Lumber Co.*, 284 U. S. 1; *Helvering* v. *American Chicle Co.*, 291 U. S. 426. Similar provisions appeared in the Regulations in effect in 1938–1940.[7]

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[6] ". . . By the Revenue Act of (November 23,) 1921, c. 136, § 213 (a) gross income includes 'gains or profits and income derived from any source whatever,' and by the Treasury Regulations authorized by § 1303, that have been in force through repeated reënactments, 'If the corporation purchases and retires any of such bonds at a price less than the issuing price or face value, the excess of the issuing price or face value over the purchase price is gain or income for the taxable year.' Article 545 (1) (c) of Regulations 62, under Revenue Act of 1921. See Article 544 (1) (c) of Regulations 45, under Revenue Act of 1918; Article 545 (1) (c) of Regulations 65, under Revenue Act of 1924; Article 545 (1) (c) of Regulations 69, under Revenue Act of 1926; Article 68 (1) (c) of Regulations 74, under Revenue Act of 1928. We see no reason why the Regulations should not be accepted as a correct statement of the law.

". . . The defendant in error has realized within the year an accession to income, if we take words in their plain popular meaning, as they should be taken here." *United States* v. *Kirby Lumber Co.*, 284 U. S. 1, 2–3.

[7] "ART. 22 (a)–14. CANCELLATION OF INDEBTEDNESS.—(*a*) *In general.*—The cancellation of indebtedness, in whole or in part, may result in the realization of income. If, for example, an individual performs services for a creditor, who in consideration thereof cancels the debt, income in the amount of the debt is realized by the debtor as compensation for his services. A taxpayer realizes income by the payment or purchase of his obligations at less than their face value. . . .

. . . . . .

"ART. 22 (a)–18. SALE AND PURCHASE BY CORPORATION OF ITS BONDS.—(1) (*a*) If bonds are issued by a corporation at their face

If § 22 (a) stood alone, without the exclusions stated in § 22 (b), the gain realized by the respondent in this case unquestionably would constitute gross income for income tax purposes. The provisions of § 22 (b) and the decisions of this Court do not change that result. On the contrary, they confirm it.

A striking demonstration of the meaning given by Congress to § 22 (a) appears in its Amendments to § 22 (b) of the Internal Revenue Code by the Revenue Act of 1939, c. 247, 53 Stat. 862, approved June 29, 1939.[8] These Amendments then applied only to taxable years beginning after December 31, 1938, and only to discharges of indebtedness occurring on or after June 29, 1939. The value of these Amendments for the purposes of the instant case is not so much in the exclusions which

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value, the corporation realizes no gain or loss. (*b*) If the corporation purchases any of such bonds at a price in excess of the issuing price or face value, the excess of the purchase price over the issuing price or face value is a deductible expense for the taxable year. (*c*) If, however, the corporation purchases any of such bonds at a price less than the issuing price or face value, the excess of the issuing price or face value over the purchase price is gain or income for the taxable year." Treasury Regulations 101, promulgated under the Revenue Act of 1938.

In Treasury Regulations 103, promulgated under the Internal Revenue Code, §§ 19.22 (a)–14 and 19.22 (a)–18 were identical with the above. Even today they are the same in Treasury Regulations 111, promulgated under the Internal Revenue Code, as §§ 29.22 (a)–13 and 29.22 (a)–17.

[8] These Amendments are contained in § 215 of the Internal Revenue Act of 1939, c. 247, 53 Stat. 862, 875–876, 26 U. S. C. (1940 ed.) §§ 22 (b) (9), 113 (b) (3). They added to the Internal Revenue Code § 22 (b) (9) and § 113 (b) (3), both relating to the discharge of indebtedness. A cross reference is made to the latter in the former. Such § 215, in its entirety, is as follows:

"SEC. 215. DISCHARGE OF INDEBTEDNESS.

"(a) INCOME FROM DISCHARGE OF INDEBTEDNESS.—Section 22 (b) of the Internal Revenue Code (relating to exclusions from gross

they prescribe, as in the clear light which their own limitations shed upon §§ 22 (a) and 22 (b) to the extent that those Sections remain unchanged.

Unless those Sections as they stood in 1938 meant that the gains derived by a debtor corporation from its purchases of its own obligations at a discount resulted in gross income under § 22 (a), there was no need for these 1939 Amendments. Furthermore, as the status of

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income) is amended by adding at the end thereof the following new paragraph:

"(9) INCOME FROM DISCHARGE OF INDEBTEDNESS.—In the case of a corporation, the amount of any income of the taxpayer attributable to the discharge, within the taxable year, of any indebtedness of the taxpayer or for which the taxpayer is liable evidenced by a security (as hereinafter in this paragraph defined) if—

(A) it is established to the satisfaction of the Commissioner, or

(B) it is certified to the Commissioner by any Federal agency authorized to make loans on behalf of the United States to such corporation or by any Federal agency authorized to exercise regulatory power over such corporation,

that at the time of such discharge the taxpayer was in an unsound financial condition, and if the taxpayer makes and files at the time of filing the return, in such manner as the Commissioner, with the approval of the Secretary, by regulations prescribes, its consent to the regulations prescribed under section 113 (b) (3) then in effect. In such case the amount of any income of the taxpayer attributable to any unamortized premium (computed as of the first day of the taxable year in which such discharge occurred) with respect to such indebtedness shall not be included in gross income and the amount of the deduction attributable to any unamortized discount (computed as of the first day of the taxable year in which such discharge occurred) with respect to such indebtedness shall not be allowed as a deduction. As used in this paragraph the term 'security' means any bond, debenture, note, or certificate, or other evidence of indebtedness, issued by any corporation, in existence on June 1, 1939. This paragraph shall not apply to any discharge occur-

natural persons and corporations is not differentiated in § 22 (a), the new Amendments make it equally clear that, inasmuch as they relieve only certain corporations from the taxability of gains derived from their purchases of their own obligations at a discount, it must be that similar gains derived by natural persons also remain taxable under § 22 (a). The strength of this reflection of the

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ring before the date of the enactment of the Revenue Act of 1939, or in a taxable year beginning after December 31, 1942.

"(b) BASIS REDUCED.—Section 113 (b) of the Internal Revenue Code (relating to the adjusted basis of property) is amended by adding at the end thereof the following new paragraph:

"(3) DISCHARGE OF INDEBTEDNESS.—Where in the case of a corporation any amount is excluded from gross income under section 22 (b) (9) on account of the discharge of indebtedness the whole or a part of the amount so excluded from gross income shall be applied in reduction of the basis of any property held (whether before or after the time of the discharge) by the taxpayer during any portion of the taxable year in which such discharge occurred. The amount to be so applied (not in excess of the amount so excluded from gross income, reduced by the amount of any deduction disallowed under section 22 (b) (9)) and the particular properties to which the reduction shall be allocated, shall be determined under regulations (prescribed by the Commissioner with the approval of the Secretary) in effect at the time of the filing of the consent by the taxpayer referred to in section 22 (b) (9). The reduction shall be made as of the first day of the taxable year in which the discharge occurred except in the case of property not held by the taxpayer on such first day, in which case it shall take effect as of the time the holding of the taxpayer began.

"(c) TAXABLE YEARS TO WHICH APPLICABLE.—The amendments made by this section shall be applicable to taxable years beginning after December 31, 1938." 53 Stat. 875–876.

See also, Treasury Regulations 103, promulgated under the Internal Revenue Code: § 19.22 (b) (9)–1, Income from discharge of indebtedness; § 19.22 (b) (9)–2, Making and filing of consent; § 19.113 (b) (3)–1, Adjusted basis: Discharge of corporate indebtedness: General rule; § 19.113 (b) (3)–2, Adjusted basis: Discharge of corporate indebtedness: Special cases.

Amendments upon the unamended Sections is emphasized by their temporary character. The Amendments expressly provide that they shall not apply to a taxable year beginning after December 31, 1942. This indicates that, for its permanent program, Congress regarded such gains as properly taxable and it indicates that the Amendments were intended to authorize temporary changes in policy and were not clarifications of existing or continuing tax policies. While the time limit originally prescribed has been subsequently extended, the extensions have been made by separate Acts, each for a period of one to three years.[9] This repeated emphasis upon their temporary character increases the contrast which they make with the permanent policy of Congress as to the general taxability of this kind of gains under § 22 (a).

These Amendments describe gains corresponding almost precisely with those derived by the respondent from his transactions in the instant case but the Amendments apply only to corporate gains. They thus indicate that such gains were recognized as not having been excluded from gross income by § 22 (b) (3) or by any other Section. If they had been so excluded there would have been no need for the new Amendments to exclude those which they did, even temporarily. Furthermore, those gains are not excluded from gross income for all purposes of the income tax laws. Section 22 (b) (9) excludes them only from the ordinary income taxes for the taxable year in which the taxpaying corporation purchases its own securities at a discount.[10] Furthermore, the exclusion under

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[9] While § 22 (b) (9) originally did not apply to any discharge occurring in a taxable year beginning after December 31, 1942, 53 Stat. 875, this date was changed to December 31, 1945, 56 Stat. 811; December 31, 1946, 59 Stat. 574; December 31, 1947, 60 Stat. 749; and December 31, 1949, 61 Stat. 179.

[10] The exclusions made by § 22 (b) apply to the taxes imposed by the Income Tax Chapter of the Internal Revenue Code. These

§ 22 (b) (9), as distinguished from other exclusions under § 22 (b), is available only upon the express condition that the taxpayer makes and files at the time of filing the return its consent to the Regulations [11] prescribed under § 113 (b) (3)[12] then in effect. That Section and such Regulations require that, where any amount is excluded by a corporation from its gross income under § 22 (b) (9) on account of its discharge of its own indebtedness, the whole or a part of such amount shall be applied to the reduction of the basis of property held by the taxpayer during any portion of the taxable year in which such discharge occurs. The amount to be so applied and the properties to which the reduction shall be allocated are to be determined by Regulations approved by the Secretary of the Treasury. This means that such a gain,

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include the ordinary income taxes but not the additional income taxes such as those imposed on personal holding companies or the excess-profits taxes.

[11] Treasury Regulations 103, *supra*, §§ 19.113 (b) (3)–1 and 2 cover the subject. They provide a comprehensive procedure for decreasing the cost or other basis of a taxpaying corporation's properties as a condition of its taking advantage of § 22 (b) (9). This procedure applies not only in "the case of indebtedness incurred to purchase specific property" but also in "the case of specific property (other than inventory or notes or accounts receivable) against which, at the time of the discharge of the indebtedness, there is a lien (other than a lien securing indebtedness incurred to purchase such property) . . . ." It even provides that if any excess of amount excluded from gross income under § 22 (b) (9) exceeds those two adjustments, the cost or other basis of all the property of the debtor other than inventory and notes and accounts receivable shall be reduced proportionately and, finally, the balance, if any, of the amount excluded from the debtor's gross income is applied to the reduction of the cost or other basis of the debtor's inventory or notes or accounts receivable. It thus offers affirmatively a broad alternative plan for reaching the corporate debtor's gains from its discharge of its indebtedness at a discount.

[12] See note 8, *supra*.

instead of being completely excluded as exempt from taxation, is postponed, for income tax purposes, until a later date when the property is disposed of in a way which will permit another form of ascertainment of the taxpayer's gain or loss in its disposition.[13] These provisions therefore demonstrate that Congress, at least since 1939, has prescribed that, in order for a corporate taxpayer to exclude from its gross income under § 22 (a) certain gains attributable to the discharge within the taxable year of the taxpayer's indebtedness evidenced by bonds, the taxpayer must consent to the subsequent use of those gains in reducing the basis of property held by the taxpayer during any portion of the taxable year in which such discharge occurred. A corporate taxpayer with gains meeting these specifications but not filing the required consent would be obliged to include those gains in its gross income, unless additional facts brought them

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[13] Subsequent Amendments have altered these provisions but have not changed their general effect nor their reflection upon the meaning of § 22 (a). For the extension of the temporary nature of the provisions, see note 9, *supra*. The requirement of a specially certified "unsound financial condition" for a corporate taxpayer in order to make § 22 (b) (9) applicable was eliminated by the Revenue Act of 1942. That Act also eliminated the limitation to securities in existence on June 1, 1939. 56 Stat. 811.

In making these temporary provisions Congress had in mind especially the conditions presented by railroads and other corporations then seeking to liquidate heavy indebtedness. The Committees reporting the bills for passage emphasized the limitations that were imposed by these Amendments upon corporations seeking to exclude from taxable income the gains derived from their acquisition of their own securities at a discount. H. R. Rep. No. 855, 76th Cong., 1st Sess. 5, 23–25 (1939); Sen. Rep. No. 648, 76th Cong., 1st Sess. 2–3, 5 (1939). Obviously it was expected that these provisions would decrease the existing burdens of income taxation. It certainly was not intended to impose a burden of postponed taxability upon gains which otherwise would have been completely exempted from taxation by § 22 (b) (3).

under some other exemption. *A fortiori,* a natural person, such as the respondent in the instant case, who has derived gains precisely within these specifications but who, as a natural person, is ineligible to file the required consent is obliged to include those gains in his gross income under § 22 (a). It remains, therefore, to consider whether there are facts in this case which bring this respondent's transactions within any exclusion other than that stated in § 22 (b) (9).[14]

The only provision for the exclusion of these types of gains from the respondent's gross income that is presented for our consideration is the general exemption of

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[14] Several provisions have extended comparable relief to other taxpayers. None of them apply to the respondent. They emphasize, however, the understanding of Congress that, without special provision for their exclusion, the gains of a taxpayer from the discharge of his indebtedness at a discount are required by § 22 (a) to be included in his gross income. They recognize that the mere exclusion of "gifts" under § 22 (b) (3) is not enough to cover factual situations like those presented in § 22 (b) (9) or in the other relief provisions above mentioned.

Among these relief provisions are the following:

Exclusion, from excess profits credit, of income derived from the retirement or discharge by the taxpayer of the taxpayer's own obligations if they have been outstanding more than 18 months. Internal Revenue Code, §§ 711 (a) (1) (C), 711 (a) (2) (E), and § 711 (b) (1) (C) added by the Second Revenue Act of 1940, c. 757, 54 Stat. 976–978, repealed by the Revenue Act of 1945, c. 453, 59 Stat. 568.

Exclusion, from gross income, for income tax purposes, of the income of railroad corporations attributable to their discharge of their indebtedness to the extent realized from a modification or cancellation of indebtedness, pursuant to an order of court. Internal Revenue Code, § 22 (b) (10), added by the Revenue Act of 1942, c. 619, 56 Stat. 812, applicable to taxable years beginning after December 31, 1939, but not applicable to any discharge in a taxable year beginning after December 31, 1945; this latter date extended to December 31, 1946, 59 Stat. 574; December 31, 1947, 60 Stat. 749; and December 31, 1949, 61 Stat. 179.

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gifts from taxation prescribed by § 22 (b) (3).[15] This was applied by this Court in favor of a taxpayer in *Helvering* v. *American Dental Co.*, 318 U. S. 322, as well as by the court below in the instant case. Both the general provision for taxation of income and this provision for the exclusion of gifts from gross income, for income tax purposes, have been in the Federal Income Tax Acts in substantially their present form since the Revenue Act of 1916.[16] The contrast between the provi-

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[15] See note 3, *supra*.

[16] "SEC. 2. (a) That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever: . . . .

. . . . . .

"SEC. 4. The following income shall be exempt from the provisions of this title [Title I.—Income Tax]:

"The proceeds of life insurance policies paid to individual beneficiaries upon the death of the insured; the amount received by the insured, as a return of premium or premiums paid by him under life insurance, endowment, or annuity contracts, either during the term or at the maturity of the term mentioned in the contract or upon the surrender of the contract; *the value of property acquired by gift, bequest, devise, or descent* (*but the income from such property shall be included as income*); interest upon the obligations of a State or any political subdivision thereof or upon the obligations of the United States or its possessions or securities issued under the provisions of the Federal farm loan Act of July seventeenth, nineteen hundred and sixteen; the compensation of the present President of the United States during the term for which he has been elected, and the judges of the Supreme and inferior courts of the United States now in office, and the compensation of all officers and employees of a State, or any political subdivision thereof, except when

sions is striking. The income taxed is described in sweeping terms and should be broadly construed in accordance with an obvious purpose to tax income comprehensively. The exemptions, on the other hand, are specifically stated and should be construed with restraint in the light of the same policy. Congress could have excluded from the gross income of all taxpayers the gains derived by debtors either from their acquisitions of their own obligations at a discount and their consequent control over them, or from their respective releases from all or part of such obligations by their respective creditors upon the debtor's payment to the creditor of something less than the full amount of the debt. Congress, especially since the Revenue Act of 1938, has been cognizant of this issue and of its power to meet it as stated, but it has chosen to extend such relief only on the above described restricted and temporary basis and only in the case of corporations. In its treatment of the issue Congress also has required the corporate taxpayer's consent to an alternative plan for a reduction of the corporation's basis of property values to be used in later determinations of its gains or losses. This special treatment is far different from the total exclusion of a gain resulting from an exempt gift. If such gains were already exempted as gifts under § 22 (b) (3), as representing something transferred to the debtor for nothing, there would have been no need for § 22 (b) (9). The conclusion to be drawn is that such transfers as are described in § 22 (b) (9) could not, without more, qualify as exempt gifts under § 22 (b) (3). The same may be said of the acquisition, by a natural person, of his own obligations as debtor. The facts in the instant case pre-

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such compensation is paid by the United States Government." (Italics supplied.) Revenue Act of 1916, c. 463, 39 Stat. 756, 757, 758–759. See also, An Act To reduce tariff duties and to provide revenue for the Government, and for other purposes. (October 3, 1913.) 38 Stat. 114, 167, § II B.

sent a situation quite similar to one contemplated by § 22 (b) (9) except that the taxpayer here is a natural person. This emphasizes the taxability of the gains before us.

In the instant case the relation between the bondholder and the respondent may be assumed in each transaction to have been one in which the ultimate parties were known to each other to be such. There was no suggestion in the evidence or the findings that any bondholder was acting from any interest other than his own. Each transaction was a sale. The seller sought to get as high a price as he could for the bond and the buyer sought to pay as low a price as he could for the same bond. If the transaction had been completely on the open market through a stock exchange, the conduct and intent of each party could have been the same and there would have been little, if any, basis for any claim that the respondent's gain was not taxable income. The mere fact that the seller knew that he was selling to the maker of the bond as his only available market did not change the sale into a gift. In the absence of proof to the contrary, the intent of the seller may be assumed to have been to get all he could for his entire claim. Although the sales price was less than the face of the bond and less than the original issuing price of the bond, there was nothing to indicate that the seller was not getting all that he could for all that he had. There is nothing in the evidence or findings to indicate that he intended to transfer or did transfer something for nothing. The form of the transaction emphasized this relationship. The seller assigned the entire bond to his purchaser. The seller did not first release the maker from a part of the maker's obligation and, having made the maker a gift of that release, then sell him the balance of the bond or vice versa. If the seller actually had intended to give the maker some gift the natural reflection of that gift would have been a credit on the face of the bond or at least some record or

testimony evidencing the release. This is not saying that the form of the transaction is conclusive. Assuming that the extension of the maturity of the bonds in the instant case was binding on the creditor, we do not rest this case upon the fact that the sale was made before maturity or that the seller may have received valid consideration for a total release of his claim because the debtor's payment was made before maturity. It is quite possible that a bondholder might make a gift of an entire bond to anyone, including the maker of it. The facts and findings in this case do not establish any such intent of the seller to make a gift in contradiction of the natural implications arising from the sales and assignments which he made. It is conceivable, although hardly likely, that a bondholder, in the ordinary course of business and without any express release of his debtor, might have sold part of his claims on the bonds he held at the full face value of those parts and then have made a gift of the rest of his claims on those bonds to the same debtor "for nothing." It is that kind of extraordinary transaction that the respondent asks us, as a matter of law, to read into the simple sales which actually took place and from which he derived financial gains. We are unable to do so on the findings before us. Cf. *Bogardus* v. *Commissioner,* 302 U. S. 34.

The situation in each transaction is a factual one. It turns upon whether the transaction is in fact a transfer of something for the best price available or is a transfer or release of only a part of a claim for cash and of the balance "for nothing." The latter situation is more likely to arise in connection with a release of an open account for rent or for interest, as was found to have occurred in *Helvering* v. *American Dental Co., supra,* than in the sale of outstanding securities, either of a corporation as described in § 22 (b) (9), or of a natural person as presented in this case. For these reasons we hold that the Commissioner was

justified in finding a taxable gain, rather than an exempt gift, in each of the transactions before us. The judgment of the Court of Appeals accordingly is reversed and the cause is remanded for further action in accordance with this opinion.

It is so ordered.

MR. JUSTICE RUTLEDGE, although joining in the Court's judgment and opinion, is of the view that the result is essentially in conflict with that reached in *Helvering* v. *American Dental Co.*, 318 U. S. 322.

MR. JUSTICE REED, with whom MR. JUSTICE DOUGLAS joins, dissenting.

As detailed in *Helvering* v. *American Dental Company*, 318 U. S. 322, the problems of the tax results to the debtor of the release of indebtedness have been difficult. That opinion shows that both Congress and Internal Revenue Regulations have taken varying views as to whether a taxpayer should pay an income tax on such balance sheet improvements.[1]

We held in the *American Dental* case in 1943 that the "receipt of financial advantages gratuitously" was a gift under Int. Rev. Code § 22. Congress has made no change in the law since that time, nor has it been requested to do so. For the reasons discussed at length in that case, we are of the opinion that the judgment of the Court of Appeals should be affirmed.

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[1] *Helvering* v. *American Dental Co.*, *supra*, p. 326, note 5; p. 328, note 9, particularly tax free railroad adjustments under c. XV, § 735, 53 Stat. 1140.

WILKERSON *v.* McCARTHY ET AL., TRUSTEES.

CERTIORARI TO THE SUPREME COURT OF UTAH.

No. 53. Argued December 6, 1948.—Decided January 31, 1949.

1. In this action under the Federal Employers' Liability Act, there was evidence (detailed in the opinion) which would support a jury finding of negligence on the part of the defendants, and it was error for the trial court to direct a verdict against the plaintiff. Pp. 54–61, 63–64.
2. In determining whether there is sufficient evidence to submit an issue of negligence to the jury, it is necessary to look only to the evidence and reasonable inferences therefrom which tend to support the case of the litigant against whom a peremptory instruction has been given. P. 57.
3. Under the Federal Employers' Liability Act, contributory negligence of the plaintiff does not bar recovery for an injury which was "in part" the result of the defendant's negligence, but the damages in such case "shall be diminished by the jury in proportion to the amount of negligence attributable" to the plaintiff. P. 61.
4. The Federal Employers' Liability Act does not make the railroad an absolute insurer of the safety of its employees, but imposes liability only for negligence. P. 61.
5. The issue of negligence under the Act is to be determined by the jury according to whether an employer's conduct measures up to what a reasonable and prudent person would have done under the same circumstances. P. 61.
6. The employer is liable for injuries attributable to conditions under his control when they are not such as a reasonable man ought to maintain in the circumstances, having in mind that the standard of care must be commensurate to the dangers of the business. P. 61.
7. The assumption that, where the issue of negligence under the Act is left to the jury, railroads practically are made insurers of the safety of their employees, is inadmissible, since courts should not assume that, in determining these questions of negligence, juries will fall short of a fair performance of their constitutional function. Pp. 61–63.

— Utah —, 187 P. 2d 188, reversed.

In an action brought by petitioner under the Federal Employers' Liability Act, to recover damages for personal injuries, the trial court directed a verdict for the defendants. The State Supreme Court affirmed. —— Utah——, 187 P. 2d 188. This Court granted certiorari. 335 U. S. 807. *Reversed,* p. 64.

Parnell Black argued the cause for petitioner. With him on the brief were *Calvin W. Rawlings* and *Harold E. Wallace.*

Dennis McCarthy argued the cause for respondents. With him on the brief was *Waldemar Q. Van Cott.*

Mr. Justice Black delivered the opinion of the Court.

The petitioner, a railroad switchman, was injured while performing duties as an employee of respondents in their railroad coach yard at Denver, Colorado. He brought this action for damages under the Federal Employers' Liability Act.[1]

The complaint alleged that in the performance of his duties in the railroad yard it became necessary for him to walk over a wheel-pit on a narrow boardway, and that due to negligence of respondents, petitioner fell into the pit and suffered grievous personal injuries. The complaint further alleged that respondents had failed to furnish him a safe place to work in several detailed particulars, namely, that the pit boardway (1) was not firmly set, (2) was not securely attached, and (3) although only about 20 inches wide, the boardway had been permitted to become greasy, oily, and slippery, thereby causing petitioner to lose his balance, slip, and fall into the pit.

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[1] 35 Stat. 65 as amended by 36 Stat. 291 and 53 Stat. 1404, 45 U. S. C. §§ 51–59.

The respondents in their answer to this complaint admitted the existence of the pit and petitioner's injuries as a result of falling into it. They denied, however, that the injury resulted from the railroad's negligence, charging that plaintiff's own negligence was the sole proximate cause of his injuries. On motion of the railroad the trial judge directed the jury to return a verdict in its favor. The Supreme Court of Utah affirmed, one judge dissenting. —— Utah ——, 187 P. 2d 188.

The opinion of the Utah Supreme Court strongly indicated, as the dissenting judge pointed out, that its finding of an absence of negligence on the part of the railroad rested on that court's independent resolution of conflicting testimony. This Court has previously held in many cases that where jury trials are required, courts must submit the issues of negligence to a jury if evidence might justify a finding either way on those issues. See, *e. g.*, *Lavender* v. *Kurn*, 327 U. S. 645, 652–653; *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350, 354; *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 68; and see *Brady* v. *Southern R. Co.*, 320 U. S. 476, 479. It was because of the importance of preserving for litigants in FELA cases their right to a jury trial that we granted certiorari in this case.

The evidence showed the following facts without dispute:

Petitioner fell into the pit July 26, 1945. The pit, constructed in 1942, ran approximately 40 feet east and west underneath three or more parallel tracks which crossed the pit from north to south. The pit was 11 feet deep and 4 feet 2½ inches wide with cement walls and floor. Car wheels in need of repair were brought to the pit, lowered into it, there repaired, and then lifted from the pit for return to use. When not in use the pit was kept solidly covered with heavy boards. These

boards were used as a walkway by all employees. When the pit was in use the cover boards were removed except one 75 pound "permanent board" 22 inches wide and 4 feet 2½ inches long. While the solid covering was off, this "permanent board," built to fit snugly and firmly, was unquestionably used as a walkway by *all* employees up to about May 1, 1945.

On this latter date, the railroad put up "safety chains" fastened to guard posts, inclosing 16½ feet of the pit, on its north, south and west sides. The posts, 42 inches high, fitted into tubes imbedded in the ground, the tubes being larger than the posts—enough larger to allow the posts to work freely. The chains, attached 2 inches from the top of the posts, were to be kept up while the pit was in use and taken down when the pit was not in use. They were up when plaintiff slipped from the "permanent board" into the pit. At that time a tourist car was standing over the pit on track "23½." This track "23½" was east of the two east chain posts, its west rail being about 36 inches, and the tourist car overhang about 7 inches from the two east chain supporting posts.[2] The floor of the "overhang" was about 51 inches above the ground, or 9 inches above the top of the posts, thus allowing an unobstructed clearance of 51 inches under the overhang. The "permanent board" was inside the chain enclosure, the board's east side being about 9½ inches from the two eastern chain posts. Despite the proximity of the tourist car to the posts there was sufficient space east of each chain post so that pit workers had access to and used the board as a walkway. One of the

[2] There was evidence that other types of cars had a wider overhang thereby reducing the space available for passage between the posts and the car. This evidence bore directly on the fact question as to the practice of employees generally in using the boardway as petitioner did here.

defendant's witnesses, a very large man weighing 250 pounds, passed through it, though according to his testimony, with "very bad discomfort." Petitioner was a much smaller man, weighing 145 pounds, and it was by passing between one of these posts and the tourist car that petitioner reached the "permanent board" which bridged the pit. Oil from wheels would sometimes accumulate at the bottom of the pit, and as stated by the Utah Supreme Court the "permanent board" was "almost certain to become greasy or oily" from use by the pit-men.

Neither before nor after the chains were put up had the railroad ever forbidden pit workers or any other workers to walk across the pit on the "permanent board." Neither written rules nor spoken instructions had forbidden any employees to use the board. And witnesses for both sides testified that pit workers were supposed to, and did, continue to use the board as a walkway after the chains and posts were installed. The Utah Supreme Court nevertheless held that erection of the chain and post enclosure was itself the equivalent of company orders that no employees other than pit workers should walk across the permanent board when the chains were up. And the Utah Supreme Court also concluded that there was insufficient evidence to authorize a jury finding that employees generally, as well as pit workers, had continued their long-standing and open practice of crossing the pit on the permanent board between the time the chains were put up and the time petitioner was injured.

It is the established rule that in passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given. Viewing the evidence here in that way it was sufficient to show the following:

Switchmen and other employees, just as pit workers, continued to use the permanent board to walk across the pit after the chains were put up as they had used it before. Petitioner [3] and another wit-

[3] Petitioner testified in part as follows:

"Q. Mr. Wilkerson, I will ask you to state whether or not you have ever observed other switchmen or workmen working in the yards there in passing over that pit while cars were standing on 23½ since the safety chains were up?

"A. Yes, sir, I have.

"Q. What has that practice been, the practice of crossing over the pit?

"A. Men that work around there, regardless of whether switchmen or car men that wanted to go that way went through there.

"Q. Went through—you mean over the pit?

"A. Over that pit, as I just described, from either side.

. . . . . .

"Q. I will ask you to state whether or not you observed any practice with reference to crossing over the pit when men were working on the cars there in the daytime before these chains were installed?

"A. Walked right straight across the board.

"Q. Was there a board usually there to walk over?

"A. Yes, sir.

"Q. Was there any change in that practice after the chains were installed?

"A. None, only they had to walk around the chains.

. . . . . .

"Q. What did you observe with reference to the number of times the occasions when men would cross over the pit.

"A. Oh, I couldn't say; I suppose maybe a hundred times; varies, men, both switchmen and car men or others working there in the yard necessary, pullman, employees and so forth.

"Q. Crossed over the pit?

"A. Yes, sir, it was a common practice for everybody to use that that way.

. . . . . .

"Q. Did you ever see—did you ever notice the board ever being used for any other purpose except men walking across?

"A. No, sir, I haven't.

"Q. Ask you to state whether or not you experience any difficulty

ness [4] employed on work around the pit, testified positively that such practice continued. It is true that witnesses for the respondents testified that after the chains were put up, only the car men in removing and

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in passing between the car and the post and onto the board and over the board and between the car and the north post at the time you passed it, the first time in the morning?

"A. No."

[4] Another witness testified in part as follows:

"Q. And what have you noticed with reference to the practice of men passing between the standing cars on 23½ and the posts that hold the safety chains?

"A. Well, they would walk through and get on the board and walk to and from each side, and the men that work on the pit work on that board, and sometimes set on the board next to the—in next to the car there to perform their work, you know, like where they are up under, or working on the car, they use the board over from it to work on.

. . . . . .

"Q. What has been your practice in passing between cars that are standing on 23½ and the posts that hold the stakes and chains when they have been in place?

"A. When I have occasion to pass through there, I put my hand on the post, step over on the board, and go around the other post, and that is the way I pass to and from on the pit.

"Q. Have you observed other men passing over the pit under similar circumstances?

"A. Yes, sir, I have.

"Q. And what can you say with reference to the—such occurrences, as to how often they happen?

"A. O, I would judge that I saw the men pass through there dozens of times. . . .

. . . . . .

"Q. Have you seen any other switchman working there in the yards act similarly; that is, go around the post, between the post and the car and pass over the board?

"A. Yes, sir, I have saw my helpers at different times and before the chains were placed, we used the board at all times, you know, just to cross the pit. I have walked across the pit a number of times that way, and also my helpers."

This witness later gave the names of two switchmen he had seen

applying wheels used the board "to walk from one side of the pit to the other . . . ." Thus the conflict as to continued use of the board as a walkway after erection of the chains was whether the pit workers alone continued to use it as a walkway, or whether employees generally so used it. While this left only a very narrow conflict in the evidence, it was for the jury, not the court, to resolve the conflict.

It was only as a result of its inappropriate resolution of this conflicting evidence that the State Supreme Court affirmed the action of the trial court in directing the verdict. Following its determination of fact, the Utah Supreme Court acted on the assumption that the respondents "had no knowledge, actual or constructive, that switchmen were using the plank to carry out their tasks," and the railroad had "no reason to suspect" that employees generally would so use the walkway. From this, the Court went on to say that respondents "were only required to keep the board safe for the purposes of the pit crewmen . . . and not for all the employees in the yard." But the court emphasized that under different facts, maintenance of "a 22-inch board for a walkway, which is almost certain to become greasy or oily, constitutes negligence." And under the evidence in this case as to the board, grease and oil, the court added: "It must be conceded that if defendants knew or were charged with knowledge that switchmen and other workmen generally in the yard were habitually using the plank as a walkway in the manner claimed by plaintiff, then the safety enclosure might be entirely inadequate, and a jury question would have been presented on the condition of the board and the adequacy of the enclosure."

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cross after chains were put up, but he did not thereby qualify his testimony previously given as to the practice of employees generally to use the walkway.

We agree with this last quoted statement of the Utah court, and since there was evidence to support a jury finding that employees generally had habitually used the board as a walkway, it was error for the trial judge to direct a verdict in favor of respondents.

There was, as the state court pointed out, evidence to show that petitioner could have taken a slightly longer route and walked around the pit, thus avoiding the use of the board. This fact, however, under the terms of the Federal Employers' Liability Act, would not completely immunize the respondents from liability if the injury was "in part" the result of respondents' negligence. For while petitioner's failure to use a safer method of crossing might be found by the jury to be contributory negligence, the Act provides that "contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee . . . ."

Much of respondents' argument here is devoted to the proposition that the Federal Act does not make the railroad an absolute insurer against personal injury damages suffered by its employees. That proposition is correct, since the Act imposes liability only for negligent injuries. *Cf. Coray* v. *Southern Pac. Co.*, 335 U. S. 520. But the issue of negligence is one for juries to determine according to their finding of whether an employer's conduct measures up to what a reasonable and prudent person would have done under the same circumstances. And a jury should hold a master "liable for injuries attributable to conditions under his control when they are not such as a reasonable man ought to maintain in the circumstances," bearing in mind that "the standard of care must be commensurate to the dangers of the business." *Tiller* v. *Atlantic C. L. R. Co.*, 318 U. S. 54, 67.

There are some who think that recent decisions of this Court which have required submission of negligence ques-

tions to a jury make, "for all practical purposes, a railroad an insurer of its employees." See individual opinion of Judge Major, *Griswold* v. *Gardner,* 155 F. 2d 333, 334. But see Judge Kerner's dissent from this view at p. 337 and Judge Lindley's dissenting opinion, pp. 337–338. This assumption, that railroads are made insurers where the issue of negligence is left to the jury, is inadmissible. It rests on another assumption, this one unarticulated, that juries will invariably decide negligence questions against railroads. This is contrary to fact, as shown for illustration by other Federal Employers' Liability cases, *Barry* v. *Reading Co.,* 147 F. 2d 129, cert. denied, 324 U. S. 867; *Benton* v. *St. Louis-San Francisco R. Co.,* 182 S. W. 2d 61, cert. denied, 324 U. S. 843. And *cf. Bruner* v. *McCarthy,* 105 Utah 399, 142 P. 2d 649, cert. dismissed for reasons stated, 323 U. S. 673. Moreover, this Court stated some sixty years ago when considering the proper tribunal for determining questions of negligence: "We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others." *Jones* v. *East Tennessee R. Co.,* 128 U. S. 443, 445. And peremptory instructions should not be given in negligence cases "where the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may draw different inferences." *Washington & G. R. Co.* v. *McDade,* 135 U. S. 554, 572. Such has ever since been the established rule for trial and appellate courts. See *Tiller* v. *Atlantic C. L. R. Co.,* 318 U. S. 54, 67, 68. Courts should not assume that in determining these questions of negligence juries will fall short of a fair performance of their constitutional function. In rejecting a contention that juries could be expected to determine certain disputed questions on whim, this Court, speaking

through Mr. Justice Holmes, said: "But it must be assumed that the constitutional tribunal does its duty and finds facts only because they are proved." *Aikens* v. *Wisconsin,* 195 U. S. 194, 206.

In reaching its conclusion as to negligence, a jury is frequently called upon to consider many separate strands of circumstances, and from these circumstances to draw its ultimate conclusion on the issue of negligence. Here there are many arguments that could have been presented to the jury in an effort to persuade it that the railroad's conduct was not negligent, and many counter arguments which might have persuaded the jury that the railroad was negligent. The same thing is true as to whether petitioner was guilty of contributory negligence. Many of such arguments were advanced by the Utah Supreme Court to support its finding that the petitioner was negligent and that the railroad was not.[5] But the arguments

[5] The state court argued that "other and safer routes were open" to the petitioner. But contributory negligence does not exempt a railroad from liability for its own negligence.

The state court also advanced the following argument: "In this particular case, the board appears adequate for the use of the pit crewmen, but entirely inadequate if intended to be a cross-walk for other employees. Employees climbing in and out of the pit approach more deliberately, use other and different hand holds, and are more careful of their footing, while employees swinging on to the plank in a hurry are apt to forget about the slippery condition of an oily board and forget about the dangers incident to crossing, as did the plaintiff, who swung himself around the chain post and onto the plank." Aside from the apparent absence of direct evidence that pit crewmen would exercise greater care to protect themselves than would other employees, whether they would or not is patently a jury question.

The state court also said: "Had they not intended to preclude the use of the board as a walk-way, the defendants would not have installed the chain posts so as to block an open straight approach to the board." This argument of the state court ignores the absence

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made by the State Supreme Court are relevant and appropriate only for consideration by the jury, the tribunal selected to pass on the issues. For these reasons, the trial court should have submitted the case to the jury, and it was error for the Utah Supreme Court to affirm its action in taking the case from the jury.

It is urged by petitioner that other fact issues should have been submitted to the jury in addition to those we have specifically pointed out. We need not consider these contentions now since they may not arise on another trial of the case.

The judgment of the Supreme Court of Utah is reversed and the cause is remanded for further action not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE FRANKFURTER, concurring.

Trial by jury as guaranteed by the Constitution of the United States and by the several States presupposes a jury under proper guidance of a disinterested and competent trial judge. *Herron* v. *Southern Pacific Co.*, 283 U. S. 91. It is an important element of trial by jury which puts upon the judge the exacting duty of determining whether there is solid evidence on which a jury's

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of any direct evidence to show that the chains were erected to keep people from walking over the old "permanent board" walkway. Petitioner testified that it was his understanding that the chains were erected "to keep people from walking directly into the open pit."

Another argument of the State Supreme Court was: "Also, a sign not to cross would have afforded plaintiff no additional security or warning, for he disregarded the chain and he would no doubt have ignored another form of warning." If such an inference was justifiable and was relevant at all on the question of railroad negligence, it was an inference to be drawn from facts by the jury, not by the court.

verdict could be fairly based. When a plaintiff claims that an injury which he has suffered is attributable to a defendant's negligence—want of care in the discharge of a duty which the defendant owed to him—it is the trial judge's function to determine whether the evidence in its entirety would rationally support a verdict for the plaintiff, assuming that the jury took, as it would be entitled to take, a view of the evidence most favorable to the plaintiff. If there were a bright line dividing negligence from non-negligence, there would be no problem. Only an incompetent or a wilful judge would take a case from the jury when the issue should be left to the jury. But since questions of negligence are questions of degree, often very nice differences of degree, judges of competence and conscience have in the past, and will in the future, disagree as to whether proof in a case is sufficient to demand submission to the jury. The fact that a third court thinks there was enough to leave the case to the jury does not indicate that the other two courts were unmindful of the jury's function. The easy but timid way out for a trial judge is to leave all cases tried to a jury for jury determination, but in so doing he fails in his duty to take a case from the jury when the evidence would not warrant a verdict by it. A timid judge, like a biased judge, is intrinsically a lawless judge.

These observations are especially pertinent to suits under the Federal Employers' Liability Act. The difficulties in these cases derive largely from the outmoded concept of "negligence" as a working principle for the adjustments of injuries inevitable under the technological circumstances of modern industry. This cruel and wasteful mode of dealing with industrial injuries has long been displaced in industry generally by the insurance principle that underlies workmen's compensation laws. For reasons that hardly reflect due regard for the interests

of railroad employees, "negligence" remains the basis of liability for injuries to them. It is, of course, the duty of courts to enforce the Federal Employers' Liability Act, however outmoded and unjust in operation it may be. But so long as negligence rather than workmen's compensation is the basis of recovery, just so long will suits under the Federal Employers' Liability Act lead to conflicting opinions about "fault" and "proximate cause." The law reports are full of unedifying proof of these conflicting views, and that too by judges who seek conscientiously to perform their duty by neither leaving everything to a jury nor, on the other hand, turning the Federal Employers' Liability Act into a workmen's compensation law.

Considering the volume and complexity of the cases which obviously call for decision by this Court, and considering the time and thought that the proper disposition of such cases demands, I do not think we should take cases merely to review facts already canvassed by two and sometimes three courts even though those facts may have been erroneously appraised. The division in this Court would seem to demonstrate beyond peradventure that nothing is involved in this case except the drawing of allowable inferences from a necessarily unique set of circumstances. For this Court to take a case which turns merely on such an appraisal of evidence, however much hardship in the fallible application of an archaic system of compensation for injuries to railroad employees may touch our private sympathy, is to deny due regard to the considerations which led the Court to ask and Congress to give the power to control the Court's docket. Such power carries with it the responsibility of granting review only in cases that demand adjudication on the basis of importance to the operation of our federal system; importance of the outcome merely to the parties is

not enough. It has been our practice to dismiss a writ of certiorari even after it was granted where argument exposed a want of conflict or revealed that the case involved no more than its particular facts.[1] I believe we should adhere to this practice in the present case.

But the importance of adhering to this practice cannot be seen in the perspective of a single case. Despite the mounting burden of the Court's business, this is the thirtieth occasion in which a petition for certiorari has been granted during the past decade to review a judgment denying recovery under the Federal Employers' Liability Act in a case turning solely on jury issues. The only petition on behalf of a carrier that brought such a case here during this period was dismissed, and rightly, as improvidently granted. *McCarthy* v. *Bruner,* 322 U. S. 718; 323 U. S. 673. Nor does what the United States Reports disclose regarding the disposition of petitions for certiorari tell the whole story of the Court's exercise of discretion in granting or denying them. This is so because of adherence, on the whole, to the wise practice of not publicly recording the vote of the Justices. Of course, some light on the situation is derivatively shed by the disclosed position of the Justices on the merits of the cases. But the unavailable data are, as can readily

[1] The reasons for this practice were indicated by Chief Justice Taft for a unanimous Court in *Layne & Bowler Corp.* v. *Western Well Works,* 261 U. S. 387, 393:

"If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. The present case certainly comes under neither head."

be imagined, especially relevant in the case of such a recurring problem as granting or denying certiorari under a particular statute.

I would, therefore, dismiss the petition as having been improvidently granted. Since, however, that is not to be done, I too have been obliged to recanvass the record and likewise think that there was here enough evidence to go to the jury.

MR. JUSTICE BURTON, having concurred in the Court's opinion, also joins in this opinion.

MR. JUSTICE DOUGLAS, concurring.

While I join in the opinion of the Court, I think it appropriate to take this occasion to account for our stewardship in this group of cases.

The Federal Employers' Liability Act was designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations. Not all these costs were imposed, for the Act did not make the employer an insurer. The liability which it imposed was the liability for negligence. But judges had created numerous defenses—fellow-servant rule, assumption of risk, contributory negligence—so that the employer was often effectively insulated from liability even though it was responsible for maintenance of unsafe conditions of work. The purpose of the Act was to change that strict rule of liability, to lift from employees the "prodigious burden" of personal injuries which that system had placed upon them, and to relieve men "who by the exigencies and necessities of life are bound to labor" from the risks and hazards that could be avoided or lessened "by the exercise of proper care on the part of the employer in providing safe and proper machinery and equipment with which the employee does his work." [1]

[1] H. R. Rep. No. 1386, 60th Cong., 1st Sess. 2 (1908).

That purpose was not given a friendly reception in the courts. In the first place, a great maze of restrictive interpretations were engrafted on the Act, constructions that deprived the beneficiaries of many of the intended benefits of the legislation. See *Seaboard Air Line* v. *Horton,* 233 U. S. 492; *Toledo, St. L. & W. R. Co.* v. *Allen,* 276 U. S. 165; and the review of the cases in *Tiller* v. *Atlantic Coast Line R. Co.,* 318 U. S. 54, 62–67. In the second place, doubtful questions of fact were taken from the jury and resolved by the courts in favor of the employer. This Court led the way in overturning jury verdicts rendered for employees. See *Chicago, M. & St. P. R. Co.* v. *Coogan,* 271 U. S. 472; *Missouri Pac. R. Co.* v. *Aeby,* 275 U. S. 426; *New York Central R. Co.* v. *Ambrose,* 280 U. S. 486. And so it was that a goodly portion of the relief which Congress had provided employees was withheld from them.

The first of these obstacles which the courts had created could be removed by Congress. In 1939 Congress did indeed move to release the employees from the burden of assumption of risk which the Court had reimposed on them. 53 Stat. 1404, 45 U. S. C. § 54; *Tiller* v. *Atlantic Coast Line R. Co., supra.* The second evil was not so readily susceptible of Congressional correction under a system where liability is bottomed on negligence. Since the condition was one created by the Court and beyond effective control by Congress, it was appropriate and fitting that the Court correct it. In fact, a decision not to correct it was to let the administration of this law be governed not by the aim of the legislation to safeguard employees but by a hostile philosophy that permeated its interpretation.

The basis of liability under the Act is and remains negligence. Judges will not always agree as to what facts are necessary to establish negligence. We are not in agreement in all cases. But the review of the cases com-

ing to the Court from the 1943 Term to date [2] and set forth in the Appendix to this opinion shows, I think, a record more faithful to the design of the Act than previously prevailed.

Of the 55 petitions for certiorari filed during this period, 20 have been granted. Of these one was granted at the instance of the employer, 19 at the instance of an employee. In 16 of these cases the lower court was reversed for setting aside a jury verdict for an employee or taking the case from the jury. In 3 the lower court was sustained in taking the case from the jury. In the one case granted at the instance of the employer we held that it had received the jury trial on contributory negligence to which it was entitled. In these 20 cases we were unanimous in 10 of the decisions which we rendered on the merits.

Of the 35 petitions denied, 21 were by employers claiming that jury verdicts were erroneous or that new trials should not have been ordered. The remaining 14 were filed by employees. In 10 of these the lower court had withheld the case from the jury and rendered judgment for the employer, in 3 it had sustained jury verdicts for the employer, and in 1 reversed a jury verdict for the employee and directed a new trial.

From this group of cases three observations can be made:

(1) The basis of liability has not been shifted from negligence to absolute liability.

(2) The criterion governing the exercise of our discretion in granting or denying certiorari is not who loses

[2] Cases where petitions for certiorari were granted this Term but which have not yet been decided on the merits have not been included. Nor have cases been included which though arising under the Act present issues other than those of negligence. Moreover, *Wabash R. Co.* v. *Williamson,* certiorari denied, 330 U. S. 824, has been omitted since negligence was admitted by the employer, the case turning on the construction of a railroad rule.

below but whether the jury function in passing on disputed questions of fact and in drawing inferences from proven facts has been respected.

(3) The historic role of the jury in performing that function, see *Jones* v. *East Tennessee, V. & G. R. Co.,* 128 U. S. 443, 445; *Washington & G. R. Co.* v. *McDade,* 135 U. S. 554, 572; *Bailey* v. *Central Vermont R. Co.,* 319 U. S. 350, 353–354, is being restored in this important class of cases.

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

APPENDIX TO OPINION OF DOUGLAS, J.

I. Cases in which certiorari was granted:

A. Where lower court which took the case from the jury or set aside a jury verdict for an employee was reversed:

Tennant v. *Peoria & P. U. R. Co.,* 321 U. S. 29.
Tiller v. *Atlantic Coast Line,* 323 U. S. 574.
Blair v. *B. & O. R. Co.,* 323 U. S. 600.
Keeton v. *Thompson,* 326 U. S. 689.
Lavender v. *Kurn,* 327 U. S. 645.
Cogswell v. *Chicago & E. Ill. R. Co.,* 328 U. S. 820.
Jesionowski v. *Boston & M. R. Co.,* 329 U. S. 452.
Ellis v. *Union P. R. Co.,* 329 U. S. 649.
Pauly v. *McCarthy,* 330 U. S. 802.
Myers v. *Reading Co.,* 331 U. S. 477 (Safety Appliance Act).
Lillie v. *Thompson,* 332 U. S. 459.
Anderson v. *Atchison, T. & S. F. R. Co.,* 333 U. S. 821.
Eubanks v. *Thompson,* 334 U. S. 854.
Penn v. *Chicago & N. W. R. Co.,* 335 U. S. 849.
Coray v. *Southern Pacific Co.,* 335 U. S. 520.
Wilkerson v. *McCarthy,* 336 U. S. 53.

I. Cases in which certiorari was granted—Continued.

B. Where lower court which set aside a jury verdict for an employee or rendered judgment for the employer on questions of law was sustained:

Brady v. *Southern R. Co.*, 320 U. S. 476.
Hunter v. *Texas Electric R. Co.*, 332 U. S. 827.
Eckenrode v. *Penn. R. Co.*, 335 U. S. 329.

C. Where lower court which upheld the jury's verdict on the issues of negligence and contributory negligence was sustained:

McCarthy v. *Bruner*, 323 U. S. 673.

II. Cases in which certiorari was denied:

A. Where lower court withheld case from jury and rendered judgment for the employer:

Beamer v. *Virginian R. Co.*, 321 U. S. 763.
Cowdrick v. *Penn. R. Co*, 323 U. S. 799.
Negro v. *Boston & Maine R.*, 324 U. S. 862.
Fantini v. *Reading Co.*, 325 U. S. 856.
Scarborough v. *Pennsylvania R. Co.*, 326 U. S. 755.
Chisholm v. *Reading Co.*, 329 U. S. 807.
Waller v. *Northern P. T. Co.*, 329 U. S. 742.
Wolfe v. *Henwood*, 332 U. S. 773.
Lasagna v. *McCarthy*, 332 U. S. 829.
Trust Co. of Chicago v. *Erie R. Co.*, 334 U. S. 845.

B. Where lower court sustained a jury verdict for the employer:

Barry v. *Reading Co.*, 324 U. S. 867.
Benton v. *St. Louis-S. F. R. Co.*, 324 U. S. 843.
Benson v. *Missouri-Kansas-Texas R. Co.*, 332 U. S. 830.

C. Where lower court reversed a jury verdict for the employee and directed a new trial:

Owens v. *Union P. R. Co.*, 323 U. S. 740.

II. Cases in which certiorari was denied—Continued.

D. Where lower court sustained jury verdict for the employee or held that the employee's case should have gone to the jury:

Southern Pacific Co. v. *Jester,* 323 U. S. 716.
Thompson v. *Godsy,* 323 U. S. 719.
Northern P. R. Co. v. *Bimberg,* 323 U. S. 752.
Terminal R. Assn. v. *Copeland,* 323 U. S. 799.
Chicago & E. Ill. R. Co. v. *Waddell,* 323 U. S. 732.
Boston & M. R. v. *Cabana,* 325 U. S. 873.
Texas & P. R. Co. v. *Riley,* 325 U. S. 873.
Terminal R. Assn. v. *Mooney,* 326 U. S. 723.
Terminal R. Assn. v. *Schorb,* 326 U. S. 786.
Baltimore & O. C. T. R. Co. v. *Howard,* 328 U. S. 867.
Gardner v. *Griswold,* 329 U. S. 725.
Henwood v. *Chaney,* 329 U. S. 760.
Boston & Maine R. v. *Meech,* 329 U. S. 763.
Wheeling & L. E. R. Co. v. *Keith,* 332 U. S. 763.
Delaware, Lackawanna & W. R. Co. v. *Mostyn,* 332 U. S. 770.
Atlantic Coast Line v. *Meeks,* 333 U. S. 827.
Wabash R. Co. v. *Hampton,* 333 U. S. 833.
Fleming v. *Husted,* 333 U. S. 843.
Unity R. Co. v. *Kurimsky,* 333 U. S. 855.
Baltimore & O. R. Co. v. *Skidmore,* 335 U. S. 816.

E. Where lower court set aside a jury verdict for the employer because of erroneous instructions and ordered a new trial:

Pennsylvania R. Co. v. *McCarthy,* 329 U. S. 812.

MR. CHIEF JUSTICE VINSON, dissenting.

In my view of the record, there is no evidence, nor any inference which reasonably may be drawn from the evidence when viewed in the light most favorable to the

petitioner, which could sustain a verdict for him. This leads me to conclude that the trial court properly directed a verdict for the respondents, and I would affirm.

MR. JUSTICE JACKSON, dissenting.

The trial court, after hearing all the evidence and seeing the witnesses, directed a verdict of no cause of action. The Utah Supreme Court, in a careful opinion, decided two propositions: First, whether this Court still holds that a plaintiff "in order to recover must still show negligence on the part of the employer." It resolved its doubts by relying upon statements of this Court to the effect that it still does adhere to that requirement.[1] Second, whether there is any evidence of negligence. On

[1] The Supreme Court of Utah considered and rejected the opinion in *Griswold* v. *Gardner*, 155 F. 2d 333, in which it was said:

"Any detailed review of the evidence in a case of this character for the purpose of determining the propriety of the trial court's refusal to direct a verdict would be an idle and useless ceremony in the light of the recent decisions of the Supreme Court. This is so regardless of what we might think of the sufficiency of the evidence in this respect. The fact is, so we think, that the Supreme Court has in effect converted this negligence statute into a compensation law thereby making, for all practical purposes, a railroad an insurer of its employees. (See dissent of Mr. Justice Roberts in Bailey v. Central Vermont Ry., 319 U. S. 350, 358, 63 S. Ct. 1062, 1066, 87 L. Ed. 1444.)

"The Supreme Court, commencing with Tiller v. Atlantic Coastline R. Co., 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610, 143 A. L. R. 967, in a succession of cases has reversed every court (with one exception hereinafter noted) which has held that a defendant was entitled to a directed verdict. In the Tiller case, the Supreme Court reversed the Court of Appeals for the Fourth Circuit, 128 F. 2d 420, which had affirmed the District Court in directing a verdict. The case, upon remand, was again tried in the court below, where a directed verdict was denied. For this denial the Court of Appeals reversed and again the Supreme Court reversed the Court of Appeals,

a careful analysis, it found no evidence whatever of negligence in this case. Following established principles of law, it concluded that it would have been error to let such a case go to the jury, and therefore affirmed the trial court's refusal so to do.

This Court now reverses and, to my mind at least, espouses the doctrine that any time a trial or appellate court weighs evidence or examines facts it is usurping the jury's function. But under that rule every claim of injury would require jury trial, even if the evidence showed no possible basis for a finding of negligence. Determination of whether there could be such a basis is a function of the trial court, even though it involves weighing evidence and examining facts. I think we are under a duty to examine the record impartially if we take such cases and to sustain the lower courts where,

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holding that the District Court properly submitted the case to the jury. In Tennant v. Peoria & P. U. R. Co., 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520, this court reversed the District Court on account of its refusal to direct a verdict, and our decision, 134 F. 2d 860, was reversed by the Supreme Court. In Bailey v. Central Vermont Ry., 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444, the Supreme Court of Vermont held that there should have been a directed verdict for the defendant, and the Supreme Court reversed the decision of that court. In Blair v. Baltimore & O. R. Co., 323 U. S. 600, 65 S. Ct. 545, 89 L. Ed. 490, the Supreme Court reversed the Supreme Court of Pennsylvania which had held that there should have been a directed verdict. In the recent case of Lavender, Administrator, etc., v. Kurn et al., [327 U. S. 645] 66 S. Ct. 740, the Supreme Court reversed the Supreme Court of Missouri which had held that there should have been a directed verdict for each of the defendants.

"The only exception to this unbroken line of decisions is Brady v. Southern R. Co., 320 U. S. 476, 64 S. Ct. 232, 88 L. Ed. 239, where the Supreme Court of North Carolina was affirmed in its holding that there should have been a directed verdict. This exception, however, is of little consequence in view of the fact that four members of the court dissented."

as here, a finding of negligence would obviously be without basis in fact.

I am not unaware that even in this opinion the Court continues to pay lip service to the doctrine that liability in these cases is to be based only upon fault. But its standard of fault is such in this case as to indicate that the principle is without much practical meaning.

This record shows that both the wheel pit into which plaintiff fell and the board on which he was trying to cross over the pit were blocked off by safety chains strung between posts. Plaintiff admits he knew the chains were there to keep him from crossing over the pit and to require him to go a few feet farther to walk around it. After the chains were put up, any person undertaking to use the board as a cross walk had to complete involved contortions and gymnastics, particularly when, as was the case with petitioner, a car was on the track 23½. A casual examination of the model filed as an exhibit in this Court shows how difficult was such a passage. Nevertheless, the Court holds that if employees succeeded in disregarding the chains and forced passage frequently enough to be considered "customary," and the railroad took no further action, its failure so to do was negligence. The same rule would no doubt apply if the railroad's precautions had consisted of a barricade, or an armed guard. I think the railroad here could not fairly be found guilty of negligence and that there was no jury question.

If in this class of cases, which forms a growing proportion of its total, this Court really is applying accepted principles of an old body of liability law in which lower courts are generally experienced, I do not see why they are so baffled and confused at what goes on here. On the other hand, if this Court considers a reform of this law appropriate and within the judicial power to promulgate, I do not see why it should constantly deny that it is doing just that.

53 Syllabus.

I think a comparison of the State Supreme Court's opinion, —— Utah ——, 187 P. 2d 188, with the opinion of this Court will fairly raise, in the minds of courts below and of the profession, the question I leave to their perspicacity to answer: In which proposition did the Supreme Court of Utah really err?

KOVACS *v.* COOPER, JUDGE.

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

No. 9. Submitted October 11, 1948.—Decided January 31, 1949.

An ordinance of Trenton, New Jersey, forbids the use or operation on the public streets of a "sound truck" or of any instrument which emits "loud and raucous noises" and is attached to a vehicle on the public streets. *Held:* As applied to the defendant in this case, it does not infringe the right of free speech in violation of the First Amendment, made applicable to the states by the Fourteenth Amendment. Pp. 78–79, 89.

135 N. J. L. 584, 52 A. 2d 806, affirmed.

Appellant was convicted in Police Court for violation of an ordinance of Trenton, New Jersey. The New Jersey Supreme Court upheld the conviction, 135 N. J. L. 64, 50 A. 2d 451, and the Court of Errors and Appeals affirmed by an equally divided court. 135 N. J. L. 584, 52 A. 2d 806. On appeal to this Court, *affirmed*, p. 89.

George Pellettieri submitted on brief for appellant.

Louis Josephson submitted on brief for appellee.

Briefs of *amici curiae* urging reversal were filed by *Osmond K. Fraenkel* and *Samuel Rothbard* for the American Civil Liberties Union; and *Lee Pressman, Frank Donner, M. H. Goldstein, Isadore Katz, Irving J. Levy, David Rein* and *Benjamin C. Sigal* for the Congress of Industrial Organizations et al.

Mr. Justice Reed announced the judgment of the Court and an opinion in which The Chief Justice and Mr. Justice Burton join.

This appeal involves the validity of a provision of Ordinance No. 430 of the City of Trenton, New Jersey. It reads as follows:

> "4. That it shall be unlawful for any person, firm or corporation, either as principal, agent or employee, to play, use or operate for advertising purposes, or for any other purpose whatsoever, on or upon the public streets, alleys or thoroughfares in the City of Trenton, any device known as a sound truck, loud speaker or sound amplifier, or radio or phonograph with a loud speaker or sound amplifier, or any other instrument known as a calliope or any instrument of any kind or character which emits therefrom loud and raucous noises and is attached to and upon any vehicle operated or standing upon said streets or public places aforementioned."

The appellant was found guilty of violating this ordinance by the appellee, a police judge of the City of Trenton. His conviction was upheld by the New Jersey Supreme Court, *Kovacs* v. *Cooper,* 135 N. J. L. 64, 50 A. 2d 451, and the judgment was affirmed without a majority opinion by the New Jersey Court of Errors and Appeals in an equally divided court. The dissents are printed. 135 N. J. L. 584, 52 A. 2d 806.

We took jurisdiction [1] to consider the challenge made to the constitutionality of the section on its face and as applied on the ground that § 1 of the Fourteenth Amendment of the United States Constitution was violated because the section and the conviction are in con-

[1] See Judicial Code § 237 (a), 28 U. S. C. § 344 (a), now 28 U. S. C. § 1257 (2); *Lovell* v. *City of Griffin,* 303 U. S. 444; *New Orleans Water Works Co.* v. *New Orleans,* 164 U. S. 471.

travention of rights of freedom of speech, freedom of assemblage and freedom to communicate information and opinions to others. The ordinance is also challenged as violative of the Due Process Clause of the Fourteenth Amendment on the ground that it is so obscure, vague, and indefinite as to be impossible of reasonably accurate interpretation. No question was raised as to the sufficiency of the complaint.

At the trial in the Trenton police court, a city patrolman testified that while on his post he heard a sound truck broadcasting music. Upon going in the direction of said sound, he located the truck on a public street near the municipal building. As he approached the truck, the music stopped and he heard a man's voice broadcasting from the truck. The appellant admitted that he operated the mechanism for the music and spoke into the amplifier. The record from the police court does not show the purpose of the broadcasting but the opinion in the Supreme Court suggests that the appellant was using the sound apparatus to comment on a labor dispute then in progress in Trenton.

The contention that the section is so vague, obscure and indefinite as to be unenforceable merits only a passing reference. This objection centers around the use of the words "loud and raucous." While these are abstract words, they have through daily use acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden. Last term, after thorough consideration of the problem of vagueness in legislation affecting liberty of speech, this Court invalidated a conviction under a New York statute construed and applied to punish the distribution of magazines "principally made up of criminal news or stories of deeds of bloodshed or lust, so massed as to become vehicles for inciting violent and depraved crimes against the person." *Winters* v. *New York*, 333 U. S. 507, 518. As thus con-

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strued we said that the statute was so vague that an honest distributor of tales of war horrors could not know whether he was violating the statute. P. 520. But in the *Winters* case we pointed out that prosecutions might be brought under statutes punishing the distribution of "obscene, lewd, lascivious, filthy, indecent or disgusting" magazines. P. 511. We said, p. 518:

> "The impossibility of defining the precise line between permissible uncertainty in statutes caused by describing crimes by words well understood through long use in the criminal law—obscene, lewd, lascivious, filthy, indecent or disgusting—and the unconstitutional vagueness that leaves a person uncertain as to the kind of prohibited conduct—massing stories to incite crime—has resulted in three arguments of this case in this Court."

We used the words quoted above from page 511 as examples of permissible standards of statutes for criminal prosecution. P. 520. There we said:

> "To say that a state may not punish by such a vague statute carries no implication that it may not punish circulation of objectionable printed matter, assuming that it is not protected by the principles of the First Amendment, by the use of apt words to describe the prohibited publications. . . . Neither the states nor Congress are prevented by the requirement of specificity from carrying out their duty of eliminating evils to which, in their judgment, such publications give rise."

We think the words of § 4 of this Trenton ordinance comply with the requirements of definiteness and clarity, set out above.

The scope of the protection afforded by the Fourteenth Amendment, for the right of a citizen to play music and express his views on matters which he considers to be

of interest to himself and others on a public street through sound amplification devices mounted on vehicles, must be considered. Freedom of speech, freedom of assembly and freedom to communicate information and opinion to others are all comprehended on this appeal in the claimed right of free speech. They will be so treated in this opinion.

The use of sound trucks and other peripatetic or stationary broadcasting devices for advertising, for religious exercises and for discussion of issues or controversies has brought forth numerous municipal ordinances. The avowed and obvious purpose of these ordinances is to prohibit or minimize such sounds on or near the streets since some citizens find the noise objectionable and to some degree an interference with the business or social activities in which they are engaged or the quiet that they would like to enjoy.[2] A satisfactory adjustment of the conflicting interests is difficult as those who desire to broadcast can hardly acquiesce in a requirement to modulate their sounds to a pitch that would not rise above other street noises nor would they deem a restriction to sparsely used localities or to hours after work and before sleep—say 6 to 9 p. m.—sufficient for the exercise of their claimed privilege. Municipalities are seeking actively a solution. National Institute of Municipal Law Officers, Report No. 123, 1948. Unrestrained use throughout a municipality of all sound amplifying devices would be intolerable. Absolute prohibition within

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[2] Ordinances regulating or prohibiting sound devices were upheld in *People* v. *Phillips,* 147 N. Y. Misc. 11, 263 N. Y. Supp. 158; *Maupin* v. *City of Louisville,* 284 Ky. 195, 144 S. W. 2d 237; *Hamilton* v. *City of Montrose,* 109 Colo. 228, 124 P. 2d 757.

Injunctions have also dealt with nuisances from the playing of mechanical music for advertising purposes. *Weber* v. *Mann,* 42 S. W. 2d 492 (Tex. Ct. of Civ. App.); *Stodder* v. *Rosen Talking Machine Co.,* 241 Mass. 245, 135 N. E. 251; 247 Mass. 60, 141 N. E. 569.

municipal limits of all sound amplification, even though reasonably regulated in place, time and volume, is undesirable and probably unconstitutional as an unreasonable interference with normal activities.

We have had recently before us an ordinance of the City of Lockport, New York, prohibiting sound amplification whereby the sound was cast on public places so as to attract the attention of the passing public to the annoyance of those within the radius of the sounds. The ordinance contained this exception:

> "Section 3. Exception. Public dissemination, through radio loudspeakers, of items of news and matters of public concern and athletic activities shall not be deemed a violation of this section provided that the same be done under permission obtained from the Chief of Police."

This Court held the ordinance "unconstitutional on its face," *Saia* v. *New York*, 334 U. S. 558, because the quoted section established a "previous restraint" on free speech with "no standards prescribed for the exercise" of discretion by the Chief of Police. When ordinances undertake censorship of speech or religious practices before permitting their exercise, the Constitution forbids their enforcement.[3] The Court said in the *Saia* case at 560–61:

> "The right to be heard is placed in the uncontrolled discretion of the Chief of Police. He stands athwart the channels of communication as an obstruction which can be removed only after criminal trial and conviction and lengthy appeal. A more effective previous restraint is difficult to imagine."

This ordinance is not of that character. It contains nothing comparable to the above-quoted § 3 of the ordi-

[3] *Lovell* v. *City of Griffin*, 303 U. S. 444; *Hague* v. *C. I. O.*, 307 U. S. 496; *Cantwell* v. *Connecticut*, 310 U. S. 296.

nance in the *Saia* case. It is an exercise of the authority granted to the city by New Jersey "to prevent disturbing noises," N. J. Stat. Ann., tit. 40, § 48–1 (8), nuisances well within the municipality's power to control. The police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a community.[4] A state or city may prohibit acts or things reasonably thought to bring evil or harm to its people.

In this case, New Jersey necessarily has construed this very ordinance as applied to sound amplification.[5] The Supreme Court said, 135 N. J. L. 64, 66, 50 A. 2d 451, 452:

> "The relevant provisions of the ordinance apply only to (1) vehicles (2) containing an instrument in the nature of a sound amplifier or any other instrument emitting loud and raucous noises and (3) such vehicle operated or standing upon the public streets, alleys or thoroughfares of the city."

If that means that only amplifiers that emit, in the language of the ordinance, "loud and raucous noises" are barred from the streets, we have a problem of regulation. The dissents accept that view.[6] So did the appellant

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[4] *Chicago, B. & Q. R. Co.* v. *Drainage Comm'rs,* 200 U. S. 561, 592; *Nebbia* v. *New York,* 291 U. S. 502, 525; *Queenside Hills Realty Co.* v. *Saxl,* 328 U. S. 80, 82.

[5] The Court of Errors and Appeals was cognizant of the difficulties. *Evening Times Printing Co.* v. *American Newspaper Guild,* 124 N. J. Eq. 71, 78, 199 A. 598, 602–603.

[6] 135 N. J. L. 584, 52 A. 2d 809:

"COLIE, J. (For reversal.) I am of the opinion that the judgment under review should be reversed but I do not agree that section 4 of the ordinance is an unconstitutional exercise of the police power. The privilege of a citizen to use the streets for the communication of ideas is not absolute but must be exercised in subordination to the general comfort and convenience. Most assuredly the prohibi-

in his Statement as to Jurisdiction and his brief.[7] Although this Court must decide for itself whether federal questions are presented and decided,[8] we must accept the

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tion against making 'loud and raucous' noises is a reasonable regulation."

Id., at 585: "There is not a scintilla of evidence that the music or voice was loud or raucous, and under the wording of section 4 such proof is an essential prerequisite to a finding of guilt of a violation."

The New Jersey courts may have concluded that the necessity of search by the patrolman to locate the sound truck on a street was sufficient evidence of loudness and raucousness.

135 N. J. L. 584, 52 A. 2d 808, Eastwood, J., for reversal, speaking for himself and three other members, said, pp. 588–89: "It appears to us, and we so hold, that the primary aim of section 4 of the ordinance, under review, is to prohibit 'loud and raucous noises,' at all times and in all places in the City of Trenton, emanating from sound trucks, loud speakers, sound amplifiers, radios or phonographs, equipped with loud speakers or sound amplifiers, or other similar instruments. It is thus clear that section 4 of the ordinance is not regulatory within a proper exercise of the police power of the municipality."

Id., at 590: "We conclude that section 4 of the ordinance under attack represents an attempt by the municipality under the guise of regulation, to prohibit and outlaw, under all circumstances and conditions, the use of sound amplifying systems."

Perhaps the last-quoted paragraph assumes that all sound trucks emit loud and raucous noises.

[7] He wrote: "Section 4 of the Ordinance, under which appellant was charged, prohibits any person from using for any purpose whatsoever, a loud speaker or sound amplifier which emits therefrom 'loud and raucous noises' and is attached to any vehicle operated or standing upon the streets of the City of Trenton."

In the brief this appears:

"This ordinance does not purport to prohibit loud and raucous noises. It attempts to prohibit sound devices which emit therefrom loud and raucous noises. This does not validate the ordinance or save it. In order to be a valid regulation the law must deal with the abuse and not with the use of the thing."

[8] *Lovell* v. *City of Griffin*, 303 U. S. 444, 450.

state courts' conclusion as to the scope of the ordinance.[9] We accept the determination of New Jersey that § 4 applies only to vehicles with sound amplifiers emitting loud and raucous noises. Courts are inclined to adopt that reasonable interpretation of a statute which removes it farthest from possible constitutional infirmity. *Cox* v. *New Hampshire,* 312 U. S. 569, 575–76; cf. *United States* v. *C. I. O.,* 335 U. S. 106, 120. We need not determine whether this ordinance so construed is regulatory or prohibitory. All regulatory enactments are prohibitory so far as their restrictions are concerned, and the prohibition of this ordinance as to a use of streets is merely regulatory. Sound trucks may be utilized in places such as parks or other open spaces off the streets. The constitutionality of the challenged ordinance as violative of appellant's right of free speech does not depend upon so narrow an issue as to whether its provisions are cast in the words of prohibition or regulation.[10] The question is whether or not there is a real abridgment of the rights of free speech.

Of course, even the fundamental rights of the Bill of Rights are not absolute. The *Saia* case recognized that in this field by stating "The hours and place of public

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[9] *Saia* v. *New York,* 334 U. S. 558; *Cox* v. *New Hampshire,* 312 U. S. 569, 574; *Winters* v. *New York,* 333 U. S. 507, 514.

[10] In the exercise of the police power acts or things which could not be barred completely from use may be prohibited under some conditions and circumstances when they interfere with the rights of others. *Cox* v. *New Hampshire,* 312 U. S. 569, 574; *Chaplinsky* v. *New Hampshire,* 315 U. S. 568; *Sage Stores Co.* v. *Kansas,* 323 U. S. 32, 36; *Hutchinson Ice Cream Co.* v. *Iowa,* 242 U. S. 153, 159, compare 160; *Powell* v. *Pennsylvania,* 127 U. S. 678, 682–83; *Mugler* v. *Kansas,* 123 U. S. 623, 657–663. For examples of federal prohibitions, see *Carolene Products Co.* v. *United States,* 323 U. S. 18, 27, Third; *United States* v. *Darby,* 312 U. S. 100, 113, 116; *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.,* 299 U. S. 334, 348; *Buttfield* v. *Stranahan,* 192 U. S. 470, 492–93.

discussion can be controlled." [11] It was said decades ago in an opinion of this Court delivered by Mr. Justice Holmes, *Schenck* v. *United States,* 249 U. S. 47, 52, that:

> "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force."

Hecklers may be expelled from assemblies and religious worship may not be disturbed by those anxious to preach a doctrine of atheism. The right to speak one's mind would often be an empty privilege in a place and at a time beyond the protecting hand of the guardians of public order.

While this Court, in enforcing the broad protection the Constitution gives to the dissemination of ideas, has invalidated an ordinance forbidding a distributor of pamphlets or handbills from summoning householders to their doors to receive the distributor's writings, this was on the ground that the home owner could protect himself from such intrusion by an appropriate sign "that he is unwilling to be disturbed." The Court never intimated that the visitor could insert a foot in the door and insist on a hearing. *Martin* v. *Struthers,* 319 U. S. 141, 143, 148. We do not think that the *Struthers* case requires us to expand this interdiction of legislation to include ordinances against obtaining an audience for the broadcaster's ideas by way of sound trucks with loud and raucous noises on city streets. The unwilling listener is

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[11] *Saia* v. *New York,* 334 U. S. 558, 562; *Prince* v. *Massachusetts,* 321 U. S. 158, 166; *Murdock* v. *Pennsylvania,* 319 U. S. 105, 109; *Cox* v. *New Hampshire,* 312 U. S. 569; *Cantwell* v. *Connecticut,* 310 U. S. 296, 303; *Whitney* v. *California,* 274 U. S. 357, 371, 373; *Reynolds* v. *United States,* 98 U. S. 145, 166.

not like the passer-by who may be offered a pamphlet in the street but cannot be made to take it.[12] In his home or on the street he is practically helpless to escape this interference with his privacy by loud speakers except through the protection of the municipality.

City streets are recognized as a normal place for the exchange of ideas by speech or paper. But this does not mean the freedom is beyond all control. We think it is a permissible exercise of legislative discretion to bar sound trucks with broadcasts of public interest, amplified to a loud and raucous volume, from the public ways of municipalities. On the business streets of cities like Trenton, with its more than 125,000 people, such distractions would be dangerous to traffic at all hours useful for the dissemination of information, and in the residential thoroughfares the quiet and tranquility so desirable for city dwellers would likewise be at the mercy of advocates of particular religious, social or political persuasions. We cannot believe that rights of free speech compel a municipality to allow such mechanical voice amplification on any of its streets.

The right of free speech is guaranteed every citizen that he may reach the minds of willing listeners and to do so there must be opportunity to win their attention. This is the phase of freedom of speech that is involved here. We do not think the Trenton ordinance abridges that freedom. It is an extravagant extension of due process to say that because of it a city cannot forbid talking on the streets through a loud speaker in a loud and raucous tone. Surely such an ordinance does not violate our people's "concept of ordered liberty" so as to require federal intervention to protect a citizen from the action of his own local government. Cf. *Palko* v. *Connecticut,* 302 U. S. 319, 325. Opportunity to gain the

[12] See *Schneider* v. *State,* 308 U. S. 147, 162.

public's ears by objectionably amplified sound on the streets is no more assured by the right of free speech than is the unlimited opportunity to address gatherings on the streets.[13] The preferred position [14] of freedom of speech in a society that cherishes liberty for all does not require legislators to be insensible to claims by citizens to comfort and convenience. To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself. That more people may be more easily and cheaply reached by sound trucks, perhaps borrowed without cost from some zealous supporter, is not enough to

[13] *Schneider* v. *State,* 308 U. S. 147, 160–61:

"Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which the streets are dedicated. So long as legislation to this end does not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature, it may lawfully regulate the conduct of those using the streets. For example, a person could not exercise this liberty by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic; a group of distributors could not insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not accept a tendered leaflet; nor does the guarantee of freedom of speech or of the press deprive a municipality of power to enact regulations against throwing literature broadcast in the streets. Prohibition of such conduct would not abridge the constitutional liberty since such activity bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion."

Cantwell v. *Connecticut,* 310 U. S. 296, 308:

"When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious. Equally obvious is it that a State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions."

[14] *Thomas* v. *Collins,* 323 U. S. 516, 527, note 12, 530; *Murdock* v. *Pennsylvania,* 319 U. S. 105.

call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open. Section 4 of the ordinance bars sound trucks from broadcasting in a loud and raucous manner on the streets. There is no restriction upon the communication of ideas or discussion of issues by the human voice, by newspapers, by pamphlets, by dodgers. We think that the need for reasonable protection in the homes or business houses from the distracting noises of vehicles equipped with such sound amplifying devices justifies the ordinance.

Affirmed.

MR. JUSTICE MURPHY dissents.

MR. JUSTICE FRANKFURTER, concurring.

Wise accommodation between liberty and order always has been, and ever will be, indispensable for a democratic society. Insofar as the Constitution commits the duty of making this accommodation to this Court, it demands vigilant judicial self-restraint. A single decision by a closely divided court, unsupported by the confirmation of time, cannot check the living process of striking a wise balance between liberty and order as new cases come here for adjudication. To dispose of this case on the assumption that the *Saia* case, 334 U. S. 558, decided only the other day, was rightly decided, would be for me to start with an unreality. While I am not unaware of the circumstances that differentiate this case from what was ruled in *Saia,* further reflection has only served to reinforce the dissenting views I expressed in that case. *Id.* at 562. In the light of them I conclude that there is nothing in the Constitution of the United States to bar New Jersey from authorizing the City of Trenton to deal in the manner chosen by the City with the aural aggressions implicit in the use of sound trucks.

The opinions in this case prompt me to make some additional observations. My brother REED speaks of "the preferred position of freedom of speech," though, to be sure, he finds that the Trenton ordinance does not disregard it. This is a phrase that has uncritically crept into some recent opinions of this Court. I deem it a mischievous phrase, if it carries the thought, which it may subtly imply, that any law touching communication is infected with presumptive invalidity. It is not the first time in the history of constitutional adjudication that such a doctrinaire attitude has disregarded the admonition most to be observed in exercising the Court's reviewing power over legislation, "that it is *a constitution* we are expounding," *M'Culloch* v. *Maryland,* 4 Wheat. 316, 407. I say the phrase is mischievous because it radiates a constitutional doctrine without avowing it. Clarity and candor in these matters, so as to avoid gliding unwittingly into error, make it appropriate to trace the history of the phrase "preferred position." The following is a chronological account of the evolution of talk about "preferred position" except where the thread of derivation is plain enough to be indicated.

1. *Herndon* v. *Lowry,* 301 U. S. 242, 258: "The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state."

2. *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152, n. 4, set forth in the margin.[1] A footnote hardly

[1] "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to

seems to be an appropriate way of announcing a new constitutional doctrine, and the *Carolene* footnote did not purport to announce any new doctrine; incidentally, it did not have the concurrence of a majority of the Court. It merely rephrased and expanded what was said in *Herndon* v. *Lowry, supra,* and elsewhere. It certainly did not assert a presumption of invalidity against all legislation touching matters related to liberties protected by the Bill of Rights and the Fourteenth Amendment. It merely stirred inquiry whether as to such matters there

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be embraced within the Fourteenth. See *Stromberg* v. *California,* 283 U. S. 359, 369–370; *Lovell* v. *Griffin,* 303 U. S. 444, 452.

"It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, see *Nixon* v. *Herndon,* 273 U. S. 536; *Nixon* v. *Condon,* 286 U. S. 73; on restraints upon the dissemination of information, see *Near* v. *Minnesota ex rel. Olson,* 283 U. S. 697, 713–714, 718–720, 722; *Grosjean* v. *American Press Co.,* 297 U. S. 233; *Lovell* v. *Griffin, supra;* on interferences with political organizations, see *Stromberg* v. *California, supra,* 369; *Fiske* v. *Kansas,* 274 U. S. 380; *Whitney* v. *California,* 274 U. S. 357, 373–378; *Herndon* v. *Lowry,* 301 U. S. 242; and see Holmes, J., in *Gitlow* v. *New York,* 268 U. S. 652, 673; as to prohibition of peaceable assembly, see *De Jonge* v. *Oregon,* 299 U. S. 353, 365.

"Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, *Pierce* v. *Society of Sisters,* 268 U. S. 510, or national, *Meyer* v. *Nebraska,* 262 U. S. 390; *Bartels* v. *Iowa,* 262 U. S. 404; *Farrington* v. *Tokushige,* 273 U. S. 284, or racial minorities, *Nixon* v. *Herndon, supra; Nixon* v. *Condon, supra:* whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. Compare *McCulloch* v. *Maryland,* 4 Wheat. 316, 428; *South Carolina* v. *Barnwell Bros.,* 303 U. S. 177, 184, n. 2, and cases cited."

may be "narrower scope for operation of the presumption of constitutionality" and legislation regarding them is therefore "to be subjected to more exacting judicial scrutiny."

The *Carolene* footnote is cited in *Thornhill* v. *Alabama,* 310 U. S. 88, 95, in an opinion which thus proceeds: "Mere legislative preference for one rather than another means for combatting substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions. It is imperative that, when the effective exercise of these rights is claimed to be abridged, the courts should 'weigh the circumstances' and 'appraise the substantiality of the reasons advanced' in support of the challenged regulations. *Schneider* v. *State* . . . ."

It is cited again in the opinion of the Court in *A. F. of L.* v. *Swing,* 312 U. S. 321, 325, together with the *Herndon* and *Schneider* cases, in support of the statement that the "right to free discussion" "is to be guarded with a jealous eye."

The *Carolene* footnote was last cited in an opinion of this Court in the passage of *Thomas* v. *Collins,* 323 U. S. 516, 530, quoted below.

(3) *Schneider* v. *State,* 308 U. S. 147, 161: "In every case, therefore, where legislative abridgment of the rights [freedom of speech and of the press] is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances

and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights."

(4) *Bridges* v. *California,* 314 U. S. 252, 262–63: "Moreover, the likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be 'substantial,' Brandeis, J., concurring in *Whitney* v. *California, supra,* [274 U. S. 357] 374; it must be 'serious,' *id.* 376. And even the expression of 'legislative preferences or beliefs' cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression. *Schneider* v. *State* . . . .

"What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."

This formulation of the "clear-and-present-danger" test was quoted and endorsed in *Pennekamp* v. *Florida,* 328 U. S. 331, 334.

(5) A number of Jehovah's Witnesses cases refer to the freedoms specified by the First Amendment as in a "preferred position." The phrase was apparently first used in the dissent of Chief Justice Stone in *Jones* v. *Opelika,* 316 U. S. 584, 600, 608. It reappears in *Murdock* v. *Pennsylvania,* 319 U. S. 105, 115; *Prince* v. *Massachusetts,* 321 U. S. 158, 164; *Follett* v. *McCormick,* 321 U. S. 573, 575; *Marsh* v. *Alabama,* 326 U. S. 501, 509; *Saia* v. *New York,* 334 U. S. 558, 562.

(6) *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 639: "The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disap-

pears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect."

(7) *Thomas* v. *Collins,* 323 U. S. 516, 530: "For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." This is perhaps the strongest language dealing with the constitutional aspect of legislation touching utterance. But it was the opinion of only four members of the Court, since MR. JUSTICE JACKSON, in a separate concurring opinion, referred to the opinion of MR. JUSTICE RUTLEDGE only to say that he agreed that the case fell into "the category of a public speech, rather than that of practicing a vocation as solicitor." *Id.* at 548.

In short, the claim that any legislation is presumptively unconstitutional which touches the field of the First Amendment and the Fourteenth Amendment, insofar as the latter's concept of "liberty" contains what is specifi-

cally protected by the First, has never commended itself to a majority of this Court.

Behind the notion sought to be expressed by the formula as to "the preferred position of freedom of speech" lies a relevant consideration in determining whether an enactment relating to the liberties protected by the Due Process Clause of the Fourteenth Amendment is violative of it. In law also, doctrine is illuminated by history. The ideas now governing the constitutional protection of freedom of speech derive essentially from the opinions of Mr. Justice Holmes.

The philosophy of his opinions on that subject arose from a deep awareness of the extent to which sociological conclusions are conditioned by time and circumstance. Because of this awareness Mr. Justice Holmes seldom felt justified in opposing his own opinion to economic views which the legislature embodied in law. But since he also realized that the progress of civilization is to a considerable extent the displacement of error which once held sway as official truth by beliefs which in turn have yielded to other beliefs, for him the right to search for truth was of a different order than some transient economic dogma. And without freedom of expression, thought becomes checked and atrophied. Therefore, in considering what interests are so fundamental as to be enshrined in the Due Process Clause, those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society come to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements. Accordingly, Mr. Justice Holmes was far more ready to find legislative invasion where free inquiry was involved than in the debatable area of economics. See my *Mr. Justice Holmes and the Supreme Court,* 58 *et seq.*

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The objection to summarizing this line of thought by the phrase "the preferred position of freedom of speech" is that it expresses a complicated process of constitutional adjudication by a deceptive formula. And it was Mr. Justice Holmes who admonished us that "To rest upon a formula is a slumber that, prolonged, means death." Collected Legal Papers, 306. Such a formula makes for mechanical jurisprudence.

Some of the arguments made in this case strikingly illustrate how easy it is to fall into the ways of mechanical jurisprudence through the use of oversimplified formulas. It is argued that the Constitution protects freedom of speech: freedom of speech means the right to communicate, whatever the physical means for so doing; sound trucks are one form of communication; *ergo* that form is entitled to the same protection as any other means of communication, whether by tongue or pen. Such sterile argumentation treats society as though it consisted of bloodless categories. The various forms of modern so-called "mass communications" raise issues that were not implied in the means of communication known or contemplated by Franklin and Jefferson and Madison. Cf. *Associated Press* v. *United States,* 326 U. S. 1. Movies have created problems not presented by the circulation of books, pamphlets, or newspapers, and so the movies have been constitutionally regulated. *Mutual Film Corporation* v. *Industrial Commission,* 236 U. S. 230. Broadcasting in turn has produced its brood of complicated problems hardly to be solved by an easy formula about the preferred position of free speech. See *National Broadcasting Co.* v. *United States,* 319 U. S. 190.

Only a disregard of vital differences between natural speech, even of the loudest spellbinders, and the noise of sound trucks would give sound trucks the constitutional rights accorded to the unaided human voice. Nor is it for this Court to devise the terms on which sound trucks

should be allowed to operate, if at all. These are matters for the legislative judgment controlled by public opinion. So long as a legislature does not prescribe what ideas may be noisily expressed and what may not be, nor discriminate among those who would make inroads upon the public peace, it is not for us to supervise the limits the legislature may impose in safeguarding the steadily narrowing opportunities for serenity and reflection. Without such opportunities freedom of thought becomes a mocking phrase, and without freedom of thought there can be no free society.

MR. JUSTICE JACKSON, concurring.

I join the judgment sustaining the Trenton ordinance because I believe that operation of mechanical sound-amplifying devices conflicts with quiet enjoyment of home and park and with safe and legitimate use of street and market place, and that it is constitutionally subject to regulation or prohibition by the state or municipal authority. No violation of the Due Process Clause of the Fourteenth Amendment by reason of infringement of free speech arises unless such regulation or prohibition undertakes to censor the contents of the broadcasting. Freedom of speech for Kovacs does not, in my view, include freedom to use sound amplifiers to drown out the natural speech of others.

I do not agree that, if we sustain regulations or prohibitions of sound trucks, they must therefore be valid if applied to other methods of "communication of ideas." The moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each, in my view, is a law unto itself, and all we are dealing with now is the sound truck.

But I agree with MR. JUSTICE BLACK that this decision is a repudiation of that in *Saia* v. *New York,* 334 U. S.

558. Like him, I am unable to find anything in this record to warrant a distinction because of "loud and raucous" tones of this machine. The *Saia* decision struck down a more moderate exercise of the state's police power than the one now sustained. Trenton, as the ordinance reads to me, unconditionally bans all sound trucks from the city streets. Lockport relaxed its prohibition with a proviso to allow their use, even in areas set aside for public recreation, when and where the Chief of Police saw no objection. Comparison of this our 1949 decision with our 1948 decision, I think, will pretty hopelessly confuse municipal authorities as to what they may or may not do.

I concur in the present result only for the reasons stated in dissent in *Saia* v. *New York,* 334 U. S. 558, 566.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE RUTLEDGE concur, dissenting.

The question in this case is not whether appellant may constitutionally be convicted of operating a sound truck that emits "loud and raucous noises." The appellant was neither charged with nor convicted of operating a sound truck that emitted "loud and raucous noises." The charge against him in the police court was that he violated the city ordinance "in that he did, on South Stockton Street, in said City, play, use and operate a device known as a sound truck." The record reflects not even a shadow of evidence to prove that the noise was either "loud or raucous," unless these words of the ordinance refer to any noise coming from an amplifier, whatever its volume or tone.

After appellant's conviction in the police court, the case was taken to the Supreme Court of New Jersey for review. That court, composed of three judges, stated with reference to the ordinance and charge: "In simple,

unambiguous language it prohibits the use upon the public streets of any device known as a sound truck, loud speaker or sound amplifier. This is the only charge made against the defendant in the complaint." *Kovacs* v. *Cooper,* 135 N. J. L. 64, 69, 50 A. 2d 451, 453–454. That this court construed the ordinance as an absolute prohibition of all amplifiers on any public street at any time and without regard to volume of sound is emphasized by its further statement that "the ordinance leaves untouched the right of the prosecutor to express his views *orally without the aid of an amplifier.*" *Id.* at 66. (Emphasis supplied.) Thus the New Jersey Supreme Court affirmed the conviction on the ground that the appellant was shown guilty of the only offense of which he was charged—speaking through an amplifier on a public street. If as some members of this Court now assume, he was actually convicted for operating a machine that emitted "loud and raucous noises," then he was convicted on a charge for which he was never tried. "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." *Cole* v. *Arkansas,* 333 U. S. 196, 201.

Furthermore, when the conviction was later affirmed in the New Jersey Court of Errors and Appeals by an equally divided court, no one of that court's judges who voted to affirm expressed any doubt as to the correctness of the New Jersey Supreme Court's interpretation; indeed those judges wrote no opinion at all. One of the six who voted to reverse did base his judgment on the fact that there was not "a scintilla of evidence that the music or voice was loud or raucous" and that under the wording of the ordinance such proof was essential. *Kovacs* v. *Cooper,* 135 N. J. L. 584, 585, 52 A. 2d 806, 809. In construing the statute as requiring a proof of loud and

raucous noises, the dissenting judge made the initial mistake of the majority of this Court, but he conceded that under this construction of the statute there was a fatal absence of proof to convict. The other five judges who were for reversal concluded that the ordinance represented "an attempt by the municipality under the guise of regulation, to prohibit and outlaw, under all circumstances and conditions, the use of sound amplifying systems." *Kovacs* v. *Cooper, supra* at 590.

It thus appears that the appellant was charged and convicted by interpreting the ordinance as an absolute prohibition against the use of sound amplifying devices. The New Jersey Supreme Court affirmed only on that interpretation of the ordinance. There is no indication whatever that there was a different view entertained by the six judges of the Court of Errors and Appeals who affirmed the conviction. And it strains the imagination to say that the ordinance itself would warrant any other interpretation.

Nevertheless, in this Court the requisite majority for affirmance of appellant's conviction is composed in part of Justices who give the New Jersey ordinance a construction different from that given it by the state courts. That is not all. Affirmance here means that the appellant will be punished for an offense with which he was not charged, to prove which no evidence was offered, and of which he was not convicted, according to the only New Jersey court which affirmed with opinion. At the last term of court we held that the Arkansas Supreme Court had denied an appellant due process because it had failed to appraise the validity of a conviction "on consideration of the case as it was tried and as the issues were determined in the trial court." *Cole* v. *Arkansas, supra* at 202. I am unable to distinguish the action taken by this Court today from the action of the Arkansas Supreme Court which we declared denied a defendant due process of law.

The New Jersey ordinance is on its face, and as construed and applied in this case by that state's courts, an absolute and unqualified prohibition of amplifying devices on any of Trenton's streets at any time, at any place, for any purpose, and without regard to how noisy they may be.

In *Saia* v. *New York,* 334 U. S. 558, we had before us an ordinance of the City of Lockport, New York, which forbade the use of sound amplification devices except with permission of the chief of police. The ordinance was applied to keep a minister from using an amplifier while preaching in a public park. We held that the ordinance, aimed at the use of an amplifying device, invaded the area of free speech guaranteed the people by the First and Fourteenth Amendments. The ordinance, so we decided, amounted to censorship in its baldest form. And our conclusion rested on the fact that the chief of police was given arbitrary power to prevent the use of speech amplifying devices at all times and places in the city without regard to the volume of the sound. We pointed out the indispensable function performed by loud speakers in modern public speaking. We then placed use of loud speakers in public streets and parks on the same constitutional level as freedom to speak on streets without such devices, freedom to speak over radio, and freedom to distribute literature.

In this case the Court denies speech amplifiers the constitutional shelter recognized by our decisions and holding in the *Saia* case. This is true because the Trenton, New Jersey, ordinance here sustained goes beyond a mere prior censorship of all loud speakers with authority in the censor to prohibit some of them. This Trenton ordinance wholly bars the use of all loud speakers mounted upon any vehicle in any of the city's public streets.

In my view this repudiation of the prior *Saia* opinion makes a dangerous and unjustifiable breach in the consti-

tutional barriers designed to insure freedom of expression. Ideas and beliefs are today chiefly disseminated to the masses of people through the press, radio, moving pictures, and public address systems. To some extent at least there is competition of ideas between and within these groups. The basic premise of the First Amendment is that all present instruments of communication, as well as others that inventive genius may bring into being, shall be free from governmental censorship or prohibition. Laws which hamper the free use of some instruments of communication thereby favor competing channels. Thus, unless constitutionally prohibited, laws like this Trenton ordinance can give an overpowering influence to views of owners of legally favored instruments of communication. This favoritism, it seems to me, is the inevitable result of today's decision. For the result of today's opinion in upholding this statutory prohibition of amplifiers would surely not be reached by this Court if such channels of communication as the press, radio, or moving pictures were similarly attacked.

There are many people who have ideas that they wish to disseminate but who do not have enough money to own or control publishing plants, newspapers, radios, moving picture studios, or chains of show places. Yet everybody knows the vast reaches of these powerful channels of communication which from the very nature of our economic system must be under the control and guidance of comparatively few people. On the other hand, public speaking is done by many men of divergent minds with no centralized control over the ideas they entertain so as to limit the causes they espouse. It is no reflection on the value of preserving freedom for dissemination of the ideas of publishers of newspapers, magazines, and other literature, to believe that transmission of ideas through public speaking is also essential to the sound thinking of a fully informed citizenry.

It is of particular importance in a government where people elect their officials that the fullest opportunity be afforded candidates to express and voters to hear their views. It is of equal importance that criticism of governmental action not be limited to criticisms by press, radio, and moving pictures. In no other way except public speaking can the desirable objective of widespread public discussion be assured. For the press, the radio, and the moving picture owners have their favorites, and it assumes the impossible to suppose that these agencies will at all times be equally fair as between the candidates and officials they favor and those whom they vigorously oppose. And it is an obvious fact that public speaking today without sound amplifiers is a wholly inadequate way to reach the people on a large scale. Consequently, to tip the scales against transmission of ideas through public speaking, as the Court does today, is to deprive the people of a large part of the basic advantages of the receipt of ideas that the First Amendment was designed to protect.

There is no more reason that I can see for wholly prohibiting one useful instrument of communication than another. If Trenton can completely bar the streets to the advantageous use of loud speakers, all cities can do the same. In that event preference in the dissemination of ideas is given those who can obtain the support of newspapers, etc., or those who have money enough to buy advertising from newspapers, radios, or moving pictures. This Court should no more permit this invidious prohibition against the dissemination of ideas by speaking than it would permit a complete blackout of the press, the radio, or moving pictures. It is wise for all who cherish freedom of expression to reflect upon the plain fact that a holding that the audiences of public speakers can be constitutionally prohibited is not unrelated to a like prohibition in other fields. And the right to freedom

of expression should be protected from absolute censorship for persons without, as for persons with, wealth and power. At least, such is the theory of our society.

I am aware that the "blare" of this new method of carrying ideas is susceptible of abuse and may under certain circumstances constitute an intolerable nuisance. But ordinances can be drawn which adequately protect a community from unreasonable use of public speaking devices without absolutely denying to the community's citizens all information that may be disseminated or received through this new avenue for trade in ideas. I would agree without reservation to the sentiment that "unrestrained use throughout a municipality of all sound amplifying devices would be intolerable." And of course cities may restrict or absolutely ban the use of amplifiers on busy streets in the business area. A city ordinance that reasonably restricts the volume of sound, or the hours during which an amplifier may be used, does not, in my mind, infringe the constitutionally protected area of free speech. It is because this ordinance does none of these things, but is instead an absolute prohibition of all uses of an amplifier on any of the streets of Trenton at any time that I must dissent.

I would reverse the judgment.

MR. JUSTICE RUTLEDGE, dissenting.

I am in accord with the views expressed by my brother BLACK. I think it important, however, to point out that a majority here agree with him that the issue presented is whether a state (here a municipality) may forbid all use of sound trucks or amplifying devices in public streets, without reference to whether "loud and raucous noises" are emitted. Only a minority take the view that the Trenton ordinance merely forbids using amplifying instruments emitting loud and raucous noises.

Yet a different majority, one including that minority and two other justices, sustain the ordinance and its application. In effect Kovacs stands convicted, but of what it is impossible to tell, because the majority upholding the conviction do not agree upon what constituted the crime. How, on such a hashing of different views of the thing forbidden, Kovacs could have known with what he was charged or could have prepared a defense, I am unable to see. How anyone can do either in the future, under this decision, I am equally at loss to say.

In my view an ordinance drawn so ambiguously and inconsistently as to reflect the differing views of its meaning taken by the two groups who compose the majority sustaining it, would violate Fourteenth Amendment due process even if no question of free speech were involved. No man should be subject to punishment under a statute when even a bare majority of judges upholding the conviction cannot agree upon what acts the statute denounces.

What the effect of this decision may be I cannot foretell, except that Kovacs will stand convicted and the division among the majority voting to affirm leaves open for future determination whether absolute and total state prohibition of sound trucks in public places can stand consistently with the First Amendment. For myself, I have no doubt of state power to regulate their abuse in reasonable accommodation, by narrowly drawn statutes, to other interests concerned in use of the streets and in freedom from public nuisance. But that the First Amendment limited its protections of speech to the natural range of the human voice as it existed in 1790 would be, for me, like saying that the commerce power remains limited to navigation by sail and travel by the use of horses and oxen in accordance with the principal modes of carrying on commerce in 1789. The Constitution was not drawn with any such limited vision of time, space

and mechanics. It is one thing to hold that the states may regulate the use of sound trucks by appropriately limited measures. It is entirely another to say their use can be forbidden altogether.

To what has been said above and by MR. JUSTICE BLACK, I would add only that I think my brother FRANKFURTER demonstrates the conclusion opposite to that which he draws, namely, that the First Amendment guaranties of the freedoms of speech, press, assembly and religion occupy preferred position not only in the Bill of Rights but also in the repeated decisions of this Court.

RAILWAY EXPRESS AGENCY, INC. ET AL. *v.* NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 51. Argued December 6, 1948.—Decided January 31, 1949.

A New York City traffic regulation forbids the operation of any advertising vehicle on the streets, but excepts vehicles which have upon them business notices or advertisements of the products of the owner and which are not used merely or mainly for advertising. An express company, which sold space on the exterior sides of its trucks for advertising and which operated such trucks on the streets, was convicted and fined for violating the ordinance. Upon review here of the state court judgment, *held:*

1. The regulation does not violate the due process clause of the Fourteenth Amendment. Pp. 108–109.

(a) The function of this Court upon such review is not to weigh evidence on the due process issue in order to determine whether the regulation is sound or appropriate, nor to pass judgment on the wisdom of the regulation. P. 109.

(b) This Court can not say that the regulation has no relation to the traffic problem of the City. P. 109.

2. The exemption of vehicles having upon them advertisements of products sold by the owner does not render the regulation a denial of the equal protection of the laws. Pp. 109–110.

(a) This Court can not say that the advertising which is forbidden has less incidence on traffic than that which is exempted. P. 110.

(b) The regulation is not rendered invalid by the fact that it does not extend to what may be even greater distractions affecting traffic safety, such as the spectacular displays at Times Square. P. 110.

3. The regulation does not burden interstate commerce in violation of Art. I, § 8 of the Federal Constitution. P. 111.

(a) Where traffic control and the use of highways are involved, and where there is no conflicting federal regulation, great leeway is allowed local authorities, even though the local regulation materially interferes with interstate commerce. P. 111.

297 N. Y. 703, 77 N. E. 2d 13, affirmed.

Appellant was convicted and fined for violation of a traffic regulation of the City of New York. The conviction was sustained by the Court of Special Sessions. 188 Misc. 342, 67 N. Y. S. 2d 732. The Court of Appeals affirmed. 297 N Y. 703, 77 N. E. 2d 13. On appeal to this Court, *affirmed*, p. 111.

Ralph M. Carson argued the cause for appellants. With him on the brief were *William R. Meagher* and *James V. Lione*.

Stanley Buchsbaum argued the cause for appellee. With him on the brief were *John P. McGrath* and *Seymour B. Quel*.

Mr. Justice Douglas delivered the opinion of the Court.

Section 124 of the Traffic Regulations of the City of New York[1] promulgated by the Police Commissioner provides:

"No person shall operate, or cause to be operated, in or upon any street an advertising vehicle; pro-

[1] This regulation was promulgated by the Police Commissioner pursuant to the power granted the police department under § 435

vided that nothing herein contained shall prevent the putting of business notices upon business delivery vehicles, so long as such vehicles are engaged in the usual business or regular work of the owner and not used merely or mainly for advertising."

Appellant is engaged in a nation-wide express business. It operates about 1,900 trucks in New York City and sells the space on the exterior sides of these trucks for advertising. That advertising is for the most part unconnected with its own business.[2] It was convicted in the magistrate's court and fined. The judgment of conviction was sustained in the Court of Special Sessions. 188 Misc. 342, 67 N. Y. S. 2d 732. The Court of Appeals affirmed without opinion by a divided vote. 297 N. Y. 703, 77 N. E. 2d 13. The case is here on appeal. Judicial Code § 237 (a), 28 U. S. C. § 344 (a), as amended, now 28 U. S. C. § 1257.

The Court in *Fifth Ave. Coach Co.* v. *New York,* 221 U. S. 467, sustained the predecessor ordinance to the present regulation over the objection that it violated the due process and equal protection clauses of the Fourteenth Amendment. It is true that that was a municipal

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of the New York City Charter which provides as follows: "The police department and force shall have the power and it shall be their duty to . . . regulate, direct, control and restrict the movement of vehicular and pedestrian traffic for the facilitation of traffic and the convenience of the public as well as the proper protection of human life and health; . . . The commissioner shall make such rules and regulations for the conduct of pedestrian and vehicular traffic in the use of the public streets, squares and avenues as he may deem necessary . . . ."

[2] The advertisements for which appellant was convicted consisted of posters from three by seven feet to four by ten feet portraying Camel Cigarettes, Ringling Brothers and Barnum & Bailey Circus, and radio station WOR. Drivers of appellant's trucks carrying advertisements of Prince Albert Smoking Tobacco and the United States Navy were also convicted.

ordinance resting on the broad base of the police power, while the present regulation stands or falls merely as a traffic regulation. But we do not believe that distinction warrants a different result in the two cases.

The Court of Special Sessions concluded that advertising on vehicles using the streets of New York City constitutes a distraction to vehicle drivers and to pedestrians alike and therefore affects the safety of the public in the use of the streets.[3] We do not sit to weigh evidence on the due process issue in order to determine whether the regulation is sound or appropriate; nor is it our function to pass judgment on its wisdom. See *Olsen* v. *Nebraska,* 313 U. S. 236. We would be trespassing on one of the most intensely local and specialized of all municipal problems if we held that this regulation had no relation to the traffic problem of New York City. It is the judgment of the local authorities that it does have such a relation. And nothing has been advanced which shows that to be palpably false.

The question of equal protection of the laws is pressed more strenuously on us. It is pointed out that the regulation draws the line between advertisements of products sold by the owner of the truck and general advertisements. It is argued that unequal treatment on the basis of such a distinction is not justified by the aim and purpose of the regulation. It is said, for example, that one of appellant's trucks carrying the advertisement of a commercial house would not cause any greater distraction of pedestrians and vehicle drivers than if the

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[3] The element of safety was held to be one of the standards by which the regulations of the Police Commissioner were to be judged. We accept that construction of the authority of the Police Commissioner under § 435 of the Charter, note 1, *supra.* See *Price* v. *Illinois,* 238 U. S. 446, 451; *Hartford Accident Co.* v. *Nelson Co.,* 291 U. S. 352, 358; *Central Hanover Bank Co.* v. *Kelly,* 319 U. S. 94, 97.

commercial house carried the same advertisement on its own truck. Yet the regulation allows the latter to do what the former is forbidden from doing. It is therefore contended that the classification which the regulation makes has no relation to the traffic problem since a violation turns not on what kind of advertisements are carried on trucks but on whose trucks they are carried.

That, however, is a superficial way of analyzing the problem, even if we assume that it is premised on the correct construction of the regulation. The local authorities may well have concluded that those who advertise their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use. It would take a degree of omniscience which we lack to say that such is not the case. If that judgment is correct, the advertising displays that are exempt have less incidence on traffic than those of appellants.

We cannot say that that judgment is not an allowable one. Yet if it is, the classification has relation to the purpose for which it is made and does not contain the kind of discrimination against which the Equal Protection Clause affords protection. It is by such practical considerations based on experience rather than by theoretical inconsistencies that the question of equal protection is to be answered. *Patsone* v. *Pennsylvania,* 232 U. S. 138, 144; *Marcus Brown Co.* v. *Feldman,* 256 U. S. 170, 198–199; *Metropolitan Co.* v. *Brownell,* 294 U. S. 580, 585–586. And the fact that New York City sees fit to eliminate from traffic this kind of distraction but does not touch what may be even greater ones in a different category, such as the vivid displays on Times Square, is immaterial. It is no requirement of equal protection that all evils of the same genus be eradicated or none at all. *Central Lumber Co.* v. *South Dakota,* 226 U. S. 157, 160.

It is finally contended that the regulation is a burden on interstate commerce in violation of Art. I, § 8 of the Constitution. Many of these trucks are engaged in delivering goods in interstate commerce from New Jersey to New York. Where traffic control and the use of highways are involved and where there is no conflicting federal regulation, great leeway is allowed local authorities, even though the local regulation materially interferes with interstate commerce. The case in that posture is controlled by *S. C. Hwy. Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 187 *et seq.* And see *Maurer* v. *Hamilton*, 309 U. S. 598.

Affirmed.

MR. JUSTICE RUTLEDGE acquiesces in the Court's opinion and judgment, *dubitante* on the question of equal protection of the laws.

MR. JUSTICE JACKSON, concurring.

There are two clauses of the Fourteenth Amendment which this Court may invoke to invalidate ordinances by which municipal governments seek to solve their local problems. One says that no state shall "deprive any person of life, liberty, or property, without due process of law." The other declares that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

My philosophy as to the relative readiness with which we should resort to these two clauses is almost diametrically opposed to the philosophy which prevails on this Court. While claims of denial of equal protection are frequently asserted, they are rarely sustained. But the Court frequently uses the due process clause to strike down measures taken by municipalities to deal with activities in their streets and public places which the local

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authorities consider as creating hazards, annoyances or discomforts to their inhabitants. And I have frequently dissented when I thought local power was improperly denied. See, for example, opinion in *Douglas* v. *Jeannette* and companion cases, 319 U. S. 157, 166; and dissents in *Saia* v. *New York,* 334 U. S. 558, 566; *Prince* v. *Massachusetts,* 321 U. S. 158, 176.

The burden should rest heavily upon one who would persuade us to use the due process clause to strike down a substantive law or ordinance. Even its provident use against municipal regulations frequently disables all government—state, municipal and federal—from dealing with the conduct in question because the requirement of due process is also applicable to State and Federal Governments. Invalidation of a statute or an ordinance on due process grounds leaves ungoverned and ungovernable conduct which many people find objectionable.

Invocation of the equal protection clause, on the other hand, does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact. I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were af-

fected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

This case affords an illustration. Even casual observations from the sidewalks of New York will show that an ordinance which would forbid all advertising on vehicles would run into conflict with many interests, including some, if not all, of the great metropolitan newspapers, which use that advertising extensively. Their blandishment of the latest sensations is not less a cause of diverted attention and traffic hazard than the commonplace cigarette advertisement which this truck-owner is forbidden to display. But any regulation applicable to all such advertising would require much clearer justification in local conditions to enable its enactment than does some regulation applicable to a few. I do not mention this to criticize the motives of those who enacted this ordinance, but it dramatizes the point that we are much more likely to find arbitrariness in the regulation of the few than of the many. Hence, for my part, I am more receptive to attack on local ordinances for denial of equal protection than for denial of due process, while the Court has more often used the latter clause.

In this case, if the City of New York should assume that display of any advertising on vehicles tends and intends to distract the attention of persons using the highways and to increase the dangers of its traffic, I should think it fully within its constitutional powers to forbid it all. The same would be true if the City should undertake to eliminate or minimize the hazard by any generally applicable restraint, such as limiting the size, color, shape or perhaps to some extent the contents of vehicular advertising. Instead of such general regulation of advertising, however, the City seeks to reduce the hazard only by saying that while some may, others may not exhibit such appeals. The same display, for exam-

ple, advertising cigarettes, which this appellant is forbidden to carry on its trucks, may be carried on the trucks of a cigarette dealer and might on the trucks of this appellant if it dealt in cigarettes. And almost an identical advertisement, certainly one of equal size, shape, color and appearance, may be carried by this appellant if it proclaims its own offer to transport cigarettes. But it may not be carried so long as the message is not its own but a cigarette dealer's offer to sell the same cigarettes.

The City urges that this applies equally to all persons of a permissible classification, because all that it does is (1) forbid all inhabitants of New York City from engaging in the business of selling advertising space on trucks which move as part of the city traffic; (2) forbid all truck owners from incidentally employing their vehicles for such purpose, with the exception that all truck owners can advertise their own business on their own trucks. It is argued that, while this does not eliminate vehicular advertising, it does eliminate such advertising for hire and to this extent cuts down the hazard sought to be controlled.

That the difference between carrying on any business for hire and engaging in the same activity on one's own is a sufficient one to sustain some types of regulations of the one that is not applied to the other, is almost elementary. But it is usual to find such regulations applied to the very incidents wherein the two classes present different problems, such as in charges, liability and quality of service.

The difference, however, is invoked here to sustain a discrimination in a problem in which the two classes present identical dangers. The courts of New York have declared that the sole nature and purpose of the regulation before us is to reduce traffic hazards. There is not even a pretense here that the traffic hazard created

by the advertising which is forbidden is in any manner or degree more hazardous than that which is permitted. It is urged with considerable force that this local regulation does not comply with the equal protection clause because it applies unequally upon classes whose differentiation is in no way relevant to the objects of the regulation.

As a matter of principle and in view of my attitude toward the equal protection clause, I do not think differences of treatment under law should be approved on classification because of differences unrelated to the legislative purpose. The equal protection clause ceases to assure either equality or protection if it is avoided by any conceivable difference that can be pointed out between those bound and those left free. This Court has often announced the principle that the differentiation must have an appropriate relation to the object of the legislation or ordinance. See, for example, *Mayflower Farms* v. *Ten Eyck,* 297 U. S. 266; *Smith* v. *Cahoon,* 283 U. S. 553. In the latter case a motor vehicle regulation was struck down upon citation of many authorities because "such a classification is not based on anything having relation to the purpose for which it is made." 283 U. S. 553, 567. If that were the situation here, I should think we should reach a similar conclusion.

The question in my mind comes to this. Where individuals contribute to an evil or danger in the same way and to the same degree, may those who do so for hire be prohibited, while those who do so for their own commercial ends but not for hire be allowed to continue? I think the answer has to be that the hireling may be put in a class by himself and may be dealt with differently than those who act on their own. But this is not merely because such a discrimination will enable the lawmaker to diminish the evil. That might be done by many classifications, which I should think wholly unsustainable.

It is rather because there is a real difference between doing in self-interest and doing for hire, so that it is one thing to tolerate action from those who act on their own and it is another thing to permit the same action to be promoted for a price.

Certainly the presence or absence of hire has been the hook by which much highway regulation has been supported. Rights usual to passengers may be denied to the nonpaying guest in an automobile to limit vexatious litigation. *Silver* v. *Silver,* 280 U. S. 117. A state may require security against injuries from one using the highways for hire that it does not exact from others because, as Mr. Justice Sutherland put it, "The streets belong to the public and are primarily for the use of the public in the ordinary way. Their use for the purposes of gain is special and extraordinary and, generally at least, may be prohibited or conditioned as the legislature deems proper." *Packard* v. *Banton,* 264 U. S. 140, 144. In the case of those who let out automobiles to those who drive them, the Court, through Mr. Justice Butler, said of the State, "It may prohibit or condition as it deems proper the use of city streets as a place for the carrying on of private business." *Hodge Co.* v. *Cincinnati,* 284 U. S. 335, 337. See also *Sproles* v. *Binford,* 286 U. S. 374, 393; *Stephenson* v. *Binford,* 287 U. S. 251, 278; *Hicklin* v. *Coney,* 290 U. S. 169; *Stanley* v. *Public Utilities Commission,* 295 U. S. 76; *Aero Transit Co.* v. *Georgia Commission,* 295 U. S. 285; *Dixie Ohio Express Co.* v. *State Revenue Commission,* 306 U. S. 72. The rule was flatly stated for the Court by Mr. Justice Brandeis: "In dealing with the problem of safety of the highways, as in other problems of motor transportation, the State may adopt measures which favor vehicles used solely in the business of their owners, as distinguished from those which are operated for hire by carriers who use the highways as their place of business." *Bradley* v. *Public Utilities Commission,* 289

U. S. 92, 97. However, it is otherwise if the discriminations within the regulated class are based on arbitrary differences as to commodities carried having no relation to the object of the regulation. *Smith* v. *Cahoon,* 283 U. S. 553. See also *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389.

Of course, this appellant did not hold itself out to carry or display everybody's advertising, and its rental of space on the sides of its trucks was only incidental to the main business which brought its trucks into the streets. But it is not difficult to see that, in a day of extravagant advertising more or less subsidized by tax deduction, the rental of truck space could become an obnoxious enterprise. While I do not think highly of this type of regulation, that is not my business, and in view of the control I would concede to cities to protect citizens in quiet and orderly use for their proper purposes of the highways and public places (see dissent in *Saia* v. *New York,* 334 U. S. 558, 566), I think the judgment below must be affirmed.

GOGGIN, TRUSTEE IN BANKRUPTCY, *v.* DIVISION OF LABOR LAW ENFORCEMENT OF CALIFORNIA.

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

No. 35. Argued November 15, 1948.—Decided January 31, 1949.

1. A tax claim of the United States which, at the time of the filing of a petition in bankruptcy, was secured by a perfected lien and accompanied by a Collector of Internal Revenue's possession of personal property of the bankrupt is entitled to priority of payment out of the proceeds of that property, over claims for wages of the kind specified in § 64a (2) of the Bankruptcy Act, and is not required by § 67c to be postponed in payment to such claims by reason of the Collector's subsequent relinquishment of possession of the property to the trustee in bankruptcy for sale by him. Pp. 119–131.
2. The priority of the tax lien over the wage claims must be determined as of the time of the filing of the petition in bankruptcy and is unaffected by an arrangement under which possession of the property is subsequently relinquished to the trustee for sale by him. Pp. 124–126.
3. Although § 67c was added to the Bankruptcy Act by the Chandler Act in 1938, there is nothing in it or in its legislative history to suggest an abandonment of the underlying point of view as to the time as of which it speaks and the general purpose of Congress to continue to safeguard interests under liens perfected before bankruptcy. Pp. 126–130.

165 F. 2d 155, reversed.

The Division of Labor Law Enforcement of the State of California, as assignee of certain claims for wages, petitioned the District Court for review of an order of the referee in bankruptcy which gave certain tax liens of the United States priority over all other claimants against the estate of a bankrupt after payment of the expenses of administration. The District Court adopted the findings of fact and conclusions of the referee and

entered judgment thereon. The Court of Appeals reversed. 165 F. 2d 155. This Court granted certiorari. 333 U. S. 860. *Reversed,* p. 131.

Martin Gendel argued the cause and filed a brief for petitioner.

By special leave of Court, *Robert W. Ginnane* argued the cause for the United States, as *amicus curiae,* urging reversal. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Caudle* and *A. F. Prescott.*

Edward M. Belasco argued the cause for respondent. With him on the brief were *Fred M. Howser,* Attorney General of California, and *Frank W. Richards,* Deputy Attorney General.

Mr. Justice Burton delivered the opinion of the Court.

This case deals with the question whether § 67c of the Bankruptcy Act,[1] in determining priorities in the payment of claims, speaks as of the time of filing the petition

[1] As § 67b is referred to in § 67c and is material to its interpretation, both subdivisions of § 67 are quoted below:

"Sec. 67. Liens and Fraudulent Transfers.— . . .

"b. The provisions of section 60 of this Act to the contrary notwithstanding, statutory liens in favor of employees, contractors, mechanics, landlords, or other classes of persons, and statutory liens for taxes and debts owing to the United States or any State or subdivision thereof, created or recognized by the laws of the United States or of any State, may be valid against the trustee, even though arising or perfected while the debtor is insolvent and within four months prior to the filing of the petition in bankruptcy or of the original petition under chapter X, XI, XII, or XIII of this Act, by or against him. Where by such laws such liens are required to be perfected and arise but are not perfected before bankruptcy, they may nevertheless be valid, if perfected within the time permitted by and in accordance with the requirements of such laws, except that if such

in bankruptcy. The precise issue presented is whether a tax claim of the United States, secured by a lien perfected before the bankruptcy of the taxpayer and accompanied, at the time of the filing of the petition in bankruptcy, by the Collector of Internal Revenue's actual possession of the bankrupt's personal property, is required by § 67c of the Bankruptcy Act to be postponed in payment to debts owed by the bankrupt for wages to claimants specified in clause (2) of § 64a of that Act,[2] because the Col-

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laws require the liens to be perfected by the seizure of property, they shall instead be perfected by filing notice thereof with the court.

"c. *Where not enforced by sale before the filing of a petition in bankruptcy* or of an original petition under chapter X, XI, XII, or XIII of this Act, *though valid under subdivision b of this section, statutory liens, including liens for taxes or debts owing to the United States* or to any State or subdivision thereof, *on personal property not accompanied by possession of such property,* and liens whether statutory or not, of distress for rent *shall be postponed in payment to the debts specified in clauses (1) and (2) of subdivision a of section 64 of this Act,* and, except as against other liens, such liens for wages or for rent shall be restricted in the amount of their payment to the same extent as provided for wages and rent respectively in subdivision a of section 64 of this Act." (Italics supplied.)

. . . . . .

Bankruptcy Act of 1898, c. 541, 30 Stat. 544, 564, as amended by the Chandler Act of June 22, 1938, c. 575, 52 Stat. 840, 875–877, 11 U. S. C. § 107 (b) and (c).

[2] Not only the portions of § 64a specifying the wages here in controversy but those otherwise related to the issues of this case are quoted below:

"Sec. 64. Debts Which Have Priority.—a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) *the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition;* the fees for the referees' salary fund and for the referees' expense fund; the filing fees paid by creditors in involuntary cases; where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the

lector later relinquished possession of such property to the trustee of the bankrupt's estate for sale by him. We hold that the lien was valid and entitled to priority of payment as against the wage claims at the date of bankruptcy and that the Collector's relinquishment of possession of the bankrupt's property did not change the result.

The facts are undisputed. Before March 26, 1946, a Collector of Internal Revenue of the United States per-

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bankrupt by the efforts and at the cost and expense of one or more creditors, the reasonable costs and expenses of such recovery; *the costs and expenses of administration,* including the trustee's expenses in opposing the bankrupt's discharge, the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases and to the bankrupt in voluntary and involuntary cases, as the court may allow; (2) *wages,* not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, *due to workmen, servants, clerks, or traveling or city salesmen* on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; . . . (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof: *Provided,* That no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court: *And provided further,* That, in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court; and (5) debts owing to any person, including the United States, who by the laws of the United States in [is] entitled to priority, and rent owing to a landlord who is entitled to priority by applicable State law: *Provided, however,* That such priority for rent to a landlord shall be restricted to the rent which is legally due and owing for the actual use and occupancy of the premises affected, and which accrued within three months before the date of bankruptcy." (Italics supplied.)

. . . . . .

Bankruptcy Act of 1898, c. 541, 30 Stat. 544, 563, as amended by the Chandler Act of June 22, 1938, c. 575, 52 Stat. 840, 874, and 60 Stat. 323, 330, 11 U. S. C. § 104 (a).

fected a statutory lien upon the personal property of the Kessco Engineering Corporation, a California corporation, and took actual possession of such property pursuant to that lien. He attempted to sell such assets and received bids for them but did not complete the sale because the price obtainable was unsatisfactory to him. He instituted a second sale but abandoned it when he relinquished possession of the property to the trustee of the bankrupt's estate. On March 26, 1946, the corporation filed its voluntary petition in bankruptcy in the United States District Court for the Southern District of California, was adjudicated a bankrupt and George T. Goggin (who later became the trustee of the bankrupt's estate and is the petitioner herein) was appointed receiver. Having qualified as receiver on March 28, 1946, he communicated with counsel for the Collector as to the Collector's turning over to him the bankrupt's personal property. In this connection, the referee in bankruptcy later made a finding of fact which was adopted by the District Court and is as follows:

> ". . . the personal property of the bankrupt in the hands of the Collector of Internal Revenue, . . . was turned over to the said George T. Goggin, who accepted the terms and conditions of a telegram from J. P. Wenchel, Chief Counsel of the Bureau of Internal Revenue, reading as follows:
>
> > " 'Reference to telephone conversation today with Mr. Webb [member of the Los Angeles office of Internal Revenue] relative to Kessco Engineering Corporation, Bankrupt, no objection by this office to Collector relinquishing personal property to Trustee for sale. Government's lien to attach to proceeds from sale subject to Trustee's expenses including costs of sale.
> >
> > J. P. Wenchel, Chief Counsel.' "

Goggin, in his final capacity as trustee for the bankrupt, caused these assets to be sold at public auction, pursuant to order of court. Having liquidated all assets which had come into his possession, he had on hand, on December 12, 1946, about $31,206.20, which the referee certified was insufficient to pay in full the expenses of administration, the lien claims, the prior labor claims and prior tax claims in the case. The gross amount of the amended claim of the Collector for taxes, penalties and interest was $78,865.03. The prior wage claims totaled $3,424.87. The Department of Employment of the State of California also filed a tax claim for $15,135, which was recorded as a lien on or about December 24, 1945. Neither the validity nor the amount of any of these claims is in issue here.[3]

The present proceeding originated in a petition filed with the referee in bankruptcy by the trustee, seeking an order to show cause why the order of priority of the payment of the tax and prior wage claims and the expenses of administration should not be determined by the District Court. The referee made findings of fact and reached conclusions of law upon the basis of which he ordered that, from the monies in the possession of the trustee,

[3] There is no issue here as to the amount of penalties or interest included in the Collector's claim for taxes or as to the date to which interest on such claim shall be computed. There is no issue here as to any difference between statutory liens which were perfected more than four months before the filing of the petition in bankruptcy or those perfected within less than that time. As the lien claimed by the United States exceeds the funds available, it has filed its brief in this Court as the sole real party in interest and in opposition to the wage claims. The respondent, Division of Labor Law Enforcement of the State of California, appears on behalf of all of the labor claimants. There also is no issue here as to the amount to be paid for the expenses of administration or the items which such expenses may include in addition to the costs of the sale made by the trustee.

there first be paid the expenses of administration and that the balance of such funds then in the hands of the trustee be paid to the Collector of Internal Revenue in partial payment of the Government's tax claims and the interest thereon as prescribed by law.[4] The District Court adopted the findings of fact and conclusions of law of the referee and entered judgment thereon. The Court of Appeals for the Ninth Circuit reversed that judgment and held that, by virtue of the Collector's relinquishment of his possession of the personal property of the bankrupt, the taxes due to the United States must be postponed, in payment, to the debts of the bankrupt for certain wage claims, pursuant to § 67c of the Bankruptcy Act. 165 F. 2d 155. Because of the importance of the issue in the administration of the Bankruptcy Act, we granted certiorari. 333 U. S. 860.

The bankrupt filed its petition and was adjudicated a bankrupt on March 26, 1946. The personal property of the bankrupt was then subject to the perfected statutory lien of the United States for taxes and that lien was accompanied by the actual physical possession of the property by a Collector of Internal Revenue on behalf of the United States. Those facts completely satisfy § 67c of the Bankruptcy Act.[5] Subsequent events, such as the relinquishment of his possession by the Collector in favor of the trustee of the bankrupt's estate for the purpose of facilitating a sale of the property by the trustee, are not material to the determination of the

[4] Provision, not material here, was made that, if additional money came into the possession of the trustee, the court, upon notice to all necessary and proper parties, should determine the respective liens or priorities, if any there be, of the Collector of Internal Revenue, the prior labor claimants, the Department of Employment of the State of California and other tax claimants entitled to be heard.

[5] See note 1, *supra*.

issue before us.[6] The terms under which the Collector's possession was relinquished are consistent with and support this result but the Government's right to payment ahead of the wage claims was determined at the time of bankruptcy and did not arise out of the arrangement under which possession was relinquished to the trustee.

This general point of view in interpreting the Bankruptcy Act is one of long standing. In *Everett* v. *Judson,* 228 U. S. 474, 479, this Court said:

> "We think that the purpose of the law was to fix the line of cleavage with reference to the condition

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[6] See *Davis* v. *City of New York,* 119 F. 2d 559. In that case the City perfected its lien for retail sales taxes by seizure of assets of the taxpayer, May 16, 1939. An involuntary petition in bankruptcy was filed, June 7, 1939, against the taxpayer and it was adjudicated a bankrupt, June 17, 1939. The assets were thereafter sold in execution of the warrant issued by the city treasurer. The levy was held to be a valid statutory levy as against the trustee of the bankrupt's estate and the City was allowed to retain the proceeds of the sale, under §§ 67b and 67c of the Bankruptcy Act, as amended in 1938. For a converse situation see *City of New York* v. *Hall,* 139 F. 2d 935. In that case the City perfected its lien on personal property of the taxpayer, arising out of long delinquent business and sales taxes, by the delivery of warrants on January 14, 1943, at 10:15 a. m., to the city's warrant agent for execution and levy on the property. The actual levy on, and inventory of, the property and the posting of notices of sale were not effected until shortly after 4:30 p. m. In the meantime, at 4:22 p. m., an involuntary petition in bankruptcy was filed against the taxpayer and upon this he was adjudicated a bankrupt. Pursuant to an order of the bankruptcy court, a receiver sold the property and the court declined to order the net proceeds to be turned over to the City. The City was the holder of a statutory lien but, at the time of the filing of the petition in bankruptcy, the lien was not accompanied by actual possession of the personal property to which it attached. It, therefore, was subordinated, under § 67c of the Bankruptcy Act, to the administration expenses and wages covered by clauses (1) and (2) of § 64a. "Notwithstanding the admonition of Section 67, sub. c, the City chose to slumber on its rights. Congress intended to penalize such somnolence." *Id.* at p. 936.

> of the bankrupt estate as of the time at which the petition was filed and that the property which vests in the trustee at the time of adjudication is that which the bankrupt owned at the time of the filing of the petition."

See also, *Myers* v. *Matley,* 318 U. S. 622, 626; *United States* v. *Marxen,* 307 U. S. 200, 207–208; *Acme Harvester Co.* v. *Beekman Lumber Co.,* 222 U. S. 300, 307.[7]

While § 67c was added to the Bankruptcy Act by the Chandler Act in 1938, we find nothing in it or in its legislative history to suggest an abandonment of the underlying point of view as to the time as of which it speaks and the general purpose of Congress to continue to safe-

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[7] "SECTION 1. MEANING OF WORDS AND PHRASES.—The words and phrases used in this Act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows:

. . . . . .

"(13) 'Date of bankruptcy', 'time of bankruptcy', 'commencement of proceedings', or 'bankruptcy', with reference to time, shall mean the date when the petition was filed; . . . ." 30 Stat. 544, as amended by 52 Stat. 840–841.

". . . the rights of creditors are fixed by the Bankruptcy Act as of the filing of the petition in bankruptcy. This is true both as to the bankrupt and among themselves. The assets at that time are segregated for the benefit of creditors. The transfer of the assets to someone for application to 'the debts of the insolvent, as the rights and priorities of creditors may be made to appear' [citing *Bramwell* v. *U. S. Fidelity & Guaranty Co.,* 269 U. S. 483, 490], takes place as of that time." *United States* v. *Marxen,* 307 U. S. 200, 207–208.

"The general rule in bankruptcy is that the filing of the petition freezes the rights of all parties interested in the bankrupt estate. Exceptions only emphasize the rule. Whatever disagreement in opinion there may have been on the matter prior to the Act of 1938, it is now clear that statutory liens may be valid if they arise before bankruptcy although they are perfected after bankruptcy, if the perfection is within the time permitted by and in accordance with the requirements of applicable law." 4 Collier on Bankruptcy 228–229 (14th ed. 1942).

guard interests under liens perfected before bankruptcy. *City of Richmond* v. *Bird,* 249 U. S. 174; *In re Knox-Powell-Stockton Co.,* 100 F. 2d 979; *In re Van Winkle,* 49 F. Supp. 711. While § 64, as amended, somewhat readjusts priorities among unsecured claims, § 67 continues to recognize the validity of liens perfected before bankruptcy as against unsecured claims. Section 67b has clarified the validity of statutory liens, including those for taxes, even though arising or perfected while the debtor is insolvent and within four months of the filing of the petition in bankruptcy. It expressly recognizes that the validity of liens existing at the time of filing a petition in bankruptcy may be perfected under some circumstances after bankruptcy. Section 67c, as amended in 1938, does, however, introduce a new postponement in the payment of certain claims secured by liens to the payment of other claims specified in clauses (1) (for certain administrative expenses, etc.) and (2) (for certain wages) of § 64a. This subordination is, however, sharply limited. For example, it does not apply to statutory liens on real property, or to those actually enforced by sale before bankruptcy, or, in general, to liens on personal property when accompanied by actual possession of such property. The background of § 67c suggests a conscious purpose to give a narrowly limited priority to administrative expenses and to certain wage claims, at least in instances disclosing accumulations of unpaid taxes the priority of which wage earners had no good reason to suspect, and which might absorb the entire estate of the bankrupt unless postponed by these provisions.[8] The

[8] These provisions apparently originated in Amendments proposed by the National Bankruptcy Conference which were before Congress in a Committee Report Analysis of H. R. 12889, 74th Cong., 2d Sess. (1936). This report states that the bill was introduced by Mr. Chandler, May 28, 1936, containing Amendments proposed by the National Bankruptcy Conference, and the several Sections are ac-

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purpose of § 67 in requiring a public warning of the existence of an enforceable statutory lien for taxes was served in the instant case not only by the steps taken to perfect

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companied by explanatory notes. Section 67c, as there proposed, resembles substantially the Section as finally enacted. The note explanatory of it, attributed to Jacob I. Weinstein, a member of the Conference, includes the following statement:

"Section 64 [of the Bankruptcy Act before amendment by the Chandler Act] is declaratory of a policy that the costs and expenses in connection with a bankruptcy proceeding and its administration shall be first paid in distribution. It is a sound policy and is in accordance with the general principles well established in liquidation proceedings. But Section 67 of the Act does not apply the same limitation with respect to valid liens. The Supreme Court, in the case of *City of Richmond* v. *Bird,* [249 U. S. 174,] 43 A. B. R. 260 (1919), resolved the conflict in the lower court decisions by holding that the priority provisions of Section 64 do not apply to liens valid under Section 67. . . .

"It is significant that in recent years state legislatures have been enacting special legislation in favor of tax claims, public debts, and a variety of private claims. Statistics in the bankruptcy cases show that the effective administration of the bankruptcy law has seriously suffered therefrom. Such claims, particularly tax liens, often consume the entire estate, leaving nothing for the payment of the costs and expenses of administration incurred in reducing the assets to cash. In many such cases the tax liens represent an accumulation of delinquent items covering a long period of time, without any attempt on the part of tax collectors to enforce payment prior to the bankruptcy proceeding.

"There is therefore need for a provision to protect the administration costs and expenses; and similar considerations apply to wage claims. Accordingly we have selected, from among the priorities fixed by Section 64 (as revised), these particular items for protection. However, by reason of the historical development and the inherent differences existing in the incidents attaching to real and personal property, it would seem advisable to restrict the remedy thus provided to liens on personal property, *where such liens have not been enforced by sale prior to bankruptcy.*" (Italics supplied.) *Id.* at p. 212 n. 1.

At that time the bill did not also except from subordination statutory tax liens on personal property "accompanied by possession of

the Government's lien but by the Collector's seizure and actual possession of the personal property of the taxpayer before the filing of the taxpayer's petition in bankruptcy.

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such property." The addition of that clause gives it special emphasis and suggests its appropriate effect as a warning to other claimants that the property, so possessed, will not be available in the first instance for the administrative expenses and wage claims specified in clauses (1) and (2) of § 64a.

The report filed by Mr. Chandler for the Committee on the Judiciary, July 29, 1937, to accompany the bill then known as H. R. 8046 merely stated: "In subdivisions b and c statutory liens are protected and permitted to be perfected if the time allowed by law for perfecting them has not expired." H. R. Rep. No. 1409, 75th Cong., 1st Sess. 34 (1937), and see references to §§ 64 and 67c on pp. 9, 15–16.

See also, Weinstein, The Bankruptcy Law of 1938 (1938):

"This subdivision is new and is designed to correct an inequitable condition which existed under the old Act, particularly with respect to tax liens allowed, through the inaction of tax authorities, to be accumulated over a long period of time. Frequently, such liens consumed the entire estate, even to the exclusion of the costs and expenses incurred in the proceeding. While subd. a of sec. 64 provides for priority of payment of such costs and expenses, such payment is prior only to the other unsecured debts and does not affect or impair valid liens, whether statutory or otherwise. But tax claims may take the form of unsecured debts due to the sovereign, and thus payable by way of priority in the order as provided in sec. 64, or the form of liens created by local statutes. As indicated, if the tax claim takes the form of a lien, or is reduced to the form of a lien, it is not affected by the provisions of sec. 64. In view of the inequitable condition above referred to, there was need for a provision to protect the administration costs and expenses, and like considerations of public policy required a similar protection for wage claimants. However, the historical development, and the inherent differences in the incidents attaching to real and personal property, made it advisable to restrict the remedy provided by this paragraph to liens on *personal* property; but, in respect even to personal property, the provisions are *applicable only where the property has not been reduced to possession or where the liens have not been enforced by sale prior to bankruptcy.*" (Italics supplied in the second instance.) (At pp. 144–145.)

The validity of the lien for taxes as against the wage claimants was thus established at the time of the filing of the petition in bankruptcy and the Collector's possession of the personal property of the bankrupt excluded the application of § 67c which otherwise would have postponed the payment of the tax claims to the payment of the claims for administrative expenses and wages specified in clauses (1) and (2) of § 64a. By his subsequent arrangement with the trustee for the sale of the bankrupt's property, the Collector did not lose the right to priority of payment accorded to the perfected tax liens, at the time of bankruptcy, as against the wage claims.

The arrangement between the Collector and the trustee was a natural and proper one. While the amended claim for taxes, penalties and interest, dated August 28, 1946, amounted to $78,865.03, the original claim, filed with the notices of lien prior to March 26, 1946, amounted to only $40,921.94 (even including the interest and costs later computed to August 21, 1946). Of this sum the taxes themselves amounted only to $34,848.04. To meet this, the trustee of the bankrupt's estate, on December 12, 1946, had on hand $31,206.20, evidently derived from the sale of the property originally held by the Collector. These figures, accordingly, suggest the possibility that, in March, 1946, it reasonably may have been supposed that a surplus above the amount of the Government's tax claim might be realized from the sale of the assets then in the possession of the Collector. In that event, it would have been the obviously appropriate procedure for the trustee to sell that property free and clear of liens and encumbrances and then distribute the proceeds to the rightful claimants. Even though there was little or no prospect of realizing such a surplus, it was reasonable and appropriate for the trustee, with the consent of the lien holder, thus to sell the property and distribute its proceeds. See *Van Huffel* v. *Harkelrode,* 284 U. S. 225; 6

Remington on Bankruptcy §§ 2577–2578 (4th ed. 1937).[9] The propriety of the present conclusion is emphasized by the fact that the opposite conclusion would, in many other cases, operate to the detriment both of unsecured creditors and of the statutory lien holders. It would compel a lien holder to retain his actual possession of the property in order to be sure of his full priority in the payment of his tax claim. He would be compelled to do this, even though by doing so the bankrupt's property probably would yield a smaller sales price than if sold by the trustee. Furthermore, the lien holder would be brought into sharp conflict with the trustee whenever there was reason to suppose that the proceeds of the sale might equal or exceed the tax claims secured by the lien. Under such circumstances the bankruptcy court generally may order the sale of the bankrupt's property by the trustee, free and clear of liens and encumbrances. See 4 Collier on Bankruptcy §§ 70.97, 70.99 (14th ed. 1942); 6 Remington on Bankruptcy § 2583 (4th ed. 1937). Accordingly, we find no substantial support for the argument that the lien holder's voluntary relinquishment of his possession of the bankrupt's property, in favor of the bankrupt's trustee, for the purpose of permitting the trustee to sell the property in this case, must carry with it, as a matter of law, a postponement of the payment of the lien holder's tax claim to that of the claims for wages here presented.

For these reasons the judgment of the Court of Appeals is

Reversed.

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[9] The only question then arising would be as to the extent to which the trustee might deduct from those proceeds his general expenses of administration, as well as the costs of the sale itself. This question was touched upon in the agreement with the trustee but no issue is presented here as to it.

CALLAWAY, TRUSTEE, ET AL. *v.* BENTON ET AL.

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

No. 21. Argued October 19, 1948.—Decided February 7, 1949.

A railroad in reorganization under § 77 of the Bankruptcy Act had for many years leased and operated the property of another railroad, which was solvent and not in reorganization. Under the plan of reorganization approved by the Interstate Commerce Commission and the bankruptcy court, the lessor was given the alternative of selling all of its property to the reorganized company on specified terms or having its lease disaffirmed and its property returned. A majority of the lessor's stockholders voted to accept the offer, but a substantial minority voted to reject it. In a suit brought by minority stockholders, a state court issued a temporary injunction restraining the officers and directors from selling the property or certifying the company's acceptance of the offer to the Commission, on the ground that state law required unanimous consent of the stockholders to such a sale. The bankruptcy court enjoined further prosecution of the state action and declared the state court's temporary injunction null and void as in excess of its jurisdiction. *Held:* Under the narrow facts presented here, the bankruptcy court erred in enjoining the state court suit leading to a determination of the requirements of state law with respect to the sale of the entire assets of the lessor. Pp. 134–151.

1. Since the lessor was not being reorganized along with the lessee and the plan of reorganization gave the lessor the unfettered right to accept or reject the offer to purchase all its property, the question whether the offer could be accepted by less than a unanimous vote of the lessor's shareholders was a question of state, not federal, law. Pp. 136–141.

(a) The Bankruptcy Act gives no clue as to what proportion of the lessor's stockholders must vote to accept the offer if state law is not controlling. P. 139.

(b) The majority vote provision of § 5 (11) of the Interstate Commerce Act is not applicable in this case, since this is not a proceeding under that Act. Pp. 139–140.

(c) The Bankruptcy Act does not give the Commission or the court the right to require acceptance by a lessor not in reorganiza-

tion of an offer for the purchase of its property, and no such power was asserted by the Commission in this case. P. 141.

2. The bankruptcy court did not have exclusive jurisdiction to decide this question of state law. Pp. 141–149.

(a) While § 77 (a) of the Bankruptcy Act gives the bankruptcy court exclusive jurisdiction of the debtor and its property, it does not give the bankruptcy court exclusive jurisdiction over all controversies that in some way affect the debtor's estate. P. 142.

(b) The interest here involved was not a part of the property of the debtor but the lessor's reversion in fee; and the issue concerned the rights of the lessor's stockholders *inter sese* to sell their reversionary interest in the property. Pp. 142–143.

(c) The lessor not being in reorganization, its internal management was not subject to the control of the bankruptcy court. Pp. 144–146.

(d) The purchase of formerly leased properties does not involve rights asserted by the lessor against the debtor; it is a creditor in the proceedings only by virtue of its claims against the debtor under the lease and for breach of the lease. Pp. 146–147.

(e) The jurisdiction asserted by the district court over a solvent lessor not in reorganization was not justified by any provision of § 77. Pp. 146–148.

3. In the circumstances of this case, *Continental Illinois Bank* v. *Chicago, R. I. & P. R. Co.*, 294 U. S. 648, and other cases dealing with the power of an equity court to prevent the defeat or impairment of its jurisdiction do not support the bankruptcy court's injunction against the state court action and its determination of the issue there involved. Pp. 149–151.

165 F. 2d 877, affirmed.

A federal district court having jurisdiction of a proceeding to reorganize a railroad under § 77 of the Bankruptcy Act enjoined further proceedings in a state court to determine the rights *inter sese* under state law of stockholders of another railroad not in reorganization to sell to the railroad being reorganized certain property leased to and operated by the latter. The Court of Appeals reversed. 165 F. 2d 877. This Court granted certiorari. 333 U. S. 853. *Affirmed*, p. 151.

T. M. Cunningham argued the cause for petitioners. With him on the brief were *A. R. Lawton, Jr., Walter A. Harris* and *Wallace Miller.*

Charles J. Bloch argued the cause for respondents. With him on the brief was *Ellsworth Hall, Jr.*

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

The Central of Georgia Railway Company, whose Trustee is the petitioner here, and its predecessor have leased and operated the property of the South Western Railroad Company since 1869. The Central went into receivership in 1932, and in 1940 entered reorganization under § 77 of the Bankruptcy Act. 49 Stat. 911, 11 U. S. C. § 205. South Western's lease was adopted successively by Central's Receiver and Trustees. It has, in consequence, remained solvent, and no petition for reorganization has ever been filed in its behalf.

Under the plan of reorganization of the Central approved by the Interstate Commerce Commission and by the district court, South Western is given the alternative of selling its property to the reorganized company in return for a fixed amount of bonds of the latter, or of having the lease disaffirmed by the debtor and its property returned.[1] South Western appeared specially

[1] With respect to South Western's property, the plan reads as follows: "Prior to or upon consummation of the plan the debtor shall also acquire, if they can be acquired on the terms hereinafter set forth, properties at present leased to the debtor by the South Western Railroad Company . . . . If any of these properties shall not be acquired as a result of the acceptance of the plan by the leased-line security holders, then and in that event the lease or leases of any line or lines not so acquired shall be disaffirmed as of such time at or prior to the consummation of the plan as the court may direct. The method of acquisition, whether through purchase, merger, or consolidation, shall, subject to the approval of the Commission and the

in the reorganization proceedings and asked that its lease be adopted by the reorganized company, but on the basis of studies and estimates not now open to challenge, the Commission rejected the proposal and found that the amount offered for its properties appears "fair and equitable and to equal the value of the transportation property, and [is] approved." [2]

Following Commission and court approval of the plan, South Western's officers, reversing their previous stand, urged acceptance of the offer by its stockholders and signified their intention of conveying the company's property to the Central if a majority of the stockholders voted to accept. Thereupon the respondents, who are individual stockholders of South Western, brought an action in the Superior Court of Bibb County, Georgia, where South Western's principal office is located, asking for an injunction against South Western, its officers and directors, restraining them from certifying the company's acceptance of the offer to the Interstate Commerce Commission or from selling the railroad's property to the reorganized debtor if, upon a vote of the stockholders, a "mere majority" of the stock was voted in favor of the plan. The basis of the petition for injunction was the contention that under the laws of Georgia, where South Western was in-

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court, be determined by the trustee or by the reorganization managers when they begin to function.

"If the leased lines are acquired, the railroads of each of the three and the personal property appurtenant thereto and all of the real estate owned by each lessor shall be conveyed to the reorganized company; each of said lessors shall waive any damages to which it has become or shall become entitled on account of any breach of lease; and the South Western Railroad Company shall waive all claims in respect to equipment. Such conveyances and waivers shall in each instance be on the sole consideration of the delivery to each of the respective lessors of the securities proposed to be allocated to it, as hereinafter specified." 261 I. C. C. 501, 515.

[2] 261 I. C. C. 263, 309.

corporated, the entire assets of the company cannot be sold except upon unanimous approval of the stockholders.

Before a decision was reached in the state court action, a meeting of South Western's stockholders was held at which the offer of purchase incorporated in the Central's plan of reorganization was considered. 30,137 shares were voted in favor of acceptance against 9,057 shares favoring rejection. Petitioner, acting as Trustee of the Central, which was not a party to the state court suit, then filed a petition in the bankruptcy court asking that respondents and other stockholders of South Western be enjoined from further prosecution of the state court action, and a temporary restraining order was entered as prayed. Thereupon the state court, of its own motion, entered an interlocutory injunction restraining the officers and directors of South Western from selling its property, on the ground that such a sale under Georgia law requires unanimous consent of the stockholders. Petitioner then amended his petition in the bankruptcy court by bringing to its attention the injunctive order of the state court, and, after holding hearings, the federal district court granted a permanent injunction restraining further prosecution of the state action and declared the state court's temporary injunction null and void as in excess of its jurisdiction. Upon appeal, the Court of Appeals for the Fifth Circuit, one judge dissenting, reversed the order of the district court. 165 F. 2d 877. We granted the petition for a writ of certiorari [3] because of the conflict between state and federal authority and the importance of the question in the administration of the Bankruptcy Act.

First. The district court's injunction was based primarily on the premise that the plan of reorganization requires the inclusion of South Western's lines within the

[3] 333 U. S. 853.

system of the reorganized company. The state action is said to be an attempt on the part of respondents "to prevent the consummation of the plan as respects South Western." Again, the court held that "the question of the consolidation, merger and sale, and under what conditions South Western may convey its property to the reorganized Company, in consummation of the plan, is not a question of State law; it is a question of Bankruptcy law—a question which arises under the Bankruptcy Act and the Interstate Commerce Act." The court's conclusion was, therefore, that although the question whether a Georgia railroad corporation can convey all of its properties without unanimous consent of its stockholders would ordinarily be one of state law cognizable in the state's courts, under these circumstances the decision was one for the bankruptcy court applying federal law.

We do not agree. The language of the plan and the factors which the Commission took into consideration in arriving at the amount offered South Western for its properties indicate clearly that, so far as the reorganization plan contemplates acquisition of the lessor railroad, the ordinary rules of offer and acceptance were intended to apply. That has invariably been the practice. As a consequence, we have held that the amount which may be offered a lessor is a question of "business judgment"; that "if the Commission deems it desirable to keep the leased line in the system, it must necessarily have rather broad discretion in providing modifications of the lease where, as here, the lessor is not being reorganized along with the debtor. For under that assumption the modification must be sufficiently attractive to insure acceptance by the lessor or its creditors." *Group of Institutional Investors* v. *Chicago, M., St. P. & P. R. Co.,* 318 U. S. 523, 550 (1943). The plan itself recites that the leased lines are to be acquired only "if they can be acquired on the

terms hereinafter set forth." [4] Otherwise, the lease is to be disaffirmed and the property returned to the lessor. In addition, the record is replete with statements by the Commission, the court, and the parties that South Western's stockholders are to have the choice open to any offeree: an unfettered right to accept or reject.[5]

Under these circumstances, we can see no reason why the ordinary incidents of a sale of the assets of a corporation should not be applicable. One of the most important of these is, of course, the question of the proportion of a corporation's stock which must be voted in favor of accepting the offer of purchase in order to make its acceptance effective. Since, as the district court held, this would ordinarily be a question of Georgia law, we believe that substitution of any other rule of law is erroneous.[6]

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[4] 261 I. C. C. 515.

[5] In its report approving the plan, the Commission said (261 I. C. C. at p. 308): "The lessor [South Western] insists that it has the right to severance if it cares to exercise it, and such a right will be recognized in the approved plan." The district court, in approving the plan, commented that "If the lessors do not accept the proposal to acquire their lines they are, on disaffirmance, at liberty to take their properties back," while counsel for the Trustee stated at a meeting of South Western's stockholders, "The plan makes an offer to you gentlemen; that is all it does."

[6] This precise problem has received little attention from commentators. It was not mentioned in the Committee reports or in debate when § 77 and its 1935 amendments were passed. However, the position of the leased line, a majority of whose stock is not owned by the debtor and which is not in reorganization, is analyzed by Meck, *The Problems of the Leased Line*, 7 Law and Contemp. Prob. 509, 518, as follows: "Upon rejection of the lease, although the leased line remains in the custody of the lessee's trustees, it is not part of the lessee's estate and security holders having interests in it cannot be bound in the lessee's reorganization. Consequently, if the lessee's plan provides for a modified lease or merger or consolidation, such a provision is little more than an offer to the lessor. Acceptance of this offer will be determined, not by submitting the lessee's plan to the lessor's security holders, pursuant to Section 77, but according to the law

Not the least of the difficulties with a contrary result is the fact that the Bankruptcy Act gives no clue to what proportion of the lessor's stockholders must vote to accept the offer if state law is not controlling. Section 77 (e) provides that confirmation of a plan requires acceptance by creditors holding two-thirds in amount of the total allowed claims of each class voting on the plan, but that the judge may confirm the plan in any event "if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it." But neither the two-thirds vote provision nor the so-called "cram-down" provision applies to a lessor not in reorganization or its stockholders. They apply to "creditors of each class whose claims have been filed and allowed in accordance with the requirements of subsection (c) of this section," which obviously does not include a lessor-offeree.[7] And, although South Western is a "creditor" under the specific terms of § 77 (b), its stockholders, individually, are not.

The district court sought to find a federal rule permitting acceptance by a simple majority vote of the shareholders in the provisions of § 5 (11) of the Interstate Commerce Act.[8] But that section relates to voluntary merg-

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of the state where the lessor is incorporated." It is also pointed out that when the rights of bondholders of the lessor may be affected, as was the case with Terre Haute bondholders in the Milwaukee Railroad reorganization (see *Group of Institutional Investors* v. *Chicago, M., St. P. & P. R. Co.*, 318 U. S. 523, and discussion *infra*), nearly unanimous consent of such bondholders may be required before the changes can be made effective. The Interstate Commerce Commission took that position in the *Milwaukee* case and provided that the offer to Terre Haute should not be deemed accepted unless substantially all of its bondholders voted to accept. *Chicago, M., St. P. & P. R. Co. Reorganization*, 239 I. C. C. 485, 536–538; 240 I. C. C. 257, 270–271. See also 318 U. S. at 532–533.

[7] See *In re New York, N. H. & H. R. Co.*, 54 F. Supp. 631, at 638.

[8] 54 Stat. 905, 49 U. S. C. § 5 (11).

ers, not to the purchase of a leased line as part of a plan of reorganization. The Commission can undoubtedly carry on § 5 proceedings simultaneously with § 77 reorganization proceedings, see *United States* v. *Lowden,* 308 U. S. 225 (1939), but that procedure was not followed in this case. The Commission preferred, instead, to carry out the consolidation under the authority of § 77 (b) (5) of the Bankruptcy Act, which provides that the plan of reorganization may include "the merger or consolidation of the debtor with another corporation or corporations." That power flows from a different source than the power over consolidations under the Interstate Commerce Act. While some of the findings required of the Commission under the two Acts are similar, and § 77 (f) provides that consolidation and merger of the debtor's property shall not be inconsistent with the provisions and purposes of chapter 1 of the Interstate Commerce Act, their procedural and jurisdictional requirements do not overlap.[9] It may be noted, in addition, that § 5 (11) contains a proviso that the majority vote provision shall not apply if "a different vote is required under applicable State law, in which case the number so required shall assent." Whether that proviso is operative when a state's law requires unanimous consent of the shareholders is a question we need not decide.

Nothing that we have said derogates in any way from decisions of this Court upholding the power of the Interstate Commerce Commission, in the exercise of its statutory obligations, to override state laws interposing

[9] See *In re Chicago, R. I. & P. R. Co.,* 168 F. 2d 587, where the State of Texas made the argument that the findings required by the Interstate Commerce Commission under subsections 2 (b), (c), and (f) of § 5 of the Interstate Commerce Act in proceedings for merger or consolidation of railroads are mandatory in proceedings under § 77 of the Bankruptcy Act.

obstacles in the path of otherwise lawful plans of reorganization. We have recently reaffirmed that power in cases arising under the Interstate Commerce Act.[10] Nor is the ambit of federal power less broad in cases arising under the bankruptcy laws of the United States. Section 77 (f) of the Bankruptcy Act specifically provides that the plan of reorganization shall be put into effect, "the laws of any State or the decision or order of any State authority to the contrary notwithstanding." The statute does not, however, give the Commission or court the right to require acceptance by a lessor not in reorganization of an offer for the purchase of its property, and no such power has been asserted by the Commission in this case. The plan of reorganization in effect hands South Western a contract of sale. Whether or not South Western signs the contract must depend not only upon its business judgment, but also upon the charter of the company and the laws of the state of its incorporation. There is therefore no occasion to override state law. The plan implicitly accepts it as controlling. The fact that the law may make acceptance of the offer less likely than would be the case if the offeree were incorporated elsewhere does not change the picture. We do not believe that Congress intended to leave to individual judges the question of whether state laws should be accepted or disregarded, *Palmer* v. *Massachusetts,* 308 U. S. 79 (1939), or to make the criterion to be applied the effect of the law upon the prospects of acceptance by the offeree.

Second. The district court further held that even if Georgia law governs the question of the authority of South Western's officers to sell its properties the bankruptcy court has exclusive jurisdiction to decide the state

[10] *Seaboard Air Line R. Co.* v. *Daniel,* 333 U. S. 118; *Schwabacher* v. *United States,* 334 U. S. 182; *Texas* v. *United States,* 292 U. S. 522.

law question. We have held that a court of bankruptcy has exclusive and nondelegable control over the administration of an estate in its possession. *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478 (1940); *Isaacs* v. *Hobbs Tie & T. Co.*, 282 U. S. 734 (1931). There can be no question, however, that Congress did not give the bankruptcy court exclusive jurisdiction over all controversies that in some way affect the debtor's estate.[11] One exception is found in the express language of the statute.[12] What it did give is exclusive jurisdiction of the debtor and its property wherever located. § 77 (a). The interest held by the debtor in South Western's lines was a leasehold estate. Such an estate is the debtor's "property" within the meaning of the Act. Any controversy involving that estate would have been within the exclusive jurisdiction of the bankruptcy court.

Here, however, the question involves not the debtor's leasehold, but the reversion in fee held by South Western as lessor. South Western was not in reorganization jointly with its lessee, nor could it have been reorganized in the Central's proceedings.[13] The controversy which

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[11] *Arkansas Corporation Commission* v. *Thompson*, 313 U. S. 132; *Gardner* v. *New Jersey*, 329 U. S. 565. See *Thompson* v. *Terminal Shares, Inc.*, 104 F. 2d 1. Even when the controversy involves property within the exclusive jurisdiction of the bankruptcy court, that court may, in its discretion, postpone action pending adjudication of the question in another court. *Ex parte Baldwin*, 291 U. S. 610; *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478; *Order of Railway Conductors* v. *Pitney*, 326 U. S. 561. See *Foust* v. *Munson S. S. Lines*, 299 U. S. 77. Cf. *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496; *Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168. Whether, if the bankruptcy court had had exclusive jurisdiction in this case, it should have withheld decision of the state law question pending the outcome of the state court action, we need not decide.

[12] § 77 (j).

[13] Under the provisions of § 77, as amended in 1935, a lessor railroad can be reorganized in connection with, or as a part of the plan of reorganization of the debtor-lessee only if a majority of its capital

respondents initiated in the state court, and which the district court decided after having enjoined the state proceedings, requires a determination of the rights of the stockholders of South Western *inter se* to sell their reversionary interest in the property. We think that the interest here involved is not part of the property of the debtor, and that the district court's assertion of exclusive jurisdiction was error.

In *Ex parte Baldwin,* 291 U. S. 610 (1934), we said (at p. 615): "All property in the possession of a bankrupt of which he claims the ownership passes, upon the filing of a petition in bankruptcy, into the custody of the court of bankruptcy. To protect its jurisdiction from interference, that court may issue an injunction." In the *Baldwin* case this Court upheld the bankruptcy court's exclusive jurisdiction under § 77 to adjudicate the question of forfeiture by the debtor of an easement of right of way—clearly a part of the property of the debtor of which it claimed ownership. See *Thompson* v. *Magnolia Petroleum Co., supra.* In *Warren* v. *Palmer,* 310 U. S. 132 (1940), where the debtor under § 77, the New Haven Railroad, was lessee of property but had rejected the lease and was operating the property for the account of the lessor under § 77 (c) (6), we held that the bankruptcy court had exclusive jurisdiction to fix the amount of the deficit resulting from such operation and to declare it a

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stock is owned by the debtor. § 77 (a). When § 77 was first enacted in 1933, a lessor could also be reorganized in the lessee's proceedings if the debtor operated substantially all of the properties of the lessor, but this provision was not reenacted, even though it was proposed in the draft amendments submitted by the Federal Coordinator of Transportation, whose proposals formed the basis of the 1935 amendments. Report of the Federal Coordinator of Transportation, 1934. H. R. Doc. No. 89, 74th Cong., 1st Sess., p. 230. See Friendly, *Amendment of the Railroad Reorganization Act,* 36 Col. L. Rev. 27, 49; Meck and Masten, *Railroad Leases and Reorganization,* 49 Yale L. J. 626, 653.

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lien upon the property of the lessor. Since the physical property covered by the rejected lease was within the custody of the bankruptcy court, the fact that legal title remained in the lessor was thought to be immaterial. Clearly, control of the physical property must remain in the court which has the ultimate responsibility for operating it. And in order to protect the estate of the debtor from dissipation through losses suffered in the operation of the lessor's property, responsibility for the determination of the amount of the losses and provision for their recoupment from the lessor was properly lodged in the court supervising the reorganization of the debtor.

Equally clear, however, is the fact that the internal management of the lessor is not properly subject to the court's control. The anomaly of petitioner's position is demonstrated by the facts of the case just discussed. The New Haven reorganization was proceeding in a Connecticut federal district court, while the lessor railroad, the Boston & Providence, was in reorganization under § 77 in a Massachusetts district court. The plan of reorganization of the New Haven, like the Central's plan in this case, contemplated the purchase of the lessor's property. Since the Boston & Providence reorganization court had exclusive jurisdiction of its property, it can hardly be contended that the New Haven reorganization court could assume exclusive jurisdiction to decide questions arising, for example, between different classes of creditors of the Boston & Providence as to whether the New Haven's offer should be accepted. Such a result would be incompatible with the Massachusetts district court's exclusive jurisdiction over the property of the Boston & Providence under § 77 (a).[14] Insofar as the power of the court re-

[14] A similar question arose in another phase of the New Haven reorganization proceedings, in connection with the use by the debtor of the Boston Terminal, which was in reorganization under § 77 in

organizing the lessee rests on its jurisdiction over the property of the debtor, the fact that the lessor here is not in reorganization in another court is immaterial.

Further support for this position is found in our decision in *Group of Institutional Investors* v. *Chicago, M., St. P. & P. R. Co., supra.* The Milwaukee reorganization, in one of its aspects, presented a situation analogous to the one now before us: the lessee was in reorganization under § 77, but no proceedings had been instituted for the reorganization of the lessor of some of its lines, the Chicago, Terre Haute & Southeastern Railway Company. The reorganization plan provided for a new lease to be offered the Terre Haute, which required that the latter scale down its bonded indebtedness so that the interest thereon, which was the rental under the lease, would be substantially reduced. The plan did not, however, differentiate

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another court. The obligations owed by the New Haven to the Terminal Company were fixed by a Massachusetts statute, but these obligations were repudiated by the New Haven's plan of reorganization, which offered the Terminal new terms for the use of its facilities by the debtor. In considering the argument made by the Terminal's bondholders that the plan violated the New Haven's obligations under the state law, the Court of Appeals for the Second Circuit made this statement: "The plan enables New Haven to reject what in effect amounts to a burdensome lease. The plan, however, does not compel Boston Terminal to furnish the service at the rental offered; if Boston Terminal does not choose to accept the offer, it can, as a creditor, file proof of claim against New Haven for any damages to which it may be entitled. It is argued that Boston Terminal has no power under its charter to accept the offer. This seems irrelevant to the problem whether the Commission has power to approve a plan making the offer. Moreover, the reorganization trustee of Boston Terminal may be able to obtain authority to accept either from the bankruptcy court in Massachusetts or through an amendment of the Boston Terminal Act. The plan could not, and does not attempt to, amend the charter of the Terminal Company; but it does amend, as it can, the charter of the New Haven." *In re New York, N. H. & H. R. Co.*, 147 F. 2d 40, 52.

between the four classes of bonds of the lessor with respect to the earning power and character of the security of each, as is required in the reorganization of properties of the debtor. Certain bondholders accordingly attacked the plan as unfair, because it did not attempt to preserve the respective priorities of these bond issues. But we said (p. 546): "The short answer to that objection is that the Terre Haute properties have not been treated by the Commission or the District Court as a part of the properties of the debtor for reorganization purposes. Nor has any question been raised or argued here as to the power of the Commission or the District Court so to treat them. The Commission and the District Court considered the problem solely as one of rejection or affirmance of a lease." It is abundantly clear that in the case before us, the interest of South Western was similarly considered.[15]

Other provisions of § 77 lend no support to petitioner's contentions. Section 77 (b), which makes South Western a creditor in the proceedings, does not, as we have pointed out, give the bankruptcy court any control over its internal organization. It is not a creditor which can

[15] It may also be noted that the Terre Haute could have been reorganized in the Milwaukee proceedings if insolvent or unable to meet its debts, since the Milwaukee owned substantially all of the Terre Haute's stock. See note 13, *supra*. The lessor's bondholders were therefore more like holders of the debtor's bonds than are stockholders of an independently owned lessor. This argument was made before the Commission by an institutional investors group committee, which contended that the assets of Terre Haute should be treated as assets of the debtor for purposes of reorganization. The Commission rejected the argument, saying: "We agree with the group of Terre Haute bondholders that they are not such creditors of the debtor as would be bound as a class by a confirmed plan of reorganization which divested them of their existing liens upon the Terre Haute properties." 239 I. C. C. 485, 535. See Swaine, *A Decade of Railroad Reorganization Under Section 77 of the Federal Bankruptcy Act*, 56 Harv. L. Rev. 1193, 1217.

be bound by the plan without its assent, except to the extent of its claim for damages for breach of the lease and for amounts due it from the lessee.[16] Section 77 (b) (1) provides that the plan may alter the rights of creditors, while § 77 (b) (5) requires that the plan provide adequate means for its execution, which may include merger or consolidation of the debtor with another corporation. This subsection also permits rejection of executory contracts and unexpired leases.

The bankruptcy power unquestionably gives the Commission and court, working within the framework of the Act, full and complete power not only over the debtor and its property, but also, as a corollary, over any rights that may be asserted against it. These rights may be altered in any way thought necessary to achieve sound financial and operating conditions for the reorganized company, subject to the requirements of the Act. The purchase of formerly leased properties does not involve rights asserted against the debtor, however.[17] This Court has said that "The exclusive jurisdiction granted

[16] The dual status of a lessor whose lease has been, or will be, rejected and to whom an offer of purchase or modification is made is explained by Meck, *The Problems of the Leased Line,* 7 Law and Contemp. Prob. 509, 516, as follows: "The plan in theory must deal with the lessor in at least two capacities: as an unsecured creditor and as owner of the leased line. In the former capacity the lessor will receive the same treatment as other unsecured creditors. In the latter, however, the lessor will be treated in accordance with the value of the line to the lessee." See note 6, *supra.*

[17] The offer of purchase may, as was true in this case, include a provision requiring the lessor-offeree to renounce the claims it could otherwise assert against the debtor, including claims for breach of the lease and for amounts due the lessor under the lease or other agreements between the parties. 261 I. C. C. 515. These factors are taken into consideration in determining the amount to be offered under the plan. See 261 I. C. C. at 272 and 295.

the reorganization court by § 77 (a) is that which bankruptcy courts have customarily possessed." *Meyer* v. *Fleming*, 327 U. S. 161, 164 (1946).[18] We conceive the jurisdiction asserted by the district court over a solvent lessor not in reorganization to be an extension of these traditional powers not justified by any provisions of the Bankruptcy Act.

A serious practical problem would arise if the consequence of rejection of the offer and return of the properties to South Western would be cessation of railroad service on the formerly leased lines. Congress has foreseen that difficulty, however. Under § 77 (c) (6), if the lessor is unable to operate the leased lines following rejection of the lease, the duty devolves upon the lessee to continue to operate the leased lines for the account of the lessor,[19] and such operation may continue after completion of the reorganization of the lessee.[20] We need not speculate upon the eventual disposition of South Western's properties. Until some final disposition is made, however, we

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[18] Cf. *In re Adolf Gobel, Inc.*, 80 F. 2d 849, involving § 77B proceedings, and *Greenbaum* v. *Lehrenkrauss Corp.*, 73 F. 2d 285, an equity receivership.

[19] Section 77 (c) (6) provides: "If a lease of a line of railroad is rejected, and if the lessee, with the approval of the judge, shall elect no longer to operate the leased line, it shall be the duty of the lessor at the end of a period to be fixed by the judge to begin the operation of such line, unless the judge, upon the petition of the lessor, shall decree after hearing that it would be impracticable and contrary to the public interest for the lessor to operate the said line, in which event it shall be the duty of the lessee to continue operation on or for the account of the lessor until the abandonment of such line is authorized by the Commission in accordance with the provisions of section 1 of Title 49, as amended."

[20] Operation of the Boston & Providence Railroad for its account is now being carried on by the reorganized New Haven pending completion of reorganization of the Boston & Providence. See *In re New York, N. H. & H. R. Co.*, 169 F. 2d 337.

are assured that service will be maintained on its lines, and that the debtor will not be prejudiced because of the duty thrust upon it. *Palmer* v. *Webster & Atlas National Bank*, 312 U. S. 156 (1941).

Third. It is argued that *Continental Illinois National Bank* v. *Chicago, R. I. & P. R. Co.*, 294 U. S. 648 (1935), and other cases applying similar principles support the district court's injunction of the state action and its determination of the issue there involved. The question specifically before the Court in the *Rock Island* case was this: "Under § 77 does the bankruptcy court have authority to enjoin the sale of the collateral here in question if a sale would so hinder, obstruct and delay the preparation and consummation of a plan of reorganization as probably to defeat it?" The affirmative answer given by the Court rested upon the inherent powers of a court of equity to prevent the defeat or impairment of its jurisdiction, upon § 262 of the old Judicial Code, which authorized United States courts "to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions," and upon § 2 (15) of the Bankruptcy Act, 11 U. S. C. § 11 (15), which gives bankruptcy courts the power to "Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act." 52 Stat. 843.

Reliance upon these cases is based, however, upon the fallacy previously adverted to. The action in the Georgia courts in this case does not embarrass or delay the formulation or promulgation of a plan of reorganization. The plan has been formulated and approved. It leaves open to South Western the alternative of selling its properties to the reorganized debtor or of facing disaffirmance of the lease and the risks of separate operation of its lines. No

suggestion has been made that a final decision of the state law question will be unreasonably delayed. Under these circumstances, we do not believe that the *Rock Island* decision provides any support for the district court's action.[21] As we held in *Thompson* v. *Texas Mexican R. Co.*, 328 U. S. 134 (1946) at 142: "Forfeiture of leases by the court in advance of a determination by the Commission of the nature of the plan of reorganization which is necessary or desirable for the debtor may seriously interfere with the performance by the Commission of the functions entrusted to it." See also *Smith* v. *Hoboken R. Co.*, 328 U. S. 123 (1946). The same considerations do not prevail at a later stage of the proceedings, however, when, pursuant to a plan formulated by the Commission, the lease is forfeited and an offer of purchase substituted in lieu thereof. Unless the offer is a sham and the lessor's discretion illusory, the plan may be effectively consummated whether the offeree accepts or not. The district court did not merely postpone action which would have hindered the development of the plan; it took to itself the decision of a question which the plan left open for decision elsewhere.

We conclude that, under the narrow facts presented here, the bankruptcy court erred in enjoining the state court suit leading to a determination of the requirements of Georgia law with respect to sale of the entire assets of South Western. This question was already in litigation in the state court when first raised in the federal court. Title 28 U. S. C. § 2283 forbids this exercise of power, since, as we hold, the controversy does not involve property of the debtor within the jurisdiction of the bank-

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[21] Cf. *In re New York, N. H. & H. R. Co.*, 102 F. 2d 923; *Guaranty Trust Co.* v. *Henwood*, 86 F. 2d 347; *Central Hanover Bank* v. *Callaway*, 135 F. 2d 592.

ruptcy court, and the assertion of jurisdiction by the state court is not inconsistent with the provisions of the Bankruptcy Act.[22]

Affirmed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE RUTLEDGE concurs, dissenting.

This decision permits control over the plan of reorganization to be taken from the Interstate Commerce Commission and the District Court contrary to the provisions of § 77 and allows a state court to undo what those federal agencies have approved.

The plan approved by the Commission and by the District Court provides for the "consolidation, merger or purchase" of the properties of South Western in lieu of continued operation under the lease, "if the leased properties can be acquired on the terms set forth in the Plan."

The terms of the acquisition are set forth in the plan. If the leased lines are acquired, South Western shall waive any damages on account of breach of the lease and in respect of equipment. Securities allocated to South Western shall not bear interest or dividends for any period prior to the acquisition. The plan also determines the amount of the allotment to South Western which the Commission and the court approved as "fair and equitable" and "equal the value of the transportation property."

On February 11, 1947, the Commission submitted the plan to all creditors, including South Western, for acceptance or rejection on or before midnight March 28, 1947. On March 13, 1947, the directors of South Western accepted the plan subject to the assent of the holders of

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[22] *Kline* v. *Burke Construction Co.*, 260 U. S. 226; *Ex parte Baldwin*, 291 U. S. 610; *Mandeville* v. *Canterbury*, 318 U. S. 47.

a majority of its stock. The stockholders met on March 28, 1947, and accepted the plan by a vote of 30,137 to 9,057. Accordingly South Western mailed its ballot approving the plan to the Commission.

The result of the balloting was certified by the Commission to the court. Thereafter the court had a hearing and confirmed the plan, specifically reserving for later adjudication the question whether it had power to enjoin action in a state court which attempted to annul the acceptance of the plan by South Western. Subsequently it held a hearing, overruled objections of the minority of South Western's stockholders and held that the acceptance by South Western was valid under Georgia law. It accordingly issued the injunction involved in this case.

It seems plain to me that the Commission and the reorganization court had exclusive jurisdiction, subject to judicial review, to determine the question of the validity of the acceptance of the plan tendered by the officers of South Western. The validity of the acceptance is, of course, a question of state law. But it has been entrusted by Congress to these federal agencies.

The plan must first be approved by the Commission and then certified to the court. § 77 (d) (e). The court, after hearing, passes on the plan; and if the court approves the plan, it certifies that fact to the Commission. § 77 (e). The Commission then submits the plan to creditors and stockholders (§ 77 (e)), the lessor and its security holders being included in the definition of creditor. § 77 (b). See *Group of Investors* v. *Milwaukee R. Co.*, 318 U. S. 523, 549. The Commission must then determine the result of the balloting and certify to the judge "the results of such submission." § 77 (e). The court then "shall confirm" the plan if satisfied (1) that the requisite percentage of each class of creditors and stockholders has been obtained and (2) "that *such acceptances have not been made or procured by any means*

forbidden by law." § 77 (e). (Italics added.) On confirmation of the plan by the court, the plan and order of confirmation "shall, subject to the right of judicial review," be binding upon the debtor and stockholders and "all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it." § 77 (f).

Section 77 (f) also provides that on confirmation of the plan the debtor or any other corporation organized to carry out the plan "shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and the control of the judge, *the laws of any State or the decision or order of any State authority to the contrary notwithstanding.*" (Italics added.) And § 77 (j), with exceptions not material here, gives the court power to enjoin or stay the commencement of any suit against the debtor until after final decree.[1]

The control of the court over the acceptance of the plan and over its confirmation is one of the historic instances of the "exclusive jurisdiction" vested in the court by § 77 (a). The exclusive jurisdiction of the reorganization court is one which heretofore we have zealously guarded against encroachments by state courts. See *Thompson* v. *Texas Mexican R. Co.*, 328 U. S. 134. That exclusive jurisdiction is not restricted to protection of the court's possession of the property and operation of the business. Section 77 (e) gives the reorganization court the sole authority to determine whether the accept-

[1] This subsection provides in part: "In addition to the provisions of section 29 of this title for the staying of pending suits against the debtor, the judge may enjoin or stay the commencement or continuation of suits against the debtor until after final decree . . . ."

ances of the plan have been made or procured "by any means forbidden by law." In this case that plainly means that the reorganization court alone had the power to ascertain whether the requisite vote of the directors and stockholders of South Western had been cast in favor of the plan. Once it determined that lawful corporate action had been taken by South Western, then § 77 (f) bound all of South Western's stockholders, since they are included in the definition of creditors for the purposes of the Act. See *Group of Investors* v. *Milwaukee R. Co., supra.* And then the reorganization court had the express power under § 77 (f) to put the plan into effect—"the laws of any State or the decision or order of any State authority to the contrary notwithstanding."

This is precisely one of those situations where the bankruptcy court, if its exclusive jurisdiction is to be maintained, must have the power to enjoin action in state courts. It has long been recognized to have that authority in order to protect its decree. See *Local Loan Co.* v. *Hunt,* 292 U. S. 234. And the policy reflected in old § 265 of the Judicial Code—now 28 U. S. C. § 2283—which frowned on the stay of state proceedings by federal courts, has for years recognized bankruptcy jurisdiction as an exception. See *Toucey* v. *N. Y. Life Ins. Co.,* 314 U. S. 118, 132. It was in recognition of the necessity for that power that Congress wrote subdivision (j) into § 77.

If a state court can hold invalid acceptances whose validity has been approved by the Commission and the District Court, then the federal agencies have lost much of the exclusive jurisdiction which Congress granted them. There are myriad questions of state law underlying the consummation of every plan of reorganization. There is the question whether the new company is validly organized; whether proxies are executed in pursuance of the provisions of the state code; whether the charter of a

corporation can contain certain kinds of provisions, authorize certain types of securities, etc., etc. If state courts can intrude with injunctions on such state law questions, the exclusive command of the federal agencies over the reorganization process is lost, its efficiency is undermined, and minorities are given leverages which the scheme of § 77 explicitly denies.

FISHER *v.* PACE, SHERIFF.

CERTIORARI TO THE SUPREME COURT OF TEXAS.

No. 45. Argued December 9, 1948.—Decided February 7, 1949.

1. In a workmen's compensation proceeding in a Texas state court, counsel for the claimant, in his argument to the jury, persisted in referring to matters which, under Texas law and as the judge twice admonished him, were outside the issues for the jury, and he was summarily fined $25 for contempt. An altercation between counsel and the judge followed, during which the fine was increased to $50, then a 3-day jail sentence was added, and finally a sentence of $100 fine and 3 days in jail was imposed. The State Supreme Court upheld the sentence. *Held:* Upon the record in this case, counsel was not denied due process of law under the Fourteenth Amendment of the Federal Constitution. Pp. 156–163.
2. The inherent power of courts to punish summarily for contempts committed in their presence is essential to preserve their authority and to prevent the administration of justice from falling into disrepute; and such summary procedure affords due process of law. Pp. 159–160.
3. The mildly provocative language of the trial judge did not excuse counsel's show of contempt for judge and court which the record in this case manifests. P. 163.

146 Tex. 328, 206 S. W. 2d 1000, affirmed.

In a state court in which he was participating as counsel in the trial of a workmen's compensation case, petitioner was summarily convicted and sentenced for a contempt of court. In a habeas corpus proceeding, the State Supreme Court upheld the conviction. 146 Tex. 328, 206

S. W. 2d 1000. This Court granted certiorari. 334 U. S. 827. *Affirmed,* p. 163.

R. Dean Moorhead argued the cause for petitioner. With him on the brief were *Dan Moody, Chas. L. Black, Everett L. Looney* and *Edward Clark.*

Quentin Keith submitted on brief for respondent.

MR. JUSTICE REED delivered the opinion of the Court.

While participating as counsel in the trial of a cause the petitioner, Joe J. Fisher, was adjudged guilty of contempt committed in the presence of the court by the District Court of Jasper County, Texas. The petitioner's client was the plaintiff in an action under the state workmen's compensation law. The case was being tried before a jury and the parties had stipulated as to the average weekly wage of the claimant and the rate of compensation per week. The only remaining questions to be determined were as to the extent and duration of the incapacity resulting from an injury to the claimant's foot. Seven special issues, designed to furnish an answer to these problems and limited to them, were submitted to the jury.

Thereafter petitioner began his opening argument to the jury during which the following occurrence took place, as shown by the trial court's order of contempt and commitment:

> "Opening argument to Jury of Plaintiff's Attorney, Joe J. Fisher
>
> "Now, bear in mind, gentlemen, that this is what we call a specific injury. A general injury is an injury to the entire body. This is what is known as a specific injury, and it is confined to the left foot. We have specific injuries where you have injuries

to the eye, to your hand, and to your foot; this is an injury to the foot, to the left foot; and the law states the amount of maximum compensation which a person can receive for such an injury, that is, one hundred and twenty-five weeks. That is the most compensation Anderson Godfrey could receive, would be one hundred and twenty-five weeks, because his injury is confined to his left foot. That is all we are asking. Now, that means one hundred and twenty-five weeks times the average weekly compensation rate.

"By Mr. Cox: Your Honor please—

"By the Court: Wait a minute.

"By Mr. Cox: The jury is not concerned with the computation; it has only one series of issues. That is not before the jury.

"By the Court: That has all been agreed upon.

"By Mr. Fisher: I think it is material, Your Honor, to tell the jury what the average weekly compensation is of this claimant so they can tell where he is.

"By the Court: They are not interested in dollars and cents.

"By Mr. Fisher: They are interested to this extent—

"By the Court: Don't argue with me. Go ahead. I will give you your exception to it.

"By Mr. Fisher: Note our exception.

"By the Court: All right.

"[By Mr. Fisher:] This negro, as I stated, can only recover one hundred and twenty-five weeks compensation, at whatever compensation the rate will figure under the law.

"By Mr. Cox: I am objecting to that discussion, Your Honor, as to what the plaintiff can recover.

"By the Court: Gentlemen! Mr. Fisher, you know the rule, and I have sustained his objection.

"By Mr. Fisher: I am asking—

"By the Court: Don't argue with me. Gentlemen, don't give any consideration to the statement of Mr. Fisher.

"By Mr. Fisher: Note our exception. I think I have a right to explain whether it is a specific injury or general injury.

"By the Court: I will declare a mistrial if you mess with me two minutes and a half, and fine you besides.

"By Mr. Fisher: That is all right. We take exception to the conduct of the Court.

"By the Court: That is all right; I will fine you $25.00.

"By Mr. Fisher: If that will give you any satisfaction.

"By the Court: That is $50.00; that is $25.00 more. Mr. Sheriff come get it. Pay the clerk $50.00.

"By Mr. Fisher: You mean for trying to represent my client?

"By the Court: No, sir; for contempt of Court. Don't argue with me.

"By Mr. Fisher: I am making no effort to commit contempt, but merely trying to represent the plaintiff and stating in the argument—

"By the Court: Don't tell me. Mr. Sheriff, take him out of the courtroom. Go on out of the courtroom. I fine you three days in jail.

"By Mr. Fisher: If that will give you any satisfaction; you know you have all the advantage by you being on the bench.

"By the Court: That will be a hundred dollar fine and three days in jail. Take him out.

"By Mr. Fisher: I demand a right to state my position before the audience.

"By the Court: Don't let him stand there. Take him out."

The sheriff held the petitioner in custody upon the verbal order of the court until an amended order in conformity with Texas law,[1] setting forth in full the above proceedings together with a formal commitment, was filed later the same day. Upon his application for a writ of habeas corpus from the Supreme Court of Texas to secure his release from the commitment, the judgment for contempt was upheld and the petitioner was denied any relief by that court and was remanded to the custody of the sheriff to undergo the punishment adjudged by the trial court. *Ex parte Fisher,* 146 Tex. 328, 206 S. W. 2d 1000. As the application alleged a denial of due process of law under the Fourteenth Amendment to the Constitution of the United States, we granted certiorari to consider its application to this conviction for contempt. 334 U. S. 827. The claimed denial of due process consists of an alleged refusal to review the facts to ascertain whether a contempt was committed and in the alternative, if the facts were reviewed, due process was denied because no facts constituting contempt appear.

Historically and rationally the inherent power of courts to punish contempts in the face of the court without further proof of facts and without aid of jury is not open to question.[2] This attribute of courts is essential to preserve their authority and to prevent the administration of justice from falling into disrepute. Such

[1] *Ex parte Kearby,* 35 Tex. Crim. Rep. 531, 34 S. W. 635; *Ex parte Ray,* 101 Tex. Crim. Rep. 432, 276 S. W. 709.

[2] 4 Bl. Comm. 286; *Ex parte Terry,* 128 U. S. 289, 302–304, 313–14; *Ex parte Savin,* 131 U. S. 267, 277; *Eilenbecker* v. *District Court,* 134 U. S. 31, 36–37; *Cooke* v. *United States,* 267 U. S. 517, 534–36; *In re Oliver,* 333 U. S. 257, 274–75.

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summary conviction and punishment accords due process of law.[3]

There must be adequate facts to support an order for contempt in the face of the court. Contrary to the contention of the petitioner the state Supreme Court evaluated the facts to decide whether there was sufficient evidence to support the judgment of the trial court and held that there was. The opinion of the Texas Supreme Court states that the court set out to review the facts "for the purpose of determining whether they constituted acts sufficient to confer jurisdiction upon the court" to enter the contempt order.[4] In other words, the highest court of the state proposed to satisfy itself that there was substantial evidence to validate the judgment of contempt and to insure that petitioner was not "restrained of his liberty without due process of law." After a careful analysis of the facts as disclosed by the judgment of the

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[3] *Ex parte Terry,* 128 U. S. 289, 313: "We have seen that it is a settled doctrine in the jurisprudence both of England and of this country, never supposed to be in conflict with the liberty of the citizen, that for direct contempts committed in the face of the court, at least one of superior jurisdiction, the offender may, in its discretion, be instantly apprehended and immediately imprisoned, without trial or issue, and without other proof than its actual knowledge of what occurred; and that, according to an unbroken chain of authorities, reaching back to the earliest times, such power, although arbitrary in its nature and liable to abuse, is absolutely essential to the protection of the courts in the discharge of their functions. Without it, judicial tribunals would be at the mercy of the disorderly and violent, who respect neither the laws enacted for the vindication of public and private rights, nor the officers charged with the duty of administering them."

See also *Cooke* v. *United States, supra,* 534; *Ex parte Hudgings,* 249 U. S. 378, 383.

[4] This rule is well established in Texas. *Ex parte Testard,* 101 Tex. 250, 106 S. W. 319; *Ex parte Dulaney,* 146 Tex. 108, 203 S. W. 2d 203. For other cases see the opinion in the instant case, *Ex parte Fisher,* 146 Tex. 328, 333, 206 S. W. 2d 1000, 1003.

trial court, the conclusion was reached that the conduct of the petitioner was clearly sufficient to support the power of the court to punish summarily the contempt committed in its presence.

The judgment of the Supreme Court of Texas must be affirmed. In a case of this type the transcript of the record cannot convey to us the complete picture of the courtroom scene. It does not depict such elements of misbehavior as expression, manner of speaking, bearing, and attitude of the petitioner. Reliance must be placed upon the fairness and objectivity of the presiding judge. The occurrence must be viewed as a unit in order to appraise properly the misconduct, and the relationship of the petitioner as an officer of the court must not be lost sight of.[5]

The state Supreme Court pointed out that its practice of submitting special issues to the jury was adopted in order to remove from the jury's consideration the effect on the ultimate outcome of the case of their answers to questions of disputed facts.[6] In this case, the jury might be tempted to find a long incapacity or a severe injury if they knew the amount of recovery was limited by the employee's wage and rate of compensation. Counsel are required to confine their arguments to the evidence and must not touch upon matters withdrawn from the consideration of the jury.[7] Yet here, petitioner, a member of the Texas bar, ignored this rule and at the outset of his address to the jury exceeded the bounds of permissible argument by trying to tell the jury the maximum compensation which their answers to the special issues would allow his client. On objection of the opposing counsel peti-

[5] *Clark* v. *United States,* 289 U. S. 1, 12.

[6] *Ex parte Fisher,* 146 Tex. 328, 334–335, 206 S. W. 2d 1000, 1004–1005.

[7] Rule 269, Vernon's Texas Rules of Civil Procedure; *Ramirez* v. *Acker,* 134 Tex. 647, 138 S. W. 2d 1054.

tioner was stopped by the trial judge, but in the face of the court's decision he persisted in trying to tell the jury the effect of their answers. He switched his explanation of the stipulated amount of recovery from the words "one hundred and twenty-five weeks times the average weekly compensation rate" to "one hundred and twenty-five weeks compensation, at whatever compensation the rate will figure under the law." The change obviously brought before the jury information on the limitation to the amount of recovery—a factor held by the trial judge inadmissible under the special issues. In addition to this stubborn effort to bring excluded matter to the knowledge of the jury, the petitioner twice refused to heed the court's admonition not to argue the point. As the Supreme Court said,

> "It was the duty and power of the trial judge in the trial of the compensation suit to determine the type, manner and character of the argument before the jury. Of course his rulings thereon were subject to review in the appellate courts, but he has the power to make them whether right or wrong. If they are erroneous the injured party has the plain, simple and adequate remedy of appeal. It was thus the duty of counsel to abide by his decisions even if erroneous; and if any rights of his clients were violated the remedy was by exception and appeal. Any other procedure would result in mockery of our trial courts and would destroy every concept of orderly process in the administration of justice." [8]

This judgment of the Supreme Court turned on their understanding of Texas law and practice. We see nothing in their opinion or conclusion that indicates any disregard of petitioner's rights. The conduct of a judge

[8] 146 Tex. 328, 335, 206 S. W. 2d 1000, 1005; cf. *United States* v. *United Mine Workers*, 330 U. S. 258, 293, 302–303.

should be such as to command respect for himself as well as for his office. We cannot say, however, that mildly provocative language from the bench puts a constitutional protection around an attorney so as to allow him to show the contempt for judge and court manifested by this record, particularly the last few sentences of the altercation.

The judgment of the Supreme Court of Texas accordingly is

Affirmed.

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

The power to punish for contempt committed in open court was recognized long ago as a means of vindicating the dignity and authority of the court. See *Ex parte Terry,* 128 U. S. 289, 301–304 and cases cited. But its exercise must be narrowly confined lest it become an instrument of tyranny. Chief Justice Taft in *Cooke* v. *United States,* 267 U. S. 517, 539, warned that its exercise by a federal court is "a delicate one and care is needed to avoid arbitrary or oppressive conclusions." The same restraint is necessary under our constitutional scheme when state courts are claiming the right to take a person by the heels and fine or imprison him for contempt without a trial or an opportunity to defend. In *Bridges* v. *California,* 314 U. S. 252; *Pennekamp* v. *Florida,* 328 U. S. 331; and *Craig* v. *Harney,* 331 U. S. 367, we narrowly restricted the power to punish summarily for constructive contempts in order to maintain freedom of press and of speech in their preferred position. Freedom of speech in the courtroom deserves the same protection.

Fisher's conviction is sustained because it is said that he persisted in trying to tell the jury what the judge held to be improper. I do not so read the record. The judge sustained an objection to Fisher's attempt to get

the average weekly compensation of the injured person before the jury, as appears from the following colloquy:

"By Mr. Cox: The jury is not concerned with the computation; it has only one series of issues. That is not before the jury.

"By the Court: That has all been agreed upon.

"By Mr. Fisher: I think it is material, Your Honor, to tell the jury what the average weekly compensation is of this claimant so they can tell where he is.

"By the Court: They are not interested in dollars and cents.

"By Mr. Fisher: They are interested to this extent—

"By the Court: Don't argue with me. Go ahead. I will give you your exception to it.

"By Mr. Fisher: Note our exception.

"By the Court: All right."

Fisher never again tried to get the amount of weekly compensation of the injured person into the record. He abided by the ruling of the judge. What next happened was as follows:

"By Mr. Fisher: This negro, as I stated, can only recover one hundred and twenty-five weeks compensation, at whatever compensation the rate will figure under the law.

"By Mr. Cox: I am objecting to that discussion, Your Honor, as to what the plaintiff can recover.

"By the Court: Gentlemen! Mr. Fisher, you know the rule, and I have sustained his objection.

"By Mr. Fisher: I am asking—

"By the Court: Don't argue with me. Gentlemen, don't give any consideration to the statement of Mr. Fisher.

"By Mr. Fisher: Note our exception. I think I have a right to explain whether it is a specific injury or general injury."

Fisher's statement that, "This negro, as I stated, can only recover one hundred and twenty-five weeks compensation, at whatever compensation the rate will figure under the law," did not mention the matter of "dollars and cents" that the judge held irrelevant. It was not a new attempt by Fisher to get the "average weekly compensation" before the jury. Yet the record can be read as meaning that they were the only specific matters on which the judge had ruled. As Justice Sharp, dissenting in the Texas Supreme Court, stated, "This statement does not indicate that relator was disobeying the ruling of the court, but, on the contrary, shows that he was trying to obey same." It also means to me that he was seeking to perfect the record so as to preserve all of his points.

It is said that the statement was improper under Texas practice. But it took a ruling of the Texas Supreme Court to make it so, and even then Justice Sharp dissented. If Texas law on the point is so uncertain that the highest judges of the State disagree as to what is the permissible practice, is a lawyer to be laid by the heels for pressing the point? Yet it was for pressing the point of law on which the Supreme Court of Texas divided that Fisher was held in contempt.

It is said, however, that such elements of misbehavior as expression, manner of speaking, bearing, and attitude of Fisher may have given the words a contemptuous flavor that the cold record does not reveal. I do not think freedom of speech should be so readily sacrificed, even in a courtroom. If that were the offense, it is not too much to ask that the judge make it the ground of his ruling. Certainly the judge did not purport to fine and imprison Fisher for the manner of making the objection, for the tone of his voice, or for his facial expression. The dispute was merely over the bounds of permissible comment before a jury. Fisher having been stopped at one point tried another strategy. He was

acting the role of a resourceful lawyer. The decision which penalizes him for that zeal sanctions censorship inside a courthouse where the ideals of freedom of speech should flourish.

There is for me only one fair inference from the record—that the judge picked a quarrel with this lawyer and used his high position to wreak vengeance on him. It is shown, I think, by the commencement of the critical colloquy:

> "By the Court: I will declare a mistrial if you mess with me two minutes and a half, and fine you besides.
>
> "By Mr. Fisher: That is all right. We take exception to the conduct of the Court.
>
> "By the Court: That is all right; I will fine you $25.00."

This lawyer was the victim of the pique and hotheadedness of a judicial officer who is supposed to have a serenity that keeps him above the battle and the crowd. That is as much a perversion of the judicial function as if the judge who sat had a pecuniary interest in the outcome of the litigation. *Tumey* v. *Ohio,* 273 U. S. 510.

MR. JUSTICE MURPHY, dissenting.

Petitioner told the jury three times, without objection, that his client was entitled to compensation for one hundred and twenty-five weeks. He then began discussion of the "average weekly compensation," and the Court told him that the jury was "not interested in dollars and cents." To this ruling he excepted, believing that the amount of possible recovery should be considered by the jury. He then repeated what he had said three times before, without objection, on a different subject, and was told that he should not "mess with" the court. Quite naturally, he objected to the court's conduct; Texas

decisions make it clear that remarks "calculated to reflect upon the counsel and prejudice his client's case with the jury . . . constitute reversible error." *Dallas Consol. Electric St. R. Co.* v. *McAllister,* 41 Tex. Civ. App. 131, 137, 90 S. W. 933. But petitioner was held in contempt. And as he objected, his penalty was successively raised. Finally the court told the sheriff: "Don't let him stand there. Take him out."

A trial judge must be given wide latitude in punishing interference with the orderly administration of justice. See *Ex parte Terry,* 128 U. S. 289; *Cooke* v. *United States,* 267 U. S. 517. But the summary nature of contempt proceedings, the risk of imprisonment without jury, trial, or full hearing, make this the most drastic weapon entrusted to the trial judge. To sanction the procedure when it is patent that there has been no substantial interference with the trial, when a judge has used his position and power to successively increase the penalty for simple objections, is, I believe, a denial of due process of law. The contempt power is an extraordinary remedy, an exception to our tradition of fair and complete hearings. Its use should be carefully restricted to cases of actual obstruction. In my opinion, this record of petty disagreement does not approach that serious interference with the judicial process which justifies use of the contempt weapon. Whatever the situations making this weapon necessary, it is plain to me that this is not one of them.

An appellate court can rarely correct abuse such as this. "If the judge intends to be unfair, the trial will be a farce no matter how many detailed rules we provide for him." McElroy, *Some Observations Concerning the Discretions Reposed in Trial Judges by the American Law Institute's Code of Evidence,* Model Code of Evidence, pp. 356, 358. A printed record cannot reveal

inflections and gestures, the tenor of a judge's conduct of a trial—matters which make his position the most responsible in the daily administration of a fair judicial system. See Rheinstein, *Who Watches the Watchmen?* in Interpretations of Modern Legal Philosophies (New York, 1947), p. 589. In recent years we have seen a pronounced tendency to leave many matters in the discretion of the trial judge. McElroy, *supra;* Yankwich, *Increasing Judicial Discretion in Criminal Proceedings,* 1 F. R. D. 746. The movement, which rests on the assumption that the judge is wise and impartial, should make us quick to upset his determinations in the few cases which clearly demonstrate light regard for the principles that should guide a responsible jurist.

I would reverse the judgment.

MR. JUSTICE RUTLEDGE, dissenting.

Without recounting further than is done in other opinions the facts of this unfortunate episode, I have concluded that the record here discloses answers or remarks made by petitioner to the court which, in some instances, may well have justified punishment for contempt, but for one circumstance. That is, I regret to say, the conclusion to which I have been forced from the record as a whole that in the course of the colloquy and especially in the rapid succession of fines, commitment to jail, and order for removal from the courtroom, as well as in the unjudicial language employed by the judge, the trial court acted in the heat of temper and not with that calm control which the fair administration of judicial office commands under all circumstances.

Lawyers owe a large, but not an obsequious, duty of respect to the court in its presence. But their breach of this obligation in no case justifies correction by an act or acts from the bench intemperate in character, over-

riding judgment. Since the case comes here upon the sequence of events taken as an entirety, I do not undertake to separate one portion of the judgment from another. Accordingly, as the case stands here, I must take the entire sentence as infected with the fault I have noted. It follows, in my view, that the judgment should be reversed. Whatever the provocation, there can be no due process in trial in the absence of calm judgment and action, untinged with anger, from the bench.

OTT, COMMISSIONER OF PUBLIC FINANCE, ET AL. *v.* MISSISSIPPI VALLEY BARGE LINE CO. ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 244. Argued January 5, 1949.—Decided February 7, 1949.

1. A state and a city levied *ad valorem* taxes on foreign corporations operating barge lines in interstate commerce on inland waters. The assessments were based on the ratio between the number of miles of line within the State and the total number of miles of the entire line. The vessels engaged in the service were enrolled at ports outside of the State and were only within the State for such time as was required to load and unload cargo and to make necessary repairs. *Held:* The taxes did not violate either the Due Process Clause of the Fourteenth Amendment or the Commerce Clause of the Federal Constitution. Pp. 170–175.
2. The rule of tax apportionment for rolling stock of railroads in interstate commerce, formulated in *Pullman's Car Co.* v. *Pennsylvania,* 141 U. S. 18, is applicable here. Pp. 172–174.
3. So far as due process is concerned, the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing State; and those requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the State. P. 174.

4. Claims of errors in the amount of the assessment need not here be resolved in the absence of any suggestion that the State affords no administrative or judicial remedy to correct them. P. 175.

166 F. 2d 509, reversed.

Appellees instituted suits in the District Court, based on diversity of citizenship, to recover allegedly unconstitutional state taxes which they had paid under protest. The District Court gave judgment for appellees. 68 F. Supp. 30. The Court of Appeals affirmed. 166 F. 2d 509. On appeal to this Court, *reversed,* p. 175.

Howard W. Lenfant argued the cause for appellants. With him on the brief were *Bolivar E. Kemp,* Attorney General of Louisiana, *Henry G. McCall* and *Henry B. Curtis.*

Arthur A. Moreno argued the cause for appellees. With him on the brief was *Selim B. Lemle.*

Mr. Justice Douglas delivered the opinion of the Court.

Appellees are foreign corporations which transport freight in interstate commerce up and down the Mississippi and Ohio Rivers under certificates of public convenience and necessity issued by the Interstate Commerce Commission. Each has an office or agent in Louisiana but its principal place of business is elsewhere. The barges and towboats which they use in this commerce are enrolled at ports outside Louisiana; but they are not taxed by the States of incorporation.

In the trips to Louisiana a tugboat brings a line of barges to New Orleans where the barges are left for unloading and reloading. Then the tugboat picks up loaded barges for return trips to ports outside that State. There is no fixed schedule for movement of the barges. But the turn-arounds are accomplished as quickly as pos-

sible with the result that the vessels are within Louisiana for such comparatively short periods of time as are required to discharge and take on cargo and to make necessary and temporary repairs.[1]

Louisiana and the City of New Orleans levied *ad valorem* taxes under assessments based on the ratio between the total number of miles of appellees' lines in Louisiana and the total number of miles of the entire line.[2] The taxes were paid under protest and various

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[1] The District Court found that of the total time covered by appellees' interstate commerce operations in 1943, the amount spent by their vessels in Louisiana or in New Orleans was approximately as follows:

	Per cent
American's tugboats	3.8
Mississippi Valley's tugboats	17.25
Mississippi Valley's barges	12.7

Similar findings for 1944 were:

Mississippi Valley's tugboats	10.2
Mississippi Valley's barges	17.5
Union's tugboats	2.2
Union's barges	4.3

[2] The statute, 6 Dart's La. Gen. Stat. § 8370, provides in part as follows:

"(a) . . . All movable and regularly moved locomotives, cars, vehicles, craft, barges, boats and similar things, which have not the character of immovables by their nature or by the disposition of law, either owned or leased for a definite and specific term stated and operated (such, illustratively but not exclusively, as the engines, cars and all rolling stocks of railroads; the boats, barges and other water-craft and floating equipment of water transportation lines); . . . .

. . . . . .

"(f). The 'movable personal property' of such persons, firms, or corporations, whose line, route, or system is partly within this state and partly within another state or states, shall be by the commission valued for the purposes of taxation and by it assessed; and such assessment by it fairly divided, allocated and certified to each such

suits, which have been consolidated, were instituted in the District Court by reason of diversity of citizenship for their return, the contention being that the taxes violated the Due Process Clause of the Fourteenth Amendment and the Commerce Clause. The District Court gave judgment for the appellees, holding that the taxes violated the Due Process Clause of the Fourteenth Amendment because the vessels had acquired no tax situs in Louisiana. 68 F. Supp. 30. The Court of Appeals affirmed. 166 F. 2d 509. Certiorari having been denied, 334 U. S. 859, the case was brought here by appeal. Judicial Code § 240, 28 U. S. C. § 347 (b), now 28 U. S. C. § 1254.

It is argued that the rule of tax apportionment for rolling stock of railroads in interstate commerce which was introduced by *Pullman's Car Co.* v. *Pennsylvania,* 141 U. S. 18, should be applied here. In that case a nondomiciliary State was allowed to tax an interstate rail

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parish and municipality as herein defined, within this state, within, through or under which same be operated; said division, allocation and certification to be determined in the following manner and according to the following method; such assessment to be there subject to all state taxes and to all parish taxes and to all municipal taxes, as same are herein defined and to none other.

"1. The portion of all of such property, of such person, firm or corporation shall be assessed in the state of Louisiana, wheresoever, in the ratio which the number of miles of the line, within the state bears to the total number of miles of the entire line, route or system, here and elsewhere, over which such movable personal property is so operated or so used by such person, firm or corporation.

. . . . . .

"(g). For the purposes of such valuation, assessment and taxation in Louisiana such parishes and municipalities shall be hereby fixed and declared, respectively, to be a taxable situs in this state of such movable personal property, whether same be operated entirely within or partly within and partly without this state and whether said taxpayer be a resident or a nonresident of Louisiana and irrespective of whether or not here domiciled locally or otherwise."

carrier by taking as the basis of assessment such proportion of its capital stock as the number of miles of railroad over which its cars ran within the State bore to the total number of miles in all the States.[3] The Court of Appeals thought that case and its offspring inapplicable because of our decisions in *Hays* v. *Pacific Mail S. S. Co.*, 17 How. 596; *St. Louis* v. *Ferry Co.*, 11 Wall. 423; *Morgan* v. *Parham*, 16 Wall. 471; *Ayer & Lord Tie Co.* v. *Kentucky*, 202 U. S. 409; and *Southern Pacific Co.* v. *Kentucky*, 222 U. S. 63. Some of these cases involved vessels which moved on the high seas. *Hays* v. *Pacific Mail S. S. Co., supra; Morgan* v. *Parham, supra; Southern Pacific Co.* v. *Kentucky, supra.* Others involved vessels moving in our inland waters, *St. Louis* v. *Ferry Co., supra; Ayer & Lord Tie Co.* v. *Kentucky, supra.* In each situation the Court evolved the rule that the vessels were taxable solely at the domicile of the owner, save where they had acquired an actual situs elsewhere as they did when they operated wholly on waters within one State. *Old Dominion S. S. Co.* v. *Virginia*, 198 U. S. 299. So far as ships of American ownership and registry sailing the high seas are concerned, it was thought that if they were not taxable at the domicile they might not be taxable at all. See *Southern Pacific Co.* v. *Kentucky, supra*, at 75. But in neither situation was the element of apportionment involved or considered.

We do not reach the question of taxability of ocean carriage but confine our decision to transportation on

[3] And see *Pittsburgh, C., C. & St. L. R. Co.* v. *Backus*, 154 U. S. 421; *Adams Express Co.* v. *Ohio*, 165 U. S. 194, 166 U. S. 185; *American Express Co.* v. *Indiana*, 165 U. S. 255; *Adams Express Co.* v. *Kentucky*, 166 U. S. 171; *Union Transit Co.* v. *Kentucky*, 199 U. S. 194; *New York Central R. Co.* v. *Miller*, 202 U. S. 584; *Wells, Fargo & Co.* v. *Nevada*, 248 U. S. 165; *St. Louis & E. St. L. R. Co.* v. *Hagerman*, 256 U. S. 314; *Southern R. Co.* v. *Watts*, 260 U. S. 519; *Rowley* v. *Chicago & N. W. R. Co.*, 293 U. S. 102; *Nashville, C. & St. L. R. Co.* v. *Browning*, 310 U. S. 362.

inland waters. We see no practical difference so far as either the Due Process Clause or the Commerce Clause is concerned whether it is vessels or railroad cars that are moving in interstate commerce. The problem under the Commerce Clause is to determine "what portion of an interstate organism may appropriately be attributed to each of the various states in which it functions." *Nashville, C. & St. L. R. Co.* v. *Browning,* 310 U. S. 362, 365. So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing State. See *Wisconsin* v. *J. C. Penney Co.,* 311 U. S. 435, 444. Those requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the State.

There is such an apportionment under the formula of the *Pullman* case. Moreover, that tax, like taxes on property, taxes on activities confined solely to the taxing State,[4] or taxes on gross receipts apportioned to the business carried on there,[5] has no cumulative effect caused by the interstate character of the business. Hence there is no risk of multiple taxation. Finally, there is no claim in this case that Louisiana's tax discriminates against interstate commerce. It seems therefore to square with our decisions holding that interstate commerce can be made to pay its way by bearing a nondiscriminatory share of the tax burden which each State may impose on the activities or property within its borders. See *Western Live Stock* v. *Bureau,* 303 U. S. 250, 254–255, and cases cited.

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[4] *New York, L. E. & W. R. Co.* v. *Pennsylvania,* 158 U. S. 431; *Utah Power & L. Co.* v. *Pfost,* 286 U. S. 165; *Coverdale* v. *Arkansas-Louisiana Pipe L. Co.,* 303 U. S. 604.

[5] *Maine* v. *Grand Trunk R. Co.,* 142 U. S. 217; *Wisconsin & M. R. Co.* v. *Powers,* 191 U. S. 379; *United States Express Co.* v. *Minnesota,* 223 U. S. 335; *Cudahy Packing Co.* v. *Minnesota,* 246 U. S. 450; *Illinois Central R. Co.* v. *Minnesota,* 309 U. S. 157.

We can see no reason which should put water transportation on a different constitutional footing than other interstate enterprises.

It is argued that the doctrine of the *Pullman* case is inapplicable here because its basis is the continuous protection afforded by the taxing State throughout the tax year to a portion of the commerce. See 141 U. S. at 26; *Union Transit Co.* v. *Kentucky,* 199 U. S. 194, 206; *New York Central R. Co.* v. *Miller,* 202 U. S. 584, 597–598; *Northwest Airlines* v. *Minnesota,* 322 U. S. 292, 297. It is said in this case that the visits of the vessels to Louisiana were sporadic and for fractional periods of the year only and that there was no average number of vessels in the State every day. The District Court indeed said that there was no showing that the particular portion of the property sought to be taxed was regularly and habitually used and employed in Louisiana for the whole of the taxable year.

We do not stop to resolve the question. Louisiana's Attorney General states in his brief that the statute "was intended to cover and actually covers here, an average portion of property permanently within the State—and by permanently is meant throughout the taxing year." Appellees do not suggest an absence of any administrative or judicial remedy in Louisiana to correct errors in the assessment. Cf. *Hillsborough* v. *Cromwell,* 326 U. S. 620. The District Court does not sit to police them. See *Great Lakes Co.* v. *Huffman,* 319 U. S. 293; *Arkansas Commission* v. *Thompson,* 313 U. S. 132; *Gardner* v. *New Jersey,* 329 U. S. 565, 578–579.

Reversed.

Mr. Justice Jackson dissents.

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WISCONSIN ELECTRIC POWER CO. *v.* UNITED STATES.

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

No. 237. Argued January 7, 1949.—Decided February 14, 1949.

1. Dairies, engaged primarily in the collection, pasteurization and distribution of fresh milk, purchased and used electricity in various ways in their general operations, including an undetermined amount used in pasteurizing milk. *Held:* Electricity supplied to these dairies through single meters, or through more than one meter but without differentiation as to use, is sold for "commercial consumption" (and not for industrial purposes), within the meaning of § 3411 of the Internal Revenue Code, and is taxable against the vendor under that section. Pp. 177–187.
2. The legislative history of this section indicates that the term "commercial" was meant to apply to the nature of the business in which the energy is consumed, and not to the specific purpose to which each measurable unit of electricity is devoted. Pp. 181–182.
3. The controlling factor in determining the applicability of the tax is the general nature of the business carried on at a given location. Pp. 182–184.
4. Though the process of pasteurizing, separately viewed, may be assumed to be industrial, the general nature of the business conducted by the dairy plants here involved was essentially commercial, notwithstanding the inclusion of pasteurization among their many activities. Pp. 184–185.
5. The conclusion here reached as to the applicability of the tax is supported by the legislative history and the administrative interpretation. Pp. 181–187.

168 F. 2d 285, affirmed.

Petitioner sued in the District Court for a refund of taxes alleged to have been erroneously collected under § 3411 of the Internal Revenue Code. The District Court denied recovery. 69 F. Supp. 743. The Court of Appeals affirmed. 168 F. 2d 285. This Court granted certiorari. 335 U. S. 842. *Affirmed,* p. 187.

Van B. Wake argued the cause and filed a brief for petitioner.

By special leave of Court, *William L. Ransom* argued the cause for the Consolidated Edison Company of New York, as *amicus curiae,* in support of petitioner. With him on the brief were *James K. Polk* and *Laurence W. Fairfax.*

Lee A. Jackson argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Caudle* and *Ellis N. Slack.*

Mr. Justice Reed delivered the opinion of the Court.

Petitioner, engaged in the business of supplying electric energy to the public, seeks the refund of taxes paid by it pursuant to § 3411 of the Internal Revenue Code. That section, in pertinent part, provides for a tax

> ". . . upon electrical energy sold for domestic or commercial consumption . . . equivalent to 3 per centum [1] of the price for which so sold, to be paid by the vendor under such rules and regulations as the Commissioner, with the approval of the Secretary, shall prescribe." [2]

Note that the statute taxes energy for domestic or commercial consumption. There is no provision for taxation of electrical energy used for industrial purposes.[3]

The purchasers of the electric power here involved are 27 dairy plants which are engaged primarily in the collection, pasteurization, and distribution of fresh milk. The sole question presented by the case is whether the use of electricity by these dairies is commercial con-

[1] Amended by the Revenue Act of 1941, c. 412, 55 Stat. 687, 707, § 521 (a) (19), to change the three percent tax to three and one-third percent.

[2] 26 U. S. C. § 3411.

[3] See, *infra,* p. 180, *et seq.*

sumption within the meaning of the statute or industrial consumption, a use not covered by the statute.

The functions of the dairy plants are sufficiently similar so that they can be treated as one for the purpose of describing their methods of operation. The plants are buildings equipped with milk-handling machinery and facilities located either off the dairy farms, or on the dairy farm itself as an activity apart from milk production. Contracts for the purchase of raw milk are negotiated with nearby farms.[4] This milk is delivered in trucks of the producers or of the dairy plant, as the case may be, to the plant where it is received, weighed, tested for butterfat content, cooled, and mixed and standardized so as to achieve the proper butterfat content. Next it is pasteurized. Pasteurization consists of heating the milk to 143°–145° F., maintaining it at that level for about thirty minutes, and then subjecting it to sudden cooling to a point between 38° and 40° F.[5] The process is designed to kill pathogenic bacteria without destroying the natural creaming properties or the taste of the milk. Then the milk is drawn into bottles or cans which have been washed, sterilized, and cooled. Finally it is stored in refrigerated rooms to permit the cream line to form and to await delivery.[6] Most of it is delivered to customers in the dairy plant's trucks or wagons. In some instances a small proportion is sold at the plant itself.

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[4] A few of the consumers of electricity here involved produce their own milk.

[5] One of the plants pasteurizes by the so-called "flash method," heating the milk to 161° F. for 16 seconds and rapidly cooling it to 32° F.

[6] A minor proportion of the milk purchased by these plants is manufactured into butter, cheese, or other by-products. An undisclosed amount of this milk is separated from the cream it contains; some is also homogenized.

Electric power is employed by the purchasing dairy plants in a number of ways. It is used to light the plants, including the garage space for the collecting and distributing trucks. It drives electric motors which pump refrigerants, deliver milk to and from the pasteurizer and to the bottling machines, operate the homogenizer, the bottling machine, the cream separator, and the machinery used in washing, sterilizing and conveying bottles. The electricity used by some of the plants is measured through a single meter, that of others through two or more meters, but in no case are the meters so connected to the incoming power line as to enable the energy supplied for one purpose to be differentiated from that supplied for another. We do not have before us a situation where pasteurization utilizes electrical energy that is measured by a meter exclusively used for pasteurization.

Pasteurization is accomplished by the use of special equipment designed for that purpose. Most of the electricity attributable to the process is devoted to the ice machines which perform the rapid cooling of the milk after the initial heating. Since the same cooling units perform the cooling which is necessary before and after pasteurization, however, the electricity which they consume for pasteurization alone cannot be ascertained. Pasteurization equipment, including the increased cooling equipment necessary therefor, accounts for about 15 or 20 percent of the total cost of plant equipment, excluding trucks and other vehicles. About one-tenth of the cost of plant operation, excluding the cost of the raw milk and costs attributable to distribution, is attributable to pasteurization.

Petitioner paid the tax on electrical energy sold to the dairy plants during the period from April, 1940, to July, 1943, and then brought suit to recover it on the ground that such energy was sold not for commercial but for

industrial consumption. The United States District Court for the Eastern District of Wisconsin held that the sales were for commercial consumption within the meaning of the statute, and therefore that the tax was valid. 69 F. Supp. 743. The United States Court of Appeals for the Seventh Circuit affirmed. 168 F. 2d 285. It summarized its views as follows:

> "We agree with [District] Judge Duffy that the wording and legislative history of the Act make it clear that the predominant character of the business carried on by a consumer of electrical energy is what determines whether the electricity sold has been sold for 'commercial consumption'; hence we are content to adopt his opinion as that of this court." *Id.* at 286.

The United States Court of Appeals for the Tenth Circuit had held in *United States* v. *Public Service Co. of Colorado,* 143 F. 2d 79, that electrical energy sold to dairy plants operating substantially as these was sold for industrial rather than commercial consumption, and consequently was not taxable under § 3411. We granted certiorari in this case in order to resolve the apparent conflict between circuits and to settle the meaning of the statute as it applies to the business of this general type of dairy plant. 335 U. S. 842.

The tax now embodied in § 3411 was originally imposed upon the consumer of electricity by the Revenue Act of 1932, 47 Stat. 169, 266. This Act was amended in 1933 to make the burden of the tax fall directly upon the vendor. 48 Stat. 254, 256. No change of any significance for our purposes has occurred since the original enactment of this provision.

Although the language of the section does not include the word "industrial," it is clear from the legislative history that "commercial" was used in contradistinction to

"industrial." [7] While electricity sold for commercial consumption is taxed, that sold for industrial consumption is not. Thus our task resolves itself to a determination of the category in which the consumption of electricity by these dairy plants should be classified. We shall not undertake the difficult and here needless task of general definition which differentiates for this statutory clause between industrial and commercial in other lines of business activity. That is a problem primarily for the administrators of the section, with knowledge of the specific and varying facts.

The legislative history indicates that the term "commercial" was meant to apply to the nature of the business in which the energy is consumed, and not to the specific purpose to which each measurable unit of electricity is devoted.[8] Where it is delivered through a single meter at one location, energy utilized to operate sewing ma-

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[7] H. R. Conference Rep. No. 1492, 72d Cong., 1st Sess., p. 22; Senator Harrison, 77 Cong. Rec. 3212–14, 3215.

[8] The legislative explanations treat of business consumers as units and do not differentiate as to use within the units.

Senator Harrison, Chairman of the Senate Finance Committee, which reported the bill, said:

"I am telling Senators nothing new when I remind them that we had a fight here in 1932 over the imposition of this tax. The Senate imposed a 3-percent electric-energy tax, and it was finally adopted, to be collected from the consumer of electric energy. We applied that only on domestic and commercial energy; that is, electric energy used in stores and dwellings that are classified as commercial and domestic. There was no tax in the 1932 act imposed upon energy employed in industry." 77 Cong. Rec. 3212–13.

Senator Couzens, a member of a subcommittee of the Senate Finance Committee, which was constituted to consider the electrical energy tax, said: "I mean they eliminated that feature of the tax; they eliminated the tax on electrical energy sold to manufacturing plants and left the tax on electricity used commercially, that is by stores and on electricity used for domestic purposes . . . ." 77 Cong. Rec. 3218.

chines for a minor manufacturing unit, *e. g.*, shirts, in a department store, would be deemed power sold for commercial consumption, although it might fall within the industrial category if sold to a consumer who did nothing but manufacture shirts. Since any other interpretation of the section would entail the almost insurmountable administrative difficulty of classifying all the electricity sold to a plant according to the specific operations to which such power was devoted by the consumer, the conclusion that the controlling factor is the general nature of a business at a location accords with the natural meaning to be given the words employed by Congress to express its purpose.

The regulations interpret the section in line with the legislative history. U. S. Treas. Reg. 46 (1940 ed.) § 316.190 [as amended by T. D. 5099], presently applicable, provides in pertinent part:

> "*Scope of tax.*—The tax imposed by section 3411 (a) of the Internal Revenue Code, as amended, applies, except as provided hereinafter, to all electrical energy sold for domestic or commercial consumption and not for resale.
>
> "The term 'electrical energy sold for domestic or commercial consumption' does not include (1) electrical energy sold for industrial consumption, e. g., for use in manufacturing, mining, refining, shipbuilding, building construction, irrigation, etc., or (2) that sold for other uses which likewise can not be classed as domestic or commercial, such as the electrical energy used by electric and gas companies, waterworks, telegraph, telephone, and radio communication companies, railroads, other similar common carriers, educational institutions not operated for private profit, churches, and charitable institutions in their operations as such. However, electrical energy is subject

to tax if sold for consumption in commercial phases of industrial or other businesses, such as in office buildings, sales and display rooms, retail stores, etc., or in domestic phases, such as in dormitories or living quarters maintained by educational institutions, churches, charitable institutions, or others.

"Where electrical energy is sold to a consumer for two or more purposes, through separate meters, the specific use for which the energy is sold through each meter, i. e., whether for domestic or commercial consumption, or for other use, shall determine its taxable status. Where the consumer has all the electrical energy consumed at a given location furnished through one meter, the predominant character of the business carried on at such location shall determine the classification of consumption for the purposes of this tax." [9]

The last sentence of this regulation makes it clear that all electrical energy furnished to a predominantly commercial establishment through a single meter is subject to the tax although portions of such energy are devoted to purposes which, considered separately, might be classified as industrial.[10] While the regulation does not deal with the point, we think it obvious from the last quoted paragraph that where the energy is furnished at a single location through various meters, although none of them

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[9] This regulation was substantially the same in its earlier versions. U. S. Treas. Reg. 42, Art. 40 (1932); T. D. 4342, XI–2 Cum. Bull. 495 (1932); T. D. 4393, XII–2 Cum. Bull. 322 (1933). The quoted version, however, omitted the word "processing," which was formerly included in the list of activities exemplifying industrial consumption. We do not consider this deletion significant for purposes of this case.

[10] Cf. *St. Louis Refrigerating & Cold Storage Co.* v. *United States,* 95 Ct. Cl. 694, 43 F. Supp. 476; *Fulton Market Cold Storage Co.* v. *United States,* 95 Ct. Cl. 710, 43 F. Supp. 485.

are shown to carry current for predominantly industrial uses, the same rule would be applied. The last sentence of the regulation adds a qualification, however, which directs our attention, not necessarily to the nature of a business as a whole, but to the nature as a whole of the activities carried on "at a given location."

We accept the last sentence of the quoted regulation as proper under the statute.[11] As applied to these plants we think that the electricity furnished by the petitioner was "sold for commercial consumption" and consequently was properly taxed. Admittedly the activities of these consumers would be considered commercial if they did not pasteurize the milk prior to its sale. Such business would accurately be called the distribution of fresh milk. The butter and cream extraction appears incidental. We are not dealing with a "creamery" in the sense of a butter or cheese factory. We agree with the courts below that the addition of pasteurization to the other activities described above does not change the nature of the dairy plants' business from commercial to industrial any more than would the cooking of food for sale in a restaurant, or the cleaning of raw food products prior to distribution or sale. The District Court found that "pasteurization plays a minor part in the total business of the dairies," and that "the predominant business of the dairies here involved . . . is, and was, that of fluid milk dealers and distributors." [12]

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[11] We do not intend by these words of limitation to approve or disapprove other provisions. There are ambiguities in this section of the regulation. In the second paragraph, without reference to separate meters, it holds that energy used in the commercial phases of an industrial business is taxable. The reverse would seem to follow as to industrial phases of a commercial business. Yet the third paragraph allows the avoidance of such a tax on industrial use only by the employment of separate meters.

[12] For state cases to the effect that this business is primarily commerical, see *e. g. City of Louisville* v. *Ewing Von-Allmen D. Co.*, 268

Petitioner argues that the test applied by the Court of Appeals, "whether the predominant character of the enterprise carried on by such consumer is commercial," is erroneous and contrary to the regulation in that it directs attention to the business as a whole rather than to the activities at a given location. While the language quoted is susceptible to this criticism, the variation is harmless because the plant itself is the location or the focal point of all the relevant activities of each of these consumers of electricity. Pasteurization does not occur at a separate location, but at the same plant where the milk is received, weighed, tested, cooled, homogenized, separated and bottled. The milk is brought to this plant when purchased, and from the plant it is distributed to customers. The fact that most of the sales or deliveries occur off the premises does not alter the essential fact that all activities occur in or pivot around the plant.

Thus, though pasteurizing, we assume, is processing and though processing separately viewed may be conceded to be industrial,[13] we conclude that the business conducted by these dairy plants is essentially commercial. The contrary conclusion reached in *United States* v. *Public Service Co. of Colorado,* 143 F. 2d 79, may be ascribed to the fact that there the court apparently looked to the use to which the electrical energy was devoted rather than to the nature of the business at a given location.[14]

Ky. 652, 105 S. W. 2d 801; *People ex rel. E. S. Dairy Co.* v. *Sohmer,* 218 N. Y. 199, 112 N. E. 755; *Richmond* v. *Dairy Co.,* 156 Va. 63, 157 S. E. 728. But see *Dairy Assn.* v. *Bd. of Tax Admin.,* 302 Mich. 643, 5 N. W. 2d 516.

[13] See note 9, *supra.*

[14] "The electrical energy was not used in the commercial phase of the dairying enterprise, but in the processing or industrial phase of the enterprise." 143 F. 2d 79, 82.

Rulings of the Bureau of Internal Revenue support our conclusion. In 1932, S. T. 518 stated that,

> "Electrical energy furnished for consumption by bottling works, milk companies, or creameries engaged in the pasteurization and bottling of milk, and in the manufacture of butter, buttermilk, chocolate milk, and cottage cheese, is not furnished for domestic or commercial consumption . . . ." [15]

Apparently, however, the Bureau intended this ruling to apply only to those plants whose business was predominantly pasteurization and the manufacture of milk by-products, because S. T. 637, issued the following year, contained the following statement:

> "A dairy which obtains milk and converts it into use for retail purposes is held to be engaged in a business commercial in character. Electrical energy used in such operations will be subject to tax." [16]

In clarification of these two rulings the Bureau explained:

> "Electrical energy furnished a commercial dairy or milk company which merely produces or purchases raw milk in bulk and pasteurizes it for sale either in bulk or bottled quantities, whose activities consist principally in the handling, distribution and sale of milk, is also subject to the tax.
>
> "It is only electrical energy that is furnished for direct consumption by dairies which in addition to pasteurizing and bottling milk are also engaged in all the essential manufacturing processes necessary for the production of dairy products, such as the

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[15] XI–2 Cum. Bull. 498 (1932).

[16] XII–1 Cum. Bull. 409, 410 (1933).

manufacturing of butter, cheese and other dairy products, for sale on the open market as an article of commerce, that is not subject to the tax." [17]

Thus we hold that electrical energy supplied to these dairy plants through single meters, or through more than one but without differentiation as to use, is energy sold for commercial consumption.

Affirmed.

McCOMB, WAGE AND HOUR ADMINISTRATOR, *v.* JACKSONVILLE PAPER CO. ET AL.

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

No. 110. Argued December 14–15, 1948.—Decided February 14, 1949.

A decree of the District Court in a proceeding under the Fair Labor Standards Act enjoined respondents from violating the minimum wage, overtime, and record-keeping provisions of the Act. Respondents took no appeal. Three years later the Administrator instituted a civil contempt proceeding alleging violations of the decree and praying that respondents, in order to purge themselves of contempt, be required to make payment of unpaid statutory wages to the employees affected. *Held:*

1. The fact that the violations of the decree were not "willful" does not absolve respondents from liability for civil contempt. P. 191.

(a) The grant or withholding of relief in a civil contempt proceeding is not wholly discretionary. The private or public rights that the decree sought to protect are an important measure of the remedy. P. 191.

2. The fact that the unlawful plan or scheme which respondents adopted was not specifically enjoined by the decree does not render them immune from liability in a civil contempt proceeding. Pp. 191–193.

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[17] Bureau Letter, dated May 13, 1933 (symbols MT: ST: BHF) (333 C. C. H. ¶ 6266), 4 C. C. H. Standard Federal Tax Reporter ¶ 2633G .175 (1949).

3. The District Court had power to order respondents, in order to purge their contempt, to pay to the affected employees amounts of wages which were unpaid in violation of the Act. Pp. 193–195.

(a) Although the decree did not compute the weekly and monthly amount due each employee under the correct construction of the Act, and did not contain the names of the payees, it did provide a formula, couched in terms of the Act, whereby the amounts could readily be ascertained. P. 194.

(b) It is immaterial that a suit could have been brought by the employees to collect the amounts due; or that in this proceeding the Administrator is the complainant and the back wages go to the employees. Pp. 194–195.

167 F. 2d 448, reversed.

The Wage and Hour Administrator instituted in the District Court a civil contempt proceeding against respondents, alleging violations of a decree which enjoined respondents from violating the minimum wage, overtime, and record-keeping provisions of the Fair Labor Standards Act. The District Court held that there was no proof of civil contempt because there was no "willful" violation of the decree, and that it had no power on the application of the Administrator to enforce compliance with its former decree by ordering the payment of unpaid statutory wages. It considered the application of the Administrator as an amended complaint seeking a broadening of the previous decree and entered such an injunction. 69 F. Supp. 599. The Court of Appeals affirmed. 167 F. 2d 448. This Court granted certiorari. 335 U. S. 809. *Reversed*, p. 195.

Bessie Margolin argued the cause for petitioner. With her on the brief were *Solicitor General Perlman, Robert L. Stern* and *William S. Tyson.*

Louis Kurz argued the cause and filed a brief for respondents.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is a civil contempt proceeding arising out of *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, which we decided January 18, 1943. The District Court had held that none of respondents' employees in specified classes were covered by the Fair Labor Standards Act. 52 Stat. 1060, 29 U. S. C. § 201. We sustained a judgment of the United States Court of Appeals which reversed the District Court, modifying it slightly to include a larger class of employees than the United States Court of Appeals had held to be covered.

On remand the District Court, without a further hearing, entered a decree enjoining respondents from violating the Act in any of the following particulars: (1) by paying the designated classes of employees less than 30¢ an hour from the date of the judgment to October 24, 1945, or less than 40¢ an hour thereafter, except as permitted by orders of the Administrator under § 8 or § 14 of the Act; (2) by employing such employees for a workweek longer than 40 hours unless they receive compensation for employment in excess of 40 hours in the workweek at a rate not less than one and one-half times the regular rate at which they are employed; and (3) by failing to keep and preserve records as prescribed by the Administrator, particularly records of the hours worked each workday and each workweek by each of the employees and of the total wages paid to each for each workweek.

Respondent took no appeal from this order. This was in 1943. In 1946 the Administrator instituted this contempt proceeding alleging that respondents had not complied with the minimum wage, overtime, and record-keeping provisions of the judgment in many specified respects. He prayed that respondents be required to ter-

minate their continuing violations and in order to purge themselves of their contempts to make payment of the amounts of unpaid wages due the affected employees. The District Court found violations of the provisions of the decree. It found that (1) respondents had set up a completely false and fictitious method of computing compensation without regard to the hours actually worked which were unlawful under the Act; (2) respondents had adopted a plan which gave the employees a wage increase in the guise of a bonus and yet excluded that increase from the regular rate of pay for the purpose of computing overtime; (3) respondents had classified some employees as executive or administrative employees in plain violation of the regulations of the Administrator adopted under § 13 (a) (1) of the Act; and (4) one of the respondents had employed pieceworkers in excess of the maximum workweek without paying them overtime compensation.[1]

The District Court held that a civil contempt required a "wilful" violation of a decree; and that there was in this case no showing of any "wilful" violation of any "specific" provision of the former decree "prohibiting the doing of any specific thing." The District Court further held that it had no power on the application of the Administrator to enforce compliance with its former decree by ordering the payment of unpaid statutory wages. It accordingly considered the application of the Administrator as an amended complaint seeking a broadening of the previous decree and entered such an injunction. 69 F. Supp. 599.

All parties appealed. The United States Court of Appeals affirmed the judgment. It ruled that respond-

[1] It also found violations of the record-keeping provisions of the decree, some of which it held to be trivial and others of which had been discontinued.

ents had violated the provisions of the decree couched in terms of the Act in the respects found by the District Court. It also held that the District Court was warranted in concluding that there was no "wilful contempt" since neither the law nor the injunction specifically referred to or condemned the practices which were found to violate the Act. 167 F. 2d 448.

The case is here on a petition for a writ of certiorari which we granted because of the importance of the problem in the administration of the Act.

First. The absence of wilfulness does not relieve from civil contempt. Civil as distinguished from criminal contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance. See *United States* v. *United Mine Workers,* 330 U. S. 258, 303–304; *Penfield Co.* v. *Securities & Exchange Commission,* 330 U. S. 585, 590; *Maggio* v. *Zeitz,* 333 U. S. 56, 68. Since the purpose is remedial, it matters not with what intent the defendant did the prohibited act.[2] The decree was not fashioned so as to grant or withhold its benefits dependent on the state of mind of respondents. It laid on them a duty to obey specified provisions of the statute. An act does not cease to be a violation of a law and of a decree merely because it may have been done innocently. The force and vitality of judicial decrees derive from more robust sanctions. And the grant or withholding of remedial relief is not wholly discretionary with the judge, as Mr. Justice Brandeis wrote for a unanimous Court in *Union Tool Co.* v. *Wilson,* 259 U. S. 107, 111–112. The private or public rights that the decree sought to protect are an important measure of the remedy.

Second. As we have noted, the decree directed respondents to obey the provisions of the Act dealing with mini-

[2] See 2 High on Injunctions (4th ed., 1905) §§ 1416 *et seq.*

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mum wages, overtime, and the keeping of records. There was no appeal from it. By its terms it enjoined any practices which were violations of those statutory provisions. Decrees of that generality are often necessary to prevent further violations where a proclivity for unlawful conduct has been shown. See *May Stores Co.* v. *Labor Board,* 326 U. S. 376, 390, 391; *United States* v. *Crescent Amusement Co.,* 323 U. S. 173, 186. Respondents' record of continuing and persistent violations of the Act would indicate that that kind of a decree was wholly warranted in this case. Yet if there were extenuating circumstances or if the decree was too burdensome in operation, there was a method of relief apart from an appeal. Respondents could have petitioned the District Court for a modification, clarification or construction of the order. See *Regal Knitwear Co.* v. *Labor Board,* 324 U. S. 9, 15. But respondents did not take that course either. They undertook to make their own determination of what the decree meant. They knew they acted at their peril. For they were alerted by the decree against any violation of specified provisions of the Act.

It does not lie in their mouths to say that they have an immunity from civil contempt because the plan or scheme which they adopted was not specifically enjoined. Such a rule would give tremendous impetus to the program of experimentation with disobedience of the law which we condemned in *Maggio* v. *Zeitz, supra,* at 69. The instant case is an excellent illustration of how it could operate to prevent accountability for persistent contumacy. Civil contempt is avoided today by showing that the specific plan adopted by respondents was not enjoined. Hence a new decree is entered enjoining that particular plan. Thereafter the defendants work out a plan that was not specifically enjoined. Immunity is once more obtained because the new plan was not spe-

cifically enjoined. And so a whole series of wrongs is perpetrated and a decree of enforcement goes for naught.

That result not only proclaims the necessity of decrees that are not so narrow as to invite easy evasion; it also emphasizes the danger in the attitude expressed by the courts below that the remedial benefits of a decree will be withheld where the precise arrangement worked out to discharge the duty to pay which both the statute and the decree imposed was not specifically enjoined.

We need not impeach the findings of the lower courts that respondents had no purpose to evade the decree, in order to hold that their violations of it warrant the imposition of sanctions. They took a calculated risk when under the threat of contempt they adopted measures designed to avoid the legal consequences of the Act. Respondents are not unwitting victims of the law. Having been caught in its toils, they were endeavoring to extricate themselves. They knew full well the risk of crossing the forbidden line. Accordingly where as here the aim is remedial and not punitive, there can be no complaint that the burden of any uncertainty in the decree is on respondents' shoulders.

Third. We have no doubts concerning the power of the District Court to order respondents, in order to purge themselves of contempt, to pay the damages caused by their violations of the decree. We can lay to one side the question whether the Administrator, when suing to restrain violations of the Act, is entitled to a decree of restitution for unpaid wages. Cf. *Porter* v. *Warner Holding Co.*, 328 U. S. 395. We are dealing here with the power of a court to grant the relief that is necessary to effect compliance with its decree. The measure of the court's power in civil contempt proceedings is determined by the requirements of full remedial relief. They may entail the doing of a variety of acts, such as the produc-

tion of books. *Penfield Co.* v. *Securities & Exchange Commission, supra.* They may also require the payment of money as in the alimony cases. See *Gompers* v. *Bucks S. & R. Co.*, 221 U. S. 418, 442; *Oriel* v. *Russell*, 278 U. S. 358, 364–365.

The decree that was violated in the present case relates to the payment of wages and overtime pay required by §§ 6 and 7 of the Act. It does not, however, compute the weekly and monthly amount that is due each employee under the correct construction of the Act. Nor does it contain the names of the payees. But it provides the formula by which the amounts can be simply computed. If it had gone one step further and made the computation, listing the amounts due each employee, the case would then be on all fours with the alimony cases. Yet the circumstance that changing payrolls and fluctuating rates of pay make that impractical in this type of case does not mark a material difference.

The direction of the court was that respondents make payments of wages to their employees pursuant to a prescribed formula. If the court is powerless to require the prescribed payments to be made, it has lost the most effective sanction for its decree and a premium has been placed on violations. The fact that another suit might be brought to collect the payments [3] is, of course, immaterial. For the court need not sit supinely by waiting for some litigant to take the initiative. Vindication of its authority through enforcement of its decree does not depend on such whimsical or fortuitous circumstances. The fact that the Administrator is the complainant [4] and that the back wages go to the employees is not material. It is

[3] Section 16 (b) authorizes suits by employees to recover wages and overtime unlawfully withheld.

[4] It is the Administrator who is directed and authorized by § 11 (a) of the Act to bring actions to restrain violations of the Act of the

the power of the court with which we are dealing—the power of the court to enforce compliance with the injunction which the Act authorizes,[5] which the court has issued, and which respondents have long disobeyed.

Reversed.

MR. JUSTICE RUTLEDGE concurs in the result.

MR. JUSTICE FRANKFURTER, with whom MR. JUSTICE JACKSON concurs, dissenting.

Obedience must of course be secured for the command of a court. To secure such obedience is the function of a proceeding for contempt. But courts should be explicit and precise in their commands and should only then be strict in exacting compliance. To be both strict and indefinite is a kind of judicial tyranny.

In such a case as this, only after an administrative order has been formulated and a court has adjudicated that the order is within the administrator's statutory authority does the command of a court come into existence, disobedience of which may be punished as contempt. For violation of the Fair Labor Standards Act as such, one may be made to suffer civil penalties or imprisonment, but the latter only after conviction by a jury. For violation of the command of an injunction issued under the Act, however, he may not only be exposed to more severe civil penalties than the Act by its own terms imposes, but made to suffer imprisonment without benefit of jury trial. It is for such reasons that this Court has indicated again and again that a statute cannot properly be made the basis of contempt proceedings merely by incorporat-

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character involved here. Cf. *Inland Steel Co.* v. *United States*, 306 U. S. 153, 157; *United States* v. *Morgan*, 307 U. S. 183, 193–194; *Commission* v. *Brashear Lines*, 312 U. S. 621, 628–630.

[5] See § 17.

ing a reference to its broad terms into a court order. See, *e. g., Swift & Co.* v. *United States,* 196 U. S. 375, 396; *New York, N. H. & H. R. Co.* v. *Interstate Commerce Comm'n,* 200 U. S. 361, 404; *Labor Board* v. *Express Publishing Company,* 312 U. S. 426, 435. These considerations become increasingly important as there is increasing use of injunctions for the enforcement of administrative orders and statutory duties.

These are general principles but their application governed the decisions of the District Court and of the Court of Appeals; they should control the decision here. The two lower courts found that while the practices now complained of by the Administrator of the Wage and Hour Division of the Department of Labor constituted violations of the Fair Labor Standards Act, they were not on any fair consideration covered by the injunction, contempt of which is now charged. The injunction underlying this proceeding takes eight pages of a printed record and particularizes in great detail the violations which were enjoined. It also contains omnibus clauses prohibiting violations of the Fair Labor Standards Act. On full consideration, the District Court treated the application for an adjudication of civil contempt "as an amended complaint seeking a broadening of the injunctive orders heretofore entered in this case, and will enter an amended judgment enjoining defendants from violating the provisions of the Fair Labor Standards Act as adjudicated in this Memorandum Opinion." 69 F. Supp. 599, 608. The Court of Appeals agreed with this view of the District Court (with a minor modification not here relevant). 167 F. 2d 448. In short, both courts found no contempt. They did so because there was lacking that clearness of command in the court's order which warranted a finding of its disobedience, if due regard were paid to the proper construction of the injunction as the starting point of the contempt proceedings. At

the least, such was a warrantable interpretation of the circumstances of this case, and we are disentitled to set our interpretation against theirs.

In reversing the conclusion of the two lower courts that there was no contempt because there was no disobedience of the injunction, the Court is rendering a decision of far-reaching import to the law of injunctions. Today's ruling happens to concern an injunction against an employer. Tomorrow it may be an injunction against employees, as it was yesterday and too often in the past. One of the grievances which led to the Norris-LaGuardia Act was the generality of the terms of labor injunctions. Ambiguity lurks in generality and may thus become an instrument of severity. Behind the vague inclusiveness of an injunction like the one before us is the hazard of retrospective interpretation as the basis of punishment through contempt proceedings. The two lower courts, in finding that generally to enjoin obedience to a law is too vague a foundation for proceedings in contempt, were avoiding the very evil with which labor injunctions were justly charged. And of course it is not to be assumed that the allowable vagueness of an injunction varies with the use to which the injunction is put. This Court ought not to encourage injunctions couched in such indefinite terms by setting aside the findings of the courts below that the injunction did not forbid with explicitness sufficient to justify a finding of contempt.

I would affirm the judgment of the Court of Appeals.

LAWSON, DEPUTY COMMISSIONER, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, *v.* SUWANNEE FRUIT & STEAMSHIP CO. ET AL.

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

No. 56. Argued December 7, 1948.—Decided February 14, 1949.

1. An employee, who had previously lost the sight of his right eye through causes unconnected with industry or his employment, suffered an injury in the course of his employment as a result whereof he lost the sight of his left eye, and thereby became totally disabled within the meaning of the Longshoremen's and Harbor Workers' Compensation Act. *Held:* Under § 8 (f) (1) of the Act, the employer was liable only for permanent partial disability (loss of the left eye), and the remainder of the compensation due for permanent total disability was payable out of the special fund established by § 44 of the Act. Pp. 199–206.
2. The term "disability" in § 8 (f) (1) is not to be construed as a term of art but rather in a broader and more usual concept. Pp. 200–202.
3. Section 8 (f) (1) is not to be read as creating a distinction between a worker previously injured in industry and one handicapped by a non-industrial cause. Pp. 202–206.
4. The contention against the conclusion here reached, that the statutory fund will soon be insolvent if burdened with liability in the case of non-industrial previous injury, can not be sustained. Pp. 205–206.

166 F. 2d 13, affirmed.

An award by the Deputy Commissioner under the Longshoremen's and Harbor Workers' Compensation Act required respondent to pay compensation for permanent total disability of an employee. On review the District Court held that respondent was liable only for permanent partial disability. 68 F. Supp. 616. The Court of Appeals affirmed. 166 F. 2d 13. This Court granted certiorari. 334 U. S. 857. *Affirmed*, p. 206.

Newell A. Clapp argued the cause for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Philip Elman, Paul A. Sweeney* and *Morton Liftin* filed a brief for petitioner.

Harry T. Gray argued the cause for respondents. With him on the brief was *Sam R. Marks.*

MR. JUSTICE MURPHY delivered the opinion of the Court.

This is a workmen's compensation case, under the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U. S. C. § 901 *et seq.* A narrow and difficult question of statutory construction confronts us.

John Davis lost the sight of his right eye in an accident unconnected with industry or his employment. He was later hired by respondent. An injury occurred during this employment, and he is now blind in both eyes. The parties agree that he is totally disabled within the meaning of the Act; they also agree that the employer is liable for compensation for the loss of the left eye. The dispute is narrowed to this question: should the employer or the statutory second injury fund, administered by petitioner, be liable for the balance of payments to equal compensation for total disability?

Petitioner concluded that the employer was liable. The employer secured a reversal of this determination in the District Court for the Southern District of Florida, 68 F. Supp. 616,[1] and the Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court. 166 F. 2d 13. Because this decision conflicted with that of the Court of Appeals for the District of Columbia in *National Homeopathic Hospital Association* v. *Britton,* 79 U. S. App. D. C. 309, 147 F. 2d 561, cert. denied 325 U. S. 857, we granted certiorari.

[1] Under § 21 of the statute.

Section 8 (f) (1) of the Act provides that "if an employee receive an injury which of itself would only cause permanent partial disability but which, *combined with a previous disability*,[2] does in fact cause permanent total disability, the employer shall provide compensation only for the disability caused by the subsequent injury: *Provided, however,* That in addition to compensation for such permanent partial disability, and after the cessation of the payments for the prescribed period of weeks, the employee shall be paid the remainder of the compensation that would be due for permanent total disability. Such additional compensation shall be paid out of the special fund established in section 44." The court below held that this section is "clear and unambiguous, and therefore needs no construction. When read in its ordinary sense it can have but one meaning": liability for the second injury fund.

But the word "disability" is defined in the statute. Section 2 provides that "when used in this Act . . . , (10) 'Disability' means incapacity because of *injury* . . . ." (Emphasis supplied.) The word "injury" is, in turn, defined as "accidental injury or death arising out of and in the course of employment . . . ." § 2 (2). If these definitions are read into the second injury provision, then, it reads as follows: "If an employee receive an injury which of itself would only cause permanent partial disability but which, combined with a previous *incapacity because of accidental injury or death arising out of and in the course of employment,* does in fact cause permanent total disability, the employer shall provide compensation only for the disability caused by the subsequent injury." Because Davis' previous injury was nonindustrial, this reading points to liability for the employer.

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[2] Emphasis supplied.

If Congress intended to use the term "disability" as a term of art, a shorthand way of referring to the statutory definition, the employer must pay total compensation. If Congress intended a broader and more usual concept of the word, the judgment below must be affirmed. Statutory definitions control the meaning of statutory words, of course, in the usual case. But this is an unusual case. If we read the definition into § 8 (f) (1) in a mechanical fashion, we create obvious incongruities in the language, and we destroy one of the major purposes of the second injury provision: the prevention of employer discrimination against handicapped workers. We have concluded that Congress would not have intended such a result.

Chief Justice Groner, dissenting in the *National Homeopathic* case, 79 U. S. App. D. C. at 313, 147 F. 2d at 565, noticed that the "inter-replacements of words" we have set out above "produces a manifest incongruity, for . . . it would literally result in this: '. . . previous *incapacity* because of accidental injury or *death*'—And if to avoid this it be argued that only a portion of the definition of injury should be inserted, the result would be to change or at least to limit the statutory definition only to produce a desired result, which no one would urge or defend. It is evident, therefore," that the definition of disability was "not made with watch-like precision" and should not be so applied in § 8 (f) (1). If the intent of Congress had been to limit the applicability of this subsection in the fashion for which petitioner contends, "it could easily have accomplished this by the insertion of the word 'compensable' between the words 'previous' and 'disability'. . . ." And see *Atlantic Cleaners and Dyers* v. *United States,* 286 U. S. 427.

More important, perhaps, is the disservice we would do to the purpose of the second injury provision. We must look to the explanation of congressional intent behind

the subsection. A witness at a hearing on the measure outlined his reasons for favoring the provision in the following manner: "The second injury proposition is as much to the advantage of the employer and his interests as it is for the benefit of the employee. It protects that employer who has hired, say, a one-eyed worker who goes and loses his other eye and becomes a total disability. The employer without this sort of thing would have to pay total permanent disability compensation. Then, on the other hand, this also protects the worker with one eye from being denied employment on account of his being an extra risk. Now, by simply taking this up in this way it is possible to protect both the employer and to protect the one-eyed employee also." [3]

Petitioner relies on the statement of another witness before the Senate Committee, who favored inclusion of the second injury provisions because "they have become a commonplace . . . in State compensation legislation and ought to be included in the act." [4] And petitioner states that "we may appropriately refer, therefore, to the second injury provisions in other statutes and to the evaluations made by administrative experts in the field for guidance with respect to the manner in which opposing policy considerations have been resolved." But our search for guidance in the sources suggested by petitioner convinces us that petitioner's theories are not well-founded.

From the attitude of experts in the field, one would not expect Congress to distinguish between two types of handicapped workers. The annual conventions of the International Association of Industrial Accident Boards

[3] Hearings before Committee on the Judiciary, House of Representatives on S. 3170, 69th Cong., 1st Sess. (1926), p. 208.

[4] Hearings before Subcommittee of the Senate Committee on the Judiciary on S. 3170, 69th Cong., 1st Sess. (1926) p. 43.

and Commissions provide the most helpful considerations of the problem. At the 1931 convention, Mr. Joseph Parks of the Massachusetts Commission spoke as follows of workmen's compensation legislation without a second injury provision: "I little knew that this great piece of legislation . . . would become an instrument of persecution, as I may call it, of men who are physically handicapped, but that is what it has become. Men who are physically handicapped are being discriminated against in our Commonwealth." [5]

This attitude has been echoed by Mr. Charles Sharkey of the United States Bureau of Labor Statistics; [6] Miss Frances Perkins, then Industrial Commissioner in New York; [7] and others.[8] Perhaps the most impressive evidence of the force behind these statements is that offered by Mr. I. K. Huber of Oklahoma. *Nease* v. *Hughes Stone Co.*, 114 Okla. 170, 244 P. 778, held the employer liable for total compensation for loss of the second eye. After the decision, Mr. Huber reports, "thousands of one-eyed,

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[5] United States Bureau of Labor Statistics, Bull. No. 564 (1932), p. 278.

[6] United States Bureau of Labor Statistics, Bull. No. 577 (1933), p. 146.

[7] United States Bureau of Labor Statistics, Bull. No. 536 (1931), p. 254.

[8] "We are dealing with a condition and not a theory. If the man is found with some defect which, if he meets with an accident, is likely to be aggravated and made more severe and thus increase the cost to the employer whose experience rating goes up as a result, then he does not want to accept that risk; and that poor fellow is met with the alternative of being deprived of a means of earning a livelihood or of waiving his rights to compensation." *Ibid.*, p. 256. And see Discussion of Industrial Accidents and Diseases, United States Division of Labor Standards, Bull. No. 94 (1948), p. 104; United States Bureau of Labor Statistics, Bull. No. 602 (1934), p. 11, *ff.*, especially p. 15; United States Bureau of Labor Statistics, Bull. No. 577 (1933), pp. 154, 155.

one-legged, one-armed, one-handed men in the State of Oklahoma were let out and can not get employment coming under the workmen's compensation law of Oklahoma. . . . Those . . . court decisions put us in bad shape. . . . The decision displaced between seven and eight thousand men in less than 30 days in Oklahoma." [9]

A distinction between a worker previously injured in industry and one handicapped by a cause outside of industry has no logical foundation if we accept the premise that the purpose of the fund is that of aid to the handicapped. This is the conclusion of Mr. Fred Wilcox, then Chairman of the Wisconsin Commission: [10] "Wisconsin takes no account of where the injured man may have gotten his first injury. It makes no difference where he got it. It is just as serious to him, when he has the second injury, as if he had gotten the first one in industry." We cannot attribute the illogic of petitioner's position to Congress.

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[9] United States Bureau of Labor Statistics, Bull. No. 536 (1931), pp. 268, 272. Mr. Fred Wilcox, former Chairman of the Wisconsin Commission, said: "Fundamentally, there is no moral reason why the employer of a man, when he gets his second injury, should not pay the full cumulative effect of that injury . . . but that is not the way things work out. The employer escapes the burden and lets the injured man bear it, and he sits at home without a job. . . . The employer is going to be afraid to take them on because of some added responsibility. . . . We allowed the employee who lost his second eye to have twice as much compensation for the loss of the second eye as for the loss of the first eye. But what about it? Did anyone ever get any compensation for the loss of a second eye? No; he never got a job. He never got a chance to lose his second eye in an industry—to be blunt in stating the facts. Employers would not hire him, because they would take on twice as much liability as they had before." United States Bureau of Labor Statistics, Bull. No. 577 (1933), pp. 157, 158.

[10] *Id.*

Our conclusion is reinforced by the administrative practice under the New York statute. The federal statute is based upon New York law.[11] In New York "the commission holds that if the man loses his second eye in an industrial accident it is immaterial how he lost the first eye. The loss of eyesight in one eye may have been congenital; it may have occurred when the child was two years old, or it may have occurred after he was grown, but not in an industrial accident. Nevertheless, at the time he loses his second eye, he has suffered total disability." [12]

Petitioner argues that New York law is to the contrary, citing *La Belle* v. *Britton Stone & Supply Corp.*, 247 App. Div. 843, 286 N. Y. S. 347, and *Bervilacqua* v. *Clark*, 225 App. Div. 190, 232 N. Y. S. 502. The *La Belle* case is inadequately reported; the *Bervilacqua* case did not consider the precise point involved in this case, and was distinguished by the New York Attorney-General in 1937 when he advised the Department of Labor to continue its established practice. Annual Report of the Attorney-General, State of New York, for 1937 (Albany, 1938), p. 270.

Petitioner's most strenuous argument is that the fund will soon be insolvent if we open liability to a nonindustrial previous injury, and that therefore Congress could not have contemplated the result we reach.[13] Petitioner's

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[11] H. R. Rep. No. 1190, 69th Cong., 1st Sess., p. 2. See *Employers' Liability Assurance Corp., Ltd.* v. *Monahan*, 91 F. 2d 130; *Hartford Accident & Indemnity Co.* v. *Hoage*, 66 App. D. C. 154, 85 F. 2d 411.

[12] United States Bureau of Labor Statistics, Bull. No. 577 (1933), p. 154.

[13] Payments are made from the special fund established in § 44 of the Act. Employers pay $1,000 into the fund for noncompensable deaths, half of which is available for second injuries. All penalties and fines collected are also paid into the fund. § 44 (c).

worries seem exaggerated in the light of Wisconsin and New York experience. From 1919 to 1933,[14] Wisconsin's fund had only 50 second injury cases charged against it. Second-Injury Funds as Employment Aids to the Handicapped, U. S. Division of Labor Standards (1944), p. 7. From 1919 to 1943, only 99 cases were charged against the New York fund. *Id.*, p. 5. In 1930 Miss Frances Perkins told her associates that the problem is "not so large . . . as it appears." [15]

On the basis of the incongruity involved in applying the definition mechanically, the unmistakable purpose of the second injury fund, and the interpretation of the State statute on which the federal act is based, we conclude that the term "disability" was not used as a term of art in § 8 (f) (1), and that the judgment must be affirmed.

Affirmed.

Mr. Justice Douglas dissents.

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[14] In 1933 the Wisconsin Supreme Court decided *Ruehlow* v. *Industrial Commission*, 213 Wis. 240, 251 N. W. 451, which reversed the administrative practice outlined by Mr. Wilcox, *supra*. Compare *Lehman* v. *Schmahl*, 179 Minn. 388, 229 N. W. 553.

[15] United States Bureau of Labor Statistics, Bull. No. 536 (1931), p. 260. At p. 259, Mr. L. W. Hatch of New York is reported as follows: "Many people have said, 'Oh, well, if you make a second-injury fund take care of every case in which a prior condition was a material factor in the man's disability you will bankrupt the State or the taxpayers will be called upon to bear an enormous burden.' The evidence so far as we have gone does not indicate any such situation."

REYNOLDS, ADMINISTRATRIX, *v.* ATLANTIC COAST LINE RAILROAD CO.

CERTIORARI TO THE SUPREME COURT OF ALABAMA.

No. 234. Argued January 10, 1949.—Decided February 14, 1949.

A complaint in a suit brought in a state court under the Federal Employers' Liability Act charged that the defendant's negligence caused the deceased to perform additional work of the same kind as he normally performed. It was not alleged that this additional work contained any hazards other than those usual to the occupation. The state court sustained a demurrer to the complaint on the ground that the injury did not result proximately, in whole or in part, from the defendant's negligence. *Held:* Judgment affirmed. Pp. 207–209.

251 Ala. 27, 36 So. 2d 102, affirmed.

The state trial court sustained respondent's demurrer to the complaint in a suit brought by petitioner under the Federal Employers' Liability Act. The State Supreme Court affirmed. 251 Ala. 27, 36 So. 2d 102. This Court granted certiorari. 335 U. S. 852. *Affirmed,* p. 209.

J. Kirkman Jackson argued the cause and filed a brief for petitioner.

Peyton D. Bibb argued the cause for respondent. With him on the brief was *Charles Cook Howell.*

PER CURIAM.

The petitioner brought this suit under the Federal Employers' Liability Act in an Alabama state court. As permitted by the practice in that state, all the facts which the petitioner expected to prove to establish her

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cause of action were set forth in the complaint so that any objections to a verdict in her favor based on evidence of those facts could be disposed of prior to trial. The respondent demurred to the complaint on the ground that the facts as thus set forth did not constitute a cause of action. The demurrer was sustained by the trial court and its action was affirmed by the Supreme Court of Alabama.[1] We granted certiorari.[2]

It appears from the complaint that the petitioner's husband was a brakeman whose duties customarily required him to cross between cars on moving freight trains. On one such crossing he fell and was killed. This crossing occurred as part of a required journey from the caboose to a car from which a signal was to be given. The signal ordinarily would have been given from the sixth car from the caboose. The complaint charged, however, that because the railroad had negligently allowed canes to grow alongside the roadbed the deceased could not safely signal from the sixth car and so had to cross to the seventh in order to give the required signal. On this additional crossing he was killed. The complaint also charged that the deceased would not have had to make this particular journey at all if the railroad had provided a competent assistant brakeman. Neither the journey nor the crossing on which the accident occurred was alleged to be any more hazardous than that usually undertaken by railroad brakemen.

The Alabama Supreme Court conceded that the complaint adequately charged negligence in the failure to remove the canes and in the failure to provide a competent fellow servant. It held, however, that the facts alleged did not show that the accident resulted proxi-

[1] 251 Ala. 27, 36 So. 2d 102 (1948).

[2] 335 U. S. 852 (1948).

mately, in whole or in part, from that negligence. We cannot say that the Supreme Court of Alabama erred.

Affirmed.

MR. JUSTICE FRANKFURTER is of opinion that this is also a case in which the petition for certiorari should not have been granted. See *Wilkerson* v. *McCarthy,* 336 U. S. 53, 64 (concurring opinion). However, inasmuch as the case does not call for an independent examination of the record in order to appraise conflicting testimony, but merely turns on the facts presented in the pleadings, he joins in the Court's disposition of it.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE dissent. See *Lillie* v. *Thompson,* 332 U. S. 459; *Anderson* v. *Atchison, T. & S. F. R. Co.,* 333 U. S. 821.

UNITED STATES EX REL. HIRSHBERG *v.* COOKE, COMMANDING OFFICER.

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

No. 231. Argued January 13, 1949.—Decided February 28, 1949.

1. A Navy court-martial has no jurisdiction to try an enlisted man for a violation of Art. 8 of the Articles for the Government of the Navy, 34 U. S. C. § 1200, Art. 8, committed during a prior enlistment terminated by an honorable discharge, even though he reenlisted on the day following his discharge. Pp. 211–219.
2. This conclusion is supported by the language and legislative history of 34 U. S. C. § 1200, Art. 14 (Eleventh), specifically authorizing trial after discharge of offenders against Art. 14. Pp. 214–216.
3. It is also supported by long-standing administrative interpretation, including 31 Op. Atty. Gen. 521. Pp. 216–217.
4. 34 U. S. C. § 591, authorizing the Secretary of the Navy, with the approval of the President, to adopt and alter regulations and orders for the control of the Navy, does not authorize the Navy to extend its court-martial jurisdiction beyond the limits Congress had fixed. Pp. 217–218.
5. Nor can a Navy regulation claimed to grant jurisdiction in cases such as this be sustained as a revision of the long-standing administrative interpretation of Art. 8. Pp. 218–219.

168 F. 2d 503, reversed.

Petitioner was convicted by a Naval court-martial for an offense committed during a prior enlistment. In a habeas corpus proceeding, a federal district court held the judgment void and ordered his release from custody. 73 F. Supp. 990. The Court of Appeals reversed. 168 F. 2d 503. This Court granted certiorari. 335 U. S. 842. Cooke was substituted as the party respondent. 335 U. S. 882. *Reversed,* p. 219.

John J. O'Neil argued the cause for petitioner. With him on the brief was *Harold Rosenwald.*

Peyton Ford, The Assistant to the Attorney General, argued the cause for respondent. With him on the brief were *Solicitor General Perlman, Robert W. Ginnane, Robert S. Erdahl* and *Philip R. Monahan.*

Mr. Justice Black delivered the opinion of the Court.

This case raises important questions concerning the statutory jurisdiction of general courts-martial of the Navy.

In 1942 the petitioner was serving a second enlistment in the Navy. Upon the surrender of the United States forces on Corregidor petitioner became a war prisoner of Japan. After liberation in September, 1945, petitioner was brought back to the United States and hospitalized. He was restored to duty in January, 1946. March 26, 1946, he was granted an honorable discharge because of expiration of his prior enlistment. The next day he re-enlisted, obligating himself to serve four years "subject to such laws, regulations, and articles for the government of the Navy as are or shall be established by the Congress . . . or other competent authority . . . ."

About a year later, petitioner was served with charges directing his trial by a general court-martial of the Navy. The specifications included charges that during his prior enlistment the petitioner had maltreated two other naval enlisted men who were also Japanese prisoners of war and who were members of groups of prisoners working under petitioner's charge. Petitioner filed a plea in bar of the trial, one ground being that the court-martial was without jurisdiction to try him for alleged offenses committed during a prior enlistment at the end of which he had received an honorable discharge. His plea was overruled. He was acquitted on some specifications but was convicted on others that charged maltreatment. His sentence was ten months confinement, reduction from

chief signalman to apprentice seaman, and dishonorable discharge from the Navy.

Petitioner then brought this habeas corpus proceeding in a federal district court charging that the court-martial judgment was void because of want of statutory power to convict him for an offense committed if at all during his prior enlistment.[1] That court sustained petitioner's contention and ordered his release from custody. 73 F. Supp. 990. The Court of Appeals reversed, one judge dissenting. 168 F. 2d 503. The importance of the statutory construction, which appeared to affect the court-martial powers of the Army as well as the Navy, caused us to grant certiorari. 335 U. S. 842.

Aside from naval regulations to which reference will later be made, court-martial authority to try and to punish petitioner for his prior enlistment conduct primarily depends on the language in Article 8 (Second) of the Articles for the Government of the Navy (34 U. S. C. § 1200, Art. 8), which particularly provides that "such punishment as a court-martial may adjudge may be inflicted on any person in the Navy . . . guilty of . . . maltreatment of, any person subject to his orders . . . ." The Government contends that this language given its literal meaning authorized the court-martial to try and

[1] Court-martial jurisdiction to try petitioner depends on a part of Article 8 (Second), which reaches only conduct of an offender charged with "maltreatment of, any person subject to his orders." Before the court-martial and in the District Court petitioner contended that the court-martial was without jurisdiction in his case because the alleged maltreatment was of naval enlisted men who were not "subject to his orders" by virtue of his United States Navy obligations, but that whatever authority he then had over the other Navy men came from duties assigned him by the Japanese as a prisoner of war. Both the District Court and the Court of Appeals rejected this suggested interpretation of the Article, and the contention is not urged here.

to punish petitioner for conduct during a prior enlistment. It is pointed out that petitioner was "in the Navy" when the offense was committed and when he was tried; this language it is argued brings his case under the Article. In aid of this interpretation the Government emphasizes that during the whole period of time involved, petitioner was continuously "in the Navy" except for an interval of a few hours between his honorable discharge and his re-enlistment. This latter circumstance we think cannot justify the statutory interpretation urged. For if that interpretation is correct, court-martial jurisdiction would be satisfied if a sailor was merely "in the Navy" when the offense was committed and when brought before the court-martial, regardless of the duration of any interim period out of the naval service, provided the prosecution was not barred by the two-year limitation period provided by 34 U. S. C. § 1200, Art. 61.

The concessions made by the Government in urging such a literal construction of this Article expose the whimsical and uncertain nature of the distinctions that would mark the boundaries of court-martial powers. It is conceded that had petitioner not re-enlisted in the Navy after his 1946 discharge, no Navy court-martial could have tried him for offenses committed during his prior naval service. Thus, under the construction here urged, naval court-martial jurisdiction for a prior enlistment offense is made wholly to depend on whether the naval offender either voluntarily re-enters the Navy or is drafted into its service. And punishment of the gravest nature might be imposed on a naval volunteer or draftee which no court-martial could have imposed but for such a voluntary or forced entry into the Navy. For under this interpretation had the same naval offender re-entered his country's service by way of the Army rather than the Navy, either by choice or by accident of draft

assignment, no court-martial, either Navy or Army, could have punished him. Jurisdiction to punish rarely, if ever, rests upon such illogical and fortuitous contingencies. We therefore must look beyond the literal language of the Article, ambiguous at best, in order to determine whether this court-martial acted within its power. See *Runkle* v. *United States,* 122 U. S. 543, 555, 556; *Ex parte Reed,* 100 U. S. 13, 23.

While not itself determinative of the question here, 34 U. S. C. § 1200, Art. 14 (Eleventh), has greatly influenced the Army and Navy in determining their court-martial jurisdiction to try service personnel for offenses committed in prior enlistments. That Article provides that where any person previously discharged or dismissed from the Navy has "while in the naval service" been guilty of certain types of fraud against the Government, such person "shall continue to be liable to be arrested and held for trial and sentence by a court martial, in the same manner and to the same extent as if he had not received such discharge nor been dismissed."

Article 14 (Eleventh) stems from an Act of Congress passed in 1863, particularly designed to punish frauds against the military branches of the Government in connection with the procurement of supplies for war activities. 12 Stat. 696. That the attention of the 1863 Congress was directly focused upon the powers that could and should be vested in courts-martial is made clear by the debates and by the fact that Congress deleted from the bill as proposed specific provisions which would have made civilian government contractors subject to trial before military and naval courts-martial. Cong. Globe, 37th Cong., 3d Sess. 952–958 (1863), and Appendix to Cong. Globe, 37th Cong., 3d Sess. 199 (1863). See *Ex parte Henderson,* 11 Fed. Cas. 1067, No. 6,349 (C. C. D. Ky. 1878). And see *United States ex rel. Marcus* v. *Hess,*

317 U. S. 537, 539–545. But after elimination of certain provisions which would further have expanded court-martial jurisdiction, Congress left in the bill § 3, now Naval Article 14 (Eleventh), which makes naval personnel guilty of service frauds subject to court-martial after discharge or dismissal. The same 1863 provision has also been made applicable to Army personnel by Article of War 94, 10 U. S. C. § 1566.

Congress in this 1863 Act plainly recognized that there was a significant difference between court-martial power to try men in the service and to try former servicemen after their discharge. The Government correctly argues that the attention of the 1863 Congress was not focused on the precise question here, namely, the extent of a military court's statutory power to punish a man presently "in the service" for an offense committed in a prior enlistment period from which he has been discharged. But the fact remains that the 1863 Congress did act on the implicit assumption that without a grant of congressional authority military courts were without power to try discharged or dismissed soldiers for any offenses committed while in the service. Acting on this assumption, Congress granted such a power to courts-martial but only in the very limited category of offenses there defined—frauds against the Government.[2] Since the 1863 Act, Congress has not passed any measure that

[2] The discussion of the 1863 Act showed that Congress rather grudgingly conceded this comparatively slight expansion of the court-martial power apparently prompted by reports of particularly abhorrent recent frauds by war contractors, such as the supply of shells to the Army "filled not with the proper explosive materials for use, but with saw-dust." Cong. Globe, 37th Cong., 3d Sess. 955 (1863). This action of the 1863 Congress does not support an argument that Congress has been quick in response to appeals for expansion of court-martial jurisdiction. See *Duncan* v. *Kahanamoku*, 327 U. S. 304; *Ex parte Milligan*, 4 Wall. 2.

directly expanded court-martial powers over discharged servicemen, whether they re-enlisted or not.

Obviously Article 8 (Second), which subjects to court-martial jurisdiction persons "in the Navy," supports an argument that petitioner was subject to trial by this court-martial. It is equally obvious that the language of Article 8 (Second) particularly in view of Article 14 (Eleventh) supports an argument that this court-martial could not try petitioner for an offense committed prior to his honorable discharge. Under these circumstances the manner in which court-martial jurisdiction has long been exercised by the Army and Navy is entitled to great weight in interpreting the Articles.

The question of the jurisdiction of a naval court-martial over discharged personnel was submitted by the Secretary of the Navy to the Attorney General in 1919. The precise question of whether re-enlistment could revive jurisdiction of a military court was not considered, but as to the power of military courts over discharged personnel in general the Attorney General reached the conclusion that a person discharged from the Navy before proceedings were instituted against him "for violations of the Articles Governing the Navy, excepting article 14" could not "thereafter be brought to trial . . . for such violations, though committed while he was in the service." 31 Op. Atty. Gen. 521, 529. This conclusion of the Attorney General relied on statements of the Judge Advocate Generals of the Army and Navy that their offices had "from the beginning and uniformly held that a person separated from the service ceases to be amenable" to military and naval jurisdiction. Previous to the Attorney General's 1919 opinion neither the Navy nor Army had ever claimed court-martial power to try their personnel for offenses committed prior to an honorable discharge where proceedings had not been instituted before dis-

charge. See Winthrop, Military Law and Precedents 93 (2d ed. 1920). The Government concedes that the Army has always so construed its court-martial jurisdiction whenever the question arose. And the Government concedes that the Navy also followed this view of its jurisdiction until 1932.[3] Many holdings and opinions of Army and Navy authorities are cited to support these concessions. The Government's brief quotes the following language by the Navy Department in one of the cases which considered the precise issue raised here. The case appears in CMO 12–1921, p. 11.

> "Except in cases of offenses in violation of Article 14 of the Articles for the Government of the Navy, there is no authority of law giving jurisdiction to a court-martial to try an enlisted man for an offense committed in a prior enlistment from which he has an honorable discharge, regardless of the fact that he has subsequently reenlisted in the naval service and was serving under such reenlistment at the time the jurisdiction of the court was asserted."

Accepting as we do the long-standing Army and Navy interpretation of the Articles previously referred to, an interpretation which necessarily would deny jurisdiction to the court-martial here, there remains the contention that the Navy has by a recent congressionally authorized regulation acquired such jurisdiction for its courts-martial. 34 U. S. C. § 591 authorizes the Secretary of the Navy, with the approval of the President, to adopt and alter regulations and orders for control of the Navy.

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[3] Since 1932 the Navy has consistently adhered to its revised interpretation of Art. 8 (Second). In 1934 the Navy Department incorporated this revised interpretation in an official Navy publication, *Naval Courts and Boards,* and this interpretation became § 334 (a) of *Naval Courts and Boards* (1937 ed.).

The Government claims that a regulation adopted pursuant to this authority has been promulgated,[4] and that it vested the necessary power in this court-martial to try petitioner. This authorized regulation, it is contended, had the force of law, *Ex parte Reed,* 100 U. S. 13, 22, and consequently supplants the prior statutes which, as interpreted, had denied the jurisdiction here asserted. There has been considerable argument as to whether the language of the Navy regulation was sufficiently precise to endow it with the force of law. Passing over this argument, however, we are not able to agree that the Navy could in this manner acquire the expanded court-martial jurisdiction it claimed. For we cannot construe 34 U. S. C. § 591 as permitting the Navy to extend its court-martial jurisdiction beyond the limits Congress had fixed. *United States* v. *Symonds,* 120 U. S. 46, 49–50.

The regulation stands no better if it be considered merely as an evidence of a revised naval interpretation of the Article. This revised naval interpretation was given in 1932. Before that time, both Army and Navy had for more than half a century acted on the implicit assumption that discharged servicemen, whether reenlisted or not, were no longer subject to court-martial power. The Attorney General of the United States had proceeded on the same assumption. And see *United*

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[4] The regulation appearing in the 1937 *Naval Courts and Boards* § 334 contained the following language:

". . . Except for offenses provided for in article 14, A. G. N., a court martial may not try an individual who has been formally separated from the Navy and is no longer in the service unless proceedings were instituted against him while he was in the service. . . . Similarly, the Navy Department has passed cases as legal in which enlisted men have been convicted by court martial of offenses committed in a previous enlistment, although such offenses were not provided for in article 14, A. G. N."

States v. *Kelly,* 15 Wall. 34, 36. Under these circumstances, little weight can be given to the 1932 separate effort of the Navy to change the long-accepted understanding of its statutory court-martial power. For should this belated naval interpretation be accepted as correct, there would be left outstanding an Army interpretation of its statutory court-martial powers directly opposed to that of the Navy. Since the Army and Navy court-martial powers depend on substantially the same statutory foundations, the opposing interpretations cannot both be right, unless it be assumed that Congress has left each free to determine its own court-martial boundaries. We cannot assume that Congress intended a delegation of such broad power in an area which so vitally affects the rights and liberties of those who are now, have been, or may be associated with the Nation's armed forces.

Reversed.

DANIEL, ATTORNEY GENERAL, ET AL. *v.* FAMILY SECURITY LIFE INSURANCE CO. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA.

No. 297. Argued February 2, 1949.—Decided February 28, 1949.

1. As applied in this case, a South Carolina statute forbidding life insurance companies and their agents to engage in the undertaking business and forbidding undertakers to serve as agents for life insurance companies does not contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. Pp. 220–225.
2. That an "insurance lobby" may have secured the enactment of the statute has no bearing on its constitutionality. P. 224.
3. It cannot be said that South Carolina is not entitled to call the funeral insurance business an evil nor that the statute has no relation to such an evil. Pp. 224–225.

79 F. Supp. 62, reversed.

A three-judge federal district court enjoined enforcement of a South Carolina statute forbidding a combination of the life insurance and undertaking businesses, on the ground that it contravened the Due Process and Equal Protection Clauses of the Fourteenth Amendment. 79 F. Supp. 62. On direct appeal to this Court, *reversed*, p. 225.

David W. Robinson argued the cause for appellants. With him on the brief were *John M. Daniel*, Attorney General of South Carolina, *T. C. Callison*, *J. Monroe Fulmer*, Assistant Attorneys General, *Edgar A. Brown*, *Nathaniel A. Turner* and *R. Hoke Robinson*.

Donald Russell argued the cause for appellees. With him on the brief were *C. Erskine Daniel* and *E. W. Johnson*.

Opinion of the Court by MR. JUSTICE MURPHY, announced by MR. JUSTICE RUTLEDGE.

A South Carolina statute provides that life insurance companies and their agents may not operate an under-

taking business, and undertakers may not serve as agents for life insurance companies. Criminal sanctions are provided. Act No. 787, S. C. Acts of 1948, p. 1947.[1] Respondents brought action before a three-judge District Court in the Eastern District of South Carolina, seeking an injunction forbidding the enforcement of the statute. 28 U. S. C. § 380, now 28 U. S. C. §§ 2281, 2284. The court, one judge dissenting, upheld respondents' contentions that the statute, as applied in this case, did not provide that due process of law and equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States. A permanent injunction issued, 79 F. Supp. 62, and the South Caro-

[1] "SECTION 1: Life insurance companies and their employees not own or operate undertaking business.—It shall be unlawful for any life insurance company, corporation, or association, except fraternal benefit societies licensed to do business in this State to own, manage, supervise, or operate or maintain a mortuary or undertaking establishment, or to permit its officers, agents or employees to own, operate or maintain any such funeral or undertaking business.

"SECTION 2: Life insurance company or sick or funeral benefit company not contract with undertaker conduct funeral of person insured by it.—It shall be unlawful for any life insurance company, sick or funeral benefit company, or any company, corporation or association engaged in a similar business to contract or agree with any funeral director, undertaker or mortuary to the effect that such funeral director, undertaker, or mortuary shall conduct the funeral of any person insured by such company, corporation or association.

"SECTION 3: Undertaker and his employees not act as agent for life insurance company.—It shall be unlawful for any funeral director, undertaker, or mortuary, or any agent, officer or employee thereof to be licensed as agent, solicitor or salesman for any life insurance company, corporation or association doing business in this State.

"SECTION 4: Penalties.—Any person violating any of the provisions of this Act shall be deemed guilty of a misdemeanor, and each violation thereof shall be a separate offense, and upon conviction shall be punished by fine not exceeding One Thousand ($1,000.00) Dollars or by imprisonment at hard labor for not exceeding six (6) months, or both such fine and imprisonment within the discretion of the courts. . . ."

lina Attorney General has appealed to this Court. 28 U. S. C. § 380, now 28 U. S. C. §§ 1253, 2281.

The respondent insurance company is incorporated and licensed to do business in South Carolina, and conforms with the comprehensive code of insurance regulations established by Act No. 232, S. C. Acts of 1947, p. 322. The other respondents are its officers and directors. It issues life insurance with cash benefits ranging from $125 to $750. The amount of outstanding policies had reached a total of $838,375 in May of 1948, compared to nothing in February of the same year. Most of the company's agents are undertakers. Parties to the insurance contract contemplate use of the policy's proceeds to pay funeral expenses. A "facility of payment" clause might justify payment of proceeds to an undertaker for the insured's funeral. At the time of the trial, respondent company was the only concern in South Carolina selling "funeral insurance" as an established practice.

For many years South Carolina has prohibited the payment of insurance proceeds in merchandise or services. Act No. 205, S. C. Acts of 1929, p. 234; S. C. Code of 1942, § 7984; Act No. 232, S. C. Acts of 1947, § 65, p. 350. Possibilities of fraud, misunderstanding in valuation, and the comparatively useless character of the merchandise delivered or services rendered make respondents readily concede the desirability of this ban. Other states have similar statutes.[2]

The South Carolina legislature might well have concluded that funeral insurance, although paid in cash, carries the same evils that are present in policies payable in merchandise or services: the beneficiary's tendency to deliver the policy's proceeds to the agent-undertaker for whatever funeral the money will buy, whether or not an

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[2] See Fla. Stat. (1941), § 639.04; Me. Rev. Stat., c. 56, § 138 (1944); Ky. Rev. Stat., § 303.120 (1946); Ill. Rev. Stat., c. 73, § 956 (1947).

expensive ceremony is consistent with the needs of the survivors.[3] Considerations which might have been influential include the likelihood of overreach on the part of insurance companies, and the possibilities of monopoly control detailed in affidavits introduced in the court below.

The South Carolina legislature is not alone in seeing evils in this kind of insurance, and in invoking its police powers to combat them. See the similar provisions in N. Y. Insurance Law, § 165 (c); Fla. Stat. (1941), § 639.02; Ga. Code Ann. § 56–9920; Page's Ohio General Code, § 666 (1946) (see *Robbins* v. *Hennessey,* 86 Ohio St. 181, 99 N. E. 319); Md. Ann. Code, Art. 48A, § 110 (1939). And see the summary of critical arguments in Business Week, October 20, 1945, pp. 48, 51.

Yet the court below held that the statute is "arbitrary and discriminative and designed to destroy, and will destroy, the plaintiff insurance company and its business . . . ." "It seems obvious from the record that this legislation had its genesis in the desire of the existing insurance companies to eliminate the plaintiff company as a competitor. . . ." 79 F. Supp. at 70, 65. The court found that the respondent's policies are actuarially sound; that funeral insurance is desirable; and that the other South Carolina insurance regulations are "ample" to correct any evils resulting from respondents' business.

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[3] "You come to the place of business, the mortuary, to pay it. Month in and month out. The inducement for a funeral director to align himself with this is the fact that it will freeze this business to him. He doesn't have to, let me hasten to say. You don't have to call that funeral director, but if he continuously beats a path to his door to pay his insurance, there is no question about it that if he has any decent employees, they are going to convince the man the thing to do is to come to them. Now, is that a healthy situation?" Proceedings of the Senate Banking and Insurance Committee, State of South Carolina, March 31, 1948, No. 1382, *In re* "THE MORTUARY BILL." R. 85.

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The Court concluded that the statute now before us is so unreasonable that it offends the Due Process Clause.

First. It is said that the "insurance lobby" obtained this statute from the South Carolina legislature. But a judiciary must judge by results, not by the varied factors which may have determined legislators' votes. We cannot undertake a search for motive in testing constitutionality. See *Hammer* v. *Dagenhart,* 247 U. S. 251, overruled in *United States* v. *Darby,* 312 U. S. 100. Compare *Bailey* v. *Drexel Furniture Co.,* 259 U. S. 20, and *United States* v. *Constantine,* 296 U. S. 287, with *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381, 393. Compare *United States* v. *Butler,* 297 U. S. 1, with *Steward Machine Co.* v. *Davis,* 301 U. S. 548, 592, and *Cincinnati Soap Co.* v. *United States,* 301 U. S. 308.

Second. Despite evidence to the contrary, respondents see no evil to be corrected by this legislation. We are asked to agree with respondents and call the statute arbitrary and unreasonable.

Looking through the form of this plea to its essential basis, we cannot fail to recognize it as an argument for invalidity because this Court disagrees with the desirability of the legislation. We rehearse the obvious when we say that our function is thus misconceived. We are not equipped to decide desirability; and a court cannot eliminate measures which do not happen to suit its tastes if it seeks to maintain a democratic system. The forum for the correction of ill-considered legislation is a responsive legislature.

We cannot say that South Carolina is not entitled to call the funeral insurance business an evil. Nor can we say that the statute has no relation to the elimination of those evils. There our inquiry must stop.[4]

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[4] Our deference to the legislative judgment is particularly pronounced in a field as traditionally well regulated as insurance. See

This rationale did not find expression in *Liggett Co.* v. *Baldridge,* 278 U. S. 105, on which respondents rely. According to the majority in *Liggett,* "a state cannot, 'under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.' " 278 U. S. at 113. But a pronounced shift of emphasis since the *Liggett* case has deprived the words "unreasonable" and "arbitrary" of the content for which respondents contend. See *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.,* 335 U. S. 525, where the cases are reviewed.

The *Liggett* case, however, was concerned with a statute far different from the one we are considering now. Pennsylvania required drug store owners to be licensed pharmacists. Because the statute was directed at owners, who might have no connection with the pharmaceutical branches of modern drug stores, a divided Court thought the measure unreasonable. The Pennsylvania statute was clearly less adapted to the recognized evil than the provision now before us. The *Liggett* case, on its facts, is not authority for the invalidation of the South Carolina Mortuary Act.

The South Carolina statute, on its face, does not contravene the provisions of the Fourteenth Amendment. Neither does it offend the Amendment as applied to these respondents.[5] We reverse the judgment below.

Reversed.

Osborn v. *Ozlin,* 310 U. S. 53, 65, 66; *La Tourette* v. *McMaster,* 248 U. S. 465, 467, 468; *Prudential Insurance Co.* v. *Benjamin,* 328 U. S. 408, 416, n. 13.

[5] That respondent company is the only concern now affected by the statute does not, of course, mean a denial of equal protection. The statute is drawn in general terms; the company's success might well induce others to enter the business. See the dissenting opinion below, 79 F. Supp. at 73, 74. And see *Mason* v. *Missouri,* 179 U. S. 328.

NATIONAL LABOR RELATIONS BOARD *v.* STOWE SPINNING CO. ET AL.

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

No. 46. Argued December 9–10, 1948.—Decided February 28, 1949.

1. In the circumstances of this case, the National Labor Relations Board could properly find that it was an unfair labor practice violative of § 8 (1) of the National Labor Relations Act, for an employer to discriminate against a labor organization by denying it the use of a company-owned meeting hall which was the only available meeting hall in a company town. The Board had found that the use of the hall had been freely given to other groups and that the employer's sole purpose in denying the use of it to the labor organization was to impede self-organization and collective bargaining by its employees. Pp. 227–233.

   (a) In the setting of this case, it can not be said as a matter of law that the grant of the use of the meeting hall to the labor organization would violate the provision of § 8 (2) forbidding employer interference with the formation or administration of any labor organization. Pp. 230–232.

   (b) Such interference with the employer's property rights as is contemplated by the result in this case does not deny any right of the employer under the Fifth Amendment of the Federal Constitution. P. 232.

2. The order of the National Labor Relations Board in this case, requiring the employer to cease and desist from refusing the use of the meeting hall to the complainant or any other labor organization, is too broad and is not supported by the findings of the Board; and it must be modified so as to restrain the employer from treating a labor organization's application for use of the hall on a different basis from those of others similarly situated. Pp. 232–233.

165 F. 2d 609, reversed.

The Court of Appeals refused enforcement of that part of an order of the National Labor Relations Board, 70 N. L. R. B. 614, which required an employer to grant to a labor organization the use of a meeting hall in a

company town. 165 F. 2d 609. This Court granted certiorari. 334 U. S. 831. *Reversed and remanded,* p. 233.

Mozart G. Ratner argued the cause for petitioner. With him on the brief were *Solicitor General Perlman, David P. Findling* and *Ruth Weyand.*

Paul C. Whitlock argued the cause and filed a brief for respondents.

Opinion of the Court by MR. JUSTICE MURPHY, announced by MR. JUSTICE RUTLEDGE.

The principal question for decision is whether the circumstances justified the finding of an unfair labor practice. A union organizer was refused the use of a company-owned meeting hall, and the union complained to the Board. After the usual proceedings, the Board found an unfair labor practice had been committed, 70 N. L. R. B. 614. The Court of Appeals refused to enforce the Board's order, 165 F. 2d 609, and the case is here on certiorari. A subsidiary problem is the breadth of the order we are asked to enforce.

First. We are asked to overrule the Board's finding that it is an unfair labor practice [1] to discriminate against a union by denying it the only available meeting hall in a company town when the Board finds that the "sole purpose" of the discriminatory denial is "to impede, prevent, and discourage self-organization and collective bargaining by the [company's] employees within the meaning of Section 7 of the Act."

North Belmont, North Carolina, is the home of the four respondents' mills. Interlocking directorates and family ties make the four equal one for our purposes.[2]

[1] Under the Wagner Act, 49 Stat. 449, 29 U. S. C. §§ 151, 158 (1).

[2] The Board found that "A. C. Lineberger is president of the respondents Perfection, Acme, and Linford; J. Harold Lineberger

Each of the mills owns a large number of houses in North Belmont which are rented to employees. At a central location are a school, a theatre, and a building housing a post office, all owned or controlled by the mill owners. In sum, North Belmont is a company town.

In December, 1944, Harris, a union organizer, appeared in North Belmont and began the first organization drive since the textile strike ten years earlier. He decided to begin with employees of respondent Stowe. A meeting hall was needed for the activity, and the post office building was the only choice open to the organizer—he was refused permission to use the school building, and was told that the theatre could be used only for motion pictures. Most of the post office building was erected by respondents for the Patriotic Order Sons of America, a "patriotic secret order to which any male citizen of the United States of good moral character" can belong. Many of respondents' employees are members; respondents check off monthly dues.

The Order's president, Baxter Black, told Harris that the proposed meeting might be held in the hall on the payment of a janitor's fee. Harris emphasized that he was willing to pay for the use of the hall. It is clear he was not asking special favors. Circulars were printed announcing the time and place of the meeting. Thereupon D. P. Stowe, for the four employer-owners, rescinded the permission granted—because Harris was a textile organizer. While the building seems to have been erected on the understanding that only the Patriotic Order might use it, that condition was never enforced

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is vice president of the respondents Perfection and Linford, and secretary-treasurer of the respondent Acme; D. P. Stowe is vice president of the respondent Acme and secretary-treasurer of the respondent Perfection. The officers of the respondent Stowe are C. T. Stowe, president; C. P. Stowe, vice president; and R. L. Stowe, secretary-treasurer, all of whom are cousins of D. P. Stowe."

until Harris' union affiliation reached the ears of the owners. Until then the Order had handled its own affairs; Black had been sure that his permission was the final word on the matter.

The Board found that the refusal "to permit use of the hall . . . under the circumstances, constituted unlawful disparity of treatment and discrimination against the Union." The union's complaint also charged that several employees had been discharged because of union activity, and again the Board found for the union. The Court of Appeals enforced the reinstatement order, but refused enforcement of the order relating to the use of the hall. On the latter determination we granted certiorari [3] to resolve an asserted conflict with prior decisions of this Court.

Company rules in *Republic Aviation Corp.* v. *Labor Board* and *Labor Board* v. *Le Tourneau Company of Georgia,* 324 U. S. 793, forbade union solicitation on company property. Under the circumstances the Board found that these rules offended the Act, and we upheld the Board. Stowe tells us that its case is far removed from the principles established in those decisions: the Board is now invading private property unconnected with the plant, for a private purpose, in the very teeth of the Fifth Amendment. "From Magna Charta on down," we are warned, "the individual has been guaranteed against disseisin of his property." A privately owned hall is different from the parking lot involved in *Le Tourneau's* case.

In the sense suggested by Stowe, the Board finding goes further than those upheld previously by this Court. But in a larger sense it does not. We mention nothing new when we notice that union organization in a com-

[3] Stowe's petition was denied, 334 U. S. 831; the reinstatement order is not being reviewed in this Court.

pany town must depend, even more than usual, on a hands-off attitude on the part of management.[4] And it is clear that one of management's chief weapons, in attempting to stifle organization, is the denial of a place to meet.[5] We cannot equate a company-dominated North Carolina mill town with the vast metropolitan centers where a number of halls are available within easy reach of prospective union members. We would be ignoring the obvious were we to hold that a common meeting place in a company town is not an important part of the company's business. The question is of course one of degree. But isolated plants must draw labor, and an element in that drawing power is a community hall of some kind.[6] In the background of discrimination found by the Board in this case, we cannot say that its conclusion should be upset.[7] As we will point out below, the Board may weigh the employer's expressed motive in determining the effect on employees of management's otherwise equivocal act.

Stowe contends that its denial of facilities to the union was in accord with § 8 (2) of the Act, prohibiting employer interference with the formation or administration of a labor organization. One Board member agreed, citing a number of cases in which the Board had made a grant of company facilities the basis for unfair practice findings. But Stowe would have the cases hold more than they do. In each of them, granting such facilities

[4] See Lahne, The Cotton Mill Worker (New York, 1944), pp. 50–51.

[5] See MacDonald, Southern Mill Hills (New York, 1928), p. 34; Blanshard, Labor in Southern Cotton Mills (New York, 1927), p. 64.

[6] See notes 4 and 5.

[7] Respondents do not contest the Board finding that antiunion bias was the cause for their refusal of the hall. And four employees were discharged for union activity. See 165 F. 2d 609, 614. Even in the *Republic* and *Le Tourneau* cases no such discrimination was shown. 324 U. S. at 797, 801.

to the union was only one facet in a pattern of domination found by the Board.[8] The opinion of the Board in this case states that the "mere granting of a meeting place to a union by an employer under the conditions present here would not . . . in and of itself constitute unlawful assistance to that union . . . ." We have said that the Wagner Act "left to the Board the work of applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms." *Republic Aviation Corp.* v. *Labor Board, supra,* 324 U. S. at 798. Sections 8 (1) and 8 (2) of the Act would seem to run into each other in the situation before us, were we to forget that the Board is the agency which weighs the relevance of factual data. Presumptions such as those employed in the *Peyton Packing Company* case, 49 N. L. R. B. 828, at 843–844,[9] may be important in cases like this one. While the Wagner Act does not ask punishment for evil intent, repeated acts of discrimination may establish a natural tendency to view justifications of other labor practices with some skepticism. Calculating a cumulative effect on employees is not a job for this Court. We cannot

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[8] See, for example, *Berkshire Knitting Mills* v. *Labor Board,* 139 F. 2d 134 (company union given use of hall denied to outside union); *Labor Board* v. *Carlisle Lumber Co.,* 94 F. 2d 138 (company union given preference over Board-certified bargaining representative); *Labor Board* v. *Norfolk Shipbuilding & Drydock Corp.,* 109 F. 2d 128 (recognition of inside union without ascertaining employees' wishes—inside union given use of company rooms); *Labor Board* v. *Lane Cotton Mills,* 111 F. 2d 814 (refusal to bargain with certified union coupled with use of recreation room by company union). And see *Cudahy Packing Co.* v. *Labor Board,* 118 F. 2d 295; *Matter of Standard Oil of California,* 61 N. L. R. B. 1251; *Matter of Virginia Electric & Power Co.,* 44 N. L. R. B. 404, enforced 319 U. S. 533.

[9] Cited and quoted with approval in the *Republic* case at 803, 804.

say that the Board was wrong as a matter of law in view of the setting.

The philosophy expressed in the Fifth Amendment does not affect the view we take. The Wagner Act was adopted pursuant to the commerce clause, and certainly can authorize the Board to stop an unfair labor practice as important as the one we are considering. Respondents are unquestionably engaged in interstate commerce within the meaning of the Act. It is not " 'every interference with property rights that is within the Fifth Amendment . . . . Inconvenience, or even some dislocation of property rights, may be necessary in order to safeguard the right to collective bargaining.' " 324 U. S. at 802.[10]

Accordingly, we think the Court of Appeals should have upheld the Board's unfair practice charge.

Second. Stowe's final contention, that the Board's order is too broad, is more serious. Stowe is ordered to "cease and desist from . . . refusing to permit the use of the Patriotic Order Sons of America hall by its employees or employees of [the other respondents] or by Textile Workers Union of America, C. I. O., or any other labor organization, for the purpose of self-organization or collective bargaining." There are none of the usual qualifications on the face of the order;[11] one construction would permit unions to use the hall at all times, whatever the legitimate activity of the Patriotic Order.

We are asked to read the decree in its background, and reject what is called a strained construction. Implicit in the order, we are told, is the word "reasonable."

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[10] We pointed out that neither the *Republic* nor *Le Tourneau* cases "is like a mining or lumber camp where the employees pass their rest as well as their work time on the employer's premises, so that union organization must proceed upon the employer's premises or be seriously handicapped." 324 U. S. at 799.

[11] Compare *Labor Board* v. *Lake Superior Lumber Corp.*, 167 F. 2d 147, 150, where the Board recognized that the employer might impose "lawful and reasonable conditions."

Perhaps this is true. The words of even a judicial decree must be read in their setting. But violation of the order brings the swift retribution of contempt, without the normal safeguards of a full-dress proceeding. Some notice of the prior proceeding must be taken in a contempt action—the very word "reasonable" invites a glance at what has gone before. But too great dependence on the former action places defendants under a restraint that makes the order itself a useless formality. Again the question is of degree.

In this case, however, the Board did not find that the very denial of the hall was an unfair labor practice. It found that the refusal by these respondents was unreasonable because the hall had been given freely to others, and because no other halls were available for organization. Now the Board asks us to enforce an order that simply does not mean what it says. We must require explicit language making it clear that the mere denial of facilities will not subject respondents to punishment for contempt. What the Board found, and all we are considering here, is discrimination. The decree should be modified to order respondents to refrain from any activity which would cause a union's application to be treated on a different basis than those of others similarly situated.

We therefore direct the Court of Appeals to remand the case to the Board for amendment of its order to conform to the Board's findings and this opinion.

Reversed and remanded.

MR. JUSTICE JACKSON, dissenting in part.

I find myself unable to join the Court's opinion because I have a different view as to the nature of the unfair labor practice involved which leads me to a different conclusion as to the remedy that the Board may prescribe.

The employers' plant was located in a company-owned town. It contained only three buildings suitable for use

for a public meeting. The Union needed a meeting place and sought to use any one of the three.

One is a motion picture theater owned and controlled by the employers but operated by a lessee. The Union was refused its use upon the ground that it was available only for motion pictures.

Another was a school building publicly owned but controlled by a school board composed entirely from officers of the employers. The Union sought to use the schoolhouse but, after some negotiations, was told by its custodian that an officer of one of the employers had issued instructions not to permit such use.

The third was a building owned and controlled by the employers, occupied by the post office and a grocery store on the first floor and by a meeting hall on the second. This hall for some time had been the quarters of the Patriotic Order Sons of America, a fraternal organization which in practice had exercised full control over it and had permitted various other organizations to use it for community purposes. Its officers consented to the Union's use of the hall on the payment of a nominal janitor's fee. Before the scheduled meeting, however, an officer of the employers told the head of the fraternal order that he should not have allowed the use of the hall and caused the permission to be withdrawn. While the tenure of the fraternal organization is somewhat shadowy, it appears that it had been given at least such control of the use of the hall that its consent would have constituted a license so that the Union would not have been trespassing.

But for the interference of the employers, either the schoolhouse or the Patriotic Sons hall might have been obtained. I agree with the Court that the Board was justified in finding that the employers' action in preventing the Union from obtaining this place of assembly constituted an unfair labor practice. But I do not think this finding is or can be based on discrimination. The

employers, having permitted the Patriotic Sons to control use of the hall, could not properly interfere and command reversal of the Sons' approval of the Union's application. On these facts, such conduct would amount to an unfair labor practice, even though no other organization had ever been allowed to use the hall. The interference to oust the Union was enough without a discrimination, which could hardly occur unless some other union had been allowed to use the hall. Consequently, I think the Board could require the employer to notify the Patriotic Sons that it has been unfair in the objections heretofore made and that it will make no objections in the future, and that the Patriotic Sons are free to allow such temporary use if they see fit.

But the Board's order goes beyond this. It has ordered that the employers take affirmative action to place the hall of the Patriotic Sons at the disposal of the Union. It is one thing to forbid the employers to bring pressure on the custodian of the hall to shut out the Union; it is another thing to order them to bring pressure on the custodian to admit the Union, or to order the employers to repossess the hall and turn it over to the Union. If the employers were controlling the hall directly, I would have serious doubts whether denial of union use of the hall could be an unfair labor practice, and equally serious doubts whether it would not be an unfair labor practice under § 8 (2) of the Act to allow it. Neither the complaining Union nor any other has yet been chosen as bargaining agent for these employees. For the employers to provide this Union a hall, by direct permission or by indirect pressure on the Patriotic Sons, may readily convey to employees an impression of favoring the Union thus indulged. As the court below pointed out, the policy of the Act as heretofore applied is one of preventing the employer from extending financial aid or support to any union. I think, in the long run, interpretation of the Act

to require a complete hands-off attitude on the part of employers will better effectuate the purposes of the Act than an occasional departure from it to require some kind of aid to a union as an expedient for correcting or punishing an unfair labor practice.

If the Act permitted imposing such a penalty upon the employers, it would perhaps be appropriate to compel them to provide a meeting hall in lieu of those it kept the Union from obtaining. However, it is well established by decisions of this Court that § 10 (c) of the Act is remedial, not punitive. *Consolidated Edison Co.* v. *Labor Board,* 305 U. S. 197; *Republic Steel Corp.* v. *Labor Board,* 311 U. S. 7. In both cases, Chief Justice Hughes said for the Court "this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order." 305 U. S. 197, 235, and 311 U. S. 7, 11.

Consequently, I think the order should be modified to provide that the employer shall cease and desist from interfering in any manner with the discretion of the Patriotic Sons with respect to use of the hall and that appropriate notices shall be posted.

MR. JUSTICE REED, with whom THE CHIEF JUSTICE joins, dissenting.

The controlling point for decision in this case is whether the Board was justified in concluding that the four respondent companies interfered with rights guaranteed by § 7 of the Wagner Act. Section 7 provides that "Employees shall have the right to self-organization, to form, join, or assist labor organizations . . . ." 49 Stat. 452. The Board's complaint charged an unfair labor practice under § 8 (1) against the four respondent companies by

their interference with the rights guaranteed by § 7. The form of interference was the refusal of the use of a hall jointly owned by respondents to employees of one of them for the purpose of self-organization. If the four respondents violated § 7, did the Board have power to redress that violation by entering § 1 (b) and § 2 (c) of its order against Stowe and similar orders against the other three respondents? Section 1 (b) ordered the respondents to cease and desist from

> "Refusing to permit the use of the Patriotic Order Sons of America hall by its employees or employees of Acme Spinning Company, Perfection Spinning Company or Linford Mills, Inc., or by Textile Workers Union of America, C. I. O., or any other labor organization, for the purpose of self-organization or collective bargaining;"

And § 2 (c) ordered respondents to

> "Upon request, grant to its employees and employees of Acme Spinning Company, Perfection Spinning Company, or Linford Mills, Inc., and to Textile Workers of America, C. I. O., or any other labor organization, the use of the Patriotic Order Sons of America hall for the purposes of self-organization or collective bargaining;"

The Board decided that the refusal of the hall violated § 7 and concluded as a matter of law:

> "3. By interfering with, restraining, and coercing their employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondents Stowe Spinning Company, Acme Spinning Company, Perfection Spinning Company, and Linford Mills, Inc., have engaged in and are engaging in unfair labor practices, within the meaning of Section 8 (1) of the Act."

The Court of Appeals accurately summarized the Board's action in these words:

> "It [the Board] made the finding that the owner's refusal 'to permit use of the hall for purposes of self organization in a labor union under the circumstances constituted unlawful disparity of treatment and discrimination against the Union.' It pointed out that foremost among the methods universally utilized by employees in self organization is the exercise of the constitutional right of peaceable assembly. It held that the sole purpose of the respondents' action was to impede, prevent and discourage the employees in the exercise of this basic right and that by refusing the union permission to use the only available meeting place in the community, the respondents in fact deprived the employees of Stowe of the right." *Labor Board* v. *Stowe Spinning Co.*, 165 F. 2d 609, 611.

In reversing the Board the Court of Appeals said:

> ". . . the employer has not interfered with, restrained or coerced its employees in the exercise of their rights. Even though it was evident to the workers that the action of the owners of the hall was inspired by hostility to the union, the refusal did not amount to unlawful interference, restraint or coercion." *Id.*, 611.

A determination that as a matter of law it is or it is not an unfair labor practice for respondents to refuse the use of their hall for union organization purposes will decide this case.

The findings show that the center of the village of North Belmont is approximately 2½ miles from the center of the town of Belmont. In the village there are four textile mills and about each textile mill a number of houses that belong to the corporations that own the

respective mills. At a central location in the village, reached by what we assume are public roads and streets, are the school, a theater, and a combined post office and store; above the post office and store is the meeting hall in question. These facilities, except the school, are owned jointly by the four corporations that own the mills. Neither the record nor the findings show whether or not there is privately owned realty in the village belonging to others than the textile mills, but we assume that there is none.

Respondents provided the hall as a meeting place for the Patriotic Order Sons of America. The Board found, 70 N. L. R. B. 614, 621:

> "As to the arrangements under which the P. O. S. of A. was permitted use of this company-owned property, Stowe credibly testified without contradiction that 'it was built especially for the Patriotic Sons of America to hold their meetings in and was not to be rented to anybody else.' He also testified: '. . . we told the Patriotic Sons of America that we were going to let them use the building free of rent, but were not going to allow it to be rented for any [other] purposes.'"

Under such an arrangement the members of the fraternal order were licensees, who were permitted to use the hall only by virtue of the owner's consent. There was the further Board statement, quoted below, as to the use of the hall.[1]

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[1] "As a matter of practice, since 1937, the hall has been used, according to the credible testimony of Black, on numerous occasions for community and employee meetings. Various churches have used the hall for banquets; 'Ladies Aid' societies have gathered there; the North Belmont School had the use of the hall for at least one Christmas party; and for several weeks employees of the respondents attended a 'Safety school' held in the hall. That no other fraternal order met there is explained by the fact, established by Stowe's

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It does not appear from the record how far this village center is from the respective mills. It is clear, however, that the Patriotic Order Sons of America hall is not connected with the mill operations, nor is its use open to employees because of their employment by any of the mills. There is a distinct line of cleavage as to the rights of employees between facilities and means of production open to the use of employees through their employment contract and other property of the employer that may be used by any person other than the owner only through some contract, license, or permission, not a part of an employment contract. The undisputed evidence discloses that membership in the fraternal order is not restricted to the employees of the mills, and that it includes others.

The error into which the Board fell concerning the right to use the Patriotic Order Sons of America hall is, it seems to us, that it thought the "disparity of treatment and discrimination against the Union" involved in the refusal of the hall was a violation of the employees' "right to self-organization, to form, join, or assist labor organizations." [2] § 7. It is only when there is a violation

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testimony, that the P. O. S. of A. is the only such organization in North Belmont. Furthermore, Black's credible testimony is undisputed that it was the practice, when any other organization wanted to use the hall, for the P. O. S. of A. 'lodge' itself to pass upon the request. There is no evidence that any other organization, except the Union, was ever refused use of the hall, either by the P. O. S. of A. or by the respondents." 70 N. L. R. B. 614, 621.

[2] The Board said: "Moreover, irrespective of the respondents' motive, we are convinced, and find upon the consideration stated above, that by refusing to permit their employees to exercise the right to meet on company-owned property for the purpose of holding a union meeting, when no other suitable property in the community was available for the purpose, under the circumstances set forth above, the respondents have placed an unreasonable impediment on freedom of communication and of assembly essential to the exercise of employees' rights guaranteed by Section 7 of the Act. By their conduct

through an interference with or a restraining or coercion of employees' rights under § 7 that an unfair labor practice finding may be predicated on the employer's acts. The employer is not required to aid employees to organize. The law forbids only interference.

Employment in a business enterprise gives an employee no rights in the employer's other property, disconnected from that enterprise. As to such property, the employer stands on the same footing as any other property owner. As indicated above, that is the condition as to the Patriotic Order Sons of America hall. The refusal of this owner to allow the hall's use for union organization is not an unfair labor practice under §§ 7 and 8 any more than a refusal by any other private owner would be. As far as the hall is concerned, the relation of employer-employee does not exist between the mill owners and the mill workers. There cannot be an unfair labor practice as to the use of this hall under the applicable sections of the National Labor Relations Act.

Perhaps the ruling of this Court in *Marsh* v. *Alabama*, 326 U. S. 501, approaches closer to this problem than any other case. There Alabama punished a distributor of religious literature for trespass when she insisted on passing out the pamphlets on a private sidewalk, used by the owners' permission to enter stores and the post office. This Court reversed and held the application of the state law of trespass violated the Fourteenth Amendment. This Court held, p. 509: "Insofar as the State has attempted to impose criminal punishment on appellant for undertaking to distribute religious literature in a company town, its action cannot stand." Certain ex-

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in revoking the grant of privilege to use the hall and thus denying the use of the hall to the Union, the respondents Stowe, Acme, Perfection, and Linford interfered with, restrained, and coerced their employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8 (1) thereof." *Id.*, 624.

pressions, set out below,[3] occur in the opinion as to the right to use private property for speech, press and assembly but they must be read in the light of the facts in the *Marsh* case. So read, or however read, they cannot be construed as a holding that the natural right of free expression or of assembly, guaranteed by our Constitution, is a delusion unless organizers and evangelists can commandeer private buildings for use in the propagation of their ideas. The *Marsh* case, in my view, goes no further than to say that the public has the same rights of discussion on the sidewalks of company towns that it has on the sidewalks of municipalities.

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[3] "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. . . . Had the corporation here owned the segment of the four-lane highway which runs parallel to the 'business block' and operated the same under a state franchise, doubtless no one would have seriously contended that the corporation's property interest in the highway gave it power to obstruct through traffic or to discriminate against interstate commerce. . . . And even had there been no express franchise but mere acquiescence by the State in the corporation's use of its property as a segment of the four-lane highway, operation of all the highway, including the segment owned by the corporation, would still have been performance of a public function and discrimination would certainly have been illegal.

"We do not think it makes any significant constitutional difference as to the relationship between the rights of the owner and those of the public that here the State, instead of permitting the corporation to operate a highway, permitted it to use its property as a town, operate a 'business block' in the town and a street and sidewalk on that business block." P. 506–507.

. . . . . .

"In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a state statute." P. 509.

There is nothing in this record that indicates a situation such as exists in employer-owned lumber camps or mining properties. Where an employer maintains living, recreation and work places on such business premises open to employees by virtue of their employment, it has been held that exclusion of union organizers from contact with the employees is an unfair labor practice and that the Board's ordering the employer to grant union representatives access in non-working hours to the employees under reasonable regulations is a proper means to effectuate the purposes of the Act. *Labor Board* v. *Lake Superior Lumber Corp.*, 167 F. 2d 147. It has never been held that where the employees do not live on the premises of their employer a union organizer has to be admitted to those premises. The present situation differs from the employer-controlled areas where employees both live and work in that here union organizers may solicit the employees on the streets or in their homes or at public meeting houses within a few miles of their employment. Employees are not isolated beyond the hours of labor from an organizer nor is an organizer denied access to the employees. After an organizer has convinced an employee of the value of union organization, that employee can discuss union relations with his fellow-employees during non-working hours in the mill. This gives opportunity for union membership proliferation. *Republic Aviation Corp.* v. *Labor Board* and *Labor Board* v. *Le Tourneau Company of Georgia,* 324 U. S. 793.

The present case differs from the *Le Tourneau* and *Republic* cases in that in those cases the problem concerned the right of an employer to maintain discipline by forbidding employees to foster by personal solicitation union organization on the grounds or in the plant of the company during the employees' non-working time. We held that, unless there were particular circumstances that justified such a regulation to secure discipline and pro-

duction, the employer must allow such discussion. *Republic Aviation Corp.* v. *Labor Board, supra.*

The Board now seeks an extension of this rule. It is argued that where the only readily available meeting place is a piece of property belonging to the employer, the Board may require him to permit his employees to use that meeting place for presentation of arguments for unionization. Even where the employer has allowed other organizations to use his property, I do not think that the words of the statute guaranteeing employees the right to organize and to form labor unions permit such an extension. Employment furnishes no basis for employee rights to the control of property for union organization when the property is not a part of the premises of the employer, used in his business. So to construe the statute raises serious problems under the Fifth Amendment. Would the theater, also owned by the mill proprietors, be subject to the union's user? Would that construction as applied in the finding and particularly in the earlier quoted sections of the order deprive respondents of their property without just compensation or force private owners to devote their property to private purposes, *i. e.*, union organization? Definite legislative language only would authorize such a construction of this statute. *United States* v. *C. I. O.*, 335 U. S. 106, 120–21.

Labor unions do not have the same right to utilize the property of an employer not directly a part of the employment facilities, that an employer has. The Board cannot require that such meeting places be furnished for employees by an employer under the terms of the Act. To require the employer to allow labor union meetings in or on property entirely disconnected in space and use from the business of the employer and employees is too extravagant an extension of the meaning of the Act for me to believe it is within its language or the purpose of Congress.

I would affirm the Court of Appeals.

Syllabus.

INTERNATIONAL UNION, U. A. W. A., A. F. OF L., LOCAL 232, ET AL. *v.* WISCONSIN EMPLOYMENT RELATIONS BOARD ET AL.

CERTIORARI TO THE SUPREME COURT OF WISCONSIN.

Nos. 14 and 15. Argued November 17–18, 1948.—Decided February 28, 1949.

Negotiations for a collective bargaining agreement between an employer, engaged in interstate commerce, and a labor union, certified under the National Labor Relations Act as collective bargaining representative of the employees, became deadlocked. In order to bring pressure on the employer, the union adopted a plan whereby union meetings were called at irregular times during working hours, without advance notice to the employer or any notice as to whether or when the employees would return. In a period of less than 5 months, 27 such work stoppages occurred. The employer was not informed during this period of any specific demands which these tactics were designed to enforce nor what concessions it could make to avoid them. In a proceeding under the Wisconsin Employment Peace Act, the Wisconsin Employment Relations Board issued an order which was construed and upheld by the State Supreme Court as forbidding the individual defendants and members of the union from engaging in concerted effort to interfere with production by those methods. *Held:* It was within the power of the State to prohibit the particular course of conduct described. Pp. 247–265.

1. Upon review here, the construction placed upon the State Board's order by the State Supreme Court is conclusive. Pp. 250–251.

2. As thus applied, the state statute does not have the purpose or effect of imposing any form of involuntary servitude in violation of the Thirteenth Amendment. P. 251.

3. The statute as applied does not invade rights of free speech and public assemblage guaranteed by the Fourteenth Amendment. *Lincoln Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U. S. 525; *American Federation of Labor* v. *American Sash & Door Co.*, 335 U. S. 538. Pp. 251–252.

4. The statute as applied does not violate the Commerce Clause of the Federal Constitution. P. 252.

5. This recurrent or intermittent unannounced stoppage of work to win unstated ends was neither forbidden by federal statute nor was it legalized and approved thereby, and there is no basis for

denying to the State the power, in governing her internal affairs, to regulate an activity having such an obviously coercive effect. Pp. 252–265.

(a) Neither by the National Labor Relations Act nor by the Labor Management Relations Act has Congress clearly manifested an intention to exclude the state power sought to be exercised in this case. Pp. 252–254.

(b) There is no existing or possible conflict or overlapping between the authority of the Federal and State Boards, because the Federal Board has no authority to investigate, approve or forbid the union conduct in question. Pp. 252–254.

(c) The order of the State Board does not conflict with the provision of § 7 of the National Labor Relations Act that employees shall have the right to engage in "concerted activities" for the purpose of "collective bargaining or other mutual aid or protection." Pp. 254–258.

(d) Nor does the order of the State Board conflict with § 13 of the National Labor Relations Act, which provides that nothing in that Act shall be construed so as to "interfere with or impede or diminish" the right to strike—even when read in connection with the definition of "strike" in the Labor Management Relations Act. Pp. 258–265.

250 Wis. 550, 27 N. W. 2d 875, affirmed.

In a proceeding under state law, the Wisconsin Employment Relations Board ordered a labor union and members thereof to cease and desist from instigating certain intermittent and unannounced work stoppages in the plants of an employer engaged in interstate commerce. Separate proceedings were instituted in the state courts by the Board to enforce the order and by the union and individual defendants to obtain review. The State Supreme Court, reversing judgments of the trial court, upheld the validity of the order. 250 Wis. 550, 27 N. W. 2d 875. This Court granted certiorari. 333 U. S. 853. *Affirmed,* p. 265.

David Previant argued the cause and filed a brief for petitioners.

Beatrice Lampert, Assistant Attorney General of Wisconsin, argued the cause for the Wisconsin Employment

Relations Board, respondent. With her on the brief were *Grover L. Broadfoot,* Attorney General, and *Stewart G. Honeck,* Deputy Attorney General.

Jackson M. Bruce argued the cause for the Briggs & Stratton Corp., respondent. With him on the brief were *Edgar L. Wood* and *Bernard V. Brady.*

Max Raskin filed a brief for the Wisconsin State Industrial Union Council, as *amicus curiae,* in support of petitioners.

Briefs urging affirmance were filed as *amici curiae* by the following: A joint brief by *Guy E. Williams,* Attorney General, for the State of Arkansas, *J. Tom Watson,* Attorney General, for the State of Florida, *Robert L. Larson,* Attorney General, for the State of Iowa, *Eugene F. Black,* Attorney General, and *Edmund E. Shepherd,* Solicitor General, for the State of Michigan, *Walter R. Johnson,* Attorney General, for the State of Nebraska, *P. O. Sathre,* Attorney General, for the State of North Dakota, *Roy H. Beeler,* Attorney General, for the State of Tennessee, and *Grover A. Giles,* Attorney General, for the State of Utah; by *T. McKeen Chidsey,* Attorney General, *M. Louise Rutherford,* Deputy Attorney General, and *George L. Reed,* Solicitor, State Labor Relations Board, for the State of Pennsylvania; by *Leon B. Lamfrom* for the Employers Association of Milwaukee; and by *Howard Johnson* for the Wisconsin Manufacturers' Association et al.

Mr. Justice Jackson delivered the opinion of the Court.

Certain labor legislation of the State of Wisconsin,[1] as applied by its Supreme Court, is challenged because it is said to transgress constitutional limitations imposed

[1] The Wisconsin Employment Peace Act provides in part as follows:

"It shall be an unfair labor practice for an employe individually or in concert with others: (a) To coerce or intimidate an employe

by the Thirteenth and Fourteenth Amendments and by the Commerce Clause [2] as implemented by the National Labor Relations Act [3] and the Labor Management Relations Act of 1947.[4]

The Supreme Court of Wisconsin held [5] that its Act authorizes the State Employment Relations Board to order a labor union to cease and desist from instigating certain intermittent and unannounced work stoppages which it had caused under the following circumstances: Briggs & Stratton Corporation operates two manufacturing plants in the State of Wisconsin engaging approximately 2,000 employees. These are represented by the International Union, Automobile Workers of America, A. F. of L., Local No. 232, as collective bargaining agent, it having been duly certified as such by the National Labor Relations Board in proceedings under the National Labor Relations Act. Under such certification, the Union had

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in the enjoyment of his legal rights, including those guaranteed in section 111.04, or to intimidate his family, picket his domicile, or injure the person or property of such employe or his family. . . . (e) To co-operate in engaging in, promoting or inducing picketing (not constituting an exercise of constitutionally guaranteed free speech), boycotting or any other overt concomitant of a strike unless a majority in a collective bargaining unit of the employes of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike. . . . (h) To take unauthorized possession of property of the employer or to engage in any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike." Wis. Stat. (1947) c. 111, § 111.06 (2).

[2] U. S. Const., Art. 1, § 8, Cl. 3, giving the Congress power "To regulate Commerce . . . among the several States . . . ."

[3] 49 Stat. 449; 29 U. S. C. §§ 151–166.

[4] 61 Stat. 136; 29 U. S. C. §§ 141–197.

[5] 250 Wis. 550, 27 N. W. 2d 875. The State Supreme Court concluded that petitioners were guilty of unfair labor practices as defined in §§ 111.06 (2) (a), (e) and (h) of the Wisconsin statutes. Those provisions are set out in note 1.

negotiated collective bargaining agreements, the last of which expired on July 1, 1944. Negotiation of a new one reached a deadlock and bargaining sessions continued for some time without success.

On November 3, 1945, its leaders submitted to the Union membership a plan for a new method of putting pressure upon the employer. The stratagem consisted of calling repeated special meetings of the Union during working hours at any time the Union saw fit, which the employees would leave work to attend. It was an essential part of the plan that this should be without warning to the employer or notice as to when or whether the employees would return. The device was adopted and the first surprise cessation of work was called on November 6, 1945; thereafter, and until March 22, 1946, such action was repeated on twenty-six occasions. The employer was not informed during this period of any specific demands which these tactics were designed to enforce nor what concessions it could make to avoid them.[6]

This procedure was publicly described by the Union leaders as a new technique for bringing pressure upon the employer. It was, and is, candidly admitted that these tactics were intended to and did interfere with production and put strong economic pressure on the employer, who was disabled thereby from making any dependable production plans or delivery commitments. And it was said that "this can't be said for the strike. After the initial surprise of the walkout, the company knows what it has to do and plans accordingly." It was

[6] Petitioners suggest that the stoppages were initiated to force the employer to comply with a War Labor Board directive. However, the stoppages began several weeks before that directive reached either the Union or the employer. By the latter date, the National Board had been abolished. Consequently the issuance of the directive would not seem to throw any light on the Union's motives or to have any effect on the State Board's jurisdiction.

commended as a procedure which would avoid hardships that a strike imposes on employees and was considered "a better weapon than a strike."

The employer did not resort to any private disciplinary measures such as discharge of the employees; instead, it sought a much less drastic remedy by plea to the appropriate public authority under Wisconsin law [7] to investigate and adjudge the Union's conduct under the law of the State. After the prescribed procedures, the Board ordered the Union to cease and desist from "(a) engaging in any concerted efforts to interfere with production by arbitrarily calling union meetings and inducing work stoppages during regularly scheduled working hours; or engaging in any other concerted effort to interfere with production of the complainant except by leaving the premises in an orderly manner for the purpose of going on strike." [8]

Two court proceedings resulted from the Board's order: one by the Board to obtain enforcement and the other by the Union to obtain review. They are here considered, as they were below, together.

The Supreme Court of Wisconsin sustained the Board's order but significantly limited the effect of its otherwise general prohibitions. It held that what the order does, and all that it does, is to forbid individual defendants and members of the Union from engaging in concerted effort to interfere with production by doing the acts in-

[7] The Employment Relations Board was created by the 1939 Act. See Wis. Stat. (1947) c. 111, § 111.03. The Board's jurisdiction over unfair labor practices is delineated in § 111.07.

[8] The Board also ordered petitioners to cease and desist from "(b) Coercing or intimidating employes by threats of violence or other punishment to engage in any activities for the purpose of interfering with production or that will interfere with the legal rights of the employes." This provision of the order, based on evidence of some violence and threats, is not challenged here.

stantly involved. As we have heretofore pointed out, the construction placed upon such an order by the State Supreme Court is conclusive on us. *Allen-Bradley Local* v. *Wisconsin Employment Relations Board,* 315 U. S. 740. Our only question is, therefore, whether it is beyond the power of the State to prohibit the particular course of conduct described.[9]

The Union contends that the statute as thus applied violates the Thirteenth Amendment in that it imposes a form of compulsory service or involuntary servitude. However, nothing in the statute or the order makes it a crime to abandon work individually (compare *Pollock* v. *Williams,* 322 U. S. 4) or collectively. Nor does either undertake to prohibit or restrict any employee from leaving the service of the employer, either for reason or without reason, either with or without notice. The facts afford no foundation for the contention that any action of the State has the purpose or effect of imposing any form of involuntary servitude.

It is further contended that the statute as applied invades rights of free speech and public assemblage guaranteed by the Fourteenth Amendment. We recently considered a similar contention in connection with other state action concerning labor relations. *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.,* and *Whitaker* v. *North Carolina,* 335 U. S. 525, and *American Federation of Labor* v. *American Sash & Door Co.,* 335

[9] In the consolidated case before the Circuit Court of Milwaukee County, that court denied enforcement of paragraph (a) of the Board's order forbidding the work stoppages, but upheld paragraph (b) enjoining violence and threats. See note 8. The Supreme Court approved the order in its entirety. Review of that court's action in upholding paragraph (a) is sought in these petitions by the Union and nine of its officers, seven of whom are employees of respondent corporation, and all of whom are members of the Union's Bargaining Committee.

U. S. 538. For reasons there stated, these contentions are without merit.

No serious question is presented by the Commerce Clause of the Constitution standing alone. It never has been thought to prevent the state legislatures from limiting "individual and group rights of aggression and defense" or from substituting "processes of justice for the more primitive method of trial by combat." Mr. Justice Brandeis, dissenting, *Duplex Co.* v. *Deering,* 254 U. S. 443, 488; see also *Dorchy* v. *Kansas,* 272 U. S. 306, 311, cited with approval, *Thornhill* v. *Alabama,* 310 U. S. 88, 103; and see *Hotel & Restaurant Employees' Local* v. *Wisconsin Employment Relations Board,* 315 U. S. 437.

The substantial issue is whether Congress has protected the union conduct which the State has forbidden, and hence the state legislation must yield. When the order of the State Board and the decision of the State Supreme Court were made, the National Labor Relations Act, 49 Stat. 449, 29 U. S. C. §§ 151–166, was in effect and questions of conflict between state and federal law were raised and decided with reference to it. However, the order imposes a continuing restraint which it is contended now conflicts with the Labor Management Relations Act of 1947, 61 Stat. 136, 29 U. S. C. §§ 141–197, which amended the earlier statute. We therefore consider the state action in relation to both Federal Acts.

Congress has not seen fit in either of these Acts to declare either a general policy or to state specific rules as to their effects on state regulation of various phases of labor relations over which the several states traditionally have exercised control. Cf. Securities Act of 1933, § 18, 48 Stat. 74, 85, 15 U. S. C. § 77r; Securities Exchange Act of 1934, § 28, 48 Stat. 881, 903, 15 U. S. C. § 78bb; United States Warehouse Act, before and after 1931 Amendment, 39 Stat. 486, 490, 46 Stat. 1465, 7

U. S. C. § 269. However, as to coercive tactics in labor controversies, we have said of the National Labor Relations Act what is equally true of the Labor Management Relations Act of 1947, that "Congress designedly left open an area for state control" and that the "intention of Congress to exclude States from exercising their police power must be clearly manifested." *Allen-Bradley Local v. Wisconsin Employment Relations Board,* 315 U. S. 740, 750, 749. We therefore turn to its legislation for evidence that Congress has clearly manifested an exclusion of the state power sought to be exercised in this case.

Congress made in the National Labor Relations Act no express delegation of power to the Board to permit or forbid this particular union conduct, from which an exclusion of state power could be implied. The Labor Management Relations Act declared it to be an unfair labor practice for a union to induce or engage in a strike or concerted refusal to work where an object thereof is any of certain enumerated ones. § 8 (b) (4), 61 Stat. 140, 141; 29 U. S. C. § 158 (b) (4). Nevertheless the conduct here described is not forbidden by this Act and no proceeding is authorized by which the Federal Board may deal with it in any manner. While the Federal Board is empowered to forbid a strike, when and because its purpose is one that the Federal Act made illegal, it has been given no power to forbid one because its method is illegal—even if the illegality were to consist of actual or threatened violence to persons or destruction of property. Policing of such conduct is left wholly to the states. In this case there was also evidence of considerable injury to property and intimidation of other employees by threats and no one questions the State's power to police coercion by those methods.[10]

[10] See notes 8 and 9.

It seems to us clear that this case falls within the rule announced in *Allen-Bradley* [11] that the state may police these strike activities as it could police the strike activities there, because "Congress has not made such employee and union conduct as is involved in this case subject to regulation by the federal Board." There is no existing or possible conflict or overlapping between the authority of the Federal and State Boards, because the Federal Board has no authority either to investigate, approve or forbid the union conduct in question. This conduct is governable by the State or it is entirely ungoverned.

This case is not analogous to *Bethlehem Steel Co.* v. *New York State Labor Relations Board,* 330 U. S. 767, on which petitioners rely. There the State Board undertook to determine the bargaining unit in an industry, an identical question which the Federal Board was authorized to determine, and the two had deliberately laid down contrary policies to govern decisions of this same matter. In that case, of course, the federal policy was necessarily given effect as the supreme law of the land. See also *La Crosse Telephone Corporation* v. *Wisconsin Employment Relations Board, ante,* p. 18.

But it is claimed that the congressional labor legislation confers upon or recognizes and declares in unions and employees certain rights, privileges or immunities in connection with strikes and concerted activities, and that these are denied by the State's prohibition as laid down in this case. It is elementary that what Congress constitutionally has given, the state may not constitutionally take away. *Hill* v. *Florida,* 325 U. S. 538.

The argument is that two provisions, found in §§ 7 and 13 of the National Labor Relations Act, not relevantly changed by the Labor Management Relations Act of

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[11] *Allen-Bradley Local* v. *Wisconsin Employment Relations Board,* 315 U. S. 740, 749.

1947, grant to the Union and its members the right to put pressure upon the employer by the recurrent and unannounced stoppage of work. Both Acts provide that "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection." [12] Because the acts forbidden by the Wisconsin judgment are concerted activities and had a purpose to assist labor organizations in collective bargaining, it is said to follow that they are federally authorized and thereby immunized from state control.

It is urged here that we are bound to hold these activities protected by § 7 because that has become the settled interpretation of the Act by the Board charged with its administration. This contention is based on decisions by the Board in *American Mfg. Concern,* 7 N. L. R. B. 753; *Harnischfeger Corp.,* 9 N. L. R. B., 676; *The Good Coal Co.,* 12 N. L. R. B. 136; *Armour & Co.,* 25 N. L. R. B. 989; *Cudahy Packing Co.,* 29 N. L. R. B. 837; and *Mt. Clemens Pottery Company,* 46 N. L. R. B. 714. We do not think it can fairly be said that even the cumulative effect of those cases amounts to a fixed Board interpretation that all work stoppages are federally protected concerted activities. In those cases, but in a context of antiunion animus on the employer's part, the Board condemned as unfair labor practices summary discharges attempted in retaliation for isolated work stoppages re-

[12] § 7 of National Labor Relations Act, 49 Stat. 449, 452. The Labor Management Relations Act of 1947 added a proviso that employees also have the right to refrain from any or all activities mentioned in this section, except to the extent that the right to refrain might conflict with an agreement requiring membership in a union as a condition of employment as authorized by the Act. 61 Stat. 140.

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flecting temporary rebellion over rules or conditions of work. The drastic remedy of discharge, so outweighing any possible damage in those cases to the employer and so tainted by antiunion motives, led to the Board's conclusion of unfair labor practices proscribed by the Act. The Board, however, made it clear in the *Harnischfeger* and *Armour* cases that such a conclusion does not necessarily follow a finding that the employees' activities were concerted:

> ". . . Section 7 of the Act expressly guarantees employees the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. We do not interpret this to mean that it is unlawful for an employer to discharge an employee for *any* activity sanctioned by a union or otherwise in the nature of collective activity. The question before us is, we think, whether this particular activity was so indefensible, under the circumstances, as to warrant the respondent, under the Act, in discharging the stewards for this type of union activity. We do not think it was." [13]

In view of that statement, the facts of the present case do not bring it within the protection of the Act as administered by the Board. Here the employer has resorted to no retaliatory measures and its motive in asking help from the State is not even alleged to be antiunion but merely a desire to keep its plant in operation. The remedy sought against repeated disruption of production is not summary dismissal but invocation of a statutory procedure made available by the State for the adjudication and resolution of such difficulties. Consequently, we do not find any fixed Board policy to apply the Act to such facts as we have here. The quoted state-

[13] 9 N. L. R. B. 676, 686; 25 N. L. R. B. 989, 996.

ment from the Board's two opinions indicates lack of belief that it was creating any such rule.

However, in no event could the Board adopt such a binding practice as to the scope of § 7 in the light of the construction, with which we agree, given to § 7 by the Courts of Appeals, authorized to review Board orders. In similar cases they have denied comparable work stoppages the protection of that section. *C. G. Conn, Ltd.* v. *Labor Board,* 108 F. 2d 390; *Labor Board* v. *Condenser Corp.,* 128 F. 2d 67; *Home Beneficial Life Ins. Co.* v. *Labor Board,* 159 F. 2d 280; and see *Labor Board* v. *Draper Corp.,* 145 F. 2d 199; *Labor Board* v. *Indiana Desk Co.,* 149 F. 2d 987. To hold that the alleged fixed Board interpretation has irrevocably labeled all concerted activities "protected" would be in the teeth of the Board's own language and would deny any effect to the Courts of Appeals' decisions. The latter decisions and our own, *Labor Board* v. *Fansteel Corp.,* 306 U. S. 240; *Southern S. S. Co.* v. *Labor Board,* 316 U. S. 31; *Labor Board* v. *Sands Mfg. Co.,* 306 U. S. 332; *Allen-Bradley Local* v. *Wisconsin Employment Relations Board,* 315 U. S. 740; and see *Hotel & Restaurant Employees' Local* v. *Wisconsin Employment Relations Board,* 315 U. S. 437, clearly interdict any rule by the Board that every type of concerted activity is beyond the reach of the states' adjudicatory machinery. The bare language of § 7 cannot be construed to immunize the conduct forbidden by the judgment below and therefore the injunction as construed by the Wisconsin Supreme Court does not conflict with § 7 of the Federal Act.

In the light of labor movement history, the purpose of the quoted provision of the statute becomes clear. The most effective legal weapon against the struggling labor union was the doctrine that concerted activities were conspiracies, and for that reason illegal. Sec-

tion 7 of the National Labor Relations Act took this conspiracy weapon away from the employer in employment relations which affect interstate commerce. No longer can any state, as to relations within reach of the Act, treat otherwise lawful activities to aid unionization as an illegal conspiracy merely because they are undertaken by many persons acting in concert.[14] But because legal conduct may not be made illegal by concert, it does not mean that otherwise illegal action is made legal by concert.

Reliance also is placed upon § 13 of the National Labor Relations Act, which provided, "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike." 49 Stat. 449, 457. The 1947 Amendment carries the same provision but that Act includes a definition. Section 501 (2) says that when used in the Act "The term 'strike' includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees." 61 Stat. 161.

This provision, as carried over into the Labor Management Relations Act, does not purport to create, establish or define the right to strike. On its face it is narrower in scope than § 7—the latter would be of little significance if "strike" is a broader term than "concerted activity." Unless we read into § 13 words which Congress omitted

[14] With respect to activities subject to state control, § 111.04 of the Wisconsin statutes provides that employees shall have the right of self-organization, the right to form, join and assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection. Section 111.06 (1) makes it an unfair labor practice for an employer to interfere with, restrain or coerce his employees in the exercise of the rights guaranteed in § 111.04, and lists other unfair labor practices which the Board is also empowered to prevent.

and a sense which Congress showed no intention of including, all that this provision does is to declare a rule of interpretation for the Act itself which would prevent any use of what originally was a novel piece of legislation to qualify or impede whatever right to strike exists under other laws. It did not purport to modify the body of law as to the legality of strikes as it then existed. This Court less than a decade earlier had stated that law to be that the state constitutionally could prohibit strikes and make a violation criminal. It had unanimously adopted the language of Mr. Justice Brandeis that "Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike." *Dorchy* v. *Kansas,* 272 U. S. 306, 311. Dissenting views most favorable to labor in other cases had conceded the right of the state legislature to mark the limits of tolerable industrial conflict in the public interest. *Duplex Co.* v. *Deering,* 254 U. S. 443, 488. This Court has adhered to that view. *Thornhill* v. *Alabama,* 310 U. S. 88, 103. The right to strike, because of its more serious impact upon the public interest, is more vulnerable to regulation than the right to organize and select representatives for lawful purposes of collective bargaining which this Court has characterized as a "fundamental right" and which, as the Court has pointed out, was recognized as such in its decisions long before it was given protection by the National Labor Relations Act. *Labor Board* v. *Jones & Laughlin,* 301 U. S. 1, 33.

As to the right to strike, however, this Court, quoting the language of § 13, has said, 306 U. S. 240, 256, "But this recognition of 'the right to strike' plainly contemplates a lawful strike,—the exercise of the unquestioned right to quit work," and it did not operate to legalize the sit-down strike, which state law made illegal and state authorities punished. *Labor Board* v. *Fansteel Corp.,* 306 U. S. 240. Nor, for example, did it make legal a strike that ran afoul of federal law, *Southern S. S. Co.* v. *Labor Board,*

316 U. S. 31; nor one in violation of a contract made pursuant thereto, *Labor Board* v. *Sands Mfg. Co.,* 306 U. S. 332; nor one creating a national emergency, *United States* v. *United Mine Workers,* 330 U. S. 258.

That Congress has concurred in the view that neither § 7 nor § 13 confers absolute right to engage in every kind of strike or other concerted activity does not rest upon mere inference; indeed the record indicates that, had the courts not made these interpretations, the Congress would have gone as far or farther in the direction of limiting the right to engage in concerted activities including the right to strike. The House Committee of Conference handling the bill which became the Labor Management Relations Act, on June 3, 1947 advised the House to recede from its disagreement with the Senate and to accept the present text upon grounds there stated under the rubric "Rights of Employees." H. R. Rep. No. 510, 80th Cong., 1st Sess., p. 38. The Committee pointed out that "the courts have firmly established the rule that under the existing provisions of section 7 of the National Labor Relations Act, employees are not given any right to engage in unlawful or other improper conduct. In its most recent decisions the Board has been consistently applying the principles established by the courts. . . ." And "it was believed that the specific provisions in the House bill excepting unfair labor practices, unlawful concerted activities, and violation of collective bargaining agreements from the protection of section 7 were unnecessary. Moreover, there was real concern that the inclusion of such a provision might have a limiting effect and make improper conduct not specifically mentioned subject to the protection of the act." The full text of this section of the report is printed in the margin.[15]

[15] "Both the House bill and the Senate amendment in amending the National Labor Relations Act preserved the right under section 7 of that act of employees to self-organization, to form, join, or assist

Thus, the obvious purpose of the Labor Management Amendments was not to grant a dispensation for the strike but to outlaw strikes when undertaken to enforce

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any labor organization, and to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. The House bill, however, made two changes in that section of the act. *First,* it was stated specifically that the rights set forth were not to be considered as including the right to commit or participate in unfair labor practices, unlawful concerted activities, or violations of collective bargaining contracts. *Second,* it was specifically set forth that employees were also to have the right to refrain from self-organization, etc., if they chose to do so.

"The first change in section 7 of the act made by the House bill was inserted by reason of early decisions of the Board to the effect that the language of section 7 protected concerted activities regardless of their nature or objectives. An outstanding decision of this sort was the one involving a 'sit down' strike wherein the Board ordered the reinstatement of employees who engaged in this unlawful activity. Later the Board ordered the reinstatement of certain employees whose concerted activities constituted mutiny. In both of the above instances, however, the decision of the Board was reversed by the Supreme Court. More recently, a decision of the Board ordering the reinstatement of individuals who had engaged in mass picketing was reversed by the Circuit Court of Appeals (*Indiana Desk Co.* v. *N. L. R. B.*, 149 Fed. (2d) 987) (1944).

"Thus the courts have firmly established the rule that under the existing provisions of section 7 of the National Labor Relations Act, employees are not given any right to engage in unlawful or other improper conduct. In its most recent decisions the Board has been consistently applying the principles established by the courts. For example, in the *American News Company case* (55 N. L. R. B. 1302) (1944) the Board held that employees had no right which was protected under the act to strike to compel an employer to violate the wage stabilization laws. Again, in the *Scullin Steel case* (65 N. L. R. B. 1294) and in the *Dyson case* (decided February 7, 1947), the Board held that strikes in violation of collective bargaining contracts were not concerted activities protected by the act, and refused to reinstate employees discharged for engaging in such activities. In the second *Thompson Products case* (decided February 21, 1947) the Board held that strikes to compel the employer to vio-

what the Act calls unfair labor practices, an end which would be defeated if we sustain the Union's claim in this respect. By § 8 (b) (4), strikes to attain named ob-

late the act and rulings of the Board thereunder were not concerted activities protected by the provisions of section 7. The reasoning of these recent decisions appears to have had the effect of overruling such decisions of the Board as that in *Matter of Berkshire Knitting Mills* (46 N. L. R. B. 955 (1943)), wherein the Board attempted to distinguish between what it considered as major crimes and minor crimes for the purpose of determining what employees were entitled to reinstatement.

"By reason of the foregoing, it was believed that the specific provisions in the House bill excepting unfair labor practices, unlawful concerted activities, and violation of collective bargaining agreements from the protection of section 7 were unnecessary. Moreover, there was real concern that the inclusion of such a provision might have a limiting effect and make improper conduct not specifically mentioned subject to the protection of the act.

"In addition, other provisions of the conference agreement deal with this particular problem in general terms. For example, in the declaration of policy to the amended National Labor Relations Act adopted by the conference committee, it is stated in the new paragraph dealing with improper practices of labor organizations, their officers, and members, that the 'elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.' This in and of itself demonstrates a clear intention that these undesirable concerted activities are not to have any protection under the act, and to the extent that the Board in the past has accorded protection to such activities, the conference agreement makes such protection no longer possible. Furthermore, in section 10 (c) of the amended act, as proposed in the conference agreement, it is specifically provided that no order of the Board shall require the reinstatement of any individual or the payment to him of any back pay if such individual was suspended or discharged for cause, and this, of course, applies with equal force whether or not the acts constituting the cause for discharge were committed in connection with a concerted activity. Again, inasmuch as section 10 (b) of the act, as proposed to be amended by the conference agreement, requires that the rules of evidence applicable in the district courts shall, so far as practicable, be followed and applied by the Board,

jectives are made unfair labor practices; and by § 10 (a),[16] the Board is authorized to prevent them. The definition plainly enough was designed to enable the Board to order a union to cease and desist from a strike so made illegal, whether it consisted of a strike in the usual or conventional meaning or consisted of some of the other practices mentioned in the definition. However, if we add the definition to § 13, it does not change the effect of the Act on state powers. It still gives the Federal Board no authority to prohibit or to supervise the activity which the State Board has here stopped nor to entertain any proceeding concerning it, because it is the objectives only and not the tactics of a strike which bring it within the power of the Federal Board. And § 13 plus the definition only provides that "Nothing in this Act . . . shall be construed so as either to interfere with or impede" the right to engage in these activities. What other Acts or other state laws might do is not attempted to be regu-

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proof of acts of unlawful conduct cannot hereafter be limited to proof of confession or conviction thereof.

"The second change made by the House bill in section 7 of the act (which is carried into the conference agreement) also has an important bearing on the kinds of concerted activities which are protected by section 7. That provision, as heretofore stated, provides that employees are also to have the right to refrain from joining in concerted activities with their fellow employees if they choose to do so. Taken in conjunction with the provisions of section 8 (b) (1) of the conference agreement (which will be hereafter discussed), wherein it is made an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of rights guaranteed in section 7, it is apparent that many forms and varieties of concerted activities which the Board, particularly in its early days, regarded as protected by the act will no longer be treated as having that protection, since obviously persons who engage in or support unfair labor practices will not enjoy immunity under the act."

[16] 61 Stat. 136, 146, 29 U. S. C. § 160 (a).

lated by this section. Since reading the definition into § 13 confers neither federal power to control the activities in question nor any immunity from the exercise of state power in reference to them, it can have no effect on the right of the State to resort to its own reserved power over coercive conduct as it has done in this instance.

If we were to read § 13 as we are urged to do, to make the strike an absolute right and the definition to extend the right to all other variations of the strike,[17] the effect would be to legalize beyond the power of any state or federal authorities to control not only the intermittent stoppages such as we have here but also the slowdown and perhaps the sit-down strike as well. Cf. *Allen-Bradley Local* v. *Wisconsin Employment Relations Board,* 315 U. S. 740, 751. And this is not all; the management also would be disabled from any kind of self-help to cope with these coercive tactics of the union except to submit to its undeclared demands. To dismiss or discipline employees for exercising a right given them under the Act or to interfere with them or the union in pursuing it is made an unfair labor practice and if the rights here asserted are rights conferred by the Labor Management Relations Act, it is hard to see how the management can take any steps to resist or combat them without incurring the sanctions of the Act. It is certain that such a result would be inconsistent with the whole purpose disclosed by the Labor Management Relations Act amendments to the National Labor Relations Act. Nor do we think such is the result of any fair interpretation of the text of the Act.

We think that this recurrent or intermittent unannounced stoppage of work to win unstated ends was

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[17] To call these stoppages a strike we would have to ignore petitioners' own conception of this activity. As we have shown, they adopted this technique precisely because it was believed to be "better than a strike." See text, pp. 249–250.

neither forbidden by federal statute nor was it legalized and approved thereby. Such being the case, the state police power was not superseded by congressional Act over a subject normally within its exclusive power and reachable by federal regulation only because of its effects on that interstate commerce which Congress may regulate. *Labor Board* v. *Jones & Laughlin,* 301 U. S. 1; *Bethlehem Steel Co.* v. *Board,* 330 U. S. 767.

We find no basis for denying to Wisconsin the power, in governing her internal affairs, to regulate a course of conduct neither made a right under federal law nor a violation of it and which has the coercive effect obvious in this device.

The judgments are

Affirmed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK and MR. JUSTICE RUTLEDGE concur, dissenting.

This strike was legal under the Wagner Act in 1945 and 1946 and its legality was not affected by the Labor Management Relations Act of 1947. I think, therefore, that the effort of Wisconsin to make it unlawful must fail because it conflicts with the national policy.

Section 13 of the Wagner Act is written in language too plain to admit of doubt or ambiguity: "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike." The Court held in *Labor Board* v. *Fansteel Corp.,* 306 U. S. 240, 256, that by this provision Congress "recognized the right to strike,—that the employees could lawfully cease work at their own volition because of the failure of the employer to meet their demands." The congressional policy of protection of strikes as economic sanctions is now converted into a congressional policy of hands-off.

If the States can outlaw this strike, I see no reason why they cannot adopt regulations which determine the manner in which strikes may be called in these interstate

industries. Can they in practical effect outlaw strikes by requiring a unanimous vote of the workers in order to call one? The federal Board is not authorized, it is said, to forbid or control strikes because of the method by which they are called or the way in which they are utilized. If that is the criterion, as the Court declares, then the manner of calling of strikes is left wholly to the States. The right to strike, which Congress has sanctioned, can in that way be undermined by state action. The federal policy thus becomes a formula of empty words.

That conclusion is made all the more surprising when § 13 of the Act is read in conjunction with § 7 which provides, "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, *and to engage in concerted activities,* for the purpose of collective bargaining *or other mutual aid or protection.*"[1] (Italics added.) Section 7 read in conjunction with § 13 must mean that one of the "concerted activities" in which employees may engage is to strike in these interstate industries. In all of labor's history no "concerted activity" has been more conspicuous and important than the strike; and none was thought to be more essential to recognition of the right to collective bargaining. Moreover, the strike historically and in the present cases was used to make effective the collective bargaining power which § 7 of the Wagner Act guarantees. The right to

[1] It was held in *Labor Board* v. *Peter C. K. Swiss Choc. Co.,* 130 F. 2d 503, 505, 506, that the right to engage in a sympathetic strike or a secondary boycott was a concerted activity protected by § 7 prior to the 1947 amendments. It was also held in *Labor Board* v. *Remington Rand, Inc.,* 94 F. 2d 862, 871, that a strike because of an employer's refusal to negotiate was protected by § 13, and employees so engaged could recover their positions even at the expense of workers hired to replace them during the strike.

strike, recognized by § 13, is thus an integral part of the federal labor-management policy.

Section 7 was invoked in *Allen-Bradley Local* v. *Wisconsin Employment Relations Board,* 315 U. S. 740, 750, to challenge as unconstitutional Wisconsin's regulation of picketing, threats, and violence in connection with labor disputes. We disallowed the defense, holding that those matters were problems within the reach of the traditional police power of the States and remained there after passage of the federal Act because it had not undertaken to regulate them.

The Wagner Act, to be sure, did not undertake to give the federal agency control over the manner of calling strikes or the purpose for which they may be called. To that extent these cases have common ground with the *Allen-Bradley* decision. But there the similarity ends. In *Allen-Bradley* the Congress had not expressed a policy on picketing, threats or violence in connection with labor disputes. In this case, as § 13 read in conjunction with § 7 makes plain, it has adopted a policy on strikes.

It is the presence of a conflicting federal policy that determines whether state action must give way under the Supremacy Clause,[2] even though there may be no actual or potential collision between federal and state administrative agencies. *Rice* v. *Santa Fe Elevator Corp.,* 331 U. S. 218. In *Hill* v. *Florida,* 325 U. S. 538, a state regulation of the licensing of business agents of unions subject to the federal Act was held to be in conflict with the Wagner Act not because the federal Board had any licensing jurisdiction but because the state law interfered with the freedom of collective bargaining guaranteed by § 7 of the Act. The present cases follow *a fortiori,* if the strike is included in the "concerted activities" guaranteed by § 7.

[2] Article VI, Clause 2 of the Constitution.

The concerted activities in these cases were as old as labor's struggle for existence and were aimed at (as well as a part of) the purposes which § 7 of the federal Act was designed to protect.[3] Therefore the legality of the methods used is exclusively a question of federal law.[4]

MR. JUSTICE MURPHY, with whom MR. JUSTICE RUTLEDGE concurs, dissenting.

To interfere with production and to enforce their bargaining demands, employees of Briggs and Stratton called twenty-seven union meetings during working hours with-

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[3] Although this litigation is controlled by the Wagner Act, there is nothing in the Labor Management Relations Act of 1947 that suggests that Congress wished to withdraw its protection from the right to strike except to the extent specially provided by the amendments to the Act. See S. Rep. No. 105, 80th Cong., 1st Sess. 28 (1947). It makes some strikes unfair labor practices. 61 Stat. 141, 29 U. S. C. § 158 (b). But the strikes so condemned concededly do not include the kind we have in the present cases. The amendments to §§ 7 and 13, 29 U. S. C. §§ 157, 163, do not restrict the right as it previously existed. Moreover, the 1947 legislation comprehensively defines a strike, 29 U. S. C. § 142, as "any concerted slow-down or other concerted interruption of operations by employees," which is broad enough to include the activity which Wisconsin has condemned here.

[4] The Court heretofore has held that the measure of the right to strike in these interstate industries is a question of federal law. *Labor Board* v. *Fansteel Corp.*, 306 U. S. at 255–257. Thus § 2 (3) of the Wagner Act defined employee to "include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute . . . ." 49 Stat. 450, 29 U. S. C. § 152 (3). In accordance with this section the Court has held that participation in a strike did not remove workers from the protection of the Act and that they retained the status of employees. See *Labor Board* v. *Mackay Co.*, 304 U. S. 333, 345–347. The question of what is a "labor dispute" within the meaning of § 2 (3) necessarily involves a consideration of whether the strike was or was not justified. See *Labor Board* v. *Stackpole Carbon Co.*, 105 F. 2d 167, 176.

Determination of the legality of strikes in interstate industries by federal law is necessary if the administration of the federal system

out advance notice to the employer. Employees left their work and returned later in the day, or the following day. Wisconsin has made this concerted activity unlawful. The question is whether the State's action violates the federal guarantee contained in § 7 of the Wagner and Taft-Hartley Acts: "Employees shall have the right to . . . engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

We have recognized that the phrase "concerted activities" does not make every union activity a federal right. We have held that violence by strikers is not protected, *Allen-Bradley Local* v. *Wisconsin Employment Relations Board,* 315 U. S. 740; that a sit-down strike, *Labor Board* v. *Fansteel Corp.,* 306 U. S. 240, a mutiny, *Southern S. S. Co.* v. *Labor Board,* 316 U. S. 31, and a strike in violation of a contract, *Labor Board* v. *Sands Mfg. Co.,* 306 U. S. 332, must be withdrawn from the literal language of § 7.

But the Court, by its reasoning and its quotation from a Congressional report, now makes intermittent work stoppages the equivalent of mutiny, contract-breaking, and the sit-down strike. It stretches the "objectives and means" test to include a form of pressure which is peaceful and direct. In effect, it adopts the employer's plea that it cannot plan production schedules, cannot notify its customers and suppliers, cannot determine its output with any degree of certainty and that these inconveniences withdraw this activity from § 7 of the national statutes. The majority and the Wisconsin court call the weapon objectionable, then, only because it is effective.

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of labor-management relations is to be uniform and harmonious. The status of workers as employees will determine what relief they may be entitled to under the federal Act. See *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177. Reinstatement rights may indeed depend on whether a worker has lost his status as an employee through activities not comprehended in the federal protection of the right to strike. *Labor Board* v. *Fansteel Corp., supra.*

To impute this rationale to the Congress which enacted the Wagner Act is, in my opinion, judicial legislation of an extreme form.

The Court chooses to ignore the consistent policy of the agency charged with primary responsibility in interpreting and administering § 7. The National Board has repeatedly held that work stoppages of this nature are "partial strikes" and "concerted activities" within the meaning of § 7. *Cudahy Packing Company,* 29 N. L. R. B. 837, 863; *Armour & Company,* 25 N. L. R. B. 989; *The Good Coal Company,* 12 N. L. R. B. 136, 146; *American Mfg. Concern,* 7 N. L. R. B. 753, 758; *Harnischfeger Corporation,* 9 N. L. R. B. 676, 685; *Mt. Clemens Pottery Company,* 46 N. L. R. B. 714, 716. In each of these six cases, the Board's interpretation of § 7 is directly contrary to that reached by the Court in the case before us. In each case the Board concluded that work stoppages or "partial strikes" cannot be withdrawn from the language of § 7. To ignore the Board's consistent rulings in this case is a new and unique departure from the rule of deference to settled administrative interpretation. The fact that the stoppages in the Board cases were fewer in number than those at Briggs and Stratton is not, of course, a controlling difference—unless we are to say that the stoppages are not protected by § 7 because they are effective from the union's point of view.

Wisconsin's action clearly conflicts with § 7, and accordingly, I would reverse the judgment.

GRAVER TANK & MFG. CO., INC. ET AL. *v.* LINDE AIR PRODUCTS CO.

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

Nos. 184 and 185. Argued January 5–6, 1949.—Decided February 28, 1949.

1. Certain flux claims of Jones patent No. 2,043,960, for an electric welding process and for fluxes, or compositions, to be used therewith, *held* valid and infringed. Pp. 273–276.

   (a) This Court, being a court of law rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error. Pp. 274–275.

   (b) While the ultimate question of patentability is one of meeting the requirements of the statute, the facts found by the two courts below with respect to these claims warrant a conclusion by this Court as a matter of law that those statutory requirements have been met. P. 275.

   (c) The two courts below found that these claims were infringed and this Court finds no cause for reversal. Pp. 275–276.

2. Certain other flux claims of the same patent *held* invalid as being too broad and comprehending more than the invention. Pp. 276–277.

   (a) While vain repetition is no more to be encouraged in patents than in other documents, and claims like other statements may incorporate other matters by reference, their text must be sufficient to "particularly point out and distinctly claim" an identifiable invention or discovery. P. 277.

   (b) When claims overclaim the invention to the point of invalidity and are free from ambiguity which might justify resort to the specifications, they are not to be saved because the latter are less inclusive. P. 277.

3. All process claims of the same patent *held* invalid. Pp. 277–279.

4. Both courts below having found that the patent had not been abused so as to forfeit the right to maintain an infringement suit based on the claims held valid, this Court affirms their judgment on that point. Pp. 279–280.

167 F. 2d 531, affirmed in part and reversed in part.

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In a suit for infringement of a patent, the District Court held that certain claims were valid and infringed and had not been forfeited by misuse, but that certain other claims were invalid. 75 U. S. P. Q. 231. The Court of Appeals affirmed in part and reversed in part. 167 F. 2d 531. This Court granted certiorari. 335 U. S. 810. *Judgment of the Court of Appeals reversed insofar as it reverses that of the District Court and judgment of the District Court reinstated in toto.* P. 280.

Thomas V. Koykka argued the cause for petitioners. With him on the brief were *John F. Oberlin, Ashley M. Van Duzer, James R. Stewart* and *Charles L. Byron.*

John T. Cahill and *Richard R. Wolfe* argued the cause for respondent. With him on the brief were *James A. Fowler, Jr.* and *Loftus E. Becker.*

Mr. Justice Jackson delivered the opinion of the Court.

Writs of certiorari have been granted, 335 U. S. 810, to review two judgments of the Court of Appeals for the Seventh Circuit involving the same patent. What we shall call the Jones patent was No. 2,043,960, issued to Lloyd Theodore Jones and others, for an electric welding process and for fluxes, or compositions, to be used therewith. The patent is now owned by The Linde Air Products Company, which brought an action for infringement against the Lincoln and two Graver companies.

The District Court held four of the flux claims valid and infringed and concluded that the patent owner had not misused the patent so as to forfeit its claims to relief therefor. It held certain other flux claims and all of the process claims invalid. 75 U. S. P. Q. 231.

The Court of Appeals affirmed the findings that four flux claims were valid and infringed and that the patent had not been abused, but reversed the trial court and held valid the process claims and the remaining contested flux claims. 167 F. 2d 531.

The petitioners contend not only that the Court of Appeals' judgment should be reversed, but that we should also reverse the District Court's finding of partial validity and should declare the patent entirely invalid and not infringed.

At the trial the electric welding prior art and the nature of the Jones invention were explored at length, and opinions of the two courts below, already in the books, adequately discuss the technology of that art and the scientific features of the claims involved. We shall confine this opinion to a statement of the legal principles which lead to our decision.

I. Flux Claims 18, 20, 22 and 23, Held Valid, and Infringed, By Two Courts Below.

Electric welding was an established art before this invention but one with serious limitations which the industry sought to overcome. The known method was slow and laborious and permitted welding of only relatively thin plates. It was of different types, but each had such deficiencies as a dazzling open arc, smoke and splatter, which made operation unpleasant and somewhat hazardous.

Three scientifically trained individuals, Jones, Kennedy and Rotermund, set out purposely to discover a cure for the deficiencies and inadequacies in the method of flux welding, then the most successful method known. They collaborated for some six months in conducting a series of about 500 experiments in the course of which they compounded 75 different flux compositions. They finally produced the invention for which a patent was sought.

The trial court noted that the results produced by their invention contrasted with those possible under all prior methods in that "there is no glare, no open arc, no splatter, and very little, if any, smoke in the Jones, et al. method."

> "The truly remarkable difference, however, between what Jones, Kennedy and Rotermund invented and what had gone on before is perhaps best manifested by the performance achievements of their invention. For instance, only through its use can plates as thick as two and one-half inches be welded in a single pass. Furthermore, the welding speeds made possible by it dwarf those of any other method, and the welds produced by it are of the highest quality in contrast to the great amount of porosity contained in the welds produced by the so-called clay flux process."

The trial court continued: "Since the patentees did invent something patentable over the prior art of electric welding, the collateral questions of what constitutes their invention, and what are its boundaries, become pertinent." He concluded that what was really invented was that which was claimed and bounded by the composition claims Nos. 18, 20, 22 and 23. His findings and conclusion were affirmed by the Court of Appeals. We are now asked to hold that there has been no such invention.

Rule 52 (a) of the Federal Rules of Civil Procedure provides in part: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." To no type of case is this last clause more appropriately applicable than to the one before us, where the evidence is largely the testimony of experts as to which a trial court may be enlightened by scientific demonstrations. This trial occupied some three weeks, during which, as the record shows, the trial judge

visited laboratories with counsel and experts to observe actual demonstrations of welding as taught by the patent and of the welding accused of infringing it, and of various stages of the prior art. He viewed motion pictures of various welding operations and tests and heard many experts and other witnesses. He wrote a careful and succinct opinion and made findings covering all the factual issues.

The rule requires that an appellate court make allowance for the advantages possessed by the trial court in appraising the significance of conflicting testimony and reverse only "clearly erroneous" findings. These are manifestly supported by substantial evidence and the Court of Appeals found them supported by the weight of the evidence—indeed found the evidence to warrant support of the patent even in matters not found by the trial court. A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error. *Goodyear Tire & Rubber Co.* v. *Ray-O-Vac Co.,* 321 U. S. 275; *District of Columbia* v. *Pace,* 320 U. S. 698; *Williams Mfg. Co.* v. *United Shoe Machinery Corp.,* 316 U. S. 364; *Baker* v. *Schofield,* 243 U. S. 114, 118.

No such showing is made. While the ultimate question of patentability is one of meeting the requirements of the statute, R. S. § 4886, as amended, 35 U. S. C. § 31, the facts as found with respect to these four flux claims warrant a conclusion here that as matter of law those statutory requirements have been met. Accordingly, we affirm the judgment insofar as it holds claims numbered 18, 20, 22 and 23 define an invention for which patent has validly issued.

Turning to the question of infringement, the District Court found that the Lincoln Electric Co. made, and the

other petitioners used and sold, a flux substantially identical with that set forth in the valid composition claims of the patent in suit and which could be made by a person skilled in the art merely by following its teachings. The petitioners introduced no evidence to show that their accused flux was derived either from the prior art, by independent experiment or from any source other than the teachings of the patent in suit. The court found infringement of each of the four claims and concluded that the respondent was entitled to a permanent injunction against future infringement and to an accounting for profits and damages. These findings and conclusions were affirmed by the Court of Appeals and we find no cause for reversal.

II. Flux Claims Held Invalid By the District Court and Valid By the Court of Appeals.

The District Court held invalid claims to a flux for use in the process, numbered 24, 26 and 27. The Court of Appeals reversed as to these and held them valid. Remaining flux claims, numbered 19, 21, 25, 28 and 29, were not in issue, and claim 27 we consider along with the process claims.

The difference between the District Court and the Court of Appeals as to these findings comes to this: The trial court looked at claims 24 and 26 alone and declined to interpret the terms "silicates" and "metallic silicates" therein as being limited or qualified by specifications to mean only the nine metallic silicates which had been proved operative. The District Court considered that the claims therefore were too broad and comprehended more than the invention. The Court of Appeals considered that because there was nothing in the record to show that the applicants for the patent intended by these claims to assert a monopoly broader than nine metallic silicates named in the specifications, the court should have con-

strued the claims as thus narrowed and limited by the specifications.

The statute makes provision for specification separately from the claims and requires that the latter "shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery." R. S. § 4888, as amended, 35 U. S. C. § 33. It would accomplish little to require that claims be separately written if they are not to be separately read. While vain repetition is no more to be encouraged in patents than in other documents, and claims like other statements may incorporate other matter by reference, their text must be sufficient to "particularly point out and distinctly claim" an identifiable invention or discovery. We have frequently held that it is the claim which measures the grant to the patentee. See, for example, *Milcor Steel Co.* v. *Fuller Co.,* 316 U. S. 143, 145; *General Electric Co.* v. *Wabash Co.,* 304 U. S. 364, 369; *Altoona Theatres* v. *Tri-Ergon Corp.,* 294 U. S. 477, 487. While the cases more often have dealt with efforts to resort to specifications to expand claims, it is clear that the latter fail equally to perform their function as a measure of the grant when they overclaim the invention. When they do so to the point of invalidity and are free from ambiguity which might justify resort to the specifications, we agree with the District Court that they are not to be saved because the latter are less inclusive. *Cf. General Electric Co.* v. *Wabash Co.,* 304 U. S. 364, 373–374; see *McClain* v. *Ortmayer,* 141 U. S. 419, 424–425; *Cimiotti Unhairing Co.* v. *American Fur Refining Co.,* 198 U. S. 399, 410.

We think the District Court correctly applied this principle to claims 24 and 26.

III. Process Claims.

All process claims were held invalid by the District Court; those numbered 1, 3, 4, 7, 8 and 9, because they

make no specific reference to the essential chemical constituents of the welding composition to be used in the claimed welding process, a conclusion with which we agree. Process claim 2 was held invalid for the reason applicable to flux claims 24 and 26, with which we also agree. Others, namely 5, 6, 11, 12, 13, 14, 15, 16 and 17, and composition claim 27 were held invalid because they erroneously import that the sole conductive medium through which electric current passes from the electrode to the base metal is the welding composition, which is in a molten state, and that no electric arc phenomenon is present.

The court found that the procedural steps in the process taught by the patent are identical in all respects with those followed in prior automatic electric welding processes and that the only invention or discovery resides in the use of a different welding composition. It sustained the patent for the composition, as we have shown, but denied its validity insofar as it claimed the old procedure.

The trial court gave extensive consideration to the process claims. It agreed that a radically new process would have been discovered if it could be said that the electric current passed between the electrode and the base metal through a welding composition in a liquid state and that no electric arc is present. All of the previous art had used the electric arc. But with full appreciation of the critical nature of the inquiry and after long litigation of the technology of the art, the court concluded that no such finding of departure from the prior art could be made and said that the evidence is persuasive that no such basic difference in phenomena is present in the Jones method.

The District Court reinforced its conclusion by pointing out that the inventors themselves initially did not conceive their invention to embody any such radical de-

parture from known phenomena and that their first application for a patent was replete with references to the presence and use of an electric arc in the new method. It was only after they had assigned their rights to the respondent that the suggestion of a basically new phenomenon, other than an arc, was made. Just what happens in the Jones method admits of controversy, for there is no visual evidence of an electric arc after the welding operation commences because what actually occurs between the electrode and the metal base is hidden from view by the flux. The court concluded that it is impossible to say with complete certainty that there is not an arc and one of the plaintiff's expert witnesses gave substantial support to the idea that the arc is still present, although it is shielded by the flux in the Jones patent.

The same deference is due to the findings of the trial court which overturn claims as to those which sustain them. Technicians may and probably will continue to debate with plausible arguments on each side as to what this obscure process really is. But the record in this case, while not establishing to a certainty that the findings are right, fall far short of convincing us that they are clearly erroneous. We think that the rules that govern review entitle the trial court's conclusions to prevail and that the process claims are invalid under the statute.

IV. Abuse of Patent.

Contentions are made that the patent has been abused through efforts to broaden the patent monopoly by requiring the purchase of unpatentable material for use in connection with it. The trial court found, however, that the plaintiff does not impose on licensees, either as a condition of a license or otherwise, any requirement, condition, agreement or understanding as to the purchase or use of unpatentable commodities and that its licensees are free to buy and use any materials and equipment

from any source. The court recognized that an appearance of such freedom is not conclusive if it conceals a subterfuge and that there is a real, although informal, restraint. But examining the conduct of the plaintiff, it found no such obstacle to the maintenance of an action for infringement on that part of the patent which was valid. The Court of Appeals affirmed, and we accept the conclusion of the two courts below on this branch of the case.

Our conclusion is that the judgment of the Court of Appeals, insofar as it reverses that of the District Court, should be reversed and that the judgment of the District Court be in all things reinstated. To that extent the judgment below is reversed.

It is so ordered.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, concurring.

I concur in the Court's judgment in this case and in parts II, III and IV of the Court's opinion. But my concurrence in the holding that Claims 18, 20, 22 and 23 are valid does not rest merely on findings of the District Court and the Court of Appeals that those claims were valid. While accepting the findings of those two courts on what I consider to be questions of fact, it is my view that determination of the ultimate question of patentability cannot properly be classified as a finding of fact. I would adhere to this Court's earlier pronouncement that "whether the thing patented amounts to a patentable invention" is a question of law to be decided by the courts as such. *Mahn* v. *Harwood,* 112 U. S. 354, 358; and see dissenting opinions in *Goodyear Tire & Rubber Co.* v. *Ray-O-Vac Co.,* 321 U. S. 275, 280, note 1, and *Williams Manufacturing Co.* v. *United Shoe Machinery Corp.,* 316 U. S. 364, 383.

I agree, however, that the facts found here justify the holding that Claims 18, 20, 22, and 23 do show patentable discovery when measured by the standards announced by this Court in *Cuno Engineering Corp.* v. *Automatic Devices Corp.*, 314 U. S. 84. For this reason I concur in affirming the judgment to the extent that it held these claims valid.

FOLEY BROS., INC. ET AL. *v.* FILARDO.

CERTIORARI TO THE SUPREME COURT OF NEW YORK, NEW YORK COUNTY.

No. 91. Argued December 15, 1948.—Decided March 7, 1949.

The Eight Hour Law, 40 U. S. C. § 324, as amended by 40 U. S. C. § 325a, which provides, in effect, that every contract to which the United States is a party shall contain a provision that no laborer or mechanic doing any part of the work contemplated by the contract shall be required or permitted to work more than eight hours in any one day upon such work unless he is compensated at the rate of one and one-half times the basic rate of pay for all work in excess of eight hours per day, is not applicable to work done under a contract between the United States and a private contractor on construction projects for the United States in Iraq and Iran. Pp. 282–291.

1. There is nothing in the language of the Act that indicates a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or some measure of legislative control. *Vermilya-Brown Co.* v. *Connell,* 335 U. S. 377, distinguished. Pp. 285–286.

2. The legislative history of the Act reveals that Congress was concerned with domestic labor conditions. Pp. 286–288.

3. Administrative interpretations of the Act tend to support the conclusions here reached. Pp. 288–291.

297 N. Y. 217, 78 N. E. 2d 480, reversed.

In a suit by an American citizen for overtime pay for work done in excess of eight hours per day for an American contractor on a construction project in Iraq and Iran

under a contract with the United States, a trial court of New York gave judgment for the plaintiff. The Appellate Division reversed. 272 App. Div. 446, 71 N. Y. S. 2d 592. The New York Court of Appeals reversed. 297 N. Y. 217, 78 N. E. 2d 480. This Court granted certiorari. 335 U. S. 808. *Reversed,* p. 291.

Robert L. Stern argued the cause for petitioners, who had a wartime "cost-plus" contract with the Government. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Morison* and *Samuel D. Slade.*

Chester A. Lessler argued the cause for respondent. With him on the brief was *Howard Henig.*

MR. JUSTICE REED delivered the opinion of the Court.

This case presents the question whether the Eight Hour Law[1] applies to a contract between the United States and a private contractor for construction work in a foreign country.

This Act provides that

> "Every contract made to which the United States . . . is a party . . . shall contain a provision that no laborer or mechanic doing any part of the work contemplated by the contract, in the employ of the contractor or any subcontractor . . . shall be required or permitted to work more than eight hours in any one calendar day upon such work; . . ." 37 Stat. 137, 40 U. S. C. § 324.

Penalties are specified for violations. In 1940 the prohibition against workdays of longer than eight hours was modified as follows:

> "Notwithstanding any other provision of law, the wages of every laborer and mechanic employed by

[1] 27 Stat. 340, as amended, 40 U. S. C. §§ 321–326.

> any contractor or subcontractor engaged in the performance of any contract of the character specified in sections 324 and 325 of this title, shall be computed on a basic day rate of eight hours per day and work in excess of eight hours per day shall be permitted upon compensation for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay." 54 Stat. 884, 40 U. S. C. § 325a.

In 1941 petitioners contracted on a cost-plus basis to build certain public works on behalf of the United States in the East and Near East, particularly in Iraq and Iran. Petitioners agreed in the contract to "obey and abide by all applicable laws, regulations, ordinances, and other rules of the United States of America." The provisions of the Eight Hour Law were not specifically included in the contract. In 1942 petitioners hired respondent, an American citizen, to work on the construction projects as a cook at sixty dollars a week. This contract of employment contained no provision concerning hours of work or overtime. Pursuant to the contract, respondent went to Iraq and Iran where he frequently worked more than eight hours a day during the years 1942 and 1943.

Upon the refusal of his request for overtime pay for work in excess of eight hours per day, he brought suit against petitioners in the Supreme Court of New York, claiming that the Act entitled him to one and one-half times the basic rate of pay for such work. The court denied petitioners' motions to dismiss the case and for a directed verdict, thereby overruling the contention that the Act did not apply to contracts which were to be performed in foreign countries. Judgment was entered on a jury verdict for respondent. The Appellate Division reversed on the ground that the Eight Hour Law as amended did not confer a right of action on an employee for overtime pay. 272 App. Div. 446, 71 N. Y. S. 2d 592.

Consequently it did not consider the question now before us. The New York Court of Appeals reversed, holding that the Act applied to this contract. 297 N. Y. 217, 78 N. E. 2d 480. Referring to the language of the statute quoted above, it concluded, "Words of such inclusive reach cannot properly be read to exclude contracts for government jobs abroad." We granted certiorari to settle this important question concerning the scope of the Eight Hour Law. 335 U. S. 808.

Since the question is one of statutory interpretation, the Act as it now exists, 40 U. S. C. §§ 321–326, is our starting point. In pertinent part it provides for the limitation to eight hours per day of the working time of laborers and mechanics employed by the government or any contractor thereof on a public work of the United States. § 321. The same section makes it unlawful to require or permit work in excess of eight hours per day except in extraordinary emergencies. An intentional violation of this mandate is made a misdemeanor punishable by fine or imprisonment or both. § 322. The insertion in "every contract" made by or on behalf of the United States of this restriction on hours of work is required by § 324. The contracts must stipulate a monetary penalty for violation, which penalty takes the form of a withholding by the government of moneys otherwise due the contractor under the terms of the contract. § 324. Finally the restriction is lifted as to employees of private contractors by § 325a, *supra,* pp. 282–283, on condition that hours worked in excess of eight be paid for at the overtime rate.

The question before us is not the power of Congress to extend the Eight Hour Law to work performed in foreign countries. Petitioners concede that such power exists. Cf. *Blackmer* v. *United States,* 284 U. S. 421; *United States* v. *Bowman,* 260 U. S. 94. The question is

rather whether Congress intended to make the law applicable to such work. We conclude, for the reasons expressed below, that such was not the intention of the legislators.

First. The canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States, *Blackmer* v. *United States, supra,* at 437, is a valid approach whereby unexpressed congressional intent may be ascertained. It is based on the assumption that Congress is primarily concerned with domestic conditions. We find nothing in the Act itself, as amended, nor in the legislative history, which would lead to the belief that Congress entertained any intention other than the normal one in this case. The situation here is different from that in *Vermilya-Brown Co.* v. *Connell,* 335 U. S. 377, where we held that by specifically declaring that the Act covered "possessions" of the United States, Congress directed that the Fair Labor Standards Act applied beyond those areas over which the United States has sovereignty and was in effect in all "possessions." This Court concluded that the leasehold there involved was a "possession" within the meaning of the Fair Labor Standards Act.

There is no language in the Eight Hour Law, here in question, that gives any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control. There is nothing brought to our attention indicating that the United States had been granted by the respective sovereignties any authority, legislative or otherwise, over the labor laws or customs of Iran or Iraq. We were on their territory by their leave, but without the transfer of any property rights to us.

The scheme of the Act itself buttresses our conclusion. No distinction is drawn therein between laborers who are aliens and those who are citizens of the United States. Unless we were to read such a distinction into the statute we should be forced to conclude, under respondent's reasoning, that Congress intended to regulate the working hours of a citizen of Iran who chanced to be employed on a public work of the United States in that foreign land. Such a conclusion would be logically inescapable although labor conditions in Iran were known to be wholly dissimilar to those in the United States and wholly beyond the control of this nation. An intention so to regulate labor conditions which are the primary concern of a foreign country should not be attributed to Congress in the absence of a clearly expressed purpose. See Attorney General Stone's conclusion to this effect in 34 Op. Atty. Gen. 257, where he stated that the law did not apply to alien laborers engaged in altering the American Embassy in London. The absence of any distinction between citizen and alien labor indicates to us that the statute was intended to apply only to those places where the labor conditions of both citizen and alien employees are a probable concern of Congress. Such places do not include foreign countries such as Iraq and Iran.[2]

Second. The legislative history of the Eight Hour Law reveals that concern with domestic labor conditions led Congress to limit hours of work. The genesis of the present statute was the Act of June 25, 1868, 15 Stat. 77, which was apparently aimed at unemployment resulting from decreased construction in government navy yards. Congressional Globe, 40th Cong., 2d Sess., Part I, p. 335. In 1892, when the coverage of this Act was extended to employees of government contractors and when criminal

[2] Since it is unnecessary for this decision, we do not reach a conclusion as to the precise geographic coverage of the Eight Hour Law.

penalties were added, 27 Stat. 340, the considerations before Congress were domestic unemployment, the influx of cheap foreign labor, and the need for improved labor conditions in this country. H. R. Rep. No. 1267, 52d Cong., 1st Sess. The purpose of the new legislation was to remedy the defects in the Act of 1868. 23 Cong. Rec. 5723.

The Act was amended in 1912 to include "*every* contract." [Italics supplied.] The insertion of the word "every" was designed to remedy a misinterpretation according to which the Act did not apply to work performed on private property by government contractors. 48 Cong. Rec. 381, 385, 394–95. Nothing in the legislative history supports the conclusion of respondent and the court below that "every contract" must of necessity, by virtue of the broadness of the language, include contracts for work to be performed in foreign countries.[3] A contrary inference must be drawn, we think, from a 1913 amendment which extended the law to cover persons employed "to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia." 37 Stat. 726, 40 U. S. C. § 321. This Court had held that such dredgers were not covered by the phrase "laborers and mechanics" in the previously existing law. *Ellis* v. *United States,* 206 U. S. 246. In its attempt to secure equality of treatment for dredgers on the one hand and laborers and mechanics on the other, Congress would

[3] ". . . Words having universal scope, such as 'Every contract in restraint of trade,' 'Every person who shall monopolize,' etc., will be taken as a matter of course to mean only every one subject to such legislation, not all that the legislator subsequently may be able to catch." *American Banana Co.* v. *United Fruit Co.,* 213 U. S. 347, 357.

hardly have intended for coverage over the latter class to extend to the far corners of the globe while coverage over the former was limited to work performed in rivers or harbors "of the United States or of the District of Columbia."

The 1940 amendment which permitted work in excess of eight hours per day upon payment of overtime, 54 Stat. 884, passed without any discussion indicative of geographical scope. 86 Cong. Rec. 11216–11217.

Third. The administrative interpretations of the Eight Hour Law in its various phases of development afford no touchstone by which its geographic scope can be determined. Executive Order No. 8623 of December 31, 1940, 3 C. F. R. Cum. Supp. 850, issued pursuant to § 326 of the Act, suspended the law as to laborers and mechanics employed directly by the government at Atlantic bases leased from Great Britain. Such a suspension indicated, to be sure, a conclusion on the part of the President that the statute applied, or might apply, to these bases. Such action, however, may well have been predicated on the premise that the leases with the provisions discussed in our *Vermilya-Brown* decision were sufficiently subject to our control so that the Eight Hour Law would apply to them. Though numerous Executive Orders have been issued which suspend the operation of the Act in the United States, Alaska, Hawaii, Midway Island, Wake Island, etc., we have not been able to find, nor has our attention been directed, to any orders purporting to suspend its operation in countries not subject to our legislative control.[4] The order deserves no weight as an administrative determination of the Act's applicability

[4] See, however, Executive Orders 9251, 3 C. F. R. Cum. Supp. 1216, and 9898, 3 C. F. R. 1947 Supp. 172, in which the geographic coverage of the suspensions is not specified.

to localities unquestionably and completely beyond the direct legislative competence of the United States.

It is true that in 1905 Attorney General Moody, in a letter to the Secretary of War, expressed the opinion that the Eight Hour Law applied to public works to be constructed in the Canal Zone. 25 Op. Atty. Gen. 441. For the purpose of his opinion he treated the Canal Zone as foreign territory. *Id.,* at 444. No distinction was drawn between citizen and alien laborers. If we accept the Attorney General's assumption as to the status of the Canal Zone,[5] his opinion is in line with respondent's contention that the law is applicable to work performed in foreign countries. The opinion, however, proves too much. Although Attorney General Moody denied that incongruous results would flow from his interpretation, it would be anomalous, as we have said, for an act of Congress to regulate the hours of a citizen of Iran at work on a government project there. Attorney General Stone so indicated in 1924 when he advised the State Department that the Eight Hour Law did not apply to English workers engaged in altering the American Embassy in London. 34 Op. Atty. Gen. 257. Since the statute contains no distinction between laborers based on citizenship, Attorney General Stone's reasoning that aliens are not covered points to the conclusion that the statute does not apply to contracts which are to be performed in foreign countries. The Comptroller General has expressed agreement with this conclusion by stating that "the Eight-Hour law of June 19, 1912, was not intended to and does not apply to contracts necessarily entered into on behalf of the United States in foreign countries which may require

[5] See, however, the Isthmian Canal Convention, proclaimed on February 26, 1904, 33 Stat. 2234, whereby the United States had been granted all the rights, power and authority of a sovereign in the Zone.

or involve the employment of foreign laborers or mechanics in their performance." 19 Comp. Gen. 516, 518.[6]

Although the statute expressly requires the inclusion in every government public-works contract of the eight-hour provision, the Secretary of the Treasury has approved a standard form for construction contracts which contains eight-hour provisions but which provides that the use of the form will not be required in foreign countries. U. S. Standard Form No. 23, 41 U. S. C. App. § 12.23, pp. 4520, 4522. The inclusion of such provisions is also required by War Department Procurement Regulation No. 3, ¶ 346, in "all contracts subject to the provisions of the Eight Hour Law." Yet neither the instant contract nor others covering off-continent operations contain the Eight Hour Law clause.[7] Similarly the Department of State "does not consider it legally necessary to include provisions of the Eight Hour Law in contracts to be performed in foreign countries." Letter of November 8, 1948, signed by the Acting Legal Adviser "For the Acting Secretary of State," to the Attorney General.

We conclude that administrative interpretations of the Act, although not specifically directed at the precise problem before us, tend to support petitioners' contention as to its restricted geographical scope.

Since we decide that the Eight Hour Law is inapplicable to a contract for the construction of public works in a foreign country over which the United States has no direct legislative control, it is unnecessary to decide

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[6] See also 29 Op. Atty. Gen. 488, 492 *et seq.*

[7] Illustrative contracts from which the clause is omitted are: W 1098 eng—1525, June 8, 1942 (Labrador and Baffin Island); W 1098 eng—1375, June 3, 1942 (Cuba); W 1098 eng—1350, April 24, 1942 (Bahamas); W 1098 eng—108, November 10, 1941 (North Africa and Palestine); W 1098 eng—2, August 2, 1941 (Greenland); W 958 eng—54, February 8, 1941 (Newfoundland); W 958 eng—50, February 4, 1941 (Bermuda).

whether the law, either directly or via the third party beneficiary contract route, gives an employee who is covered by it a cause of action against his employer for overtime wages.

Reversed.

MR. JUSTICE FRANKFURTER, with whom MR. JUSTICE JACKSON joins, concurring.

Because the decision in *Vermilya-Brown Co.* v. *Connell*, 335 U. S. 377, was one of statutory interpretation, I would feel bound by it were it not still open because rendered at this Term. If I felt bound by it, I would be obliged to dissent in this case.

We are here confronted by a statute which in terms covers "every contract made to which the United States . . . is a party." 37 Stat. 137, 40 U. S. C. § 324. Yet the Court construes it as inapplicable even to the work of a citizen of the United States under a contract between the United States and a corporation domiciled in the United States because "An intention so to regulate labor conditions which are the primary concern of a foreign country should not be attributed to Congress in the absence of a clearly expressed purpose." For this conclusion reliance is put upon an opinion of Attorney General Stone which refused to interpret the statute as applying to work done upon the American Embassy at London on the ground that "the enforcement of the statutory provision would disturb the agreements entered into between contractors and laborers and mechanics in a foreign country." 34 Op. Atty. Gen. 257, 260. Support is also found in an opinion of the Comptroller General which reaches a similar conclusion on the basis that "such an application of the statute might easily lead to serious difficulties in effecting contracts for necessary services in countries where social and business conditions and customs differ widely from our own." 19 Comp. Gen. 516, 518.

Such considerations, I agree, ought properly to take precedence over the literal language of the Eight Hour Law as guides to its interpretation. See *American Security Co.* v. *District of Columbia,* 224 U. S. 491. We should not, in the absence of an explicit declaration of policy, assume that Congress meant to impose our domestic standards of employment upon peoples who are not generally subject to the regulatory power of Congress. See 29 Op. Atty. Gen. 488, 492–93. But I could not regard these considerations as controlling if I felt bound by the decision of the Court in the *Vermilya-Brown* case. That case extended to foreign conditions of labor provisions of the Fair Labor Standards Act indistinguishable in effect from those of the Eight Hour Law, and it was an extension more difficult than that which the Court avoids here both because not apparently compelled by the literal terms of the Fair Labor Standards Act and because that Act is not confined in its application to contracts to which the United States is a party. Uniformity in the terms of Government contracts, indeed, is a matter so much more nearly within the usual scope of Congressional concern that Attorney General Moody required no explicit showing of Congressional purpose to conclude that the Eight Hour Law applied to contracts for the construction of the Panama Canal, even upon the assumption that the Canal Zone was to be regarded as foreign territory. 25 Op. Atty. Gen. 441.

But there are other respects in which the *Vermilya-Brown* case presented more compelling reasons than we have here for refusing to attribute to Congress an intention to regulate the conditions of work of foreign employees. Here we are required only to construe a phrase, "every contract made to which the United States . . . is a party," which is peculiar to its own context. In the *Vermilya-Brown* case, however, the Court held that our leased bases fell within the term "possessions," and that is

a term which Congress has used at least sixty-eight times. See *Vermilya-Brown Co.* v. *Connell,* dissenting opinion, 335 U. S. at 398, n. 11. And as illustrating the readiness with which the *Vermilya-Brown* case can be regarded as controlling the interpretation of all the statutes in which the term occurs, see *Spelar* v. *United States,* 171 F. 2d 208, applying the Federal Tort Claims Act to a leased base in Newfoundland. The *Vermilya-Brown* case, moreover, brushes aside official apprehensions about the interference of the United States in foreign conditions of labor far more serious than those which have influenced judgment here. All we have to guide us in the present case are general statements in opinions of two Attorneys General and a Comptroller General which required no specialized information about working conditions abroad, the knowledge that the standard contracts approved by the Secretary of the Treasury and the War Department are consistent with those opinions, and a letter from the State Department which says merely that the Department "does not consider it legally necessary to include provisions of the Eight Hour Law in contracts to be performed in foreign countries."

In the *Vermilya-Brown* case, however, the Court had before it a letter on behalf of the Secretary of State which said:

> "Any holding that the bases obtained from the Government of Great Britain on 99 year leases are 'possessions' of the United States in a political sense would not in the Department's view be calculated to improve our relations with that Government. Moreover, such a holding might very well be detrimental to our relations with other foreign countries in which military bases are now held or in which they might in the future be sought."

The State Department speaks authoritatively on the international responsibility of our Government in observ-

ing agreements with other nations, and thus it spoke in this letter. It also has knowledge, to which courts cannot pretend, of the bearing of such observance on propitious negotiations of future agreements. The letter reflects that knowledge. Even cloistered judges, however, need not be ignorant of the fact that this country has not exhausted its interest in securing bases on territory not ours.

Our decision in the *Vermilya-Brown* case in disregard of this weighty concern of the Secretary of State was followed by a petition for rehearing impressively supported by all the actively responsible executive officers of the Government. The State Department reiterated its view that the inclusion of the leased bases among the "possessions" of the United States was "unfortunate" and added that the Department "does not share the assurance of the Court that the house of assembly of Bermuda or other colonial legislatures might not undertake legislation similar to the Fair Labor Standards Act to control labor relations on the bases. It is at least worthy of note in this connection that administrative difficulties have arisen in the bases by reason of the application to contractors' employees of workmen's compensation laws of both the United States and the colonies concerned."

The petition for rehearing also brought to the attention of the Court a letter from the Secretary of the Army which read in part as follows:

> "During the past nine years of employment experience in foreign countries, Army contracting officers have discovered (whether the employment was handled directly or through a CPFF contractor) that in hiring native workmen the local government in many countries will impose *maximum* wage standards which dare not be violated. These standards are sometimes fixed by statute or regulation with the force of statute, and other times by policy which has

the practical effect of law. Such governments explain that to pay native workmen according to American wage standards would seriously disrupt the local economy. Also, in many industrially undeveloped countries, local officials advise that 'excessive' wages to common laborers would jeopardize the availability of such laborers and impose serious police problems upon the state. (It should be noted that the social and economic structure of many areas, organized along tribal lines, precludes a direct dealing with individual laborers.) It appears doubtful that the Court has been sufficiently apprised of this special problem. The payment of statutory overtime to American personnel at contractors' overseas construction sites will be a minor problem in comparison with paying of statutory minimum wages *and* overtime to native workmen in the face of militant opposition by foreign governments. (It should be noted that among American personnel all laborers and mechanics, skilled and semi-skilled artisans and craftsmen, have always been paid on hourly rates with overtime benefits far exceeding statutory requirements . . . .)"

The Acting Secretary of the Navy expressed similar views:

"It has been and is the policy of this Department to employ local labor at the leased bases to the maximum extent practicable and to make its wage and labor practices with respect thereto conform as nearly as possible to the usual wage and labor practices of the particular locality. Application of the Fair Labor Standards Act to the particular areas involved may well create conditions which would adversely affect the cooperation heretofore given Navy contractors by local authorities. The continued cooperation of such authorities is, of course, highly desirable."

The Wage and Hour Administrator, who is ultimately responsible for enforcing the *Vermilya-Brown* decision, wrote that "even if I should be able to reach sound conclusions as to the application of the Act in these areas, I cannot help but foresee fundamental administrative difficulties in attempting to apply the Act in 'possessions' over which the United States does not exercise full sovereign rights, especially where foreign employers and alien labor are involved." In view both of the Administrator's very special relation to this matter and of the persuasiveness of his views, his letter is printed as an Appendix to this opinion.

If, in the face of these statements by executive officers charged with, and experienced in, the administration of our leased bases, the Court could reach a contrary interpretation of the broad term "possessions," it must be manifest why I could not, were I bound by precedent, join in reading the narrow phrase "every contract made to which the United States . . . is a party" in a way which departed from its literal terms when the only reason for such a departure is reluctance to attribute to Congress an intention to interfere in "labor conditions which are the primary concern of a foreign country."

APPENDIX

U. S. DEPARTMENT OF LABOR
WAGE AND HOUR AND PUBLIC CONTRACTS DIVISIONS

WASHINGTON 25, D. C., *December 23, 1948.*

The HONORABLE PHILIP B. PERLMAN,
Solicitor General of the United States,
Department of Justice,
Washington 25, D. C.

DEAR MR. PERLMAN: By letter dated December 22, 1948, you advise that you intend to support a petition

for rehearing to be filed in connection with the recent decision of the Supreme Court in *Vermilya-Brown Company* v. *Connell,* No. 22, This Term, decided December 6, 1948. You state that you will present to the Court the views of the Departments of State, Army, and Navy. On behalf of these Departments, and the Department of Justice, you will urge the Court to reconsider its holding that the word "possession," as used in the phrase "State, territory or possession" in Section 3 (c) of the Fair Labor Standards Act, is not a term of art, and that the Bermuda defense area leased to us in 1940 by Great Britain is within the coverage of the statute as a "possession." You request that I forward to you my views concerning the effect which this holding may have on administration and enforcement of the Act.

I think it may fairly be said that my predecessors and I, in considering the territorial aspects of wage-hour coverage in the past, have proceeded on the assumption that traditional concepts of sovereign control were implicit in the meaning of the phrase, "any Territory or possession of the United States," as that phrase is used in the Fair Labor Standards Act. In the absence of controlling court decisions, it was necessary for us to interpret the phrase for our guidance in the administration of the Act. In doing so, we not only studied the provisions of other statutes in which these terms were used and authoritative decisions of the courts construing such language in situations which were thought to be comparable, but gave particular weight to authoritative expressions of the State Department and other proper governmental agencies on the question of what areas are viewed as Territories or possessions over which the United States exercises full sovereign rights. On this basis we expressed the opinion in Interpretative Bulletin No. 2, first issued in November, 1938, and in Chapter V,

Part 776, Title 29 of the Code of Federal Regulations (section 776.1 (c)) which replaced this bulletin in July, 1947, that Alaska, Hawaii, Puerto Rico, the Canal Zone, Guam, Guano Islands, Samoa, and the Virgin Islands were Territories and possessions within the meaning of the Act.

When the question of the status of the leased bases of the type involved in the *Vermilya-Brown* case was first brought to our attention in 1942 and 1943, we expressed the view, in the opinions quoted in the Government's brief before the Supreme Court, that these bases were not Territories or possessions of the United States within the meaning of the Act. This view was subsequently modified after it appeared that the matter was being litigated in the courts and consultation with State Department officials indicated that that Department had made no ruling (the letter from that Department which is Appendix A to your brief not having been written at that time). This modification of our position is reflected by the following language which was used to advise inquiries: "Until the question has been settled by court decisions, congressional or executive action, or interpretations issued by the State Department or other proper governmental agencies, the Divisions are not in a position to assert whether the Fair Labor Standards Act applies to employees working at bases leased from the British."

As a result of the Supreme Court's decision in the *Vermilya-Brown* case, it appears that the status of a given area as a "Territory or possession of the United States" for purposes of the Act is subject to determination on the basis of considerations other than those used by the political departments of the Government, on which we have placed particular reliance in the past. I anticipate that at least two major problems will confront me as a result of the Court's ruling.

First, in order to perform my statutory duties under the Act, it will be necessary for me to decide initially, pending authoritative guidance from the courts, whether other defense base areas come within the statutory language covering Territories and possessions of the United States. If, as would seem to follow from the Court's decision, I would not be aided in this by the views of the State Department as to whether such areas are Territories or possessions in the political sense, or under traditional concepts of sovereignty, I shall be called upon to enter a field of interpretation in which our previous experience with the Act offers no reliable guides, and which may involve the meaning of international agreements on which this agency would ordinarily seek the advice of the State Department. Adequate standards for guidance in deciding such questions for purposes of administration of the Act are, in my opinion, not available to me either in the language of the statute, its legislative history, or in the *Vermilya-Brown* decision itself. The difficulty, in such circumstances, of reaching sound conclusions concerning coverage in bases such as Okinawa, Greece, Iceland, Canada, Newfoundland, the Philippine Islands, Tunisia, and Arabia is apparent. My position will be even more difficult in connection with classified military base areas.

Second, even if I should be able to reach sound conclusions as to the application of the Act in these areas, I cannot help but foresee fundamental administrative difficulties in attempting to apply the Act in "possessions" over which the United States does not exercise full sovereign rights, especially where foreign employers and alien labor are involved. Even if such difficulties may not be insuperable, vexing problems of courts with proper jurisdiction and venue to apply the criminal and civil sanctions in such cases are, it seems to me, bound

to arise if we are to undertake active enforcement in these bases. And, as you will appreciate, neither the appropriation for, nor the organization of the Wage and Hour Division were devised in contemplation of enforcement efforts in outposts such as these.

It has, of course, not been possible for us to explore fully these and other possible problems which might confront us as a result of the *Vermilya-Brown* decision, in the limited time available to us by reason of the period for filing petitions for rehearing. If the Court should grant a rehearing in the case, I shall be glad to make available to you the results of our further exploration of these questions in order that you may fully apprise the Court of my views concerning the probable effects of the present decision in terms of the over-all administration of the Fair Labor Standards Act.

Very truly yours,

WM. R. MCCOMB,
Administrator.

Syllabus.

ALGOMA PLYWOOD & VENEER CO. *v.* WISCONSIN EMPLOYMENT RELATIONS BOARD.

CERTIORARI TO THE SUPREME COURT OF WISCONSIN.

No. 216. Argued November 18, 1948.—Decided March 7, 1949.

In 1942 the National Labor Relations Board certified a union as bargaining representative for employees of a manufacturer producing goods for interstate commerce. In 1943, under pressure from the Department of Labor and the War Labor Board, the employer agreed to a maintenance-of-membership clause in its contract with the union, which was extended from year to year to April, 1947. In January, 1947, an employee was discharged for refusal to pay union dues and filed a complaint with the Wisconsin Employment Relations Board charging violation of Wis. Stat. § 111.06 (1) (c) 1, which, in effect, forbids enforcement of a maintenance-of-membership clause unless the contract containing it is approved by two-thirds of the employees in a referendum conducted by the State Board. No such referendum had been conducted for these employees. The State Board ordered the manufacturer to cease and desist from giving effect to the maintenance-of-membership clause, to offer the employee reinstatement, and to reimburse him for loss of pay. *Held:* The order is not in conflict with the National Labor Relations Act or the Labor Management Relations Act. Pp. 303–315.

1. The State Board was not deprived of power to issue its order by § 10 (a) of the National Labor Relations Act, which grants the National Board exclusive power to prevent any person from engaging in any unfair labor practice listed in § 8. Pp. 305–307.

2. Nor was it deprived of power to issue its order by § 8 (3), which forbids employers to encourage or discourage membership in a union but provides that nothing in the Act or any other federal statute shall preclude an employer from making an agreement with a union to require membership therein as a condition of employment if the union is the bargaining representative of the employees. Pp. 307–312.

(a) This conclusion is supported by the language and legislative history of § 8 (3). Pp. 307–310.

(b) It is not in conflict with any ruling by the courts or the National Labor Relations Board. P. 310.

(c) Nor is it in conflict with the administrative practice of the War Labor Board in prescribing maintenance-of-membership clauses to settle wartime disputes, since that practice was based upon the war powers rather than upon § 8 (3) of the National Labor Relations Act and the War Labor Board had ceased to exist when the State Board issued its order. Pp. 310–312.

3. Nor does the state statute or the State Board's action thereunder conflict with § 10 (a) of the Labor Management Relations Act. Pp. 313–314.

4. The certification of the union by the National Board did not oust the State Board from jurisdiction to enjoin practices forbidden by state law and not governed by federal law. Pp. 314–315.

252 Wis. 549, 32 N. W. 2d 417, affirmed.

The Wisconsin Employment Relations Board ordered an employer to cease and desist from giving effect to a maintenance-of-membership clause in a contract with a union certified by the National Labor Relations Board as the collective bargaining representative of its employees and to reimburse for loss of pay an employee who had been discharged for refusal to pay union dues. A state circuit court modified the order by striking the award of back pay but otherwise affirmed it. 14 Labor Cases (C. C. H.) No. 64,253. The State Supreme Court sustained the order as originally issued. 252 Wis. 549, 32 N. W. 2d 417. This Court granted certiorari. 335 U. S. 812. *Affirmed,* p. 315.

Roger C. Minahan argued the cause for petitioner. With him on the brief was *Malcolm K. Whyte.*

Beatrice Lampert, Assistant Attorney General of Wisconsin, argued the cause for respondent. With her on the brief were *Grover L. Broadfoot,* Attorney General, and *Stewart G. Honeck,* Deputy Attorney General.

David Previant filed a brief on behalf of the United Brotherhood of Carpenters and Joiners of America, A. F. of L., as *amicus curiae,* urging reversal.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The Algoma Plywood & Veneer Co. manufactures in Kewaunee County, Wisconsin, the products for which it is named. Ninety-five per cent of its output is sold in interstate commerce. In 1942 the National Labor Relations Board held an election at the plant, the outcome of which was the certification of Local 1521 of the Carpenters and Joiners Union as bargaining representative for all production employees, about 650 in number. In 1943, under pressure from the Department of Labor and the War Labor Board, Algoma agreed to a maintenance-of-membership clause in its contract with Local 1521. That clause was carried over from year to year and was part of the contract effective for the year following April 29, 1946. One Victor Moreau refused to pay dues, and on Jan. 7, 1947, the Union notified him that unless he paid up by Jan. 13, he would be discharged. On Jan. 14, 1947, in the presence of representatives of the Company and the Union, he said that he would rather quit than pay dues to the Union. And so the Vice-President of the Company told him to collect his pay and go home.

On Jan. 27, 1947, Moreau filed with the Wisconsin Employment Relations Board a complaint charging the Company with an unfair labor practice under Wis. Stat. § 111.06 (1) (c) 1, which provides:

> "It shall be an unfair labor practice for an employer . . . to encourage . . . membership in any labor organization . . . by discrimination in regard to hiring, tenure or other terms or conditions of employment; provided, that an employer shall not be prohibited from entering into an all-union agreement with the representatives of his employes in a collective bargaining unit, where at least two thirds of such employes voting . . . shall have voted

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affirmatively by secret ballot in favor of such all-union agreement in a referendum conducted by the board. . . ."

No referendum had been conducted at the Algoma plant. The Board, accordingly, on April 30, 1947, ordered the Company to cease and desist from giving effect to the maintenance-of-membership clause, to offer Moreau reinstatement, and to make him whole for any loss of pay. The Company and the Union petitioned the Wisconsin Circuit Court of Kewaunee County for review of the order, and the Board petitioned for its enforcement. In its judgment of Nov. 21, 1947, the Circuit Court modified the order by striking the award of back pay, but otherwise affirmed it. On May 11, 1948, the Wisconsin Supreme Court affirmed the judgment of the Circuit Court insofar as it sustained the jurisdiction of the Board to issue its cease and desist order and to require an offer of reinstatement but directed enforcement of the back-pay award. 252 Wis. 549, 32 N. W. 2d 417.

At every stage of the proceedings the Company and the Union contested the jurisdiction of the Employment Relations Board on the ground of the exclusive authority of the National Labor Relations Board under § 10 (a) of the National Labor Relations Act, 49 Stat. 453, 29 U. S. C. § 160 (a), and asserted the repugnancy of Wis. Stat. § 111.06 (1) (c) 1 to § 8 (3) of the National Labor Relations Act, 49 Stat. 452, 29 U. S. C. § 158 (3). We granted certiorari under 28 U. S. C. § 1257 (3) because of the important bearing of these issues upon the distribution of power in our federal system. 335 U. S. 812.

The discharge of Moreau and the orders of the Wisconsin Board preceded the Labor Management Relations Act, 1947, colloquially known as the Taft-Hartley Act, 61 Stat. 136, 29 U. S. C. § 141 *et seq.* The judgments of the Circuit Court for Kewaunee County and the Supreme Court of Wisconsin were rendered after it came into

force. If the National Labor Relations Act gave affirmative protection to the employer in discharging an employee under a union-security agreement for failure to maintain union membership, it would be necessary to decide whether adoption of the Taft-Hartley Act retroactively removed that protection and whether it equally gave effect to a reinstatement order, an award of back pay, and a cease and desist order which would previously have been invalid. Since, however, we do not find conflict between the Wisconsin law under which the orders were issued and either the National Labor Relations Act or the Taft-Hartley Act, we are relieved from defining the respective applicability of the federal Acts.

In seeking to show that the Wisconsin Board had no power to make the contested orders, petitioner points first to § 10 (a) of the National Labor Relations Act, which is set forth in the margin.[1] It argues that the grant to the National Labor Relations Board of "exclusive" power to prevent "any unfair labor practice" thereby displaced State power to deal with such practices, provided of course that the practice was one affecting commerce. But this argument implies two equally untenable assumptions. One requires disregard of the parenthetical phrase "(listed in section 8)"; the other depends upon attaching to the section as it stands, the clause "and no other agency shall have power to prevent unfair labor practices not listed in section 8."

The term "unfair labor practice" is not a term of art having an independent significance which transcends its statutory definition. The States are free

[1] "SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise."

(apart from pre-emption by Congress) to characterize any wrong of any kind by an employer to an employee, whether statutorily created or known to the common law, as an "unfair labor practice." At the time when the National Labor Relations Act was adopted, the courts of many States, at least under some circumstances, denied validity to union-security agreements. See 1 Teller, Labor Disputes and Collective Bargaining § 170 (1940). Here Wisconsin has attached conditions to their enforcement and has called the voluntary observance of such a contract when those conditions have not been met an "unfair labor practice." Had the sponsors of the National Labor Relations Act meant to deny effect to State policies inconsistent with the unrestricted enforcement of union-shop contracts, surely they would have made their purpose manifest. So far as appears from the Committee Reports, however, § 10 (a) was designed, as its language declares, merely to preclude conflict in the administration of remedies for the practices proscribed by § 8. The House Report, after summarizing the provisions of the section, adds, "The Board is thus made the paramount agency for dealing with the unfair labor practices described in the bill." H. R. Rep. No. 969, 74th Cong., 1st Sess. 21. See also the identical language of H. R. Rep. No. 972, 74th Cong., 1st Sess. 21 and H. R. Rep. No. 1147, 74th Cong., 1st Sess. 23. And the Senate Report describes the purpose of the section as "intended to dispel the confusion resulting from dispersion of authority and to establish a single paramount administrative or quasi-judicial authority in connection with the development of the Federal American law regarding collective bargaining." S. Rep. No. 573, 74th Cong., 1st Sess. 15.

The contention that § 10 (a) of the Wagner Act swept aside State law respecting the union shop must therefore

be rejected. If any provision of the Act had that effect, it could only have been § 8 (3), which explicitly deals with membership in a union as a condition of employment. We now turn to consideration of that section.

Section 8 (3) provides that it shall be an unfair labor practice for an employer

> "By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act . . . or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made."

It is argued, therefore, that a State cannot forbid what § 8 (3) affirmatively permits. The short answer is that § 8 (3) merely disclaims a national policy hostile to the closed shop or other forms of union-security agreement. This is the obvious inference to be drawn from the choice of the words "nothing in this Act . . . or in any other statute of the United States," and it is confirmed by the legislative history.

The Senate Report on the bill which was to become the National Labor Relations Act has this to say about § 8 (3):

> "The proviso attached to the third unfair-labor practice deals with the question of the closed shop. Propaganda has been wide-spread that this proviso attaches special legal sanctions to the closed shop or seeks to impose it upon all industry. This propa-

ganda is absolutely false. The reason for the insertion of the proviso is as follows: According to some interpretations, the provision of section 7 (a) of the National Industrial Recovery Act, assuring the freedom of employees 'to organize and bargain collectively through representatives of their own choosing', was deemed to illegalize the closed shop. The committee feels that this was not the intent of Congress when it wrote section 7 (a); that it is not the intent of Congress today; and that it is not desirable to interfere in this drastic way with the laws of the several States on this subject.

"But to prevent similar misconceptions of this bill, the proviso in question states that nothing in this bill, or in any other law of the United States, or in any code or agreement approved or prescribed thereunder, shall be held to prevent the making of closed-shop agreements between employers and employees. In other words, the bill does nothing to facilitate closed-shop agreements or to make them legal in any State where they may be illegal; it does not interfere with the *status quo* on this debatable subject but leaves the way open to such agreements as might now legally be consummated . . . ." S. Rep. No. 573, 74th Cong., 1st Sess. 11–12.

The House Report contains similar language:

"The proviso to the third unfair labor practice, dealing with the making of closed-shop agreements, has been widely misrepresented. The proviso does not impose a closed shop on all industry; it does not give new legal sanctions to the closed shop. All that it does is to eliminate the doubts and misconstructions in regard to the effect of section 7 (a) upon closed-shop agreements, and the possible repetition of such doubts and misconstructions under this bill,

by providing that nothing in the bill or in section 7 (a) or in any other statute of the United States shall illegalize a closed-shop agreement between an employer and a labor organization, provided such organization has not been established, maintained, or assisted by any action defined in the bill as an unfair labor practice and is the choice of a majority of the employees, as provided in section 9 (a), in the appropriate collective bargaining unit covered by the agreement when made. The bill does nothing to legalize the closed-shop agreement in the States where it may be illegal; but the committee is confident that it would not be the desire of Congress to enact a general ban upon closed-shop agreements in the States where they are legal. And it should be emphasized that no closed shop may be effected unless it is assented to by the employer." H. R. Rep. No. 969, 74th Cong., 1st Sess. 17. See also the identical language in H. R. Rep. No. 972, 74th Cong., 1st Sess. 17, and H. R. Rep. No. 1147, 74th Cong., 1st Sess. 19–20.

In his major speech to the Senate in support of the bill, Senator Wagner said:

"While outlawing the organization that is interfered with by the employer, this bill does not establish the closed shop or even encourage it. The much-discussed closed-shop proviso merely states that nothing in any Federal law shall be held to illegalize the confirmation of voluntary closed-shop agreements between employers and workers." 79 Cong. Rec. 7570.

The Senator went on to explain the purpose of the section as dispelling misunderstanding of § 7 (a) of the National Industrial Recovery Act, 48 Stat. 198, denied

either advocacy or disapproval of the closed shop, then added:

> "The virulent propaganda to the effect that this bill encourages the closed shop is outrageous in view of the fact that in two respects it actually narrows the now-existing law in regard to the closed-shop agreement." *Ibid.*

Later, during discussion of proposed amendments, Senator Wagner answered a question from the floor about the effect of the proviso in the following words:

> "The provision will not change the status quo. That is the law today; and wherever it is the law today that a closed-shop agreement can be made, it will continue to be the law. By this bill we do not change that situation." *Id.* at 7673.

Equally conclusive is the answer by Representative Connery, manager of the bill in the House, to a statement by Representative Taber in support of an amendment which would have entirely stricken the proviso. Representative Taber charged that the proviso would make it possible for 51% of the employees of any organization to bring about the discharge of the other 49%. Representative Connery said:

> "Mr. Chairman, I merely rise to say this in opposition: The closed-shop proposition in this bill does not refer to any State which has any law forbidding the closed shop. It does not interfere with that in any way." *Id.* at 9726.

No ruling by the courts or the National Labor Relations Board, the agency entrusted with administration of the Wagner Act, has adopted a construction of § 8 (3) in disregard of this legislative history. It is suggested, however, that the interpretation given the section by the War Labor Board supports petitioner's position. The

Board, it is true, in view of the practical desirability of the maintenance-of-membership clause in settling wartime disputes over union security found authority to order contracts containing such clauses despite inconsistent State law. It found such authority, however, not in § 8 (3) but in the conclusion that "its power to direct the parties to abide by the maintenance-of-membership provision in such a case as this one stems directly from the war powers of the United States Government." *Greenebaum Tanning Co.*, 10 War Lab. Rep. 527, 534.[2] The Supreme Court of Wisconsin itself acknowledged the supremacy of the war power in a decision suspending an order directing the reinstatement of an employee discharged under a maintenance-of-membership clause ordered by the War Labor Board. *International Brotherhood of Papermakers* v. *Wisconsin E. R. Board*, 245 Wis. 541, 15 N. W. 2d 806. When the orders of the Wisconsin Board in the present case were entered, the War Labor Board had ceased to exist, Exec. Order No. 9672, 11 Fed. Reg. 221, and, with the occasion that had called it into

[2] Although some language in the *Greenebaum* opinion seems to point to an interpretation of § 8 (3) inconsistent with its legislative history, see 10 War Lab. Rep. at 542–43, the Board adopted as its own the conclusion of its General Counsel, Mr. Lloyd K. Garrison, reached in a full-dress opinion which reviewed that history. 10 War Lab. Rep. at 541. The General Counsel had said: "The National Labor Relations Act does not preclude a governmental agency from ordering maintenance of membership in suitable cases for the purpose of settling disputes and stabilizing industrial relations in time of war." 12 War Lab. Rep. ix, xxii. The next two cases ordering a maintenance-of-membership contract which would not have been permitted by State law did not mention the National Labor Relations Act. *Fairbanks, Morse & Co.*, 11 War Lab. Rep. 217; *Vilter Mfg. Co.*, 11 War Lab. Rep. 332. In later cases, the Board adhered to its reliance upon the war power. *U. S. Vanadium Corp.*, 13 War Lab. Rep. 527; *Ingalls Iron Works Co.*, 17 War Lab. Rep. 190; *Cudahy Bros. Co.*, 19 War Lab. Rep. 124.

being, the necessity for suppression of State law had also come to an end.[3]

Since we would be wholly unjustified, therefore, in rejecting the legislative interpretation of § 8 (3) placed upon it at the time of its enactment, it is not even necessary to invoke the principle that in cases of concurrent power over commerce State law remains effective so long as Congress has not manifested an unambiguous purpose that it should be supplanted. See, e. g., *Sinnot* v. *Davenport,* 22 How. 227; *Missouri, K. & T. R. Co.* v. *Haber,* 169 U. S. 613. Nor need we, if Congress in enacting § 8 (3) did not mean to enlarge the right to bargain for union security, consider contentions based on *Hill* v. *Florida,* 325 U. S. 538, to the effect that in guaranteeing the right to collective bargaining the National Labor Relations Act also guaranteed the right to contract upon any terms which are commonly the subject of collective bargaining.

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[3] The significance of the War Labor Board's determination of the impact of federal power on State law must be viewed in the light of the fact that it was an agency of the War Administration organized not to interpret the Constitution but to prevent interruption of production. See Exec. Order No. 9017, 7 Fed. Reg. 237. That the two rôles are quite distinct is illustrated by the policy of the War Labor Board of the First World War which outlawed "yellow-dog" contracts for the duration of that war, thereby in effect nullifying this Court's then recent decision in *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229. See *Smith & Wesson Co.,* War Lab. Bd. Docket No. 273; Gregg, *The National War Labor Board,* 33 Harv. L. Rev. 39, 54. The difference in rôles is again emphasized by the ruling of the War Labor Policies Board of 1918 that all Government contracts should contain a clause prohibiting the use of child labor, although *Hammer* v. *Dagenhart,* 247 U. S. 251, invalidating such a child-labor provision, was decided within a few weeks after that Board was established. See 6th Ann. Rep. of the Secretary of Labor 114 (1918); 7th Ann. Rep. of the Secretary of Labor 126 (1919); Report on International Labor Standards 43 (prepared in 1918 by the War Labor Policies Board, undated).

We come now to the question whether the Taft-Hartley Act expresses a policy inconsistent with § 111.06 (1) (c) 1 of the Wisconsin Employment Peace Act.

Section 10 (a) of the Taft-Hartley Act, which is set forth in the margin,[4] contains important changes, but none requiring modification of the conclusions we have reached as to the corresponding section of the National Labor Relations Act. One phrase, however, reinforces those conclusions; that is the phrase "inconsistent with the corresponding provision of this Act." These words must mean that cession of jurisdiction is to take place only where State and federal laws have parallel provisions. Where the State and federal laws do not overlap, no cession is necessary because the State's jurisdiction is unimpaired. This reading is confirmed by the purpose of the proviso in which the phrase is contained: to meet situations made possible by *Bethlehem Steel Co.* v. *New York S. L. R. B.*, 330 U. S. 767, where no State agency would be free to take jurisdiction of cases over which the National Board had declined jurisdiction. See H. R. Rep. No. 245, 80th Cong., 1st Sess. 40; S. Rep. No. 105, Minority Views, Part 2, 80th Cong., 1st Sess. 38.

Other provisions of the Taft-Hartley Act make it even clearer than the National Labor Relations Act that the

[4] "SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

States are left free to pursue their own more restrictive policies in the matter of union-security agreements. Because § 8 (3) of the new Act forbids the closed shop and strictly regulates the conditions under which a union-shop agreement may be entered, § 14 (b) was included to forestall the inference that federal policy was to be exclusive. It reads:

> "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

It is argued, however, that the effect of this section is to displace State law which "regulates" but does not wholly "prohibit" agreements requiring membership in a labor organization as a condition of employment. But if there could be any doubt that the language of the section means that the Act shall not be construed to authorize any "application" of a union-security contract, such as discharging an employee, which under the circumstances "is prohibited" by the State, the legislative history of the section would dispel it. See S. Rep. No. 105, 80th Cong., 1st Sess. 5–7; H. R. Rep. No. 245, 80th Cong., 1st Sess. 9, 34, 40, 44; H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 60; 93 Cong. Rec. 3554, 3559, 4904, 6383–84, 6446; H. R. 3020, 80th Cong., 1st Sess., as reported, § 13.

It remains to consider whether certification of the Union by the National Labor Relations Board in 1942 thereby forever ousted jurisdiction of the Wisconsin Board to enjoin practices forbidden by Wisconsin law. Since the enumeration by the Wagner Act and the Taft-Hartley Act of unfair labor practices over which the National Board has exclusive jurisdiction does not prevent the States from enforcing their own policies in matters not governed by the federal law, such freedom of action

by a State cannot be lost because the National Board has once held an election under the Wagner Act. The character of activities left to State regulation is not changed by the fact of certification. Certification, it is true, makes clear that the employer and the union are subject to federal law, but that is not disputed. So far as the relationship of State and national power is concerned, certification amounts to no more than an assertion that as to this employer the State shall not impose a policy inconsistent with national policy, *Hill* v. *Florida,* 325 U. S. 538, or the National Board's interpretation of that policy, *Bethlehem Steel Co.* v. *New York S. L. R. B.,* 330 U. S. 767; *La Crosse Telephone Corp.* v. *Wisconsin E. R. B.,* 336 U. S. 18. Indeed, the express disclaimer in § 8 (3) of the National Labor Relations Act of intention to interfere with State law and the permission granted the States by § 14 (b) of the Taft-Hartley Act to carry out policies inconsistent with the Taft-Hartley Act itself, would be practically meaningless if so easily avoided. For these provisions can have application, obviously, only where State and federal power are concurrent; it would have been futile to disclaim the assertion of federal policy over areas which the commerce power does not reach.

Since, therefore, the effect given the Wisconsin Employment Peace Act by the judgment below does not conflict with the enacted policies of Congress, that judgment is

Affirmed.

MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE concur in the result.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, dissenting.

The decision just rendered holds that the State of Wisconsin can compel the petitioner to pay unearned back wages to an employee found to have been discharged

by petitioner under the terms of a collective bargaining agreement which required such discharge. The petitioner had originally entered into the agreement in response to irresistible pressure by the United States Government. 252 Wis. 549, 559, 32 N. W. 2d 417. The circumstances under which the contract was made were these:

From 1938 to 1943 the company and the union were in an almost constant wrangle. The chief bone of controversy throughout this five-year period was the union's demand for a "closed shop." Petitioner resolutely fought for an "open shop." In 1938 the union took its cause to the National Labor Relations Board. After a long hearing of which the closed shop issue was a prominent phase, that Board in 1940 ordered petitioner to bargain with the union on the pending issues. *Algoma Plywood Co.*, 26 N. L. R. B. 975, 980, 1002 (1940). The Court of Appeals, referring to the closed shop question as the "main stumbling block" between petitioner and the union, refused to enforce the order on the ground that it was not clear that the union represented a majority of petitioner's employees. *Labor Board* v. *Algoma Plywood Co.*, 121 F. 2d 602, 606, 611. Thereafter, early in 1942, petitioner appealed to the Wisconsin Employment Relations Board to conduct an election. The union went to the National Board; petitioner withdrew its state board application; the National Board conducted an election; the union won, and the old closed shop controversy was renewed with increased intensity.

The union appealed to the National War Labor Board to settle the closed shop dispute. That Board, in collaboration with the United States Department of Labor, put pressure on petitioner to yield to the union's demands. Petitioner was informed that unless it agreed to a maintenance of membership clause, which was at the time forbidden by Wisconsin law, the clause "would be put in by the War Labor Board anyhow" since inclusion of

such provisions was a part of that Board's national policy. Thus fired at from one side by the state and from the other side by powerful federal agencies, petitioner had to flee to one side or the other. Neither side offered a safe sanctuary. In weighing the conflicting considerations, petitioner not unreasonably found the scales tipped on the United States' side. Had petitioner refused the demands of the federal agency, the Government could and might have seized and operated its plants.[1] Furthermore, petitioner's employees might have stopped work. In response to its best judgment, though contrary to its own strong desires, petitioner finally yielded to the Federal Government's demands and agreed to the union's terms. January 23, 1943, a collective bargaining agreement was executed which contained the controversial maintenance of union membership clause and an automatic extension clause. This contract was approved by the War Labor Board. The controversial clause was extended automatically from year to year and was in effect when the alleged discharge took place. The Court apparently concedes that this clause of the collective bargaining contract was valid when petitioner entered into it under federal compulsion. In my judgment it was equally valid when

[1] The dire consequences of a violation of a Board order is illustrated by *United States* v. *Montgomery Ward,* 150 F. 2d 369. This Court granted certiorari and ordered the judgment vacated on the ground that the cause had become moot. 326 U. S. 690. In this case Montgomery Ward refused to carry out an order of the War Labor Board. One of the subjects of the order was a maintenance of membership clause similar to the one involved in this case. The action in this *Montgomery Ward* case was brought by the United States to test the legality of an order of the President of the United States directing seizure of the properties of Montgomery Ward because of the refusal of that company to obey the Board's order. The Court of Appeals upheld the legality of the seizure order. See also *National War Labor Bd.* v. *Montgomery Ward,* 79 U. S. App. D. C. 200, 144 F. 2d 528; and *United States* v. *Montgomery Ward,* 58 F. Supp. 408.

the employee was discharged under it. It seems at least a questionable interpretation of federal statutory policy for this Court—a federal tribunal—to hold that a state is free to impose a money penalty on this company for acting in obedience to a contract which a federal agency validly compelled it to make.[2]

I.

The Court's concession that the contract was valid when made rests on the premise that the statute creating the War Labor Board stemmed from the war power of Congress and that under this power the War Labor Board could, as it did, force petitioner to make the contract. *Greenebaum Tanning Co.*, 10 War Lab. Rep. 527. But, says the Court, when Wisconsin entered the back-pay order, the War Labor Board had ceased to exist and on its dissolution on January 4, 1946, Wisconsin became possessed of the power to order petitioner to break his contract. In other words, the holding seems to be that the discontinuance of the War Labor Board automatically and instantly empowered the states to impair and nullify all collective bargaining contracts entered into under authority of the supreme federal policy embodied in the National War Labor Board Act. For several reasons, I cannot agree.

1. The termination of the War Labor Board was accomplished by Executive Order of the President, No. 9672. 11 Fed. Reg. 221. But there is nothing in that Executive

[2] The Wisconsin trial court refused to impose this "penalty" on petitioner. It found the "equities" on petitioner's side. The State Supreme Court held that the compulsion under which petitioner had acted could not relieve him from the state penalty which was imposed to "retard the employer's inclination to yield to this compulsion in the future." 252 Wis. 549, 561, 32 N. W. 2d 417, 423. In other words the penalty was imposed as a warning to petitioner and others that continued compliance with the federal policy would subject them to penalties in Wisconsin.

Order that indicates a purpose to authorize invalidation of contracts made under the Board's directions. A contrary purpose is indicated. The Executive Order established the National Wage Stabilization Board. As the name of that Board indicates, it was established to exercise functions in connection with wage disputes which might adversely affect the national economy. For the limited purposes enumerated in the Order the new Board was vested with all the "powers, functions, and responsibilities of the National War Labor Board . . . ." While scope for operation of these powers was within more narrow limits than had been the scope of the War Labor Board's powers, the creation of this new Board negatives any possible contention that dissolution of the War Labor Board showed an intention to permit states to invalidate previously executed legal contracts approved by the War Labor Board in the interests of industrial peace. And far from indicating a presidential belief that wage stabilization and industrial peace were no longer essential in the war emergency period, the new Executive Order, as had the old, rested on the war power and the statutes that had stemmed from it. The War Labor Board was created to implement a congressional war policy expressed in part in the War Labor Disputes Act. 57 Stat. 163. The Board's dissolution could not detract from the force of the statute or from the congressional war power. See *Kelly* v. *Washington,* 302 U. S. 1, 14. This Executive Order recognized the continued existence of conditions that called for the further exercise of war powers. It was promulgated January 4, 1946. The last automatic extension of the compelled contract was April 4, 1946. This automatically extended contract was the basis for the discharge. Under the foregoing circumstances I cannot agree that dissolution of the War Labor Board authorized Wisconsin to punish petitioner for its continued observance of the contract.

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2. That the President correctly assumed the continued existence of war powers after the cessation of hostilities seems beyond question in the light of this Court's holding in *Ludecke* v. *Watkins,* 335 U. S. 160, 166–170. The holding in the *Ludecke* case was that the war had not at that time officially ended and that the congressional war power still existed in May, 1947. This was long after the dissolution of the War Labor Board and the employee's discharge. In light of the 1947 *Ludecke* holding it seems odd that dissolution of the War Labor Board should now be held an adequate reason for permitting a state in 1947 to invalidate contracts previously entered into in obedience to federal commands made under a valid federal law rooted in the war power. It seems to me that the Court's holding today can be justified if at all only by adopting the holding of the Wisconsin Supreme Court in this case. That court supported the state penalty imposed on petitioner by concluding that the National War Labor Board's action was *ultra vires.* Its reasoning was that national war powers had "ended" in 1946. 252 Wis. at 560, 32 N. W. 2d 522. But in the *Ludecke* case this Court held those powers still existed in 1947. The result here is all the more inexplicable when it is considered that wholesale invalidation of those federally authorized contracts could result in serious industrial conflicts at a time when industrial relationships were extremely strained due to the transition from a war to a peace economy. *Woods* v. *Miller Co.,* 333 U. S. 138, 144.

3. I suppose it cannot be denied that congressional authority to force contracts under the war power carries with it authority to provide that (at least during the existence of the war power) the obligations assumed under those contracts should be faithfully observed and that the contracts should be invulnerable to state attack. In this view after the War Labor Board ceased to exist and before

peace had been officially declared, Congress under the war power doubtless could have made it possible under enumerated contingencies for states to invalidate contracts such as this one. But no suggestion has been made that any statutory language of Congress can be stretched far enough to find such congressional intent. Since no such intent has been manifested, it seems fair to assume that Congress intended that such contracts should remain immune from state attack and continue in force unless terminated under their valid provisions. I would therefore hold that petitioner was obligated to continue to observe the terms of the contract until terminated according to its provisions.

The contract had not terminated when the War Labor Board ceased to exist. It had been given continued vitality under its own original terms, terms which must be interpreted under controlling federal law authorizing the contract's creation. I may assume at this point that the contract was invulnerable to state impairment or nullification only because of congressional authority stemming from the war power. Even so and despite the dissolution of the War Labor Board, I think the state was without power to penalize petitioner for observance of the contract, at least during the period in which the war had not officially ended.

II.

It is apparent that the Wisconsin statute as here applied deprives petitioner and his employees of a substantial federal right if § 8 (3) of the National Labor Relations Act[3] authorized union membership maintenance agreements without regard to contrary state policies. For given that interpretation of § 8 (3), the Wisconsin Act would not only impair collective bargaining rights

[3] See note 10, p. 326.

protected by § 8 (3); [4] it would also stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hill* v. *Florida,* 325 U. S. 538, 542; *Bethlehem Steel Co.* v. *New York Labor Bd.,* 330 U. S. 767, 775–776.

The Wisconsin Employment Relations Board began proceedings against the petitioner eleven years after passage of the National Labor Relations Act. During that entire eleven-year period it seems to have been generally assumed that § 8 (3) was an unequivocal federal authorization for collective bargaining provisions of the type here made. This Court had noticed that such provisions were "frequent subjects of negotiation between employers and employees," and had strongly indicated that it was an unfair labor practice for an employer to refuse to bargain concerning them. *National Licorice Co.* v. *Labor Board,* 309 U. S. 350, 360. Both the courts and the National Labor Relations Board have held that efforts of employers to frustrate the right of unions to bargain for exclusive union employment constituted a violation of the federal Act for which employers could be held accountable.[5]

The action of the United States Department of Labor and the National War Labor Board in forcing this petitioner to accept a maintenance of membership provision in its collective bargaining agreement was not the result of an isolated or haphazard interpretation of § 8 (3) of the

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[4] See *Allen-Bradley Local* v. *Wisconsin Employment Board,* 315 U. S. 740, 751.

[5] *Labor Board* v. *Reed & Prince Mfg. Co.,* 118 F. 2d 874, 883; *Peninsular & Occidental S. S. Co.* v. *Labor Board,* 98 F. 2d 411, 414. In 1944 the National Labor Relations Board held that an employer was guilty of an unfair labor practice where it refused to negotiate with the union's collective bargaining representative on the subject of a contract providing that none but union members should be employed. The Board held that such a refusal was an unfair labor practice. *In the Matter of Tampa Electric Co.,* 56 N. L. R. B. 1270, 1273. And see *Algoma Plywood Co.,* 26 N. L. R. B. 975, 994.

National Labor Relations Act. The action forced upon petitioner was pursuant to a thoroughly considered and well-established policy of the National War Labor Board.[6] Both the National War Labor Board and the Conciliation Division of the United States Department of Labor were charged with special duties in regard to labor disputes by the War Labor Disputes Act of June 25, 1943, 57 Stat. 163, 50 U. S. C. App. §§ 1501–1511. And the War Labor Disputes Act required both these federal agencies to conform to the provisions of the National Labor Relations Act. In order that these government agencies might be better able to carry out their statutory duty of conforming to the National Labor Relations Act, an interdepartmental committee was established. It consisted of representatives of the National Labor Relations Board, the Department of Labor, and the National War Labor Board. This committee was vested with power to discuss and consider policy questions and other problems relating to administration of the duties of the National Labor Relations Board and the National War Labor Board. This power was exercised. Rep. N. L. R. B. 74 (1943).

As early as April, 1942, the National War Labor Board in the *Little Steel Companies'* controversy, 1 War Lab. Rep. 325, asserted its power to require that contracts for maintenance of union membership be inserted in collective bargaining agreements. It reached the conclusion, see pp. 354–356, that such collective bargaining provisions were valid because they fell within the proviso of § 8 (3) of the National Labor Relations Act. From then on until 1945, when its last decisions were made, the National War Labor Board continued to require maintenance of membership contracts.[7]

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[6] See for example, *Little Steel Companies,* 1 War Lab. Rep. 325; and *Industrial Cotton Mills Co.,* 25 War Lab. Rep. 136.

[7] *Douglas Aircraft Co.,* 28 War Lab. Rep. 51 (1945).

The most extensive discussion of the question directly involved in this case occurred in the National War Labor Board's opinion in *Greenebaum Tanning Co.*, 10 War Lab. Rep. 527. Greenebaum Tanning Co., a Wisconsin business, was engaged in interstate commerce and therefore was covered by the National Labor Relations Act. In the *Greenebaum* case, the National War Labor Board had to decide whether it could enforce a maintenance of union membership contract in Wisconsin contrary to the provisions of the very Wisconsin statute relied on by the Wisconsin Board in this case. It was decided over the strenuous objection of the company that the National War Labor Board had power to enforce contracts such as petitioner made here, despite the conflicting Wisconsin statute.[8] The Board found its power to override the state law in the war powers of the President, the War Labor Disputes Act, and the National Labor Relations Act. The National War Labor Board pointed out in the *Greenebaum* decision that, at the request of the President of the United States, it had first considered with the National Labor Relations Board the questions of the power of these Boards in cases such as the *Greenebaum* case. In holding that § 8 (3) of the National Labor Relations Act granted the employers and employees the right to make maintenance of union membership agreements, the Board at p. 543 stated: "The Board is satisfied that, were it not for the existence of the war emergency, the employees involved in this case would have had the right to demand maintenance of membership in favor of the designated representative of a major-

[8] In all of the cases below, the War Labor Board required insertion of the maintenance of membership clause despite local state statutes which prohibited such agreements. *Vilter Mfg. Co.*, 11 War Lab. Rep. 332; *U. S. Vanadium Corp.*, 13 War Lab. Rep. 527; *Ingalls Iron Works Co.*, 21 War Lab. Rep. 27; *St. Joe Paper Co.*, 25 War Lab. Rep. 421.

ity of employees. This right is granted to the employees under the National Labor Relations Act, and is a right which could be enforced in peace-time by the strike. If the Wisconsin Employment Peace Act requires more than a majority of employees to vote for maintenance of membership under those circumstances, it must be subordinated to the provisions of the National Labor Relations Act."

The foregoing is evidence that up to the time the Taft-Hartley Act was passed by Congress in 1947, § 8 (3) of the National Labor Relations Act had been accepted by government agencies as an unequivocal authorization for maintenance of union membership contracts. The Taft-Hartley Act expressly granted the states more leeway in regard to enforcement of their own policies as to contracts of the type here involved. 61 Stat. 136, 151, 29 U. S. C. § 164. And the National Labor Relations Board has now construed the new federal Act as precluding such contracts to the same extent that they are precluded by state law.[9] But it is significant that this interpretation rested entirely on the language and legislative history of the Taft-Hartley Act. The Board did not indicate any belief that this phase of the new Taft-Hartley Act was a mere clarification of the old Act.

Thus, up to 1943, when petitioner originally made this contract, and up to 1946 when it was automatically renewed, all indications were that § 8 (3) authorized the type of contract which federal authorities practically commanded petitioner to accept. There seemed to be no reason then why petitioner or any other employer should anticipate that § 8 (3) would be construed to permit states to nullify collective bargaining rights which

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[9] *Giant Food Shopping Center* (1948), 77 N. L. R. B. (No. 153). The Taft-Hartley Act cannot justify this order of the Wisconsin Board because the Act was passed after the order was issued.

that section was generally supposed to have recognized. It is apparent from this record that petitioner entered into the contract and permitted its automatic renewal in the belief that § 8 (3) deprived the state of power to enforce its policy and that petitioner's reluctant action was due to pressure incident to the then accepted interpretation of § 8 (3).

Nevertheless, the Court now, after § 8 (3) is no longer the law, gives it an entirely new and apparently wholly unanticipated interpretation. Whether such new interpretation will affect the past conduct of any persons other than the parties to this action we do not know. We do know that a new interpretation will impose penalties on this employer for conduct pressed upon it by federal labor authorities under authority of the federal Act.

The new interpretation given § 8 (3) by the Court rests on the conclusion that the legislative history of the Act shows that Congress intended to leave states free to bar the type of contract here involved. The committee reports and legislative comments on the national Act set out in the Court's opinion do lend strong support to this contention. In the light of this legislative history, I would join in the Court's interpretation of § 8 (3) if we were interpreting that section on a clean slate. But we are not. The section has a history of administrative interpretation counter to the one that the Court gives it today. The language of § 8 (3)[10] is rea-

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

. . . . . .

"(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, . . . or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership

sonably susceptible of the interpretation the section was given by the Conciliation Division of the United States Department of Labor and by the National War Labor Board, an interpretation to which the National Labor Relations Board appears to have assented. And, as previously pointed out, the National Labor Relations Board held this very petitioner guilty of an unfair labor practice for its refusal to bargain with its Wisconsin employees on their demand for a closed shop. *Algoma Plywood Co., supra* at 994, 998. This N. L. R. B. finding was in 1940, a year after the passage of the Wisconsin Act here held controlling. I think a change in the interpretation of § 8 (3) should not be made at this late date, when the section is no longer the law, merely to invalidate a contract made under federal compulsion and founded on a justifiable belief that § 8 (3) authorized the contract. I would not make a trap of this settled administrative interpretation by subjecting this employer to penal damages for his good faith reliance on it. See *Labor Board* v. *Hearst Publications,* 322 U. S. 111, 123.

I would reverse this judgment.

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therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made." 49 Stat. 449, 452, 29 U. S. C. § 158 (3).

CITY OF NEW YORK *v.* SAPER, TRUSTEE IN BANKRUPTCY.

NO. 168. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.*

Argued January 4, 1949.—Decided March 7, 1949.

Under the Bankruptcy Act of 1898, as amended by the Act of 1926 and the Chandler Act of 1938, tax claims against a bankrupt bear interest only until the date of bankruptcy, not until payment. Pp. 329–341.

168 F. 2d 268, 272, affirmed.

In No. 168, the District Court in a bankruptcy proceeding allowed interest on a tax claim of the City of New York to the date of payment. 75 F. Supp. 458. The Court of Appeals reversed. 168 F. 2d 268. This Court granted certiorari. 335 U. S. 811. *Affirmed,* p. 341.

In Nos. 200 and 201, the District Court in a bankruptcy proceeding allowed interest on tax claims of the United States and the State of New York only to the date of bankruptcy. 73 F. Supp. 685. The Court of Appeals affirmed. 168 F. 2d 272. This Court granted certiorari. 335 U. S. 812. *Affirmed,* p. 341.

Seymour B. Quel argued the cause for the City of New York, petitioner in No. 168. With him on the brief were *John P. McGrath* and *Isaac C. Donner.*

Francis R. Curran, Assistant Attorney General, argued the cause for the State of New York, petitioner in No. 200. With him on the brief were *Nathaniel L. Goldstein,* Attorney General, and *Wendell P. Brown,* Solicitor General.

*Together with No. 200, *State of New York* v. *Carter, Trustee in Bankruptcy,* and No. 201, *United States* v. *Carter, Trustee in Bankruptcy,* also on certiorari to the same court.

I. Henry Kutz argued the cause for the United States, petitioner in No. 201. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Caudle, Robert W. Ginnane, Ellis N. Slack* and *Lee A. Jackson.*

David Haar argued the cause and filed a brief for respondent in No. 168.

Sydney W. Cable argued the cause and filed a brief for respondent in Nos. 200 and 201.

MR. JUSTICE JACKSON delivered the opinion of the Court.

The ultimate issue in these three cases is whether tax claims against a bankrupt bear interest until the date of bankruptcy,[1] as held by the court below,[2] or until payment, as previously held by another Court of Appeals.[3] We granted certiorari [4] to resolve the conflict, the matter being of considerable practical importance [5] in the administration of the Bankruptcy Act.[6]

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[1] The terms "date of bankruptcy" and "bankruptcy," with reference to time, mean the date when the petition was filed, 30 Stat. 544, as amended 52 Stat. 840–841, and are used accordingly in this opinion.

[2] In No. 168 the District Judge allowed New York City interest to the date of payment, 75 F. Supp. 458, and the Court of Appeals reversed, 168 F. 2d 268. In Nos. 200–201, the District Judge allowed the United States and the State of New York interest only to the date of bankruptcy, 73 F. Supp. 685, and the Court of Appeals affirmed, 168 F. 2d 272.

[3] *Davie* v. *Green,* 133 F. 2d 451.

[4] 335 U. S. 811, 812.

[5] Those most immediately concerned with administration of the Act have frequently expressed dissatisfaction over the inroads taxes and interest thereon make in the fund available for creditors. For discussions of that and similar practical problems see 14 J. N. A. Ref. Bankr. 3; 17 *id.* 129; 18 *id.* 17; 19 *id.* 31; 21 *id.* 106; 22 *id.* 41; 44 Com. L. J. 411; and 45 *id.* 370. See also Judge Bright's opinion below, 73 F. Supp. 685, and referees' comments in *Matter of Dorsey,* 46 Am. B. R. (N. S.) 146, and *Matter of D. O. Summers Co.,* 45 Am. B. R. (N. S.) 123. The whole subject of tax claims and interest

If the question were one of first impression to be decided in the light of the present statute alone, we should have no difficulty in affirming the court below. More than forty years ago Mr. Justice Holmes wrote for this Court that the rule stopping interest at bankruptcy had then been followed for more than a century and a half. He said the rule was not a matter of legislative command or statutory construction but, rather, a fundamental principle of the English bankruptcy [7] system which we copied. *Sexton* v. *Dreyfus,* 219 U. S. 339, 344. Our present statute contains no provision expressly repudiating that principle or allowing an exception in favor of tax claims. Every logical implication from relevant provisions is to

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is discussed at length in 3 Collier on Bankruptcy (14th ed., 1941, and 1948 Cum. Supp.) ¶¶ 57.22, 57.30, 63.16, 63.26, 64.404, 64.407, 64.408. Comments appear in 61 Harv. L. Rev. 354; 21 Temp. L. Q. 428; 29 Va. L. Rev. 206; 34 *id.* 835; 23 N. Y. U. L. Q. Rev. 516.

[6] Bankruptcy Act of 1898, c. 541, 30 Stat. 544, as amended by the Chandler Act of June 22, 1938, c. 575, 52 Stat. 840, 11 U. S. C. § 1 *et seq.*

[7] In England the practice was well established, 2 Blackstone, Commentaries *488; *Bromley* v. *Goodere,* 1 Atk. 75; *Ex parte Bennet,* 2 Atk. 527; and applied to mortgages as well as unsecured debts, *Ex parte Badger,* 4 Ves. Jr. 165; *Ex parte Ramsbottom,* 2 Mont. & Ayr. 79; *Ex parte Penfold,* 4 De G. & Sm. 282; *Ex parte Lubbock,* 9 Jur. (N. S.) 854; *In re Savin,* L. R. 7 Ch. 760, 764; *Ex parte Bath,* 22 Ch. Div. 450, 454; *Quartermaine's Case,* [1892] 1 Ch. 639; *In re Bonacino,* 1 Manson 59. Two exceptions were recognized: if the alleged "bankrupt" proved solvent, creditors received post-bankruptcy interest before any surplus reverted to the debtor, *Bromley* v. *Goodere,* 1 Atk. 75; *Ex parte Mills,* 2 Ves. Jr. 295; *Ex parte Clarke,* 4 Ves. Jr. 676; and if securities held by a creditor as collateral produced interest or dividends during bankruptcy such amounts were applied to post-bankruptcy interest, *Ex parte Ramsbottom,* 2 Mont. & Ayr. 79; *Ex parte Penfold,* 4 De G. & Sm. 282; *Quartermaine's Case,* [1892] 1 Ch. 639. These exceptions have been carried over into our system. See *American Iron Co.* v. *Seaboard Air Line,* 233 U. S. 261, 267; *Sexton* v. *Dreyfus,* 219 U. S. 339, 346.

the contrary. Section 63 (a) (1), 11 U. S. C. § 103 (a) (1) allows interest on judgments and written instruments [8] only to date of bankruptcy. Section 63 (a) (5), 11 U. S. C. § 103 (a) (5) allows interest only to that date on debts reduced to judgment [9] after bankruptcy.[10] No provision permits post-bankruptcy interest on other claims in general or tax claims in particular. Section 57 (j), 11 U. S. C. § 93 (j), forbidding allowance of governmental penalties or forfeitures, permits [11] allowance of losses sustained by the acts penalized, with actual costs and "such interest as may have accrued thereon according to law." However, on its face this appears to delimit even such allowable debts as of the date of bankruptcy and to allow no more interest than does § 63 with respect to the claims there specified. Moreover, there is no

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[8] "Debts of the bankrupt may be proved and allowed against his estate which are founded upon (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition by or against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest . . . ."

[9] ". . . (5) provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgments . . . ."

[10] Although the provisions of § 63 (a) (1) requiring a rebate of unearned interest, and of § 63 (a) (5) eliminating certain post-bankruptcy interest, may in practice be operative but infrequently, they reflect a principle of long standing. See 2 Blackstone, Commentaries *488.

[11] "Debts owing to the United States or any State or subdivision thereof as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law."

interest except that which accrues according to law—it is exactly such interest that the "fundamental principle" cuts off as of bankruptcy. Section 57 (n), 11 U. S. C. § 93 (n) requires governmental claims to be proved in the same manner and within the same time as other debts and only for cause shown may a reasonable extension be granted. Tax claims are treated the same as other debts except for the fourth priority of payment, § 64 (a), 11 U. S. C. § 104 (a), and the provision making taxes nondischargeable, § 17, 11 U. S. C. § 35. But each of these sections is silent as to interest.

The long-standing rule against post-bankruptcy interest thus appears implicit in our current Bankruptcy Act. To read into such a statute an exception to that rule would be unwarranted and, as an original proposition, we should decline to do so. However, the issue comes here after forty years of bankruptcy administration under the Act of 1898 followed by ten years under the 1938 Chandler Amendments. Petitioners contend that judicial decisions during those periods have now been incorporated into a legislative policy allowing interest on tax claims to payment, thereby producing a rule of law beyond further judicial scrutiny.

It is contended that decisions under the Act of 1898 definitely established such a rule. And petitioners challenge the lower court's holding, despite those decisions, that the Congress through the Chandler Act completed the assimilation of taxes to debts and manifested an intention that such claims be treated, interest-wise, the same as other debts. They assert that the pre-Chandler Act allowance of interest to date of payment was grounded in judicial construction of § 57 (j), approved at least *sub silentio* by this Court in *United States* v. *Childs,* 266 U. S. 304, and adopted by Congressional reenactment of that section in the Chandler Act. They

also contend that even after the Chandler Act the lower courts, and this Court in *Meilink* v. *Unemployment Commission,* 314 U. S. 564, affirmed the alleged prior interpretation of § 57 (j). In such a situation, it is said, the courts cannot modify what has now become legislative policy even though originally it may have been a judicially developed rule and one which now, as a matter of statutory construction, we should reject.

At the outset it may be admitted that in practice under the Act of 1898 the lower courts generally did allow interest on tax claims until paid. The parties and the lower courts trace that practice to *In re Kallak,* 147 F. 276, and cases following that decision. But we do not believe those cases support petitioners' contention that the pre-Chandler allowance of post-bankruptcy interest reflects a construction of § 57 (j). The *Kallak* opinion itself refutes that contention insofar as it may be based on that line of cases. The court there first decided that since § 64 (a) of the Act of 1898 [12] gave taxes absolute priority over claims of every kind, "public taxes do not constitute a 'claim' in bankruptcy." 147 F. 276, 277. The statute did not require that taxes be proved but that the trustee should seek them out and pay them in full. In view of that requirement and since taxes were not claims, the court saw no reason why the rule stopping interest on ordinary claims should apply. The court found that rule was based on considerations of expediency and practical

[12] "Sec. 64. Debts which have Priority.—a The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors . . . . b The debts to have priority . . . and to be paid in full out of bankrupt estates, and the order of payment shall be [(1) costs of preserving the estate (2) certain filing fees (3) administration expenses including attorney's fees (4) wages as specified (5) debts entitled to priority under state or federal laws]. . . ." 30 Stat. 544, 563.

convenience not present in the case of taxes. First, it said that allowance of such interest at the varying rates applicable to the different claims sharing the estate would prevent definite determination of each claimant's proportionate share. Secondly, such recurring readjustments would complicate administration of the estate. Since neither difficulty would result from allowing post-bankruptcy interest on taxes not sharing the fund with other obligations, the rule against such interest was held to be inapplicable. This conclusion was grounded entirely in reasons of practical convenience. If the case involved construction of any part of the Act of 1898, it clearly was § 64 (a) with its requirements of absolute priority in payment of "all taxes legally due and owing," which, together with the dispensation from proof, the court considered as indicating that taxes enjoyed a status entirely different from that accorded ordinary claims. Those provisions were considered controlling, while § 57 (j) was not mentioned in the opinion. Consequently the latter section's reenactment could not be considered a legislative adoption of any "judicial gloss" on that section resulting from the *Kallak* line of cases. The only section relied upon in *Kallak,* § 64 (a), has been significantly amended to deprive taxes of their preferred status, first by the amendment of 1926, and later by the Chandler Act. The former [13] expressly provided that taxes yield priority to administration expenses and certain wages, neither of which bear interest. The latter amendments finalized the subordination of taxes to other priority items. They also wrote into § 57 (n) the requirement of proof, formerly dispensed with under § 64 (a). Consequently the argument based on alleged Chandler Act recognition of lower court interpretations of § 57 (j) seems entirely without force. And, on the contrary, that enactment did

[13] § 15 of the Act of May 27, 1926, c. 406, 44 Stat. 662, 666.

significantly change the provisions of § 64 (a) which were decisive in *Kallak* and similar cases.[14]

Petitioners rely most heavily, however, upon this Court's decision in *United States* v. *Childs*, 266 U. S. 304, reversing *In re J. Menist & Co.*, 290 F. 947. It is urged that this decision reflected a construction by this Court of § 57 (j) which the Congress adopted in enacting the Chandler amendments. We do not believe this contention survives scrutiny of that case or that it is supported by the legislative history of the Chandler Act. The Court of Appeals stated that the only issue before it was "whether an exaction of 1 per cent. a month as the price of delay amounts to a penalty." 290 F. 947, 949. It decided that anything in excess of 6% per annum would be a penalty barred by § 57 (j). It is true that court also stated the allowable interest could run until payment. However, that statement was also based on the "highly preferred" status of taxes and the requirement of § 64 (a) that absolute priority be given to "all taxes legally due and owing." Section 57 (j) was con-

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[14] *In re Ashland Emery & Corundum Co.*, 229 F. 829, relies entirely on § 64 (a) and the *Kallak* case. *In re Clark Realty Co.*, 253 F. 938, discusses § 64 (a) but not § 57 (j) and relies, erroneously, on *Dayton* v. *Stanard*, 241 U. S. 588, as to which see text. *In re J. Menist & Co.*, 290 F. 947, relying on § 64 (a), is discussed in the text. *In re A. E. Fountain, Inc.*, 295 F. 873, does not discuss the issue, deciding only that taxes bear simple interest. *Horne* v. *Boone County*, 44 F. 2d 920, discusses only whether the levy there was penalty or interest. *In re Martin*, 75 F. 2d 618, does not discuss the issue. *In re Semon*, 11 F. Supp. 18, modified 80 F. 2d 81, was based on the Revenue Act of 1928 and the Court of Appeals decided only that the levy there was not a penalty. *In re Beardsley & Wolcott Mfg. Co.*, 82 F. 2d 239, also involved only the penalty issue. Compare *In re William F. Fisher & Co.*, 148 F. 907, denying the claimed interest because § 64 (a) contained no provision allowing it; and *dictum* as to interest in *McCormick* v. *Puritan Coal Min. Co.*, 41 F. 2d 213, 214.

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sidered as establishing that 12%, as a penalty, could not be allowed but that 6% was a "pecuniary loss" within the meaning of that section, and allowable as such, in full. But the Government challenged in this Court only the holding that the 12% interest was a penalty barred by § 57 (j). This Court reversed as to that point and the opinion makes it clear that it was the only issue considered and decided here. The question whether interest could run to payment, although discussed in respondent's brief on the merits, was not the issue which induced the Court to bring the case here, and it is not discussed in the opinion. We cannot agree that the case represents even a *sub-silentio* approval of allowance of post-bankruptcy interest. Even assuming, *arguendo,* such approval to be implicit in the decision, it would not help petitioners, relying solely on reenactment of § 57 (j), since we have shown the lower court's holding was based largely on provisions of § 64 (a) which have since been changed by the Act of 1926 and the Chandler Act.

Other decisions of this Court cited by petitioners on this point do not help their cause and require little discussion. *Dayton* v. *Stanard,* 241 U. S. 588, approved payment of interest to individuals who, during the course of a bankruptcy, paid off tax liens binding property of the bankrupt. The Court's decision was only that such parties, whose tax deeds were invalidated because at the time they were issued the property was *in custodia legis,* could be reimbursed out of the estate's general fund for both their advances and interest at the legal rate. This was simple equity since the claimants had paid taxes which the then § 64 (a) required the trustee to seek out and pay in full. *New York* v. *Jersawit,* 263 U. S. 493, is clearly a holding limited to the determination that the claim there asserted was a penalty not allowable under § 57 (j). The case was so described in the *Childs* opinion, 266 U. S. 304, 309, and the discus-

sion there confirms our conclusion that the latter decision was similarly limited to that point. *Coder* v. *Arts,* 213 U. S. 223, states as a subsidiary point only that, where the estate was adequate, interest could properly be allowed on a mortgage which the Court had held not to be a voidable preference.

It is thus clear that when the Chandler amendments were under consideration in Congress the reported cases established only that lower courts were allowing interest on tax claims until payment, either as a matter of practical convenience or because § 64 (a) gave those claims absolute priority and dispensed with proof. There was no basis for belief that the lower courts, much less this Court, had applied any judicial gloss to § 57 (j) requiring similar preferred treatment, interest-wise, for tax claims. If any conclusion could have been drawn from the cases it was that § 64 (a) might have justified a judicial belief that taxes need not be considered, for any purpose, the same as other debts. And, as we have seen, both significant provisions of that section were amended with adverse effects on the status of tax claims. Consequently, reenactment of § 57 (j) does not support petitioners' position on this issue. This conclusion is confirmed by the complete lack of any indication in the legislative history that Congress considered § 57 (j) in this connection. Petitioners are in fact asserting that adding to an alleged *sub-silentio* ruling here on § 57 (j) Congressional silence in reenacting that section precipitated a legislative command that post-bankruptcy interest be allowed on tax claims which, at the same time, were deliberately being reduced to the level of other debts. Mere statement of the proposition indicates its rejection.

The Court of Appeals concluded that by the 1926 amendment and the Chandler Act, Congress assimilated taxes to other debts for all purposes, including denial of post-bankruptcy interest. We think this is a sound and

logical interpretation of the Act after those amendments to §§ 64 (a) and 57 (n). Considered in conjunction with the general rule against post-bankruptcy interest [15] as well as § 63's limitations of interest on other claims to date of bankruptcy, they compel our conclusion, already stated, that the statute as amended did not contemplate any exception in favor of tax claims.

Petitioners' final contention is that even after the Chandler Act the lower courts continued to allow post-bankruptcy interest, that this Court in *Meilink* v. *Unemployment Commission,* 314 U. S. 564, approved the practice, and that Congressional recognition of that interpretation is reflected in an unsuccessful attempt to modify § 57 (j). It may be admitted that lower courts, other than the one whose judgment is now being reviewed, did continue to allow such interest after the 1938 amendment.[16] But this Court has not, in the *Meilink* case or otherwise, passed on the question. That case involved the same issue that had been presented in *Childs:* whether or not the interest there challenged was in fact a penalty proscribed by § 57 (j) which had been left substantially unchanged by the Chandler Act. We decided only that question.

But, irrespective of that decision, petitioners contend that Congress has considered the lower courts' post-Chandler Act decisions as a statutory interpretation which can be overruled only by legislation. The argu-

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[15] See note 7 and text; and see *Thomas* v. *Western Car Co.,* 149 U. S. 95; *Sexton* v. *Dreyfus,* 219 U. S. 339; *American Iron Co.* v. *Seaboard Air Line,* 233 U. S. 261.

[16] See, for example, *In re L. Gandolfi & Co.,* 42 F. Supp. 706; *In re Flayton,* 42 F. Supp. 1002; *Davie* v. *Green,* 133 F. 2d 451. But see Referee's decision, *In Matter of Union Beverage Co.,* 50 Am. B. R. (N. S.) 825, 829. And see discussion by the court below in *Hammer* v. *Tuffy,* 145 F. 2d 447, 449, and in *United States* v. *Roth,* 164 F. 2d 575, 577–578.

ment is based on a Committee Report accompanying a bill approved by the House during the 80th Congress but not acted upon in the Senate. Among Bankruptcy Act amendments proposed in this bill was one designed "both to clarify and modify" § 57 (j). The change, it was said in the House Report, was to make it clear that the section referred to interest on the "pecuniary loss" and that such interest stops at bankruptcy. The clarifying clause was "intended to overrule an obsolete rule" as to interest on delinquent taxes. It was stated that although §§ 64 (a) and 57 (n) as amended by the Chandler Act rendered the reasoning of the *Kallak* case obsolete, nevertheless its rule had not been changed and legislation was necessary, citing *Davie* v. *Green,* 133 F. 2d 451, the case which conflicts with the decision now being reviewed. The text of the section of the report devoted to this proposed amendment is printed in the margin.[17] We

[17] "11. Section 11 (a) of the bill is intended both to clarify and modify section 57j of the act. The change in 57j (c) is to make clear that the limitation on interest 'up to the date of bankruptcy' relates only to interest on the 'pecuniary loss,' and further that such interest stops at the date of bankruptcy. The addition of clause (2) in the bill is intended to overrule an obsolete rule as to interest on delinquent tax debts. Interest on general unsecured debts, on unsecured Government debts other than taxes, and on debts entitled to priority under section 64a, is suspended at the date of bankruptcy so that, except in the rare case of a solvent estate, interest is allowable only to such date. (Sec. 63a; *Adams* v. *Napa Cantina Wineries* (C. C. A., 9th Cir.), 36 Am. B. R. (N. S.) 8; *In re Gandolfi & Co., Inc.* (S. D., N. Y.), 51 Am. B. R. (N. S.) 521 (governmental debts and other debts entitled to priority); 3 *Collier on Bankruptcy,* 14th Ed., 1835 *et seq.;* 2 *Remington on Bankruptcy,* 4th Ed., secs. 771, 795.) However, interest on delinquent tax debts is allowable to the date of payment (*In re Kallak* (D. C., N. D., 1906), 17 Am. B. R. 414; *In re Ashland Emery and Corundum Co.* (D. C., Mass., 1916), 36 Am. B. R. 194; *In re Clark Realty Co.* (C. C. A., 7th Cir., 1918), 42 Am. B. R. 403; *sub silentio, United States* v. *Childs,* 266 U. S. 304, 307 (1924), 5 Am. B. R. (N. S.) 5). Although, under the Chandler

believe a fair reading of it leads to the conclusion that the Committee believed, not that the Chandler Act either allowed post-bankruptcy interest or left the matter open, but that the courts in allowing such interest were ignoring the necessary and intended implications from the Chandler amendments to §§ 57 (n) and 64 (a). The court below did not have this report before it, but in a well-considered opinion reached the same conclusion. We believe that conclusion is confirmed by the report and that petitioners' contentions find no support in either the Chandler Act or this abortive attempt at clarification.[18]

Act, a tax debt is required to be proved (sec. 57n) and its order of priority ranks below all administration costs and expenses, wages and costs and expenses of creditors successfully opposing a settlement or discharge, or procuring a conviction for an offense (sec. 64a (1), (2), (3)), thereby rendering obsolete the reasoning in the *Kallak* case, nevertheless its rule has not been changed, and therefore requires this statutory modification. For further discussion see *In re D. O. Summers* (Ref., N. D., Ohio, 1939), 46 [45] Am. B. R. (N. S.) 123; *In re Dorsey* (Ref., W. D., Wash., 1940), 46 Am. B. R. (N. S.) 146; *Davis*[*e*] v. *Green* (C. C. A. 1st Cir., 1943), 52 Am. B. R. (N. S.) 603. And on overruling the *Kallak* case see *In re Union Fabrics, Inc.*, (S. D., N. Y., 1947), 73 F. Supp. 685, appeal pending.

"The Judicial Conference has more than once expressly approved this amendment to section 57j. Its most recent reaffirmation of its position was in October 1946. (See Report of the Judicial Conference, October 1946, p. 15.) The Administrative Office of the United States Courts has stated that the language of section 11 of the bill is satisfactory on this score." H. R. Rep. No. 2083, 80th Cong., 2d Sess., p. 5.

[18] The United States cites, as confirming the construction it has placed on § 57 (j), federal taxing statutes beginning with the Revenue Act of 1924 which direct that upon nonpayment of the tax there shall be added, as part of the tax, interest at the specified rate from due date to date of payment. It has been held that federal taxes ordinarily bear interest even in the absence of statute. See *Billings* v. *United States*, 232 U. S. 261, 284–288. But we do not think either such a rule or statutory provision could be permitted to negative the

The case thus presents only the conflict between two Courts of Appeals as to the proper interpretation of the current statute. We agree with the court below and resolve the conflict by affirming its judgments.[19]

Affirmed.

MR. JUSTICE REED dissents for the reasons given in *Davie* v. *Green*, 133 F. 2d 451.

Bankruptcy Act's requirement in that respect if the latter be to the contrary, as we think it is. That Act was early held to take into consideration "the whole range of indebtedness of the bankrupt, national, state and individual," *Guarantee Co.* v. *Title Guaranty Co.*, 224 U. S. 152, 160, and to have been passed "with the United States in the mind of Congress," *Davis* v. *Pringle*, 268 U. S. 315, 317. We do not believe the Revenue Act of 1924 and similar enactments were intended to amend the comprehensive scheme of the Bankruptcy Act, with an effect clearly contrary to specific amendments such as the Act of 1926 and the Chandler Act. This would indeed be a strange way to require, as it would, that federal tax claims be preferred over state and municipal claims when the Bankruptcy Act itself treats all tax claims equally. This contention, standing by itself, or in support of the argument based on § 57 (j), cannot be accepted.

[19] Since we have concluded that neither the alleged legislative treatment of this issue nor prior rulings of this Court support the contrary result, this decision involves no consideration of the principle of *stare decisis*. If it did, the responsible exercise of the judicial process, *Helvering* v. *Hallock*, 309 U. S. 106, 119, would dictate that the express principles and logical implications of the Chandler Act prevail over earlier inconclusive lower court holdings and Congressional failure to correct them.

OKLAHOMA TAX COMMISSION *v.* TEXAS COMPANY.

NO. 40. CERTIORARI TO THE SUPREME COURT OF OKLAHOMA.*

Argued November 19, 1948.—Decided March 7, 1949.

1. A lessee of mineral rights in allotted and restricted Indian lands in Oklahoma has no immunity under the Federal Constitution from nondiscriminatory state gross production taxes and state excise taxes on petroleum produced from such lands. Pp. 343–367.
2. Overruling *Choctaw, O. & G. R. Co.* v. *Harrison,* 235 U. S. 292; *Indian Territory Illuminating Oil Co.* v. *Oklahoma,* 240 U. S. 522; *Howard* v. *Gipsy Oil Co.,* 247 U. S. 503; *Large Oil Co.* v. *Howard,* 248 U. S. 549; and *Oklahoma* v. *Barnsdall Refineries,* 296 U. S. 521. *Helvering* v. *Mountain Producers Corp.,* 303 U. S. 376, held controlling and not limited to income taxes. Pp. 364–365.
3. No question is here presented as to the immunity from state taxation of the Indian lands themselves or of the Indians' share of production, since only the interests of lessees were assessed. Pp. 347 (n. 14), 353.
4. A constitutional immunity of such a lessee is not to be inferred from Acts of Congress authorizing a state gross production tax on minerals produced from the lands of certain Indians, since the purpose of those statutes was to remove immunities of the Indians themselves. Pp. 366–367.
5. Congressional approval of the doctrine of immunity enunciated in the cases herein overruled is not to be inferred from mere congressional silence. P. 367.

Reversed.

State gross production taxes and state excise taxes on petroleum produced from allotted and restricted Indian lands by respondents, who were lessees of mineral rights in the lands, were held invalid by the Oklahoma Supreme Court. This Court dismissed appeals by the State Tax Commission and granted certiorari. 333 U. S. 870. *Reversed and remanded,* p. 367.

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*Together with No. 41, *Oklahoma Tax Commission* v. *Magnolia Petroleum Co.,* also on certiorari to the same court.

R. F. Barry argued the cause for petitioner. With him on the brief was *Joe M. Whitaker*. *Mac Q. Williamson,* Attorney General of Oklahoma, and *Fred Hansen,* Assistant Attorney General, were also of counsel.

B. W. Griffith argued the cause and filed a brief for respondent in No. 40.

Robert W. Richards argued the cause for respondent in No. 41. With him on the brief was *Walace Hawkins.*

Hayes McCoy and *R. O. Mason* filed a brief in No. 40, as *amici curiae,* urging affirmance.

Solicitor General Perlman, Assistant Attorney General Caudle, Arnold Raum and *Hilbert P. Zarky* filed a brief in Nos. 40 and 41 on behalf of the United States, as *amicus curiae,* urging reversal.

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

The principal question is whether a lessee of mineral rights in allotted and restricted Indian lands is immunized by the Constitution against payment of nondiscriminatory state gross production taxes and state excise taxes on petroleum produced from such lands. In effect the issue is whether this Court's previous decisions in *Howard* v. *Gipsy Oil Co.,* 247 U. S. 503; *Large Oil Co.* v. *Howard,* 248 U. S. 549; and *Oklahoma* v. *Barnsdall Refineries,* 296 U. S. 521, invalidating such taxes as applied to like lessees, have been so undermined by later decisions, in particular *Helvering* v. *Mountain Producers Corp.,* 303 U. S. 376, that they should now be overruled.

With certain exceptions,[1] the lands from which was extracted the petroleum sought to be taxed are held in

[1] Interests in the lands to which the United States does not hold title are of two kinds: (1) undivided interests acquired by non-Indians; (2) an interest (which is still restricted) conveyed to the son of an allottee by approved noncompetent Indian deeds, pursuant to the Act of March 1, 1907, 34 Stat. 1018, 25 U. S. C. § 405.

trust by the United States, pursuant to allotments made under the General Allotment Act,[2] for various members of the Pottawatomie, Apache, Comanche, and Otoe and Missouria Tribes.[3] All the lands are located within the State of Oklahoma and at all material times they were restricted[4] against alienation by the Indian *cestui* owners without the consent of the Secretary of the Interior.[5] He

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[2] February 8, 1887, 24 Stat. 388, as amended, 25 U. S. C. § 331 *et seq.*

[3] The allotments were made to members of the Apache and Comanche tribes pursuant to the agreement approved by Congress on June 6, 1900, 31 Stat. 676. Members of the Citizen Band of the Pottawatomie Tribe were allotted land pursuant to the agreement of March 3, 1891, 26 Stat. 1016. Allotments were made to the Otoe and Missouria Indians under the General Allotment Act without special agreement. Mills, Oklahoma Indian Land Laws § 438 (1924).

The nature of the Indians' interest has been described as follows: ". . . the United States retained the legal title, giving the Indian allottee a paper or writing, improperly called a patent, showing that at a particular time in the future, unless it was extended by the President, he would be entitled to a regular patent conveying the fee." *United States* v. *Rickert,* 188 U. S. 432, 436.

[4] With these exceptions: (1) In a single immaterial instance in No. 40, an undivided 7/16th interest in one of the leases was alienable and was owned by non-Indians. The Texas Company paid without protest the taxes levied against it which were attributable to this 7/16th interest. (2) In No. 41, an undivided 1/4th interest in the lands subject to one of the leases and an undivided 1/3d interest in the land subject to another lease were owned by non-Indians. The effect of the decision of the Oklahoma Supreme Court was to deny the portion of the assessments applicable to these interests. However, it was conceded at the argument here that the assessments were valid insofar as they applied to interests in lands owned, when the assessments were made, by non-Indian owners or by Indian owners not under restriction.

[5] 24 Stat. 389, 390, as amended, 25 U. S. C. §§ 348, 349. See Cohen, Handbook of Federal Indian Law 108–109 (1942). Leases of allotted land for mining purposes may be made with the approval of the Secretary of the Interior under 35 Stat. 783, 25 U. S. C. § 396.

approved each of the leases now in question. The respondents Texas Company (No. 40) and Magnolia Petroleum Company (No. 41) acquired their leases before Oklahoma levied the assessments now in issue, either as original lessees or by assignment from non-Indians who were such lessees. The companies thus became owners of all right, title and interest in their respective leases, subject only to the one-eighth royalty interest reserved to the Indian lessors, and were such owners at the times of the respective assessments. It may be taken that they have operated the leases in conformity with the applicable regulations of the Department of the Interior [6] and of the State of Oklahoma,[7] except for the payment of the state taxes in question.[8]

The Oklahoma gross production tax requires payment of five per cent of the gross value of production, including royalty interests. It is imposed on every person engaged in the production in Oklahoma of petroleum, crude oil or other mineral oil, and natural gas and casinghead gas. The tax is exacted in lieu of all taxes by the state

[6] 52 Stat. 348, 25 U. S. C. § 396d; 30 C. F. R. Cum. Supp. §§ 221.1–221.67.

[7] 52 Okla. Stat. §§ 81–286.17 (Conservation of Oil and Gas), §§ 291–303 (Regulation and Inspection of Wells) (Cum. Supp. 1947); Order No. 1299—Cause No. 2935, Thirty-seventh Annual Report of Corporation Comm'n of Okla., 1944, p. 84.

The assumption stated in the text is made, although in No. 41 the commission excluded, as irrelevant, evidence tendered to show compliance with the federal and state regulations, and in No. 40 no evidence of compliance was introduced.

[8] The three oil and gas leases involved in No. 40 were made by members of the Apache Tribe to non-Indian lessees who assigned their interests to the Texas Company. In No. 41, in which eight leases are involved, the Indian lessors are members of the Apache, Comanche, Citizen Pottawatomie, and Otoe and Missouria Tribes.

Undivided interests in the lands subject to certain leases were held by non-Indians at the time of assessment. See notes 1 and 4.

and its political subdivisions on property rights in minerals and mineral rights, producing leases, machinery used in connection with any oil or gas well, the oil and gas during the tax year in which it is produced, and any investment in any leases, minerals, or other property. The statute authorizes the state board of equalization to raise or lower the rate of tax to equate the amount payable with the amount which would be payable if the general *ad valorem* property tax were assessed against the property of the producers subject to taxation. The board's rate changes are subject to review by the state supreme court.[9] In consequence of these provisions, the tax has been construed consistently by the state courts to be a tax on the lessee's property, not an occupation or excise tax.[10]

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[9] 68 Okla. Stat. § 821 (1941). The (general) scheme of the tax is as follows: The tax falls due on the first day of each calendar month as to production during the preceding month. The purchaser pays the tax on oil or gas sold at the time of production and is authorized to deduct the amount of tax paid when settling with the producer (and with the royalty owner in cases in which the tax applies to him, see note 14). If the tax becomes due before the oil is sold, the producer is required to pay the tax for himself (and, in cases where the tax applies to royalties, see note 14, for the royalty owner, and is permitted to deduct the amount of tax paid on royalty oil when settling with the royalty owner). 68 *id.* § 833. The tax is a first and paramount lien against the property of the person liable for the tax. 68 *id.* § 836.

Of the proceeds received from the tax, 78 per cent is paid into the state treasury to be used for the general expenses of state government. Ten per cent is paid to the county treasurer of the county in which the oil or gas was produced, and is used for the construction and maintenance of county highways. Ten per cent is paid to the county treasurer for distribution among the county's school districts. The remaining two per cent is placed to the credit of the Oklahoma Tax Commission and is used for collection and enforcement activities. 68 *id.* § 827 (Cum. Supp. 1947).

[10] But see note 27 and text *infra*.

The petroleum excise tax requires payment of one mill, formerly one-eighth of one cent,[11] per barrel on every barrel of petroleum produced in Oklahoma. The statute was enacted first in 1933 to defray the expenses of administering the state's newly adopted proration law [12] and has been reenacted at each subsequent session of the legislature.[13] The tax, unlike the gross production tax, is construed by the Oklahoma Supreme Court as an excise tax on the production of oil. *Barnsdall Refineries* v. *Oklahoma Tax Commission,* 171 Okla. 145, affirmed, 296 U. S. 521.

In No. 40 the Oklahoma Tax Commission, petitioner here, assessed both gross production and petroleum excise taxes against the Texas Company for production, less royalties to the Indian lessors,[14] during September, Oc-

[11] The amount of the tax was one-eighth of one cent per barrel for the period prior to July 1, 1943, Okla. Laws, 1941, tit. 68, c. 26, and one mill per barrel after that date, Okla. Laws, 1943, tit. 68, c. 26. The Texas Company was assessed under the former act. Magnolia was assessed under both acts.

[12] Okla. Laws, 1933, c. 131, as amended, 52 Okla. Stat. 81 *et seq.* (Cum. Supp. 1947).

[13] Okla. Laws, 1933, c. 132; Okla. Laws, 1935, c. 59, Art. 2; Okla. Laws, 1937, c. 59, Art. 2; Okla. Laws, 1939, c. 66, Art. 7; Okla. Laws, 1941, tit. 68, c. 26; Okla. Laws, 1943, tit. 68, c. 26; Okla. Laws, 1945, tit. 68, c. 26; Okla. Laws, 1947, tit. 68, c. 26. The present statute appears at 68 Okla. Stat. § 1220.1 *et seq.* (Cum. Supp. 1947).

The tax receipts, collected in the same manner as in the case of the gross production tax, present 68 Okla. Stat. § 1220.1 (Cum. Supp. 1947), are deposited to the credit of the "Conservation Fund" and the "Interstate Oil Compact Fund of Oklahoma." 68 *id.* 1220.3.

[14] Although the Oklahoma statutes in their general application lay the taxes on gross production, including royalties, cf. notes 9 and 13, they provide, with respect to the gross production tax, that the producer, in his required monthly statement to the Oklahoma Tax Commission, state "where such royalty is claimed to be exempt from taxation by law, the facts on which such claim of

tober and November, 1942. In No. 41 the commission likewise assessed both taxes, less royalties, on the Magnolia Company's production for various periods between June 1, 1942, and March 1, 1946. The orders were entered after the cases were consolidated for hearing before the commission and were thus heard by it.

In No. 40 the Texas Company paid the taxes under protest and brought suit to recover them in an Oklahoma trial court. After hearing, that court sustained the commission's demurrer to the company's amended petition and ordered it dismissed. Appeal was duly taken to the state supreme court. In No. 41, following a different statutory procedure, the Magnolia Company appealed from the assessments against it directly to that court.

In both cases the Supreme Court of Oklahoma, with one judge dissenting, held the assessments invalid. The decisions rested flatly on the ground that the lessee was an instrumentality of the Federal Government and as such, under prior and controlling decisions of this Court, particularly in the *Large Oil, Gipsy Oil,* and *Barnsdall Refineries* cases, *supra,* not subject to the taxes in question.[15] In the Texas Company case the court expressly distinguished *Helvering* v. *Mountain Producers Corp., supra,* on the ground that the decision in that case related

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exemption is based." 68 Okla. Stat. § 821 (1941). This provision is made applicable to the petroleum excise tax by the first section of each of the several enactments establishing and continuing that exaction. See note 13 *supra.* Only the interests of the lessees were assessed in these cases.

[15] The Oklahoma Supreme Court rendered separate, unreported opinions. The principal opinion, filed in the Texas Company case, was followed in the later one filed in the Magnolia Petroleum case. Rehearing was denied in both cases.

The original judgment in the Texas Company case provided for reversal of the trial court's judgment, with directions to overrule the commission's demurrer "and proceed consistent with the views

to income taxes assessed against the lessee there situated as were the lessees here. The opinion, indicating the writer's personal view that reconsideration of the earlier decisions well might be sought, nevertheless stated:

> "But it is thought beyond the power of this court to now engage in such reconsideration, in view of the cited decisions of the higher authority which thus far wholly sustain the claim of [the Texas Company] to immunity from the tax here involved.
>
> "Upon questions of federal law, citizens and their attorneys have the right to rely upon decisions of the Supreme Court of the United States, and upon such questions it is our fixed duty to follow such decisions, leaving to the United States Congress or Supreme Court the making of the necessary changes in such legal rules."

From the state supreme court's decisions [16] the Oklahoma Tax Commission filed appeals in this Court. We dismissed the appeals for want of jurisdiction. But treating them as applications for certiorari,[17] we granted the writs and consolidated the cases for argument. 333 U. S. 870. The Solicitor General was requested to file a brief as *amicus curiae.*

I.

But for the course of decision here from *Choctaw, O. & G. R. Co.* v. *Harrison,* 235 U. S. 292, decided in 1914, to

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here expressed." On motion of counsel for the commission this was modified to provide that "The trial court judgment . . . is reversed" and that "final judgment is hereby rendered for plaintiff and against the defendant for the sum sued for," thus eliminating all question concerning the finality of the judgment.

[16] See note 15 *supra.*

[17] Pursuant to former § 237 (c) of the Judicial Code, as amended, 28 U. S. C. § 344 (c), present 28 U. S. C. § 2103.

Oklahoma v. *Barnsdall Refineries,* 296 U. S. 521, decided in 1936, the problems of taxation and intergovernmental immunity these cases present would seem subject to solution on well-settled or fairly obvious legal principles.

It has long been established that property owned by a private person and used by him in performing services for the Federal Government is subject to state and local *ad valorem* taxes.[18] And the oil and gas produced is, of course, subject to such taxation. *Indian Territory Illuminating Oil Co.* v. *Board of Equalization,* 288 U. S. 325. Both by the substance of the statute's explicit provisions and by the consistent construction of the Oklahoma Supreme Court,[19] that state's so-called gross production tax in its presently applicable form is a tax on the lessee's property used in carrying out its contractual obligations with the Federal Government and on the oil and gas during the tax year in which it was produced. The tax is levied expressly in lieu of all property taxes which the state might constitutionally impose in *ad valorem* form, the gross production levy being a tentative measure for the value of that property. To guard against that measure's being utilized to lay in effect a tax not actually of that character, the state board of equalization is authorized, indeed is required upon complaint, to equate the amount payable with what would be payable if the general *ad valorem* tax were assessed against the property of the producing lessees subject to taxation, with provision for judicial review of the board's action.

Unembarrassed by some of this Court's prior decisions, therefore, Oklahoma's so-called gross production tax

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[18] *Thomson* v. *Pacific R. Co.,* 9 Wall. 579; *Railroad Co.* v. *Peniston,* 18 Wall. 5; *Central Pacific R. Co.* v. *California,* 162 U. S. 91; *Gromer* v. *Standard Dredging Co.,* 224 U. S. 362, 371; *Choctaw, O. & G. R. Co.* v. *Mackey,* 256 U. S. 531, 535–537.

[19] See note 27 and text.

would seem to be sustained by the well-established line of decisions cited above.[20]

Moreover, even if the status of respondents as federal instrumentalities, in the sense in which they use the term, were fully conceded, it seems difficult to imagine how any substantial interference with performing their functions as such in developing the leaseholds could be thought to flow from requiring them to pay the small tax Oklahoma exacts to satisfy their shares of the state's expense in maintaining and administering its proration program. That system works for respondents' benefit in performing their producing function, as it does for the benefit of all other producers, by stabilizing production, eliminating waste, and preventing runaway competition in an industry notorious for those evils in the absence of some such control. Cf. *Railroad Commission* v. *Rowan & Nichols Oil Co.,* 310 U. S. 573; *Republic Gas Co.* v. *Oklahoma,* 334 U. S. 62, dissenting opinion Part III, 89. Indeed respondents do not claim they are exempt from the plan's regulatory features. They claim only that they are constitutionally immune from con-

[20] But see text *infra,* Part III. Unless the measure of a tax is fairly to be considered as designed to conceal or distort unduly its true nature, the tax is not to be invalidated because the measure is not one customarily employed if as applied it achieves fairly the purpose for which it is avowedly laid, that purpose of course being one within the legislative power to accomplish. *American Mfg. Co.* v. *St. Louis,* 250 U. S. 459; *Hope Gas Co.* v. *Hall,* 274 U. S. 284; *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165. Moreover, ordinarily the construction given to a state statute by the state's highest court capable of deciding the question is taken as binding on this Court. See *e. g., Knights of Pythias* v. *Meyer,* 265 U. S. 30, 32–33; *Guaranty Trust Co.* v. *Blodgett,* 287 U. S. 509, 513; *Hartford Accident Co.* v. *Nelson Co.,* 291 U. S. 352, 358. Cf. *Galveston, H. & S. A. R. Co.* v. *Texas,* 210 U. S. 217, 227; *Hanover Insurance Co.* v. *Harding,* 272 U. S. 494, 509–510; *Carpenter* v. *Shaw,* 280 U. S. 363, 367–368.

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tributing to the plan's support. As a matter entirely fresh, the contention would not seem weighty.

II.

But neither issue is fresh. Each is complicated by this Court's prior decisions squarely ruling that the taxes are invalid as unconstitutional intrusions by the state upon the performance of federal functions. Those decisions have not been explicitly overruled. But it is strongly urged that our later decisions, especially in *Helvering* v. *Mountain Producers Corp., supra,* have stricken the foundation from beneath the *Gipsy Oil, Large Oil* and *Barnsdall Refineries* decisions, *supra,* so that the latter no longer can stand in reason and consistency with the former.

It is true that this Court's more recent pronouncements have beaten a fairly large retreat from its formerly prevailing ideas concerning the breadth of so-called intergovernmental immunities from taxation, a retreat which has run in both directions—to restrict the scope of immunity of private persons seeking to clothe themselves with governmental character from both federal and state taxation. The history of the immunity, by and large in both aspects, represents a rising or expanding curve, tapering off into a falling or contracting one.

Our present problem lies on the constitutional level. It requires reconsideration of former decisions specifically in point, together with later ones deviating in rationale. It is of substantial importance both for the states' powers of taxation and for the subjects on which they may impinge. Moreover, even though the immediate questions are closely related to federal policies concerning Indian lands, they are equally tangent to considerations affecting other types of situation raising questions of immunity. For these reasons it will not

be amiss to consider the questions in the context of two conflicting courses of decision.

Before we turn to the survey, however, two delimitations of the specific issues should be made.

These cases present no question concerning the immunity of the Indian lands themselves from state taxation. There is no possibility that ultimate liability for the taxes may fall upon the owner of the land. Cf. *Wilson* v. *Cook,* 327 U. S. 474, dissenting opinion, 489. Nor, as has been noted, do the cases involve challenges to the immunity from state taxation of royalty oil, the Indian's share of production.[21]

III.

Despite the possibility that the prospect of taxation by the state may reduce the amount the United States might receive from the sale of its property, it is well established that property purchased by a private person from the Federal Government becomes a part of the general mass of property in the state and must bear its fair share of the expenses of local government. The theoretical burden which state *ad valorem* property taxation thus imposes upon the Federal Government is regarded as too remote and indirect to justify tax immunity for property purchased from that Government. *New Brunswick* v. *United States,* 276 U. S. 547; *Forbes* v. *Gracey,* 94 U. S. 762; *Tucker* v. *Ferguson,* 22 Wall.

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[21] See note 14 *supra.* Cf. *Carpenter* v. *Shaw,* 280 U. S. 363, holding that oil royalties received by Indian lessors from nontaxable allotted lands were not subject to a state gross production tax, the tax being regarded as on the lessor's interest rather than on the severed oil. But royalty income is subject to state and federal net income taxes. *Choteau* v. *Burnet,* 283 U. S. 691; *Superintendent of Five Civilized Tribes* v. *Commissioner,* 295 U. S. 418; *Leahy* v. *State Treasurer,* 297 U. S. 420.

527; see *Weston* v. *Charleston,* 2 Pet. 449, 468. Also subject to local *ad valorem* taxation, as has been noted above,[22] is property owned by a private party and used by him in performing services for the Federal Government. Where oil produced by a private lessee from restricted Indian lands was owned solely by the lessee and had been removed from the leased lands and stored in the lessee's tanks, it was held subject to state *ad valorem* taxation. *Indian Territory Illuminating Oil Co.* v. *Board of Equalization,* 288 U. S. 325.[23] And equipment used by a lessee of restricted Indian lands has been held subject to the same sort of exaction. *Taber* v. *Indian Territory Illuminating Oil Co.,* 300 U. S. 1. Cf. *Thomas* v. *Gay,* 169 U. S. 264, sustaining a state tax on cattle grazing on tribal lands leased from Indians by the non-Indian owner of the cattle.

Anomalous in the light of these rulings was the evolution of a line of decisions of this Court condemning forms of taxation which would have imposed no more direct or substantial burden upon the United States than would an *ad valorem* property tax applied to property purchased from the United States. Private lessees of restricted or tribal Indian lands came to be held "federal instrumentalities" like the lands themselves, and so immune from various forms of state taxation ranging from a gross production tax on production from the leased lands to a tax upon the lessee's net income. The theory of the Court was the one which was rejected in directly analogous cases: A state tax on the lessee, the lease, or the profits from the lease would be "a direct hamper upon the effort of the United States to make the best terms that it can

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[22] At note 18.

[23] Distinguishing *Jaybird Mining Co.* v. *Weir,* 271 U. S. 609, on the ground that there the interest of the Indian lessor had not been prepaid or segregated.

for its wards." *Gillespie* v. *Oklahoma,* 257 U. S. 501, 506. Alternatively, "A tax upon the leases is a tax upon the power to make them, and could be used to destroy the power to make them." *Indian Territory Illuminating Oil Co.* v. *Oklahoma,* 240 U. S. 522, 530.

The history of this development is a progression "from exemption of the gross income of the lessee of Indian lands . . . through exemption of net receipts to serious impairment of the taxing powers of Oklahoma." Cohen, Handbook of Federal Indian Law 257, n. 29 (1942). The development is an outgrowth and a progressive extension of early rulings that tribal lands themselves are immune from state taxation.[24] More immediately it stems from the later ruling that allotted Indian lands held in trust by the United States were "an instrumentality employed by the United States for the benefit and control of this dependent race," and so were immune from state taxation. *United States* v. *Rickert,* 188 U. S. 432, 437–439.

In 1908 Oklahoma imposed, in addition to *ad valorem* property taxes, a gross production tax, the progenitor of the present tax bearing that label, on oil, gas and other minerals produced within the state. Okla. Laws, 1908,

[24] See *The Kansas Indians,* 5 Wall. 737; *The New York Indians,* 5 Wall. 761. Those early decisions seem to rest on the basis that the Indian tribes possessed many attributes of sovereignty.

As to the immunity from state taxation of lands acquired by individual Indians by treaty or under the general homestead laws rather than under the General Allotment Act, see Cohen, *op. cit. supra* note 5, at 257–258, 259–260.

Lands outside a reservation purchased with restricted Indian funds from a person who did not hold the land tax exempt were held subject to state taxes in *Shaw* v. *Gibson-Zahniser Oil Corp.,* 276 U. S. 575. But Congress specifically exempted such lands from taxation. Act of June 20, 1936, 49 Stat. 1542, as amended, 50 Stat. 188 (to limit the exemption to homesteads), 25 U. S. C. § 412a. See Cohen, *op. cit. supra,* at 260–261. This legislation was sustained and applied in *Board of Commissioners* v. *Seber,* 318 U. S. 705.

c. 71, Art. II, § 6. The Oklahoma court held that the 1910 reenactment of the statute [25] imposed a property tax. *McAlester-Edwards Coal Co.* v. *Trapp,* 43 Okla. 510. But the statute, as applied to a lessee of restricted Indian coal lands, was held by this Court to be an occupational tax and so an unconstitutional burden on the lessee, who was held to be an instrumentality of the Federal Government. *Choctaw, O. & G. R. Co.* v. *Harrison, supra.* Next the Court held the lease itself a federal instrumentality immune from state taxation. *Indian Territory Illuminating Oil Co.* v. *Oklahoma, supra.*

The Oklahoma legislature revised the gross production tax statute in 1915 and again in 1916, a principal change being the provision that the tax was in lieu of all other *ad valorem* taxes.[26] The revised tax was held by the Oklahoma Supreme Court to be a property tax.[27] But this Court rejected that construction *sub silentio* and invalidated the tax in memorandum opinions citing only the *Choctaw, O. & G. R. Co.* case (235 U. S. 292) and

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[25] Okla. Laws, 1910, c. 44, § 6, adding a provision permitting the producer to deduct the amount of royalties paid for the benefit of an Indian tribe.

[26] Okla. Laws, 1915, c. 107, Art. 2, subd. A; Okla. Laws, 1916, c. 39. Further amendments were made by Okla. Laws, 1933, c. 103, and by Okla. Laws, 1935, c. 66, Art. 4. See note 9 and text *supra.*

[27] *Large Oil Co.* v. *Howard,* 63 Okla. 143, reversed *per curiam,* 248 U. S. 549. *In re Gross Production Tax of Wolverine Oil Co.,* 53 Okla. 24, which had held that the 1915 Act was an occupational rather than a property tax, was distinguished because of changes made by the 1916 Act. The *Wolverine* case was specifically overruled in *In re Skelton Lead & Zinc Co.'s Gross Production Tax, 1919,* 81 Okla. 134; accord, *Bergin Oil & Gas Co.* v. *Howard,* 82 Okla. 176. The Oklahoma Supreme Court has since consistently held that the tax is a property tax in lieu of all other *ad valorem* taxes. *E. g., In re Protest of Bendelari, Agent,* 82 Okla. 97. And see *Meriwether* v. *Lovett,* 166 Okla. 73; *State* v. *Indian Royalty Co.,* 177 Okla. 238; *Peteet* v. *Carmichael,* 191 Okla. 593.

the *Indian Territory Illuminating Oil Co.* case (240 U. S. 522). *Howard* v. *Gipsy Oil Co.*, 247 U. S. 503; *Large Oil Co.* v. *Howard*, 248 U. S. 549.

Suspicions that this Court had overlooked the fact that under the revised statute the gross production tax was in lieu of rather than in addition to all other *ad valorem* property taxes,[28] were dispelled by Mr. Justice Holmes' remark in *Gillespie* v. *Oklahoma, supra* at 504–505, that the statutory change had been noticed and regarded as immaterial.[29] If a gross receipts tax was a burden on the Federal Government "so as to interfere with the performance of its functions, it could not be saved because it was in lieu of a tax upon property or was so characterized." See *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 158.

The high-water mark of immunity for non-Indian lessees of restricted and allotted Indian lands came in 1922 when the *Gillespie* decision, *supra*, invalidated an Oklahoma net income tax upon income derived by a lessee from sales of his share of oil produced from restricted lands.

The non-Indian lessee's immunity was last sustained here by *Oklahoma* v. *Barnsdall Refineries, supra.* That decision held, on application of a rule of strict construction of congressional waivers, that Congress' express waiver of immunity from gross production taxes on oil produced from the specified Indian lands did not extend to petroleum excise taxes. The state did not challenge

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[28] The Oklahoma Supreme Court assumed for a time that the statutory difference was overlooked by this Court and that an opposite result would have been reached had the difference been noticed. *In re Skelton Lead & Zinc Co.'s Gross Production Tax, 1919*, 81 Okla. 134; *In re Protest of Bendelari, Agent*, 82 Okla. 97.

[29] The Oklahoma Supreme Court capitulated in *Atchison, T. & S. F. R. Co.* v. *McCurdy*, 86 Okla. 148.

the implied constitutional immunity but pitched its argument on the ground of statutory exemption.[30]

The instrumentality doctrine has been applied to confer a correlative immunity upon private lessees of state-owned lands. The Texas rule that oil and gas leases are present sales to the lessees of the oil and gas in place caused this Court to sustain the imposition of the federal income tax upon income of the lessee derived from the sale of oil and gas produced from lands leased from that state. It was observed that ". . . the remote and indirect effects upon the one government of such a non-discriminatory tax by the other have never been considered adequate grounds for thus aiding the one at the expense of the taxing power of the other." *Group No. 1 Oil Corp.* v. *Bass*, 283 U. S. 279, 282.

Although this decision may be taken to mark a turning point in expansion of the lessee's immunity, it was not immediately permitted to impair the *Gillespie* rationale. A tax on income would be no greater burden where, under applicable state law, "title" to the oil did not "pass" until the oil was removed from the ground. And although Justices Brandeis, Stone, Roberts and Cardozo contended that the *Gillespie* decision could not stand consistently with the principles which had been reaffirmed in the *Group No. 1 Oil* case, a majority of one in *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, provided a corollary to the rule of the *Gillespie* case. This was done by holding that the Federal Government was barred from taxing the income of a lessee of state lands as the state was barred from taxing the income of the lessee of federal lands.

A parallel immunity from state occupational or privilege taxes was once accorded private contractors with, or agencies of, the Government, *Williams* v. *Talladega*,

[30] See note 39 *infra*.

226 U. S. 404, notwithstanding the venerable rule that the property of such a contractor or agency is liable to state property taxation. See the cases cited *supra* in note 18. Decisions curtailing this immunity were presaged by *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514. It held subject to federal income taxation income received by a consulting engineer from a state for services in connection with temporary work. Equally significant was *Alward* v. *Johnson,* 282 U. S. 509, 514, which sustained a state tax measured by gross receipts on the property of a stage line engaged in carrying the mails.[31]

Later this Court sustained a state tax on the gross receipts of a contractor with the Federal Government, *James* v. *Dravo Contracting Co.,* 302 U. S. 134; *Silas Mason Co.* v. *Tax Commission,* 302 U. S. 186; a state tax on the net income of such a contractor, *Atkinson* v. *Tax Commission,* 303 U. S. 20; state sales and use taxes on purchases of materials used by a contractor in performing a cost-plus contract with the United States, *Alabama* v. *King & Boozer,* 314 U. S. 1; *Curry* v. *United States,* 314 U. S. 14; and a state severance tax imposed on a contractor who severed and purchased timber from lands owned by the United States, *Wilson* v. *Cook,* 327 U. S. 474. It was pointed out that

> ". . . the Constitution, unaided by Congressional legislation, . . . [does not prohibit] a tax exacted from the contractors merely because it is passed on economically, by the terms of the contract or otherwise, as a part of the construction cost to the Government. So far as such a non-discriminatory state tax upon the contractor enters into the cost of the materials to the Government, that is but a normal

[31] Cf. the contemporary case of *Willcuts* v. *Bunn,* 282 U. S. 216, holding capital gain resulting from resale of municipal bonds taxable under the federal income tax law.

> incident of the organization within the same territory of two independent taxing sovereignties. The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity." *Alabama* v. *King & Boozer,* 314 U. S. 1, 8–9.

The opportunity to reexamine the *Gillespie* and *Coronado* cases arose in 1938 in *Helvering* v. *Mountain Producers Corp.,* 303 U. S. 376, the decision upon which the Oklahoma commission relies most strongly to secure reversal of the judgments in the present cases. The *Mountain Producers* case involved the application of the federal income tax law to a *cestui* of an express trust which received the proceeds of the sale of oil taken from school lands owned by the State of Wyoming. The Court declined to distinguish the *Gillespie* and *Coronado* decisions on the narrow ground available, the fact that the taxpayer was a *cestui* of a trust which received the proceeds of the sale of the oil rather than the lessee itself. 303 U. S. at 383.[32]

Rather the Court sought broader grounding, which lay in reconsideration of the foundations of the *Gillespie* and *Coronado* decisions. The opinion stated:

> "The ground of the decision in the *Gillespie* case, as stated by Mr. Justice Holmes in speaking for the Court, was that 'a tax upon the leases' was 'a tax upon the power to make them, and could be

[32] Cf. *Burnet* v. *A. T. Jergins Trust,* 288 U. S. 508, 516, in which a city leased oil and gas land to a private trust, which was held liable for a federal income tax on its share of the receipts, the Court stating that "the doctrine of *Gillespie* v. *Oklahoma* is to be applied strictly and only in circumstances closely analogous to those which it disclosed."

> used to destroy the power to make them' (240 U. S. p. 530) and that a tax 'upon the profits of the leases' was 'a direct hamper upon the effort of the United States to make the best terms that it can for its wards.' [257 U. S. at 506.] In the light of the expanding needs of State and Nation, the inquiry has been pressed whether this conclusion has adequate basis . . . ." 303 U. S. at 384.

Noting that it had held that the *Gillespie* ruling should be limited strictly to cases closely analogous,[33] and asserting that "the distinctions thus maintained have attenuated its teaching and raised grave doubt as to whether it should longer be supported," 303 U. S. at 384–385, the Court went on to say:

> "In numerous decisions we have had occasion to declare the competing principle, buttressed by the most cogent considerations, that the power to tax should not be crippled 'by extending the constitutional exemption from taxation to those subjects which fall within the general application of nondiscriminatory laws, and where no direct burden is laid upon the governmental instrumentality and there is only remote, if any, influence upon the exercise of the functions of government.' *Willcuts* v. *Bunn,* 282 U. S. 216, 225, and illustrations there cited." 303 U. S. at 385.

That competing principle the Court found applicable to the case before it and to require that the decisions in the *Gillespie* and *Coronado* cases be overruled. Rejecting as insubstantial the distinction based on the passage of title to the oil at the time of making the lease, compare *Group*

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[33] Citing *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393, which the opinion characterized as "a corollary" to the *Gillespie* case. 303 U. S. at 383. The federal income tax in the *Coronado* case was levied upon the lessee of state school lands. Cf. note 32 *supra.*

No. 1 Oil Corp. v. *Bass, supra,* with *Burnet* v. *Coronado Oil & Gas Co., supra,* and after reviewing various other decisions denying the immunity when claimed by private persons, 303 U. S. at 385–386, the Court said:

> "These decisions in a variety of applications enforce what we deem to be the controlling view—that immunity from non-discriminatory taxation sought by a private person for his property or gains because he is engaged in operations under a government contract or lease cannot be supported by merely theoretical conceptions of interference with the functions of government. Regard must be had to substance and direct effects." 303 U. S. at 386.

IV.

Respondents strongly urge that the *Mountain Producers* decision is not controlling or effective to require reversal in these cases, since it involved a tax on net income rather than gross production and excise taxes. And they insist that a sharp line should be drawn between what they call lessees performing a governmental function and independent contractors doing work for the Government.[34] The latter distinction is largely, if not altogether verbal, in the context of the fact situations in these cases. As for the former difference, although the Court explicitly overruled only the *Gillespie* and *Coro-*

[34] Among the cases which one or the other of respondents attempts to distinguish on the ground that the tax was imposed on an independent contractor rather than a "true Federal instrumentality" are: *James* v. *Dravo Contracting Co.,* 302 U. S. 134; *Buckstaff Co.* v. *McKinley,* 308 U. S. 358; *Alabama* v. *King & Boozer,* 314 U. S. 1; and *Wilson* v. *Cook,* 327 U. S. 474.

It is also contended that cases sustaining taxes on the property of a federal instrumentality, *e. g., Railroad Co.* v. *Peniston,* 18 Wall. 5; *Alward* v. *Johnson,* 282 U. S. 509; *Indian Territory Illuminating Oil Co.* v. *Board of Equalization,* 288 U. S. 325, are not inconsistent with the view they ask us to take. Cf. Part I *supra.*

nado cases, the groundings of the *Mountain Producers* decision do not permit limiting its effects to so narrow an application.[35]

The language last quoted above is as applicable to the present cases as it was to the *Gillespie* and *Coronado* decisions. The taxes here are nondiscriminatory. The respondents are "private persons" who seek immunity "for their property or gains because they are engaged in operations under a government contract or lease." The functions they perform in operating the leases are hardly more governmental in character than those performed by lessees of school lands or, indeed, by many contractors with the Government. The lessees in the *Mountain Producers* case stood identically with the respondents in all these respects.

Moreover the burdens of the taxes here, if any of a character likely to interfere with respondents in carrying out the terms of their leases, are as appropriately to be judged by "regard . . . to substance and direct effects," and as inappropriately to be determined "by merely theoretical conceptions of interference with the functions of government," as were those in the *Mountain Producers* case.[36] True, as respondents say, a net income

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[35] The incongruity of the doctrine respondents ask us to perpetuate is underscored by decisions subsequent to the *Mountain Producers* case withdrawing income tax immunity for state and federal official salaries. *Helvering* v. *Gerhardt,* 304 U. S. 405; *Graves* v. *New York ex rel. O'Keefe,* 306 U. S. 466.

See generally, Powell, The Waning of Intergovernmental Tax Immunities, 58 Harv. L. Rev. 633; Powell, The Remnant of Intergovernmental Tax Immunities, 58 Harv. L. Rev. 757.

[36] Respondents merely assert hypothetically that imposition of the taxes might in some instances make the margin between successful and unsuccessful operation. Leases approved by the Secretary of the Interior provided for the same rental and royalty payments both before and after the *Mountain Producers* decision. 25 C. F. R. § 189.16. And rental and royalty payments provided for by the

tax may be a step farther removed from interfering effect than a gross production tax or an excise tax on production. But this all depends upon the rate at which each tax is levied.

To the adaptation of Marshall's oft-quoted aphorism made by Mr. Justice McKenna in *Indian Territory Illuminating Oil Co.* v. *Oklahoma,* 240 U. S. at 530, and followed by Mr. Justice Holmes in *Gillespie* v. *Oklahoma,* 257 U. S. at 505, namely, that "A tax upon the leases is a tax upon the power to make them, and could be used to destroy the power to make them," Chief Justice Hughes in the *Mountain Producers* case did not explicitly make the rejoinder given by Holmes in another connection, "The power to tax is not the power to destroy while this Court sits." *Panhandle Oil Co.* v. *Knox,* 277 U. S. 218, 223. But this was the effect of the *Mountain Producers* decision, when in a single paragraph it challenged both the aphorism and the assumption that "a tax upon the profits of the leases" was "a direct hamper upon the effort of the United States to make the best terms that it can for its wards."

The *Mountain Producers* case was not decided on narrow, merely technical or presumptive grounds. Its very foundation was a repudiation of those insubstantial bases for securing broad private tax exemptions, unjustified by actual interfering or destructive effects upon the performance of obligations to or work for the government, state or national. The decision came as the result of

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Department of the Interior are the same for lands allotted under the General Allotment Act as they are for lands of members of the Five Civilized Tribes, 25 C. F. R. §§ 183.24, 189.16. Production from the latter lands has been subject to Oklahoma's gross production tax since 1928. See note 42 *infra.* The Government, in its brief *amicus curiae,* states that, because differences in the value of different tracts of land would be reflected in the bonuses which lessees are willing to pay, an exact comparison of bonuses is impossible.

experience and of observation of the constant widening of the exempting process from tax to tax to tax.

Since that decision, as we have noted, the process has been reversed in direction. True intergovernmental immunity remains for the most part. But, so far as concerns private persons claiming immunity for their ordinary business operations (even though in connection with governmental activities), no implied constitutional immunity can rest on the merely hypothetical interferences with governmental functions here asserted to sustain exemption. In the light of the broad groundings of the *Mountain Producers* decision and of later decisions, we cannot say that the *Gipsy Oil, Large Oil* and *Barnsdall Refineries* decisions remain immune to the effects of the *Mountain Producers* decision and others which have followed it. They "are out of harmony with correct principle," as were the *Gillespie* and *Coronado* decisions and, accordingly, they should be, and they now are, overruled. This accords with the result reached in *Santa Rita Oil Co.* v. *State Board of Equalization,* 112 Mont. 359. Moreover, since the decisions in *Choctaw, O. & G. R. Co.* v. *Harrison, supra,* and *Indian Territory Illuminating Oil Co.* v. *Oklahoma, supra,* rest upon the same foundations as those underlying the *Gipsy Oil, Large Oil* and *Barnsdall Refineries* decisions, indeed supplied those foundations, we think they too should be, and they now are, overruled.

We do not imply, by this decision, that Congress does not have power to immunize these lessees from the taxes we think the Constitution permits Oklahoma to impose in the absence of such action.[37] The question whether immunity shall be extended in situations like these is

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[37] See *James* v. *Dravo Contracting Co.,* 302 U. S. 134, 160–161; *Pittman* v. *Home Owners Corp.,* 308 U. S. 21, 32–33; *Maricopa County* v. *Valley Bank,* 318 U. S. 357, 361; *Board of Commissioners*

essentially legislative in character. But Congress has not created an immunity here by affirmative action,[38] and "The immunity formerly said to rest on constitutional implication cannot now be resurrected in the form of statutory implication." *Oklahoma Tax Commission* v. *United States,* 319 U. S. 598, 604. And see *Graves* v. *New York ex rel. O'Keefe,* 306 U. S. 466, 480: ". . . if it appears that there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity."

The Oklahoma Supreme Court appears to suggest, though the opinions do not flatly so state, as a possible alternative support for its conclusion in these cases that "Congress has acted on the theory that such immunity exists in the case of leases of this character unless waived," that is, several congressional enactments permit Oklahoma to impose a gross production tax on minerals produced from the lands of the Osages,[39] the Kaws,[40] the Quapaws,[41] and the Five Civilized Tribes,[42] and authorize payment of taxes due on account of the Indians' royalty interest. But Congress' purpose in enacting these statutes was the removal of the immunities of the Indians themselves, immunities which are not challenged in these cases; the action was occasioned by the favorable eco-

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v. *Seber,* 318 U. S. 705, 715–719; *Oklahoma Tax Commission* v. *United States,* 319 U. S. 598, 606–607; *Mayo* v. *United States,* 319 U. S. 441, 446; *Smith* v. *Davis,* 323 U. S. 111, 116–119.

[38] See Cohen, *op. cit. supra* note 5, at 255–256.

[39] 41 Stat. 1250. As has been stated, *Oklahoma* v. *Barnsdall Refineries,* 296 U. S. 521, held that this statute did not authorize the imposition of the state's petroleum excise tax. See text at note 30 *supra.*

[40] 43 Stat. 176.

[41] 41 Stat. 1248, as amended, 50 Stat. 68.

[42] 45 Stat. 496.

nomic position of the particular Indians.[43] The resulting removal of the immunity of private lessees of those Indian lands was an incidental effect of this legislation.

Finally, we refuse to infer from mere congressional silence approval of the doctrine of immunity enunciated in the *Choctaw, O. & G. R. Co., Indian Territory Illuminating Oil* (240 U. S. 522), *Gipsy Oil, Large Oil* and *Barnsdall Refineries* decisions, *supra.* Congress' silence prior to the *Mountain Producers* decision did not preclude this Court from curtailing the lessee's immunity in that case; and Congress seems to have accepted that decision with equanimity. Cf. *Girouard* v. *United States,* 328 U. S. 61, 69–70; *Graves* v. *New York ex rel. O'Keefe,* 306 U. S. 466, 479–480.[44]

Reversed and remanded.

MR. JUSTICE JACKSON concurs in the result.

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[43] H. R. Rep. No. 1377, 66th Cong., 3d Sess. 4; H. R. Rep. No. 1278, 66th Cong., 3d Sess. 2–3; S. Rep. No. 704, 66th Cong., 3d Sess. 3 (all relating to the Osage Act, note 39 *supra*); H. R. Rep. No. 269, 68th Cong., 1st Sess. 3; S. Rep. No. 433, 68th Cong., 1st Sess. 3 (both relating to the Kaw Act, note 40 *supra*); H. R. Rep. No. 431, 75th Cong., 1st Sess.; S. Rep. No. 234, 75th Cong., 1st Sess. 2 (both relating to the Quapaw Act, note 41 *supra*); H. R. Rep. No. 1193, 70th Cong., 1st Sess. 5; S. Rep. No. 982, 70th Cong., 1st Sess. 4–5 (both relating to the Five Civilized Tribes Act, note 42 *supra*).

[44] Respondents also urge that the Oklahoma legislature has recognized the immunity they assert here by authorizing the refund of "payment made in error on account of the production being derived from restricted Indian lands and therefore exempt from taxation." 68 Okla. Stat. § 832 (1941). Although respondents tell us that this argument was urged upon the Oklahoma Supreme Court, that court did not mention this possible state ground but rested its decision exclusively on the federal ground. We do not purport to decide whether Oklahoma law affords the exemption which federal law denies.

See note 4 as to the assessments attributable to the undivided interests in lands held by non-Indians in No. 41.

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STAINBACK, GOVERNOR OF THE TERRITORY OF HAWAII, ET AL. *v.* MO HOCK KE LOK PO, AN ELEEMOSYNARY CORPORATION, ET AL.

NO. 52. APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII.*

Argued January 11–12, 1949.—Decided March 14, 1949.

1. Section 266 of the Judicial Code (now 28 U. S. C. §§ 2281, 1253, etc.), which required that a suit to enjoin state officers from enforcing a state statute on the ground of unconstitutionality be heard and determined by a district court of three judges, and which authorized a direct appeal to this Court from a final decree in such suit, *held* not applicable to the Territory of Hawaii. Pp. 374–380.
2. A final judgment of the United States District Court for Hawaii in a suit heard and determined by three judges, although not appealable directly to this Court because of the inapplicability of Judicial Code § 266 (now 28 U. S. C. § 1253), was nevertheless reviewable in the Court of Appeals and could be considered here on certiorari to that court. Pp. 380–381.
3. A final judgment of the United States District Court for Hawaii, erroneously constituted of three judges under Judicial Code § 266 (now 28 U. S. C. § 2281), enjoined territorial officers from enforcing an Act of the Territory on the ground of unconstitutionality. A direct appeal was erroneously taken to this Court; an appeal was also taken to the Court of Appeals; and this Court was petitioned to review the case in the Court of Appeals by certiorari before judgment. *Held:* As the record, arguments and briefs here and the opinions of the District Court fully present the case decided by the District Court, and to avoid further futile proceedings, this Court grants certiorari to review the case in the Court of Appeals before judgment. Pp. 370–371.

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*Together with No. 474, *Stainback, Governor of the Territory of Hawaii, et al.* v. *Mo Hock Ke Lok Po, an Eleemosynary Corporation, et al.*, on petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

4. Claiming that it was invalid under the Federal Constitution, certain Chinese School Associations, a Chinese school, and a teacher of Chinese in Chinese language schools sued in the United States District Court for Hawaii to enjoin officers of the Territory from enforcing an Act of the Territory which forbids the teaching of foreign languages to children in certain circumstances. The sole sanction for its enforcement was by injunction, in a suit for which the defense of unconstitutionality would be available. The Act had not been construed by the Hawaiian courts. *Held:* Assuming the existence of federal and equitable jurisdiction, the District Court, as a matter of its discretion, should have refused to grant the injunction. Pp. 381–384.
5. Where equitable interference with state and territorial acts is sought in federal courts, judicial consideration of acts of importance primarily to the people of the state or territory should, as a matter of discretion, be left by the federal courts to the courts of the legislating authority, unless exceptional circumstances command a different course. Pp. 383–384.

74 F. Supp. 852, reversed.

Respondents sued in the United States District Court for the District of Hawaii to enjoin officers of the Territory from enforcing an Act of the Territory challenged as invalid under the Federal Constitution. The suit was heard and determined by a court of three judges, which granted the injunction. 74 F. Supp. 852. The defendants took a direct appeal to this Court (No. 52) and an appeal to the Court of Appeals. They also petitioned this Court for review of the case in the Court of Appeals by certiorari before judgment (No. 474). In No. 52, the appeal is dismissed; in No. 474, certiorari is granted, the judgment is reversed and the cause is remanded to the District Court with directions to dismiss the complaint. P. 384.

Thomas W. Flynn, Deputy Attorney General of Hawaii, argued the cause for appellants in No. 52. With him on the brief in No. 52 and the petition in No. 474

were *Walter D. Ackerman, Jr.,* Attorney General of Hawaii, *Rhoda V. Lewis,* Assistant Attorney General, and *C. Nils Tavares. Pauline Day Bakst* and *Robert B. Griffith,* Deputy Attorneys General, were also on the brief in No. 52.

A. L. Wirin and *Wai Yuen Char* argued the cause for appellees in No. 52. With them on the briefs in Nos. 52 and 474 were *James M. Mortia* and *Fred Okrand.*

Briefs of *amici curiae* urging affirmance were filed by *Phineas Indritz* and *Paul Dobin* for the American Veterans Committee; *Osmond K. Fraenkel* and *Frank E. Karelsen, Jr.* for the American Civil Liberties Union; *William Maslow, Shad Polier* and *Leo Pfeffer* for the American Jewish Congress; *Arthur Goldberg* and *Frank Donner* for the Congress of Industrial Organizations; and *Edward J. Ennis* and *Saburo Kido* for the Japanese American Citizens League.

Mr. Justice Reed delivered the opinion of the Court.

The appeal in No. 52, *Stainback, Governor of the Territory of Hawaii, et al.* v. *Mo Hock Ke Lok Po, An Eleemosynary Corporation, et al.,* and the petition for writ of certiorari in No. 474, a case with the same short title, seek review of a judgment of the United States District Court for the District of Hawaii. This judgment was entered by a special three-judge court that was called pursuant to Judicial Code § 266, and by that section's provision was brought directly here on May 7, 1948, in case No. 52. To guard against a frustration of review by this Court's refusal to accept jurisdiction, a timely appeal by the appellants here in No. 52 has been taken by them in No. 474 to the Court of Appeals for the Ninth Circuit. No judgment on that appeal has been entered by the Court of Appeals; and appellants there, the Governor of Hawaii *et al.,* petitioned here on December 21, 1948, for

the allowance of a writ of certiorari under 28 U. S. C. § 1254 (1).[1]

A jurisdictional question as to whether Judicial Code § 266 was applicable in the Territory of Hawaii arises in No. 52. It was postponed by order of this Court on June 1, 1948, to the hearing of that case on the merits. This Court postponed action on the petition for certiorari in No. 474 until the hearing of No. 52 on the merits. As the record, arguments and briefs here and the opinions below fully present the case decided by the District Court, to avoid further futile proceedings we now grant the petition for the writ of certiorari to the Court of Appeals before its decree and proceed in No. 474 to a review of the judgment of the District Court of Hawaii. The opinions appear in 74 F. Supp. 852, *Mo Hock Ke Lok Po* v. *Stainback*.

Respondents here were plaintiffs in the trial court. They are Chinese School Associations, a Chinese school, all giving instruction in Chinese, and a teacher of Chinese in Chinese language schools. After December 7, 1941, these schools closed and have not reopened. Prior to that date they had more than 2,000 pupils, several hundred of whom were in the first and second grade, and numerous teachers. Under Judicial Code § 266 they sought an injunction against officers of the Territory of Hawaii charged by law with the administration of an Act of the Territory "Regulating the Teaching of Foreign Languages to Children," [2] from enforcing it in any particular against

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[1] "§ 1254. Courts of appeals; certiorari; appeal; certified questions

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . . ."

[2] Session Laws of Hawaii 1943, Act 104; Revised Laws of Hawaii 1945, c. 31.

the teaching of foreign languages to the respondents' pupils.

The Act was grounded on a legislative finding "that the study and persistent use of foreign languages by children of average intelligence in their early and formative years definitely detract from their ability properly to understand and assimilate their normal studies in the English language." Revised Laws of Hawaii (1945), § 1871. "School" was defined as any teaching regularly of two or more persons in a group.[3] Requirements for pupils and teachers in foreign language schools were set out.[4] Visitation of the foreign language schools by appropriate officials for enforcement purposes was authorized. § 1875. The only sanction for enforcement is by injunction.[5]

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[3] "Sec. 1872. Definitions. As used in this chapter:

" 'School' means any person, firm, group of persons, unincorporated association, corporation, establishment, or institution, which teaches, with or without fees, compensation or other charges therefor, any language other than the English language, as a course of study, to two or more persons as a group, as a regular and customary practice."

[4] "No child shall be taught a foreign language in any school unless he shall comply with one of the following requirements: (a) That he shall have passed the fourth grade in public school or its equivalent, and shall pass from time to time in each succeeding grade a standard test in English composition and reading conducted by or under the direction of the department of public instruction attaining a score not lower than normal for his grade; or (b) that he shall have passed the eighth grade in public school or its equivalent; or (c) that he shall have attained the age of fifteen years." R. L. Haw. 1945, § 1873.

"No school shall permit the teaching of any foreign language to any child under the age of fifteen unless the teacher shall have been examined and certified by a board of examiners of three persons appointed by the commissioners of public instruction to be reasonably well versed in the usage and idiom of both the English language and the foreign language to be taught by such teacher. . . ." R. L. Haw. 1945, § 1874.

[5] "Sec. 1876. Injunctive enforcement. In the event any school or any person shall be found to be violating, or failing to comply with any of the requirements of, this chapter, or there shall be reasonable

This lack of coercion by fine or imprisonment and the limitation of enforcement to injunction are important factors in our conclusion upon No. 474.

The complaint alleged that in violation of the Fifth Amendment the Act deprived plaintiff schools of the right to manage their property by contracting with instructors and parents for the teaching of Chinese, and the plaintiff teacher of Chinese of his right to follow his occupation.[6] See *Farrington* v. *Tokushige*, 273 U. S. 284, 299. The judgment of the special district court granted a sweeping permanent injunction against enforcement of the Hawaiian Act. As our conclusions are based solely upon procedural issues, any further discussion of the facts or of the law applicable to the merits is not appropriate.

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cause to believe that such school or person is violating, or failing to comply with the requirements of, this chapter, the attorney general, at his own instance or at the request of the department of public instruction, shall institute appropriate proceedings in equity in the circuit in which the violation occurs to enjoin the performance of any acts or practices forbidden by this chapter, or to require such school or person to comply with the requirements of this chapter. Jurisdiction to hear and dispose of all actions under this section is hereby conferred upon each circuit judge, and each such judge shall have power to issue such orders and decrees, by way of injunction, mandatory injunction or otherwise, as may be appropriate to enforce the provisions of this chapter. In the event any respondent or respondents shall fail or refuse to comply with any such order or decree, the court, in addition to any other powers hereby granted, shall have power to enjoin the operation and conduct of such school until and unless this chapter is complied with or satisfactory assurance is given that this chapter will be complied with. The county attorney of each county shall, at the request of the attorney general, conduct such proceeding in behalf of the Territory. All such suits shall be brought in the name of the Territory by the attorney general." R. L. Haw. 1945.

[6] There was a further allegation of a denial to plaintiffs of rights under 8 U. S. C. §§ 41, 42, 43. This was not considered by the District Court or relied upon in brief or argument here. We do not consider it.

The complaint asked for and obtained a three-judge court under the provisions of the Judicial Code § 266.[7] The minute entries of proceedings and trial and the opinion re applicability of § 266, Judicial Code, 74 F. Supp. at

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[7] 28 U. S. C. § 380 (see redistribution without change of importance in this case, 28 U. S. C. §§ 1253, 2101, 2281, 2284, as revised by the Act of June 25, 1948, 62 Stat. 928, 964, 968, effective September 1, 1948):

"No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, . . . shall be issued or granted . . . unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, ... Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: . . . . An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. . . . The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

An interlocutory injunction was sought in the complaint, filed June 26, 1947, but the record presented to us does not show that one was issued although the final injunction was not issued until February 11, 1948. An opinion on the applicability of Judicial Code § 266, filed October 22, 1947, says that "All pertinent adjective prerequisites specified by the Supreme Court in Ayrshire Collieries Corporation v. United States, 331 U. S. 132, . . . and in Farrington v. T. Tokushige, supra, necessary to make operative three judge participation in the instant suit have occurred. An interlocutory injunction has been sought and passed to a hearing in the District Court at Honolulu and a substantial federal question of transcending limitations of the 5th Amendment to the Constitution has been sufficiently alleged in the Amended Complaint." 74 F. Supp. 858, 859.

Despite appellants' suggestion that the application for an interlocutory injunction was not pressed, we think that in view of this

858, show suggestions that a special district court under Judicial Code § 266 cannot be called for Hawaii. The statement of jurisdiction laid bare the problem with commendable frankness. It lies at the threshold of any consideration of this appeal.[8]

Within the present decade, this Court summarized in *Phillips* v. *United States,* 312 U. S. 246, the purpose and effect of § 266 and extracted from its history and the precedents for the section's application a congressional requirement of strict construction to protect our appellate docket while assuring the states that exceptionally careful judicial consideration would guard them against all assaults, through federal courts, against their legislative statutes or administrative board orders by applications for injunction when those assaults were based on the Federal Constitution. Pp. 250–51. While we take judicial notice that since the *Phillips* case air carriage has brought Hawaii closer to the continent,[9] the interference with the normal adjudicatory and appellate processes of the federal judicial system and our docket persists. The power

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language it would be hypercritical for us to dismiss this appeal for failure of the record to show more definitely that the prayer for an interlocutory judgment was pressed. But see *Healy* v. *Ratta,* 289 U. S. 701, where the correspondence file in this Court shows receipt of a supplemental record containing a formal waiver of prayer for temporary relief. *Ayrshire Corp.* v. *United States, supra,* at 140; *Stratton* v. *St. Louis S. W. R. Co.,* 282 U. S. 10. Compare 28 U. S. C. § 1253 and 28 U. S. C. (1946 ed., Supp. II) pp. 1444, 1453, showing repeal and redistribution of Judicial Code § 266. We therefore assume that the quoted statement from the District Court opinion establishes that the request for an interlocuory injunction was pressed on that court.

[8] *Stratton* v. *St. Louis S. W. R. Co.,* 282 U. S. 10, 13; *Phillips* v. *United States,* 312 U. S. 246, 248.

[9] Air travel to Hawaii is recognized by the Administrative Office of the United States Courts as a necessary travel expense for judges under 28 U. S. C. § 604 (7).

to call a panel of judges under § 266 in Hawaii is to be examined in the light of the *Phillips* case.

Hawaii is still a territory but a territory in which the Constitution and laws of the United States generally are applicable. 31 Stat. 141, § 5, as amended 48 U. S. C. § 495; *Duncan* v. *Kahanamoku,* 327 U. S. 304, 317. Not only its federal courts but also its territorial courts are of course subject to congressional legislation. 48 U. S. C. § 631, *et seq.* The Organic Act for Hawaii, § 86,[10] provided in 1900:

> "That there shall be established in said Territory a district court to consist of one judge, ... Said court shall have, in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizable in a circuit court of the United States, and shall proceed therein in the same manner as a circuit court; . . . ." 31 Stat. 158.

When incorporated into the Code, this Court was given "the jurisdiction of district courts of the United States, and shall proceed therein in the same manner as a district court." 48 U. S. C. § 642. It now has that jurisdiction.[11] The only change that could be considered significant is the more definite integration of the district court for Hawaii into the federal judicial system by definition.[12] As jurisdiction of this Court on appeal depends upon whether or not a special three-judge court was properly called[13] and not upon the power of this Court to review under

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[10] 31 Stat. 158.

[11] 28 U. S. C. §§ 451, 91, 1331–59; see 28 U. S. C. § 41; sec. 8, Act of June 25, 1948, 62 Stat. 986. Note arrangement for Alaska, *id.,* sec. 9, at p. 986.

[12] See Reviser's Notes to 28 U. S. C. §§ 1291, 1292. Cf. *Mookini* v. *United States,* 303 U. S. 201.

[13] *Rorick* v. *Board of Commissioners of Everglades Drainage District,* 307 U. S. 208, 212.

Judicial Code § 266, we need not analyze the method of review of the judgments of the District Court of Hawaii.[14]

Our issue is narrowed to the inquiry of whether Congress intended that Judicial Code § 266 should apply in the Territory of Hawaii under circumstances that would require its application in a similar suit in a state. Congress in discussing an amendment to the Mann-Elkins Act, which amendment evolved into this section, considered the geographical difficulties inherent in the requirement of a three-judge court and the burden thus placed on the functioning of the federal judicial system, but decided that such considerations were outweighed by the desirability of having the constitutionality of a state statute passed on by a court comparable to the court of last resort of the state. 45 Cong. Rec. 7253–57. It is to be noted that nowhere in § 266 is mention made of territories nor as far as has been called to our attention in the congressional debates and reports relating to this section and its amendments.

While, of course, great respect is to be paid to the enactments of a territorial legislature by all courts as it is to the adjudications of territorial courts,[15] the predominant reason for the enactment of Judicial Code § 266 does not exist as respects territories. This reason was a con-

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[14] Review of the judgments of the district court for Hawaii was allowed in the Organic Act by § 86 to the ninth judicial circuit in the same manner as from the then circuit courts to the circuit courts of appeals. This was adjusted to conform to the elimination of the circuit courts by Judicial Code § 128 as amended. See 48 U. S. C. § 645. Since this appeal was taken, the revision of the United States Code, Title 28, §§ 1291, 1294, has become effective. Under Judicial Code § 266 this Court had direct review, Judicial Code §§ 128, 238, at the time of appeal and still has. 28 U. S. C. § 1253 as revised effective September 1, 1948.

[15] *Waialua Co.* v. *Christian,* 305 U. S. 91, 108; *De Castro* v. *Board of Comm'rs,* 322 U. S. 451, 455.

gressional purpose to avoid unnecessary interference with the laws of a sovereign state.[16] In our dual system of government, the position of the state as sovereign over matters not ruled by the Constitution requires a deference to state legislative action beyond that required for the laws of a territory.[17] A territory is subject to congressional regulation.[18]

When the long-established rule of strict construction of Judicial Code § 266 and that of protection of the docket of this Court is also considered in conjunction with the necessary interference with the normal operations of the federal judicial system by the establishment of the three-judge requirement in Hawaii, we are not persuaded that Congress intended § 266 to cover Hawaii. See 45 Cong. Rec. 7253–57. Despite its generality the words of § 266 have been strictly construed so that "statute of a State" does not include ordinances; "officer of such State" means one with authority to execute or administer a state-wide policy.[19]

It is not merely the absence of the word "territory" from § 266 that leads us to this conclusion. We recognize that in some situations the word "state" includes territory. *Andres* v. *United States,* 333 U. S. 740. In that

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[16] *Ex parte Collins,* 277 U. S. 565, 567–569.

[17] Although Judicial Code § 266 originated in 1910, 36 Stat. 539, 557, it was not until 1937 that the requirement of a three-judge district court to hear applications for injunctions against the enforcement of Acts of Congress was enacted. 50 Stat. 751, 752.

[18] Const., Art. IV, § 3, cl. 2.

[19] To the cases on strict construction of § 266 cited in *Phillips* v. *United States, supra,* add *City of Cleveland* v. *United States,* 323 U. S. 329; *Spielman Motor Co.* v. *Dodge,* 295 U. S. 89; *Public Nat. Bank of New York* v. *Keating,* 29 F. 2d 621; *City of Des Moines* v. *Des Moines Gas Co.,* 264 F. 506; *Calhoun* v. *City of Seattle,* 215 F. 226; *Cumberland Telephone & Telegraph Co.* v. *City of Memphis,* 198 F. 955.

case we thought the purpose of Congress would be frustrated by a holding that the word "state" in a federal statute providing for execution of a criminal in "the manner prescribed by the laws of the State within which the sentence is imposed" did not include "Territory." There we held state included territory.[20] Here the purpose of the statute to protect state sovereignty is not furthered by an interpretation of state to include territory.

A former opinion of this Court lends strength to this interpretation. In *Farrington* v. *Tokushige,* 273 U. S. 284, decided in the United States District Court of Hawaii on July 21, 1925, a temporary injunction forbidding territorial officers from enforcing a territorial statute somewhat similar to the one here involved was granted by a single district judge on the ground of the invalidity of the territorial statute under the Federal Constitution. The Circuit Court of Appeals for the Ninth Circuit affirmed on the same ground, 11 F. 2d 710, and so did this Court on certiorari. No question was raised in any court as to the applicability of the requirement of § 266 that no such injunction should be granted against a state without three judges. If § 266 applied to Hawaii, the interlocutory order of injunction was entered without jurisdiction. The Court of Appeals and this Court were without jurisdiction over the appeal. While it is sometimes said that action, where the power to act is unquestioned, can hardly be said to be a precedent for a future case,[21] where as here the responsibility was on the courts to see that the three-

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[20] See also *Talbott* v. *Silver Bow County,* 139 U. S. 438; *Wynne* v. *United States,* 217 U. S. 234, 242; *Yeung* v. *Territory of Hawaii,* 132 F. 2d 374, 377.

[21] *United States* v. *More,* 3 Cranch 159, 172; *Snow* v. *United States,* 118 U. S. 346, 354; *Cross* v. *Burke,* 146 U. S. 82, 87; *Louisville Trust Co.* v. *Knott,* 191 U. S. 225, 236; *Arant* v. *Lane,* 245 U. S. 166, 170.

judge rule was followed, we think it significant that no one sought to apply § 266 to Hawaii.[22]

We hold that Judicial Code § 266 is not applicable to Hawaii, that we are without jurisdiction in case No. 52 and that the appeal therein must be dismissed.

We turn now to No. 474, here on writ of certiorari to the Court of Appeals of the Ninth Circuit before the entry of a decree in that court. 28 U. S. C. § 2101 (d). What we have said concerning the final judgment in the District Court of Hawaii establishes that the judgment was entered by a court improperly constituted under Judicial Code § 266. Nevertheless this order is subject

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[22] *Stratton* v. *St. Louis S. W. R. Co.*, 282 U. S. 10, 13. See also *Benedicto* v. *West India & Panama Telegraph Co.*, 256 F. 417. Compare *Porto Rico Light & Power Co.* v. *Colom*, 106 F. 2d 345, 354–55.

The District Court thought that any question by reason of the *Tokushige* case as to differences between that court and the United States District Courts of the States so far as their powers under § 266 is concerned, had been "expressly and clearly removed by subsequent specific Congressional legislation. Title 48, Section 646, U. S. C. A., Federal Rules of Civil Procedure, rules 1, 65(e), 28 U. S. C. A. following section 723c." 74 F. Supp. at 860.

We do not think that either the section or the rules have any effect upon the applicability of § 266 to the United States District Court in Hawaii. 48 U. S. C. § 646 (now covered by 28 U. S. C. § 2072, see note 26 *infra*) made the rules applicable to Hawaii, but the rules do not affect the question of the applicability of § 266 to Hawaii. Rule 1 states the scope of the rules. Rule 65 (e), insofar as it has any possible bearing, says merely that "These rules do not modify . . . the act of August 24, 1937, c. 754, § 3, relating to actions to enjoin the enforcement of acts of Congress." Section 3 of c. 754, 50 Stat. 751, is the section that provides for a special district court where an injunction is sought to restrain the enforcement, operation or execution of, or to set aside, any act of Congress on the ground that it is repugnant to the Constitution of the United States. In this present proceeding we are not dealing with an act of Congress but with an act of the territorial legislature of the Hawaiian Islands.

to review in the Court of Appeals.[23] It is the final order of a district court although erroneously heard by three judges instead of one and not appealable directly here because not covered by § 266. But as a final order of the District Court, it is reviewable in the Court of Appeals,[24] and can be considered here.

Another procedural matter leads us to refuse consideration of case No. 474 on the merits. Respondents in the United States District Court sought and obtained injunctive relief from the enforcement of a territorial law by a proceeding under 28 U. S. C. § 41 (1) on the plea that the law violates the due process clause of the Fifth Amendment because respondents by the law were deprived of liberty and of property.[25] The allegations of irreparable injury consist of an assertion that it will be necessary to incur a comparatively large liability for building repairs and employment of teachers on the part of the respondent schools before the Act will be violated, sums that will be lost if the Act can be enforced constitutionally. The teacher claims to suffer irreparable injury because he cannot follow his occupation. As the District Court found irreparable injury to all respondents

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[23] *Healy* v. *Ratta,* 289 U. S. 701; 292 U. S. 263, 264; 67 F. 2d 554, 556; *Wilentz* v. *Sovereign Camp,* 306 U. S. 573, 582; *Commission* v. *Brashear Lines,* 312 U. S. 621, 626.

[24] 28 U. S. C. § 225 (a), now 28 U. S. C. § 1291. See *Gully* v. *Interstate Nat. Gas Co.,* 292 U. S. 16, 19; *Oklahoma Gas Co.* v. *Packing Co.,* 292 U. S. 386, 392; *Rorick* v. *Commissioners,* 307 U. S. 208, 213. Cf. *Jameson & Co.* v. *Morgenthau,* 307 U. S. 171, 174; *Garment Workers* v. *Donnelly Co.,* 304 U. S. 243, 251–252.

[25] As indicated above, note 6, respondents also relied upon a denial of equal rights under 8 U. S. C. §§ 41, 42 and 43. No more definite allegation appears. The hearing developed nothing to indicate any purpose or action of discrimination against any race or group in the law or its administration. The Act covered all foreign languages. We, therefore, confine ourselves to the due process issue. See *Snowden* v. *Hughes,* 321 U. S. 1.

in the jurisdictional amount, we assume there is both federal and equitable jurisdiction.[26] Furthermore, there is no problem as to whether or not there is an adequate legal remedy in the federal courts.[27] There is none. The sole sanction, see note 5 *supra,* is by the institution of proceedings in equity in territorial courts whereby the extraordinary remedies of prohibitory and mandatory injunctions are utilized to stop violations of the Act. The

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[26] Notwithstanding the fusion of law and equity by the Rules of Civil Procedure, the substantive principles of Courts of Chancery remain unaffected. Rules 1 and 2; 48 Stat. 1064, §§ 1 and 2; [note 48 U. S. C., 1946 ed., § 646; repealed by Act of June 25, 1948, 62 Stat. 992; cf. 28 U. S. C. § 451] *Abbe* v. *New York, N. H. & H. R. Co.,* 171 F. 2d 387, 388; *Bereslavsky* v. *Caffey,* 161 F. 2d 499; *Bereslavsky* v. *Kloeb,* 162 F. 2d 862; *Byram* v. *Vaughn,* 68 F. Supp. 981, 984. Compare *Sibbach* v. *Wilson & Co.,* 312 U. S. 1, 9–10. See *Hillsborough* v. *Cromwell,* 326 U. S. 620, 622.

Atlas Ins. Co. v. *Southern, Inc.,* 306 U. S. 563, 568:

"Section 11 of the Judiciary Act of 1789, 1 Stat. 78, provided that the circuit courts should have 'cognizance . . . of all suits of a civil nature at common law or in equity' in cases appropriately brought in those courts. This provision is perpetuated in § 24 (1) of the Judicial Code, 28 U. S. C. § 41 (1), [now §§ 1331 *et seq.*] which declares that the district courts shall have jurisdiction of such suits. The 'jurisdiction' thus conferred on the federal courts to entertain suits in equity is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries. . . . This clause of the statute does not define the jurisdiction of the district courts as federal courts, in the sense of their power or authority to hear and decide, but prescribes the body of doctrine which is to guide their decisions and enable them to determine whether in any given instance a suit of which a district court has jurisdiction as a federal court is an appropriate one for the exercise of the extraordinary powers of a court of equity. . . ."

[27] Cf. *Matthews* v. *Rodgers,* 284 U. S. 521, 525; Moore's Federal Practice, vol. 1, pp. 108, 208; *Grauman* v. *City Company of New York,* 31 F. Supp. 172; H. R. Rep. No. 308, 80th Cong., 1st Sess., p. A 236 on 28 U. S. C. § 384.

respondents here, if such proceedings were brought, would have such defenses as the laws of the territory allow, including of course defenses based upon the present issues of unconstitutionality under the Federal Constitution.

We are of the view, however, that the United States District Court for Hawaii, as a matter of its discretion, should have refused to grant this injunction. The complaint called for broad consideration of the application of the Act to foreign language schools and teachers. It had not been construed by the Hawaiian courts. Judge McLaughlin pointed out in his conclusions of law on a motion for preliminary injunction before the request for a three-judge court that this law

> ". . . carries no criminal penalties for infractions. Enforcement is in equity in the circuit courts of the Territory. Plaintiffs have no reason to fear a court of equity, and there is every reason to believe that their constitutional rights would be fully protected in the equity courts of the Territory and that an appeal, if need be, eventually could be had to the United States Supreme Court."

The statement applies as well to the final injunction. Entirely aside from the question of the propriety of an injunction in any court,[28] territorial like state courts are the natural sources for the interpretation and application of the acts of their legislatures and equally of the propriety of interference by injunction.[29] We think that where equitable interference with state and territorial acts is sought in federal courts, judicial consideration of acts of importance primarily to the people of a state

[28] See *Spielman Motor Co.* v. *Dodge,* 295 U. S. 89, 95.

[29] *Waialua Co.* v. *Christian,* 305 U. S. 91, 108; *Beal* v. *Missouri Pacific R. Corp.,* 312 U. S. 45; *Watson* v. *Buck,* 313 U. S. 387; *Douglas* v. *Jeannette,* 319 U. S. 157; *Burford* v. *Sun Oil Co.,* 319 U. S. 315, 333, n. 29; *Meredith* v. *Winter Haven,* 320 U. S. 228, 235. Compare *Spector Motor Co.* v. *McLaughlin,* 323 U. S. 101.

or territory should, as a matter of discretion, be left by the federal courts to the courts of the legislating authority unless exceptional circumstances command a different course. We find no such circumstances in this case.

The appeal in No. 52 is dismissed.

The judgment in No. 474 is reversed and the cause remanded to the District Court with directions to dismiss the complaint.

MR. JUSTICE FRANKFURTER, with whom MR. JUSTICE RUTLEDGE joins, concurring in part and dissenting in part.

As to No. 52, I join the Court's opinion.

As to No. 474, I would leave the appeal now pending in the Court of Appeals for the Ninth Circuit to its adjudication there and not grant the petition for certiorari. The power which Congress has given to this Court to short-circuit the Courts of Appeals should not be exercised except for some compelling reason of wise judicial administration. No reason is here present that would not be equally available in almost every case which, even though a constitutional issue may be involved, cannot come here directly, but must first go to a Court of Appeals. Congress decided not to provide for such direct appeals here and we should not exercise our discretionary power to grant what Congress has withheld. This discretionary power should come into play only for those exceptional circumstances for which Congress designed it.

After finding that we are without jurisdiction to review directly the decree of the District Court of Hawaii, the Court in effect allows such direct review by not requiring the appeal now pending in the Court of Appeals to run its normal course of adjudication in that court. This is justified on the ground that the case has been fully presented in the District Court and here. But if we

would not have brought here an appeal undecided in the Court of Appeals merely because it had been adjudicated on its merits in the District Court, there is no more reason for doing so when a direct appeal from the District Court has been improvidently sought here. Moreover, the Court is not disposing of the case on its merits. By lifting the case out of the Court of Appeals the Court is assuming the burden of canvassing issues not dealt with below. This entails the study of new questions and the task of opinion writing. These are precisely the burdens from which the Court asked to be saved and from which Congress saved the Court by the Judiciary Act of 1925. If the regular course of proceeding were followed and the matter were to be disposed of by the Court of Appeals, as it is now being disposed of here, the necessity for future consideration here might never arise beyond that involved in finding no reason for granting a petition for certiorari were one to be applied for. Drains on the Court's time through jurisdictional misconceptions should be strongly discouraged. We should follow the honored practice of this Court in dismissing a proceeding that should not be here *ab initio,* even though the Court's time and effort had been expended after full argument in concluding that a case should never have been brought here.[1]

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[1] Writs of certiorari granted because of an apparent conflict between courts of appeals have been dismissed because the existence of such conflict did not survive argument. And for these reasons. "If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. The present case certainly comes under neither head." *Layne & Bowler Corp.* v. *Western Well Works, Inc.,* 261 U. S. 387, 393.

If the attempt had been made to bring No. 474 here prematurely it would surely have failed. It should not succeed because No. 52 was improperly brought here. Accordingly I agree with the Court in dismissing No. 52 for want of jurisdiction, and in No. 474 I would deny the petition for certiorari.

BLACK DIAMOND STEAMSHIP CORP. *v.* ROBERT STEWART & SONS, LTD. ET AL.

NO. 121. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.*

Argued January 3–4, 1949.—Decided March 14, 1949.

A vessel owned by the United States and chartered under a bareboat charter to an American corporation collided with a British vessel in territorial waters of Belgium. The British vessel sank with all of her cargo; her chief steward was killed; and the American vessel damaged the bank of the river. Owners of the British vessel sued the charterer of the American vessel in England, claiming damages of $1,000,000. Owners of the cargo of the British vessel sued the United States and the charterer of the American vessel in a federal district court for claims aggregating nearly $1,000,000. Alleging that the value of the American vessel was about $1,000,000, that the total claims would exceed that amount, and that their liability under Belgian law was limited to $325,000, the United States and the charterer petitioned the District Court for limitation of liability under R. S. § 4285, as amended, 46 U. S. C. § 185. The United States posted no bond and the charterer posted a bond of only $325,000. The District Court dismissed the petition and the Court of Appeals affirmed. *Held:* The District Court should not have dismissed the petition but should have required the charterer (but not the United States) to post a bond of $1,000,000, to guard against the possibility that American law, and not Belgian law, might be found to control the amount of liability. Pp. 388–399.

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*Together with No. 130, *United States* v. *Robert Stewart & Sons, Ltd. et al.*, also on certiorari to the same court.

1. R. S. § 4285 is applicable, because the total amount of potential claims exceeds the fund available for their satisfaction, whether that fund be measured by the law of Belgium or of the United States. Pp. 393–394.

2. Under 28 U. S. C. § 2408 and 46 U. S. C. § 743, the United States is not required to post a bond in a proceeding under R. S. § 4285. P. 394.

3. In view of the six-month limitation on proceedings under R. S. § 4285, the Court of Appeals, instead of affirming the dismissal, should have remanded the case to the District Court in order to give the charterer an opportunity to file a larger bond, since the defect was not jurisdictional. P. 395.

4. If the Belgian law is not merely procedural but attaches to the right of recovery and if it does not conflict with any overriding domestic policy, it is applicable in this case. Pp. 395–396.

5. The Belgian law having been pleaded, it must be proved as a fact—even though it is derived from the Brussels Convention of August 25, 1924, limiting the liability of owners of seagoing vessels. Pp. 396–397.

6. Upon remand, the question of what law governs the substantive limit of liability should be determined in advance of the proof of individual claims. Pp. 397–398.

7. If Belgian law is found to control, a $325,000 bond would suffice; but, if American law is found to control, a $1,000,000 bond would be required. P. 398.

8. The District Court, in the exercise of its power to preserve the *status quo* pending appeal, should require the charterer to post a bond for the value of the ship and freight. Pp. 398–399.

167 F. 2d 308, reversed.

A federal district court dismissed a petition of the United States and the charterer of one of its vessels for limitation of liability under R. S. § 4285, as amended, 46 U. S. C. § 185. The Court of Appeals affirmed. 167 F. 2d 308. This Court granted certiorari. 335 U. S. 809. *Reversed and remanded*, p. 399.

John W. Crandall argued the cause and filed a brief for petitioner in No. 121.

Philip Elman argued the cause for the United States, petitioner in No. 130. With him on the brief were

Solicitor General Perlman, Assistant Attorney General Morison, Samuel D. Slade and *Morton Hollander.*

William G. Symmers argued the cause for respondents. With him on the brief were *Wilbur E. Dow, Jr.* and *Frederick Fish.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

We brought these cases here because they call for determination of important issues in the administration of admiralty law. 335 U. S. 809. They bring for review a decree of the Court of Appeals for the Second Circuit affirming the dismissal of a petition for limited liability brought in the United States District Court for the Eastern District of New York by the United States as owner and the Black Diamond Steamship Corporation as bareboat charterer of the S. S. *Norwalk Victory.* 167 F. 2d 308.

The facts controlling our decision are briefly these. On April 28, 1947, the *Norwalk Victory,* while proceeding down the Schelde River in the territorial waters of Belgium, collided with the British steamer *Merganser.* The *Merganser* sank with all her cargo; her chief steward was killed; in backing away from the *Merganser* the *Norwalk Victory* struck and damaged the bank of the Schelde. Soon after the collision the owners of the *Merganser* brought suit against Black Diamond in the High Court of Justice of England claiming damages in the amount of $1,000,000. That is the only proceeding which has been brought abroad. On October 14, 1947, the owners of the cargo lost in the sinking of the *Merganser* brought suit in the Eastern District of New York; aggregate claims thus far filed total nearly $1,000,000.

In their petition for limitation of liability, brought under R. S. § 4285, as amended, 49 Stat. 1480, 46 U. S. C.

§ 185,[1] the United States and Black Diamond allege the possibility that in addition to the suit in the High Court of Justice and the suits by the cargo owners in New York, there may be suits in the courts of the United States by other cargo owners, by the personal representative of the *Merganser's* chief steward, and by the Belgian Government for damages to the bank of the Schelde and for the cost of removing the wreck of the *Merganser* from the river. These claims, they say, would exceed the value of the *Norwalk Victory,* which is about $1,000,000. But the petitioners, despite the provisions of R. S. § 4283, as amended, 49 Stat. 1479, 46 U. S. C. § 183,[2] do not rec-

[1] "SEC. 4285. The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter, as amended, and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 4283, as amended, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 4283, as amended. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease."

[2] "SEC. 4283. (a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

ognize the value of their ship as the limit of their liability. They insist, rather, that their liability is limited by the International Convention for the Unification of Certain Rules relating to the Limitation of the Liability of Owners of Seagoing Vessels, signed at Brussels on August 25, 1924.[3] The Convention was ratified by Belgium on

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[3] The pertinent parts of the Convention, published in U. S. Dept. of State Treaty Information Bull. No. 20, p. 13 (1931), are:

"ARTICLE 1

"The liability of the owner of a seagoing vessel is limited to an amount equal to the value of the vessel, the freight, and the accessories of the vessel, in respect of—

"1. Compensation due to third parties by reason of damage caused, whether on land or on water, by the acts or faults of the master, crew, pilot, or any other person in the service of the vessel;

"2. Compensation due by reason of damage caused either to cargo delivered to the master to be transported, or to any goods and property on board;

. . . . . .

"5. Any obligation to remove the wreck of a sunken vessel, and any obligations connected therewith;

. . . . . .

"Provided that, as regards the cases mentioned in Nos. 1, 2, 3, 4, and 5 the liability referred to in the preceding provisions shall not exceed an aggregate sum equal to 8 pounds sterling per ton of the vessel's tonnage.

. . . . . .

"ARTICLE 4

"The freight referred to in article 1, including passage money, is deemed, as respects vessels of every description, to be a lump sum fixed at all events at 10 per cent of the value of the vessel at the commencement of the voyage. . . .

. . . . . .

"ARTICLE 7

"Where death or bodily injury is caused by the acts or faults of the captain, crew, pilot, or any other person in the service of the vessel, the owner of the vessel is liable to the victims or their representatives in an amount exceeding the limit of liability provided for

June 2, 1930, and took effect on June 2, 1931; it is alleged, therefore, to have been part of the territorial law of Belgium at the time of this collision in Belgian waters. On the basis of this Convention, the petitioners assert their maximum liability to be $325,028.79.

Accordingly, Black Diamond accompanied its petition for limitation of liability with a bond in the amount of $325,028.79. The United States, standing upon 28 U. S. C. § 2408 [4] and § 3 of the Suits in Admiralty Act, 41 Stat. 526, as amended, 46 U. S. C. § 743,[5] filed no bond. The District Court, holding that the privilege of limiting liability relates "not to the substantive rights giving rise to the liability, but to the remedy, and that is governed by the law of the forum," dismissed the petition on the ground that Black Diamond had not complied with R. S.

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in the preceding articles up to 8 pounds sterling per ton of the vessel's tonnage. . . .

. . . . .

"ARTICLE 10

"Where the person who operates the vessel without owning it or the principal charterer is liable under one of the heads enumerated in article 1, the provisions of this convention are applicable to him.

"ARTICLE 11

"For the purposes of the provisions of the present convention, 'tonnage' is calculated as follows:

"In the case of steamers and other mechanically propelled vessels, net tonnage, with the addition of the amount deducted from the gross tonnage on account of engine-room space for the purpose of ascertaining the net tonnage. . . ."

[4] "§ 2408. Security not required of United States

"Security for damages or costs shall not be required of the United States, any department or agency thereof or any party acting under the direction of any such department or agency on the issuance of process or the institution or prosecution of any proceeding. . . ."

[5] "§ 743. Procedure in cases of libel in personam.

". . . Neither the United States nor such corporation shall be required to give any bond or admiralty stipulation on any proceeding brought hereunder."

§ 4285 by filing a bond in the amount of the value of the ship—$1,000,000. The standing of the United States (which was not separately represented at that stage of the proceeding) was not considered.

Upon appeal, the petitioners were found to be in "a dilemma from which they cannot escape." 167 F. 2d at 309. Reading the petition as alleging that the Belgian limitation attached to the claimants' substantive right to recover, and treating that allegation as proved for purposes of determining the sufficiency of the petition, the Court accepted *arguendo* the sum of $325,000 as "the limit of all their [petitioners'] liabilities." *Ibid.* But though the Court of Appeals looked to the *lex loci delicti* for the substantive limit of liability, its next step was taken on the assumption that the conditions under which a petition praying for the injunction of other proceedings and a *forum concursus* may be filed are matters of procedure governed by the *lex fori.* It is a condition imposed by the *lex fori,* the court's reasoning continued, that a petition for limitation of liability is not available to a shipowner unless the aggregate of known and probable claims against him is greater than the value of his ship. As establishing this proposition, the court cited *The Aquitania,* 20 F. 2d 457 (C. A. 2d Cir.); *Curtis Bay Towing Co.* v. *Tug Kevin Moran,* 159 F. 2d 273 (C. A. 2d Cir.); and *The George W. Fields,* 237 F. 403 (S. D. N. Y.). And it held these cases applicable on the ground that the maximum liability imposed by Belgian law was less than the value of the *Norwalk Victory.*

But the lower court found it unnecessary to pass finally on the question whether the Belgian limitation was in fact controlling because, if it were not, petitioners would be impaled on the other horn of the dilemma: if the substantive law of the forum rather than that of Belgium applied, the limit of liability, by R. S. § 4283, would be the value of the vessel.

Since the procedural law of the forum, moreover, requires the posting of a bond in the amount of potential liability, and since the bond proposed by petitioners was for less than a third of that amount, upon this hypothesis also they were disentitled to proceed. The Court of Appeals accordingly affirmed the dismissal of the petition.

If the Court of Appeals' reliance upon *The Aquitania, Curtis Bay Towing Co.* v. *Tug Kevin Moran,* and *The George W. Fields, supra,* was, as we are convinced, under the circumstances misplaced, we escape its dilemma without wanting in respect for the wisdom of that most experienced of admiralty courts. Those cases, it is true, hold that where the aggregate claims against a shipowner can by no possibility exceed the value of his ship, a proceeding under R. S. § 4285 will not lie. But the value of the ship was relevant in those cases only because under the law of the United States, which was assumed to be applicable, that was the limit of the owner's liability. Since the total amount of all potential claims in each case was only a fraction of that limit, the fund available for their satisfaction was more than ample. There was no reason, therefore, for permitting the petitioners to invoke a *forum concursus.* But where, as here, the total amount of potential claims exceeds the fund available for their satisfaction, whether that fund be measured by the law of Belgium or of the United States, there exists just such a situation as R. S. § 4285 was designed to meet.

> "Unless some proceeding of this kind were adopted which should bring all the parties interested into one litigation, and all the claimants into concourse for a *pro rata* distribution of the common fund, it is manifest that in most cases the benefits of the act could never be realized. Cases might occur, it is true, in which the ship owners could avail themselves of those benefits, by way of defence alone, as where both ship and freight are totally lost, so that the

> owners are relieved from all liability whatever. But even in that case, in the absence of a remedy by which they could obtain a decree of exemption as to all claimants, they would be liable to a diversity of suits, brought perhaps in different States, after long periods of time, when the witnesses have been dispersed, and issuing in contrary results before different tribunals; whilst in the ordinary cases, where a limited liability to some extent exists, but to an amount less than the aggregate claims for damages, so as to require a concourse of claimants and a *pro rata* distribution, the prosecution of separate suits, if allowed to proceed, would result in a subversion of the whole object and scheme of the statute." *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 594–95.

Indeed, if the total amount recoverable is fixed by Belgian law, the need for the issuance of a monition under Admiralty Rule 51, the injunction of other suits, and a *forum concursus* is obviously greater than it is under the higher substantive limitation of our own law. Thus one of the horns of petitioners' dilemma disappears; we must, accordingly, reverse the judgment below and remand the cases for further proceedings.

Since the cases are going back, it is necessary to confront the other horn of the dilemma. In that branch of its reasoning, the Court of Appeals assumed that the posting of too small a bond would require the dismissal of the petition. The court's attention apparently was not directed to the status of the Government, which, by the plain import of 28 U. S. C. § 2408 [6] and 41 Stat. 525, as amended, 46 U. S. C. § 743,[7] relieves it of the duty to post a bond in order to be entitled to proceed under

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[6] See footnote 4 *ante*.

[7] See footnote 5 *ante*.

R. S. § 4285. And perhaps it is well to add, in passing, that, in view of the six-month limitation [8] on proceeding under that statute, remand to the District Court in order to give Black Diamond an opportunity to file a larger bond would have been a better course, since the defect was not jurisdictional, than affirmance of dismissal of the petition. See *Langnes* v. *Green,* 282 U. S. 531, 541–42; *Curtis Bay Towing Co.* v. *Tug Kevin Moran,* 159 F. 2d 273, 276; cf. *Bigler* v. *Waller,* 12 Wall. 142, 149; *Davis* v. *Wakelee,* 156 U. S. 680. We add this observation because, under the circumstances, affirmance could only have had the effect of depriving the petitioners altogether of the privilege of a limitation proceeding, no matter what the amount of the bond they were willing to post. It threw them back upon the dubious advantage of limitation of liability as a partial defense to successive suits in admiralty in which the recoveries, though separately less than the applicable limit, might in the aggregate far exceed it. And such would be the effect were we also to affirm the judgment.

Having decided that the case must be remanded because the petition was improperly dismissed, we turn to the question whether there are any circumstances under which the Belgian limitation would be enforceable by our courts. On this point we agree with the Court of Appeals—and disagree with the District Court—that if, indeed, the Belgian limitation attaches to the right, then nothing in *The Titanic,* 233 U. S. 718, stands in the way of observing that limitation. The Court in that case was dealing with "a liability assumed already to exist on other grounds." *Id.* at 733. But if it is the law of Belgium that the wrong creates no greater liability than that recognized by the Convention of 1924, we cannot, without more, regard our own statutes as ex-

[8] See footnote 1 *ante.*

panding the right to recover. Any other conclusion would disregard the settled principle that, in the absence of some overriding domestic policy translated into law, the right to recover for a tort depends upon and is measured by the law of the place where the tort occurred. *Smith* v. *Condry,* 1 How. 28, 33; *Slater* v. *Mexican National R. Co.,* 194 U. S. 120; *Cuba R. Co.* v. *Crosby,* 222 U. S. 473; *Western Union Telegraph Co.* v. *Brown,* 234 U. S. 542.

If, on the other hand, the Convention merely provides procedural machinery by which claims otherwise created are brought into concourse and scaled down to their proportionate share of a limited fund, we would respect the equally well settled principle that the forum is not governed by foreign rules of procedure. See *Pritchard* v. *Norton,* 106 U. S. 124; *Davis* v. *Mills,* 194 U. S. 451. We leave open the choice between these opposing hypotheses. Nor do we mean to imply that these apparently clear-cut alternatives are exhaustive. A limit which attaches not to an individual's right of recovery but to the aggregate claims arising from a given tort can be said to be "attached to the right" only in a special sense of that phrase, and a rule which operates to cut down the amount recoverable by a claimant cannot be fitted within any but a very broad definition of the term "procedure." Whether they are in fact considerations of domestic policy which deserve to be measured against application of the *lex loci delicti* and whether such considerations are as significant where the foreign limitation is lower than our own as where it is higher—these too are questions not now before us in view of the fact that the case is here merely on exceptions to the petition for limitation of liability.

Since Belgian law may be enforceable by our courts, that law, having been pleaded, must be established. It is true that this Court has on several occasions held

international rules which had passed into the "general maritime law" to be subject to judicial notice. *The Scotia,* 14 Wall. 170; *The Belgenland,* 114 U. S. 355, 370; *Richelieu & Ontario Nav. Co.* v. *Boston Marine Ins. Co.,* 136 U. S. 408, 422; *The New York,* 175 U. S. 187. But where less widely recognized rules of foreign maritime law have been involved, the Court has adhered to the general principle that foreign law is to be proved as a fact. *Liverpool Steam Co.* v. *Phenix Ins. Co.,* 129 U. S. 397; see *Talbot* v. *Seeman,* 1 Cranch 1, 38; *The Scotia,* 14 Wall. 170, 188. See also the decisions of the lower federal courts cited in 3 Benedict on Admiralty 11, n. 36 (6th ed., Knauth, 1940). Although we would no doubt be free to notice the terms of the Limitation Convention itself even though they were not set forth among the allegations of the petition, their legal significance does not appear on the surface. "Many doubts are left unresolved by the documents before us." *Slater* v. *Mexican National R. Co., supra,* 194 U. S. at 130. Respondents, indeed, in their effort to show that the Convention lays down purely "procedural" requirements, rely upon "personal consultations with three active maritime lawyers of Antwerp" which are no part of the record before us. "Substance" and "procedure," moreover, are not legal concepts of invariant content, see *Guaranty Trust Co.* v. *York,* 326 U. S. 99, 109, and on the basis of what is before us we are precluded from choosing one of these categories rather than the other.

It is important to add, moreover, that the question of what law governs the substantive limit of liability should be determined upon remand in advance of the proof of individual claims. A proceeding to limit liability is *ipso facto* a proceeding to limit recovery, and the amount of the applicable limit, like the value of the vessel and freight, is a question affecting the magnitude of the *res* from which recovery is sought. It is a question, therefore,

which lies at the threshold of all claims, is equally relevant to all, and should accordingly be disposed of before any.

One last point remains to be considered—the amount of the bond to be required of Black Diamond upon remand of No. 121. A literal reading of the procedural requirements of R. S. § 4285 would compel the posting of a bond in "a sum equal to the amount or value of the interest of such owner in the vessel and freight," in this instance about $1,000,000. But we think that this provision, as part of a total legislative scheme, should be read in the light of the substantive limitation imposed by R. S. § 4283, for it is obvious that the words "amount or value of the interest of such owner" in § 4285 were carried over from and are relevant solely to the identical language of § 4283 laying down the limit which recovery against the owner "shall not . . . exceed." The whole tenor of R. S. § 4285—the option of depositing cash or "approved security," the discretion granted the court to require additional deposits if "necessary to carry out the provisions of section 4283," and the alternative of transferring the vessel and freight to a trustee—is one of concern with protecting the assets from which the claimants' satisfaction must ultimately come.

If, therefore, Belgian law rather than R. S. § 4283 should be found to govern the substantive limit of liability, no purpose would be served, so far as proceedings in the District Court are concerned, by demanding security in excess of that limit. But the choice of law presents a knotty problem, and we cannot overlook the contingencies of appellate review. If the District Court should find Belgian law controlling, it might, under our interpretation of § 4285, exact a bond of only $325,000. If, however, a contrary view should ultimately prevail, the requisite amount of the bond would have been $1,000,000. The District Court, therefore, should provide for that contingency by requiring Black Diamond to

post a bond for the value of the ship and freight, not because § 4285 demands it, but as an exercise of its power to preserve the *status quo* pending appeal. See *Scripps-Howard Radio, Inc.* v. *F. C. C.*, 316 U. S. 4, 9–10.

So, for proceedings not inconsistent with this opinion, the case is

Reversed and remanded.

MR. JUSTICE JACKSON, dissenting.

I suspect this decision will cause confusion in practical application of the Act of Congress governing limitation proceedings in admiralty.

The Act is designed to encourage American capital to risk itself in shipping ventures where "ships are but boards, sailors but men: . . . and then there is the peril of waters, winds, and rocks." In order that disaster at sea might not jeopardize the shipowner's other assets, Congress limited his liability to the "value of the interest of such owner in such vessel, and her freight then pending." R. S. § 4283, as amended, 49 Stat. 1479, 46 U. S. C. § 183.[1] This limitation serves much the same purpose for maritime ventures that the corporate fiction serves for the landsman's enterprises.

The statute also provides a skeleton proceeding, filled in by our rules, for affirmatively effecting this limitation of liability when catastrophe threatens claims that exceed the value of ship and freight. To a landlocked mind it has some analogy to voluntary bankruptcy. It is, in

[1] "The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

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effect, a turn-over of the assets at risk to satisfy creditors. The owner may, after petitioning the District Court for limitation of liability, either transfer to a trustee his interest in the vessel and freight, together with enough to make up the limitation, and be quit of further responsibility, or he may keep his ship and sail on, provided he shall deposit with the court "a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor." R. S. § 4285, as amended, 49 Stat. 1480, 46 U. S. C. § 185.

Our statute is clear: § 4283 fixes the *maximum* liability at ship plus freight and § 4285 sets the *minimum* security at the same figure. To provide any other limit of liability or security is to rewrite both sections. As written, the two sections provide and are designed to provide a provisional remedy to let the ship go her way while the creditors are secured as well as if she were held in custody to pay their claims.

Our own rules in admiralty, as amended June 21, 1948, prescribe the practice for applying this limitation when the shipowner takes the initiative under R. S. § 4285. The proceeding is conducted in two stages. In the first or preliminary stage the owner petitions for relief from personal liability, is required either to surrender his interest in the ship and her freight or to stipulate, with adequate bond, to pay into court its value. The statute says, "Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease." At this point an important change in the nature of the proceeding occurs.

The proceeding continues as a proceeding *in rem* against either the ship or the fund as the *res*. Our rules provide that when petitioner complies with the court's order as to surrender or bond, the court shall issue a monition requiring all persons asserting claims to file the

same and may also issue injunction against the further prosecution of suits against either the owner or the vessel. Rule 51. The court then adjudicates the claims and apportions the available fund among them. Rule 52. The owner is at liberty to contest his liability or the liability of the vessel "provided he shall have complied" with the requirements of surrender or deposit as above set forth. Rule 53.

We think such compliance is a condition precedent to obtaining a *forum concursus* to adjudicate liability. As the petitioner in this case did not post the security nor surrender the ship as required, the court below properly dismissed the petition and refused to enter the second or adjudicating stage of the proceeding.

This Court apparently holds that compliance is not a condition precedent and that instead of the vessel's value some other measure of liability might be adequate. While it requires the prescribed bond in this particular case, it does so, as we read its opinion, only as a matter of discretion and because of uncertainty as to the final decision on the foreign law issue on appeal. It seems to authorize a foreign law limitation on liability to be applied before a *forum concursus* takes place, while we think any issue as foreign law liability is to be applied only in the latter stage of the proceedings when the general issues as to liability are to be determined.

Congress could not have been unaware that maritime usages the world over have imposed some limitation upon ship-owners' liability and that several bases for its ascertainment have existed. Some systems have admitted no personal liability of the owner, confining liability to the ship itself; others have limited the owner's personal responsibility on his abandonment of the ship and freight. Still others have limited personal responsibility to payment of a sum computed on the ship's tonnage. Congress, however, has deliberately imposed and adhered to

our own measure of liability based on the actual value of the interest in the ship and her freight. We think there is no authority for releasing the owner from liability, or releasing the ship, which are the steps now under consideration, until the owner has complied with provisions which fully protect this American measure of liability.

In this case, the reason the owners did not comply with the American limitation provision is that they aver that on the Schelde, where the collision occurred, Belgian law granted a much more drastic limitation, under which their liability is only about one-third of that imposed by our law. The court below held that release of the owner and ship, and invocation of a *forum concursus,* could not be granted on this basis. But it held that if they had complied with provisions of American law necessary to reach the question of the amount of aggregate liability, they were at liberty to interpose the Belgian law as a defense. The Court now holds that this question of fact—what is the foreign law?—should be determined as a part of the preliminary step in the case and that the bond may be limited thereby. We think this is not the scheme of the statute and the rules and that, except for issues subsidiary to the court's fixing of the security required under Rule 51, all matters of fact, going to the substance of liability, are to be heard only at the later stages of the proceedings.

The limitation figure is established preliminarily, not because it represents the *res,* but because the statute and rules prescribe that formula and procedure for fixing both the maximum liability and minimum security required of the owner. And it has no bearing on the amount of claims that may be proved—until the latter are determined and a proportion established there is no need to know, for that purpose, what limit of liability applies. Indeed, unless it is intended to also change the

rule where the statutory limitation under R. S. § 4283 is set up as a defense, it may be asserted after trial on the merits and after judgment. *The Benefactor,* 103 U. S. 239. And by the terms of Rule 55, the provisions of Rules 51–54 regulating limitation of liability proceedings are made applicable even to the Courts of Appeals.

Admiralty practice is a unique system of substantive law and procedure with which members of this Court are singularly deficient in experience. The court below is perhaps the most experienced in this country. The issue on which we reverse it is not one of ultimate rights of parties but one of practice, the consequences of which cannot be foreseen. I should leave the problem, at least at this stage, where the Court of Appeals left it, with a minor exception.

Of course, it should be noted that the Government is exempt from giving any security, but that is an oversight that it hardly needed to come here to correct. It should have the limitation which Congess has prescribed.

Except for that detail, I would affirm.

It may be that petitioner should now be allowed to amend and file the required bond equal to the ship's value and proceed. It has not so far asked to do so, insisting instead upon what it thought to be its legal right to proceed without compliance. This question, too, may be left to the courts below.

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

MR. JUSTICE RUTLEDGE, dissenting.

I agree with MR. JUSTICE JACKSON that, when Congress gave shipowners the privilege of limiting their liability and conditioned that privilege, in the alternative, upon turning over the vessel and freight for the benefit of claimants or depositing with the court cash or approved

security of equivalent value, it meant exactly what it wrote into the statute concerning the amount of the security to be given.

Nothing in the statute's wording, purpose, or legislative history is cited or exists to justify rewriting "a sum equal to the amount or value of the interest of such owner in the vessel and freight," [1] so as to make that wording read "a sum equal to one-third the value of the interest of such owner when that amount possibly but by no means certainly will be the limit of his substantive liability after the claims against him are finally determined."

The most appealing argument put forward to support this statutory distortion is petitioners' wholly specious plea of resulting "injustice" if the judicial revision is not made. The plea is founded altogether upon petitioners' assumption that their view of the extent of their aggregate possible liability will prevail, when the time comes for deciding that question.

Petitioners' view is that the *lex loci delicti* governs both the existence and the extent of their liability in this case. That law is the law of Belgium, because the collision here involved took place in Belgian waters. Moreover, since Belgium ratified the Brussels Convention of August 25, 1924,[2] that Convention is claimed to be controlling of the resulting substantive liability. This, because the aggregate limit the Convention prescribes comes to only some $325,000 in this case and that limit, so it is argued, attaches to the right of recovery as part of the right, not merely as a matter of remedy. See *Slater* v. *Mexican National R. Co.*, 194 U. S. 120. Cf. *Smith* v.

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[1] Rev. Stat. § 4285, as amended, 49 Stat. 1480, 46 U. S. C. § 185. The full text of the section is quoted in note 1 of the majority opinion.

[2] International Convention for the Unification of Certain Rules Relating to the Limitation of the Liability of Owners of Seagoing Vessels, signed at Brussels on August 25, 1924. See note 3 of the majority opinion.

Condry, 1 How. 28, 33; *Cuba R. Co.* v. *Crosby,* 222 U. S. 473; *American Banana Co.* v. *United Fruit Co.,* 213 U. S. 347.

Hence, it is urged, petitioner Black Diamond satisfied the requirements of Rev. Stat. § 4285, as amended, for limitation of liability, when it deposited an approved bond for $325,000, rather than one in the amount of $1,000,000, the value of the owner's interest in the vessel and freight, as § 4285 in terms requires. The conclusion is grounded on the "injustice" which petitioners say would result if one substantively liable for only $325,000 were required to post bond in three times that amount in order to have the advantage of limitation. This, it is said, would mean forcing such an owner to pay bond premiums three times larger than necessary to discharge all his liabilities, an "injustice" it is argued Congress cannot have contemplated notwithstanding its clear and unambiguous language.

Even if petitioners' assumption concerning their ultimate liability should turn out to be true, the statutory command is clear and unequivocal: Turn over the ship and the freight or their value as the price of limitation. In this command Congress was concerned not at all with the extent of aggregate claims or liabilities. It was concerned only with affording the owner a chance to limit his liabilities, but at the same time allowing this privilege only on precise and fixed conditions for giving security to his creditors in the amount specified. This was unrelated to the amount of the liabilities in the aggregate, whether above or below the maximum fixed by the statute.[3]

That Congress intended the same maximum and the same security for claimants, regardless of the alternative mode chosen for giving the security, is shown by

[3] But cf. the cases cited in the text *infra* at note 5.

the very alternatives themselves. They are equivalents. There was no intent to permit less security to be given when the owner elects to give the statutory substitutes than when he turns over the ship. Correlatively there was no intention to give him the limitation for less cost or on more advantageous terms in the one case than in the other. The provision for substituting money or security for the ship had no purpose or function to correlate the bond required with the amount of the ultimate aggregate substantive liabilities, which seldom can be known in advance of their final determination. The alternative mode's purpose was only to permit the owner to release the ship and continue it in active business use, provided he substituted its equivalent in value, not some lesser sum, for it.

It is quite true that the statute was enacted for shipowners' benefit and for encouragement of the industry, by enabling owners to limit their liability. But in doing this and thereby cutting down the rights of claimants to recovery, Congress was not unmindful of the latter. For satisfying their unrestricted claims it substituted a fund instead of the owner's general and unlimited liability. That fund was the vessel's value or its equivalent. Nor was this a subordinate feature of the scheme of limitation. It was the very heart of that scheme, and, in my opinion, was intended to create a general and uniform policy for application in American courts. In cutting down claimants' rights of recovery to the fund prescribed, Congress was not giving the owner the additional right to cut further the security provided for their payment, by either assuming or pleading that his ultimate aggregate liabilities would be below that fund.

This brings us to the final consideration, which is that there is no injustice whatever here, there is only an imagined one, in requiring Black Diamond to deposit in court cash or security in the full amount of $1,000,000

required by the statute's terms. The aggregate of petitioners' liabilities has not been determined, nor can it be until the further and probably extended proceedings for that purpose have been concluded. Meanwhile, it must remain uncertain, as it has during all the litigation to this date, whether petitioners' or respondent's view on that matter ultimately will prevail. In other words, it is now as likely that petitioners' liabilities eventually will be found to be $1,000,000 as it is that they will be fixed according to petitioners' view of the Belgian law and ours. Indeed, the Court's opinion sets forth considerations casting grave doubt on whether petitioners' theory of the substantive limitation can prevail.

In this state of affairs petitioners actually are asking us to gamble with them, and against respondent and other claimants, on the ultimate computation of petitioners' aggregate liabilities. And in this petitioners are asking us to put upon the claimants the risk that petitioners will turn out to be right. That risk, under the statute's policy, should be the other way. Likewise, under that policy, the cost of that risk is put upon petitioner Black Diamond. In reducing claimants' rights of recovery to the value of the ship or its equivalent, Congress did not mean that the claimants should take the risk of not having that value available to satisfy their claims if the aggregate should eventually be held to be the amount of the specified fund. Nor did it mean that they should have that value for security if the ship were turned over for their benefit, but should bear either the loss or the risk if the shipowner elected to substitute cash or other security, with the court's approval, in a smaller amount in order to keep his vessel running.

In the event petitioners turn out to be wrong and, as seems likely in that event, valid claims should amount to $1,000,000 or more, under the view petitioners would have us take, the claimants would have certain security

to apply on what is due them for only $325,000. Petitioner Black Diamond then either will have limited its liability to that amount, to the claimants' loss and contrary to the statute's provision; or, if the District Court should then see fit to apply the authority given it to require further security to carry out the purposes of § 4283, as amended,[4] it will have cast the burden of Black Diamond's solvency on the claimants for the probably extended period of litigation necessary to complete the final determination of petitioners' substantive liabilities.

I do not think the statute meant the claimants to bear either such a loss or such a risk. Its policy is to exchange limitation for security. The security specified is not contingent or to be supplied in the future. It is a present exchange, immediately effective, to give the shipowner immunity to liability beyond the fund exacted and, at the same time, to relieve claimants of any risk that the fund will not be available if their valid claims eventually equal or exceed it. To allow security in less than the statutory amount to be given, on the chance that valid claims may turn out to be less than the fund, vitiates that clear statutory object and command. The only purpose of requiring the approved substituted security to be deposited in court is to assure that claimants will not bear the risk of loss of the fund pending the final determination of their claims.

Petitioners' claim of "injustice" is therefore without substance. Black Diamond seeks to shift to its creditors the risk which the language and policy of the statute place on it. The statute does not permit security contingent upon the outcome of the adjudication of claims

[4] Whether the ship is turned over for the creditor's benefit or other acceptable security is substituted, § 4285, as amended, authorizes the court to require "in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of" § 4283, as amended. 46 U. S. C. § 185.

or to be given in the future. The security is to be given concurrently with the privilege of limitation and is to stand in the court's control and at the statutory amount until the claims are finally adjudicated. Black Diamond seeks to have the statutory limitation without paying the statutory price. If that were allowed, the injustice would fall upon the claimants, not upon Black Diamond.

No case has been cited which holds that the statutory limitation can be obtained by giving security in less than the statutory amount. Nor need we now express opinion upon the problem considered in cases like *The Aquitania,* 20 F. 2d 457, and *Curtis Bay Towing Co.* v. *Tug Kevin Moran,* 159 F. 2d 273.[5]

In my view petitioner Black Diamond has not complied with the statute. Strictly therefore it is not entitled to the statutory limitation. But because the question is novel, the time for instituting another limitation proceeding has passed, and filing of security now in accordance with the statute's command would better serve its objects than dismissing the cause, I would reverse the judgment and remand the cause to the District Court to permit the filing of the statutory security, if Black Diamond can and promptly will comply with that requirement. This is for the reason that the statute, § 4285, requires security to be given by turning over the ship or its value in order to secure the limitation of liability, not merely as a matter of judicial discretion to preserve the status quo pending appeal from determination of the issues concerning whether the Belgian substantive limitation applies. The statutory security, if given, should remain in force until all claims have been filed and finally adjudicated.

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[5] Holding, as the Court of Appeals said in this case, that the limitation proceeding is not available where the aggregate of known and probable claims is less than the value of the ship.

COMMISSIONER OF INTERNAL REVENUE *v.* PHIPPS.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 83. Argued December 10, 1948.—Decided March 14, 1949.

In 1936 a parent corporation made a tax-free liquidation of five of its wholly-owned subsidiaries by distributing to itself all of their assets, subject to their liabilities, and redeeming and canceling all of their stock. At that time, one subsidiary had earnings and profits of $90,362 accumulated since February 28, 1913, and the other four had deficits aggregating $3,147,803. Not counting the earnings or deficits of its subsidiaries, the parent had at the end of that year earnings and profits of $2,129,957 accumulated after February 28, 1913. In 1937 it had earnings of $390,387. During 1937 the parent made a pro rata cash distribution of $802,284 to its preferred stockholders. *Held:* This distribution in its entirety was a dividend under § 115 of the Revenue Act of 1936 and constituted ordinary income. Pp. 411–421.

1. The rule of *Commissioner* v. *Sansome,* 60 F. 2d 931, is grounded not on a theory of continuity of the corporate enterprise but on the necessity to prevent escape of earnings and profits from taxation. Pp. 414–417.

2. *Harter* v. *Helvering,* 79 F. 2d 12, distinguished. Pp. 417–418.

3. Under the *Sansome* rule, explicitly ratified by Congress, tax-free reorganizations do not disturb the status of earnings and profits otherwise available for distribution. Pp. 418–421.

4. In this case, to allow deduction of the subsidiaries' deficits from the parent's earnings would, in effect, recognize losses the tax effects of which Congress has explicitly provided should be deferred. P. 421.

167 F. 2d 117, reversed.

The Tax Court held that part of a cash distribution to stockholders by a parent corporation which had absorbed five subsidiaries in a tax-free liquidation was not a dividend taxable as income under § 115 of the Revenue Act of 1936, because the accumulated earnings and profits of the parent corporation, plus those of one of the sub-

sidiaries, were erased by the aggregate deficits of the other four subsidiaries. 8 T. C. 190. The Court of Appeals affirmed. 167 F. 2d 117. This Court granted certiorari. 335 U. S. 807. *Reversed,* p. 421.

Stanley M. Silverberg argued the cause for petitioner. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Lee A. Jackson* and *Helen Goodner.*

W. Clayton Carpenter argued the cause for respondent. With him on the brief were *Montgomery Dorsey* and *William L. Branch.*

MR. JUSTICE MURPHY delivered the opinion of the Court.

This case involves a tax-free liquidation by a parent corporation of some of its subsidiaries. At the time of the liquidation the parent had earnings and profits available for distribution, and the subsidiaries had an aggregate net deficit. The issue now before us is whether the rule of *Commissioner* v. *Sansome,* 60 F. 2d 931, requires the subtraction of the subsidiaries' deficit from the parent's earnings and profits, in determining whether a subsequent distribution by the parent constituted dividends or a return of capital to its stockholders.

The *Sansome* case, *supra,* arose from a tax-free reorganization in which the transferor corporation had a surplus in earnings and profits available for distribution. It was there held that those earnings and profits, for purposes of a subsequent distribution by the transferee corporation to its stockholders, retain their status as earnings or profits and are taxable to the recipients as dividends. The rule has been held to include liquidations of a subsidiary by its parent. *Robinette* v. *Commissioner,* 148 F. 2d 513; U. S. Treas. Reg. 101, Art.

115–11, promulgated under the Revenue Act of 1938 and made retroactive, 52 Stat 447.

The facts were stipulated, and so found by the Tax Court. So far as relevant, they are as follows: In December, 1936, Nevada-California Electric Corporation liquidated five of its wholly-owned subsidiaries by distributing to itself all of their assets, subject to their liabilities, and by redeeming and canceling all of their outstanding stock. No gain or loss on the liquidation was recognized for income tax purposes under § 112 (b) (6) of the Revenue Act of 1936.[1] On the date of liquidation, one of the subsidiaries had earnings and profits accumulated after February 28, 1913, in the amount of $90,362.77. The four others had deficits which aggregated $3,147,803.62. On December 31, 1936, the parent had earnings and profits accumulated after February 28, 1913, in the amount of $2,129,957.81, which amount does not reflect the earnings or deficits of the subsidiaries. In 1937, Nevada-California had earnings of $390,387.02. In the years 1918 to 1933 inclusive the parent and its subsidiaries filed consolidated income tax returns.[2]

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[1] "SEC. 112. RECOGNITION OF GAIN OR LOSS.

"(a) GENERAL RULE.—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

"(b) EXCHANGES SOLELY IN KIND.—

. . . . . .

"(6) PROPERTY RECEIVED BY CORPORATION ON COMPLETE LIQUIDATION OF ANOTHER.—No gain or loss shall be recognized upon the receipt by a corporation of property distributed in complete liquidation of another corporation. . . ." 49 Stat. 1648, 1678–79.

[2] It does not appear in what years occurred the subsidiaries' losses which resulted in their deficits, or to what extent they were set off against the net income of the parent in consolidated return years. To the extent that such set-offs did exist, the basis of the subsidiaries' stock to Nevada-California had been reduced and the losses realized

Respondent was the owner of 2,640 shares of the preferred stock of Nevada-California. During 1937 that corporation made a pro rata cash distribution to its preferred stockholders in the amount of $802,284, of which respondent received $18,480. The Commissioner determined that the distribution was a dividend under § 115 of the Revenue Act of 1936[3] and constituted ordinary income in its entirety.

Of the 1937 distribution, approximately 49% was chargeable to earnings and profits of the taxable year. Consequently, respondent conceded in the Tax Court that that percentage of her share, or about nine thousand dollars, was taxable as a dividend under § 115 (a) (2). The Tax Court held in her favor that the balance was not a taxable dividend out of earnings and profits, on

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by the parent and availed of for tax purposes prior to the liquidation. U. S. Treas. Reg. 94, Art. 113 (b)–1, promulgated under the Revenue Act of 1936.

[3] "SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

"(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 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.

"(b) SOURCE OF DISTRIBUTIONS.—For the purposes of this Act every distribution is made out of earnings or profits to the extent thereof, and from the most recently accumulated earnings or profits. Any earnings or profits accumulated, or increase in value of property accrued, before March 1, 1913, may be distributed exempt from tax, after the earnings and profits accumulated after February 28, 1913, have been distributed, but any such tax-free distribution shall be applied against and reduce the adjusted basis of the stock provided in section 113." 49 Stat. 1687.

the theory that all of Nevada-California's accumulated earnings and profits, plus the accumulated earnings and profits of the subsidiary that had a surplus, were erased by the aggregate deficits of the other four subsidiaries.[4] 8 T. C. 190. The Court of Appeals affirmed by a divided court, 167 F. 2d 117. We brought the case here on a writ of certiorari, 335 U. S. 807, because of its importance in the administration of the revenue laws, and because of an alleged conflict of the decision below with that of the Court of Appeals for the Ninth Circuit in *Cranson* v. *United States,* 146 F. 2d 871.

Commissioner v. *Sansome,* 60 F. 2d 931, arose thus: *A* Corporation sold out all its assets to *B* Corporation, both organized under the laws of New Jersey. *B* Corporation assumed all liabilities and issued its stock to the stockholders of *A* Corporation, without change in the proportions of their holdings. The only change was that the charter of *B* Corporation gave it slightly broader powers. At the time of the reorganization, *A* Corporation had on its books a large surplus and undivided profits. The new corporation made no profit and the company soon dissolved. The liquidating distributions in 1923, the year when the dissolution was begun, did not exhaust the amount of accumulated profits of the predecessor corporation, and the Commissioner contended that those distributions were taxable to the stockholders as dividends and not, as claimed by them, as a return of capital. The Court of Appeals for the Second Circuit agreed with the Commissioner, and held that since the reorganization was nontaxable under § 202 (c) (2) of the Revenue Act of 1921, the accumulated earnings and profits of the transferor retained their character as such for tax purposes

[4] Respondent agrees that the earnings and profits of the subsidiary with a surplus become, by virtue of the *Sansome* rule, earnings and profits of the parent, whatever the ultimate treatment of the deficits of the other subsidiaries.

in the hands of the transferee and were consequently taxable on distribution as ordinary income under § 201 of the same Act.[5] The view of the court was thus expressed by Judge Learned Hand: "Hence we hold that a corporate reorganization which results in no 'gain or loss' under section 202 (c) (2) (42 Stat. 230) does not toll the company's life as continued venture under section 201, and that what were 'earnings or profits' of the original, or subsidiary, company remain, for purposes of distribution, 'earnings or profits' of the successor, or parent, in liquidation." 60 F. 2d 931, 933. The rule has been consistently followed judicially[6] and has received explicit Congressional approval.[7]

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[5] Section 201 of the 1921 Act specifies what corporate distributions are taxable as dividends; § 202 (c) (2) provides for the nonrecognition of gain or loss from certain corporate reorganizations.

[6] *Commissioner* v. *Munter,* 331 U. S. 210; *United States* v. *Kauffmann,* 62 F. 2d 1045; *Murchison's Estate* v. *Commissioner,* 76 F. 2d 641; *Harter* v. *Helvering,* 79 F. 2d 12; *Georday Enterprises, Ltd.* v. *Commissioner,* 126 F. 2d 384; *Reed Drug Co.* v. *Commissioner,* 130 F. 2d 288; *Robinette* v. *Commissioner,* 148 F. 2d 513; *Putnam* v. *United States,* 149 F. 2d 721. See also *Coudon* v. *Tait,* 61 F. 2d 904, which was decided a few months after *Sansome* and reached the same result independently.

[7] The Senate Finance Committee Report on § 115 (h) of the Revenue Act of 1936, S. Rep. No. 2156, 74th Cong., 2d Sess., p. 19 (1939–1 Cum. Bull. (part 2) 678, 690), recognized the rule of the *Sansome* case, and said that the amendment made by that Act intended no change in existing law, but was added only in the interest of clarity. U. S. Treas. Reg. 94, Art. 115–11, promulgated under the 1936 Act, incorporates the substance of the report. The Revenue Act of 1938 amended § 115 (h) only by extending its application to distributions of "property or money" as well as of "stock or securities"; the effect was to make § 115 (h) harmonize with § 112 (b) (6) and (7); and Treasury Regulations 101, promulgated under the 1938 Act, was amended to conform. The Internal Revenue Code contains the section substantially unchanged.

Section 501 of the Second Revenue Act of 1940 added § 115 (l) to the Internal Revenue Code, to elaborate the law with regard to

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The rationale of the *Sansome* decision as a "continued venture" doctrine has been often repeated in the cases, and in some of them the fact that the successor corporation has differed from the predecessor merely in identity or form [8] has lent it plausibility. Other cases, however, demonstrate that the "continued venture" analysis does not accurately indicate the basis of the decisions. The rule that earnings and profits of a corporation do not lose their character as such by virtue of a tax-free reorganization or liquidation has been applied where more than one corporation has been absorbed or liquidated,[9] where there has been a "split-off" reorganization,[10] and where the reorganization has resulted in substantial changes in the proprietary interests.[11]

In *Commissioner* v. *Munter,* 331 U. S. 210, this Court reversed a decision of the Court of Appeals for the Third Circuit which had held in favor of the taxpayer on the ground that the ownership of the successor corporation was so different from that of the two predecessors that there was not sufficient continuity of the corporate entity to apply the *Sansome* doctrine. The opinion of the Court stated our unanimous view of the basis of the rule: "A basic principle of the income tax laws has long been

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the effect of tax-free distributions on earnings and profits. The reports accompanying the bill in Congress, H. R. Rep. No. 2894, 76th Cong., 3d Sess., p. 41 (1940–2 Cum. Bull. 496, 526), and S. Rep. No. 2114, 76th Cong., 3d Sess., p. 25 (1940–2 Cum. Bull. 528, 546–547), both recognize the application of "the principle under which the earnings and profits of the transferor by reason of the transfer become the earnings and profits of the transferee." *Ibid.,* p. 25. The reports do not mention deficits.

[8] See, *e. g., Murchison's Estate* v. *Commissioner, Reed Drug Co.* v. *Commissioner, United States* v. *Kauffmann,* all *supra,* n. 6.

[9] *Harter* v. *Helvering, Baker* v. *Commissioner,* 80 F. 2d 813.

[10] *Barnes* v. *United States,* 22 F. Supp. 282; *Estate of McClintic,* 47 B. T. A. 188; *Stella K. Mandel,* 5 T. C. 684.

[11] *Commissioner* v. *Munter, supra.*

that corporate earnings and profits should be taxed when they are distributed to the stockholders who own the distributing corporation. . . . Thus unless those earnings and profits accumulated by the predecessor corporations and undistributed in this reorganization are deemed to have been acquired by the successor corporation and taxable upon distribution by it, they would escape the taxation which Congress intended. . . . The congressional purpose to tax all stockholders who receive distributions of corporate earnings and profits cannot be frustrated by any reorganization which leaves earnings and profits undistributed in whole or in part." 331 U. S. at 214, 215. See *Murchison's Estate* v. *Commissioner,* 76 F. 2d 641, 642; *Putnam* v. *United States,* 149 F. 2d 721, 726; *Samuel L. Slover,* 6 T. C. 884, 886. We conclude from the cases that the *Sansome* rule is grounded not on a theory of continuity of the corporate enterprise but on the necessity to prevent escape of earnings and profits from taxation.

The decision of the Court of Appeals for the Second Circuit in *Harter* v. *Helvering,* 79 F. 2d 12, is not inconsistent with this view. In that case the situation was as follows: *A* Corporation and *B* Corporation, each of which had accumulated earnings and profits, merged to form *C* Corporation. By the operation of the *Sansome* rule, the earnings and profits retained their character as such in the hands of *C*. Some time later, *D* Corporation acquired all the stock of *C,* and thereafter liquidated it in a transaction in which no gain or loss was recognized. At the time of the liquidation of *C* Corporation, *D* Corporation, the parent, had a deficit in earnings and profits. The court held, in determining the amount of earnings and profits available to *D* Corporation after the liquidation for distribution as dividends, that its deficit should be deducted from the accumulated earnings and profits acquired from its subsidiary. It is vigorously contended

that the logic of the *Harter* case compels the allowance of a deduction of the deficits of the subsidiaries from the accumulated earnings and profits of the parent. We believe this view to be the product of inadequate analysis.[12] The difference between the *Harter* situation and the problem before us may perhaps be clarified by comparing them taxwise if neither liquidation had occurred. Briefly stated, in the case of a distribution to a corporation with a deficit from either current or prior losses, the corporation receiving the distribution has no taxable income or earnings or profits available for current distribution until current income exceeds current losses, and no accumulated earnings or profits until its actual deficit from prior losses is erased. See 1 Mertens, Law of Federal Income Taxation (1942) § 9.30, and cases cited therein n. 44 *et seq.* In the instant situation, however, the parent did have accumulated earnings and profits available for distribution as dividends, absent the liquidation. Congressional intent to tax such earnings and profits on their distribution cannot be prevented by the fact of an intervening reorganization or liquidation.[13]

The operation of the *Sansome* rule on the taxation of corporate distributions is brought into high relief by consideration of the economic relation between a parent

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[12] See Note, *The Effect of Tax-Free Reorganizations on Subsequent Corporate Distributions,* 48 Col. L. Rev. 281; Atlas, *The Case of the Disappearing Earnings and Profits,* in Seventh Annual Institute of Federal Taxation, 1155; cf. 1 Mertens, Law of Federal Income Taxation (1942) § 9.58; 1 Montgomery, Federal Taxes—Corporations and Partnerships 1948–49, 154 (1948); Green, *Recent Trends Under the Sansome Rule,* in Sixth Annual Institute on Federal Taxation, 338; cf. Rudick, *"Dividends" and "Earnings or Profits" Under the Income Tax Law: Corporate Non-Liquidating Distributions,* 89 U. Pa. L. Rev. 865, 896.

[13] *Senior Investment Corp.*, 2 T. C. 124, did not involve the question before us, but was concerned with the applicability, for purposes of computing surtax on undistributed profits, of §§ 26 (c) (1) and 26

corporation and its subsidiary. Congress requires that earnings and profits, current or accumulated, be taxed to the recipients thereof as dividends on their distribution.[14] If a subsidiary has a surplus in earnings and profits, the parent has a choice of two methods by which it may "realize" this surplus. It may cause the subsidiary to declare a dividend, or it may liquidate its interest or part of its interest in the subsidiary. In the former case, the distribution would of course be taxable as ordinary income to the parent insofar as that distribution, plus the parent's other income, represented net income to it. If the parent uses the second method, two alternatives again are available: the liquidation may take the form of a sale outright, or may be performed within the framework of the reorganization sections of the Internal Revenue Code or its predecessor acts. If the former, gain is of course realized, and is also recognized for tax purposes. We note in passing, in this connection, that such gain will correspond, if at all, only by coincidence with the amount of earnings and profits of the subsidiary. If the latter, Congress has determined that the gain shall not be recognized at that time, but that such recognition shall be deferred. If the subsidiary has a deficit in earnings and profits, the deficit may be "realized" by the parent only by liquidation, and the

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(c) (3) of the Revenue Act of 1936, the latter as amended by § 501 (a) (2) of the Revenue Act of 1942, to the transferor corporation in a tax-free reorganization. 49 Stat. 1664; 56 Stat. 798, 954. The question of "inheritance" of a deficit was not in issue. See Green, *supra*, note 12, at 341.

[14] The operation of the *Sansome* rule is restricted, of course, to earnings and profits which are not considered to be distributed to its own stockholders by the transferor corporation in a tax-free reorganization. *Commissioner* v. *Munter*, 331 U. S. 210, 215–16; *Samuel L. Slover*, 6 T. C. 884. Cf. U. S. Treas. Reg. 111, § 29.112 (b) (6)–4 as to the effect of a tax-free reorganization on minority stockholders of the transferor corporation.

same two alternatives are present as when the subsidiary has a surplus: sale, and reorganization within § 112. Again, in the former case, loss is realized and also recognized. And in the case of a reorganization or liquidation in the framework of the Code, the recognition of loss is deferred by Congressional mandate to a later time.

If the assets of the parent and subsidiary are combined via a tax-free reorganization or liquidation, the effect of the *Sansome* rule is simply this: a distribution of assets that would have been taxable as dividends absent the reorganization or liquidation does not lose that character by virtue of the tax-free transaction. Respondent's contention that the logic of the *Sansome* rule requires subtracting the deficit of the subsidiary from the earnings and profits of the parent as a corollary of carrying over the earnings and profits of the subsidiary has a superficial plausibility; but the plausibility disappears when it is noted that the taxpayer would thus obtain an advantage taxwise that would not be available absent the liquidation, since there is no way to "declare" a deficit, and thus no method of loss realization open to the parent parallel to a declaration of dividends as a mode of realizing the profits of a subsidiary.

It is urged upon us that the deficits of the subsidiaries should be subtracted from the earnings and profits of the parent in order to make the tax consequences of the liquidation correspond with corporate accounting practice. The answer is brief. The *Sansome* rule itself, as applied to earnings and profits, has never been thought to be controlled by ordinary corporate accounting concepts; its uniform effect is to treat for tax purposes as earnings or profits assets which are properly considered capital for many if not most corporate purposes, and it has long been a commonplace of tax law that similar

divergences often occur. See *Commissioner* v. *Wheeler,* 324 U. S. 542, 546; *Putnam* v. *United States,* 149 F. 2d 721, 726; 1 Mertens, *op. cit.* § 9.33; Rudick, *op. cit.* 878–906.[15]

Congress has expressed its purpose to tax all stockholders who receive distributions of earnings and profits. In order to facilitate simplification of corporate financial structures, it has further provided that certain intercorporate transactions shall be free of immediate tax consequences to the corporations. There has been judicially superimposed by the *Sansome* rule, with the subsequent explicit ratification of Congress, the doctrine that tax-free reorganizations shall not disturb the status of earnings and profits otherwise available for distribution. Nevada-California at the time of the 1937 distribution to respondent had such earnings and profits. Since we believe that to allow deduction from these earnings of the deficits of its subsidiaries would be in effect to recognize losses the tax effects of which Congress has explicitly provided should be deferred, the judgment of the Court of Appeals is reversed.

Reversed.

Mr. Justice Douglas concurs in the result.

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[15] On the merits, respondent's argument is not convincing. It fails to take into account the difference between the concept of surplus or deficit, which is a summary of the operations of the corporation reporting it, and the concept of gain or loss, which reports the effect of the tax-free transaction itself. So various are the possible permutations and combinations of the economic factors that equivalence of surplus or deficit in the accounts of the subsidiary with the gain or loss to the parent would be mere coincidence. Consider for example the case where a corporation acquires all the stock of another which at the time has a large deficit. If the subsidiary is soon liquidated, the deficit will still be large, and the parent may realize little or no loss on the liquidation. See the first two texts cited note 12, *supra.*

NATIONAL CARBIDE CORP. *v.* COMMISSIONER OF INTERNAL REVENUE.

NO. 151. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.*

Argued January 6, 1949.—Decided March 28, 1949.

1. Petitioners were wholly owned subsidiaries of a parent corporation which utilized them as operating companies in the manufacture and sale of products. They operated strictly in accord with contracts with the parent which provided, *inter alia*, that the subsidiaries were employed as agents of the parent, that the parent would furnish working capital, and that all profits in excess of six percent on their capitalization (which was nominal) would be paid to the parent. Title to the assets utilized by the subsidiaries was held by them, and advances by the parent of working capital were shown on the books of the subsidiaries as accounts payable to the parent. *Held:* For purposes of federal income and excess profits taxes for the year 1938, income earned by the subsidiaries and paid over to the parent corporation was taxable to the subsidiaries and not only to the parent corporation. Pp. 424–439.
2. A corporation formed or operated for business purposes must share the tax burden despite substantial identity, in practical operation, with its owner. Complete ownership of the corporation, and the control primarily dependent upon such ownership, are no longer of significance in determining taxability. P. 429.
3. So far as the basis for the result reached in *Southern Pacific Co.* v. *Lowe*, 247 U. S. 330, was the close relationship between corporations because of complete ownership and control of one by the other, that basis has been repudiated by subsequent decisions of this Court. *Moline Properties, Inc.* v. *Commissioner*, 319 U. S. 436; *Burnet* v. *Commonwealth Improvement Co.*, 287 U. S. 415. Pp. 428–430.
4. Ownership of a corporation and the control incident thereto can have no different tax consequences when clothed in the garb of agency than when worn as a removable corporate veil. P. 430.

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*Together with No. 152, *Air Reduction Sales Co.* v. *Commissioner of Internal Revenue*, and No. 153, *Pure Carbonic, Inc.* v. *Commissioner of Internal Revenue*, also on certiorari to the same court.

5. So far as control is concerned, there is no difference in principle between that exercised by the parent over the subsidiaries in this case and that exercised by the sole stockholder of the corporation in the case of *Moline Properties, Inc.* v. *Commissioner, supra.* Pp. 433–434.
6. It makes no difference in this case that financing of the subsidiaries was carried out by means of book indebtednesses in lieu of increased book value of the subsidiaries' stock. Pp. 434–435.
7. That the contracts required the subsidiaries to pay to the parent all but a nominal amount of the profits does not make them "agency" contracts within the meaning of the decisions of this Court. Pp. 435–436.
8. While a corporation which performs the usual functions of an agent for its owner-principal may handle the latter's property and income without being taxable therefor, these subsidiaries are not true agents of, or trustees for, their parent. Pp. 437–439.
9. Where a corporation chooses to avoid the burdens of principalship by utilizing subsidiary corporations to conduct certain business activities, it can not escape the tax consequence of that choice, no matter how bona fide its motives or long-standing its arrangements. Pp. 438–439.

167 F. 2d 304, affirmed.

The Commissioner assessed against each of the petitioners deficiencies in income tax and declared value excess profits tax for 1938. The Tax Court determined that there were no deficiencies. 8 T. C. 594. The Court of Appeals reversed. 167 F. 2d 304. This Court granted certiorari. 335 U. S. 810. *Affirmed,* p. 439.

Erwin N. Griswold argued the cause for petitioners. With him on the brief were *Boykin C. Wright, Edgar J. Goodrich* and *John A. Wilson.*

Hilbert P. Zarky argued the cause for respondent. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Caudle, Stanley M. Silverberg, Ellis N. Slack* and *Lee A. Jackson.*

Mr. Chief Justice Vinson delivered the opinion of the Court.

Petitioners are three wholly owned subsidiaries of Air Reduction Corporation (Airco). They seek a determination of the question whether deficiencies in income and declared value excess profits taxes for the year 1938 found by the Commissioner of Internal Revenue are properly chargeable to them. Their contention is that they are corporate agents of Airco, that the income from their operations is income of Airco, and that income and excess profits taxes must be determined on that basis.

By a series of combinations and dissolutions of previously acquired subsidiary companies, Airco had, prior to 1938, reduced the number of its subsidiaries to four. All operated strictly in accordance with contracts with Airco.[1] The subsidiaries were utilized by Airco as oper-

[1] The substance of a typical subsidiary-parent contract is as follows: "Airco hereby employs Sales as its agent to manage and operate, during the term of this contract, all plants for the production of oxygen, acetylene and other gases and for the manufacture of apparatus and containers for the utilization and transportation of such gases . . . ; and likewise employs Sales as its agent to market and sell, during the term of this contract, the output of all such plants. . . . Airco agrees (1) to give Sales the use of all cylinders, containers, motor trucks, equipment, and shipping facilities, which it now owns or may hereafter acquire; (2) to supply such working capital as Sales may need; (3) to provide such executive management (but not accounting, bookkeeping and clerical service), and office accommodation and facilities, as may be necessary for the proper conduct of Sales business . . . . Sales agrees (1) to manage and operate . . . all of said plants; (2) to maintain the same in first class condition, charging necessary repairs and replacements to operating expense and setting aside and charging to operating expense proper reserves for depreciation . . . (3) to distribute, market and sell, the product manufactured in said plants as efficiently as possible . . . (4) to pay all expenses of such operation, maintenance and selling, and to discharge all expenses or liabilities incurred therein or thereby and to collect all accounts receivable

ating companies in the four major fields of operation in which it was engaged. Air Reduction Sales Company carried on the manufacture and sale of the gaseous constituents of air; National Carbide Corporation, the manufacture and sale of calcium carbide; Pure Carbonic, Inc., the manufacture and sale of carbon dioxide; and Wilson Welder & Metals Co., the manufacture and sale of welding machines, equipment and supplies.[2]

The contracts between Airco and its subsidiaries provided, in substance, that the latter were employed as agents to manage and operate plants designed for the production of the products assigned to each, and as agents to sell the output of the plants. Airco was to furnish working capital, executive management and office facilities for its subsidiaries. They in turn agreed to pay Airco all profits in excess of six percent on their outstanding capital stock, which in each case was nominal in amount.[3] Title to the assets utilized by the subsidiaries was held by them, and amounts advanced by Airco for the purchase of assets and working capital were shown on the books of the subsidiaries as accounts payable to Airco. The value of the assets of each company thus approximated the amount owed to Airco. No interest ran on these accounts.

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or other proceeds resulting therefrom; (5) to credit monthly on its books to Airco all profits accruing to it from the operation of its entire business over and above an amount equal to six per cent (6%) per annum on its outstanding capital stock, which said amount it is hereby authorized to deduct and retain, and it hereby agrees to accept as full compensation for its services hereunder; and (6) to pay over to Airco upon demand any profits becoming due and credited to Airco as aforesaid."

[2] Wilson Welder had a net deficit during the year here involved and is not a petitioner in this action.

[3] Sales had outstanding 125 shares of stock of $100 par value; Carbide's outstanding capital stock was 50 shares of $100 par value; Carbonic also had 50 shares of $100 par value.

Airco and its subsidiaries were organized horizontally into six overriding divisions: corporate, operations, sales, financial, distribution, and research. Officers heading each division were, in turn, officers of the subsidiaries. Top officials of Airco held similar positions in the subsidiary companies. Directors of the subsidiaries met only to ratify the actions of the directors and officers of Airco.

Airco considered the profits turned over to it by the subsidiaries pursuant to the contracts as its own income and reported it as such. Petitioners reported as income only the six per cent return on capital that each was entitled to retain. Similarly, in declaring the value of their capital stock for declared value excess profits tax purposes, the subsidiaries reported only the nominal amounts at which the stock was carried on the books of each. The Commissioner notified petitioners of substantial income and excess profits tax deficiencies in their 1938 returns, having taken the position that they are taxable on the income turned over to Airco as well as the nominal amounts retained. The Tax Court held, however, that the income from petitioners' operations in excess of six per cent of their capital stock was income and property of Airco. Three judges dissented. The Court of Appeals for the Second Circuit reversed. 167 F. 2d 304. We granted the petition for a writ of certiorari, 335 U. S. 810, because of this conflict of opinion and the disagreement between courts as to the continuing vitality of *Southern Pacific Co.* v. *Lowe,* 247 U. S. 330 (1918).

Petitioners' contention is, in substance, that our decision in *Moline Properties, Inc.* v. *Commissioner,* 319 U. S. 436 (1943), which held that the tax laws require taxation of the corporate entity if it engages in "business activity," expressly excepted the situation in which the corporation is the agent of its owner; that *Southern Pacific Co.* v.

Lowe, supra, defines the content of "agency" for tax purposes; and that, as the Tax Court found, this Court's characterization of the relationship between the corporations in the *Southern Pacific* case is "aptly descriptive" of the relationship between Airco and petitioners. It must follow, according to petitioners, that income received by them and transmitted to Airco is taxable only to Airco.

Respondent does not quarrel with the first and third propositions. The collision occurs at the second. The issue as presented by petitioners is, therefore, whether the principal-agent relationship described in the *Southern Pacific* case—and the similar arrangement between Airco and petitioners—contains the "usual incidents of an agency relationship," as that phrase was used in *Moline Properties, Inc.* v. *Commissioner, supra.*

Petitioners' contention that the *Southern Pacific* case established a concept of agency that has survived our later decisions may be dealt with rather summarily. That case treated income earned by a wholly owned subsidiary before March 1, 1913, the effective date of the Income Tax Act of 1913, as having accrued to its parent prior to that date despite the fact that the actual transfer of funds by declaration of dividends occurred subsequent thereto. The theory of the case was that the two corporations could be treated as identical, for the purposes of the 1913 Act, because of the complete domination and control exercised by the parent over its subsidiary.

By this decision, this Court is said to have "looked beyond the corporate form," [4] and ignored "the separate entity of a corporation." [5] Whatever the dialectics em-

[4] Mertens, *Law of Federal Income Taxation* (1948 ed.), Vol. 10A, p. 237.

[5] Finkelstein, *The Corporate Entity and the Income Tax,* 44 Yale L. J. 436, 448.

ployed, courts and commentators have agreed that parent and subsidiary were treated as one corporation for the purposes of the taxes there in question; transfer of earnings to the parent was merely "a paper transaction." The *Southern Pacific* case did not, and did not purport to, rest on any principle of agency. The only reference to the subsidiary (Central Pacific) as an agent is made in this context:

> ". . . the Central Pacific and the Southern Pacific were in substance identical because of the complete ownership and control which the latter possessed over the former, as stockholder and in other capacities. While the two companies were separate legal entities, yet in fact, and for all practical purposes they were merged, the former being but a part of the latter, acting merely as its agent and subject in all things to its proper direction and control." 247 U. S. at 337.

It is thus clear beyond doubt that the subsidiary was not referred to as an agent of the parent in the usual or technical sense. "Agency" and "practical identity," as those words are used in the *Southern Pacific* case, are unquestionably opposite sides of the same coin.[6] The close relationship between corporations because of com-

[6] In Ballantine, *Separate Entity of Parent and Subsidiary Corporations*, 14 Cal. L. Rev. 12, 18, the writer discusses this use of the agency concept as follows: "What is meant by such terms as 'adjunct,' 'agency,' 'instrumentality,' 'creature' or 'mouthpiece'? What conditions must exist to warrant a court in treating the A corporation as the mere adjunct of the B corporation? The word 'agency' is often used as a synonym of 'adjunct,' whatever that may mean, and as descriptive of a relation variously defined in the cases as 'alter ego,' 'alias,' 'device,' 'dummy,' 'branch,' 'tool,' 'corporate double,' 'business conduit,' 'instrumentality,' etc., but all in the sense of 'means' through which a corporation's own business is actively prosecuted."

plete ownership and control of one by the other was the basis for the result reached, whatever its articulation.

That basis has been repudiated by subsequent decisions of this Court. Whatever the vitality of *Southern Pacific Co.* v. *Lowe* on its special facts, we have held that a corporation formed or operated for business purposes must share the tax burden despite substantial identity, in practical operation, with its owner. Complete ownership of the corporation, and the control primarily dependent upon such ownership—the important ingredients of the *Southern Pacific* case—are no longer of significance in determining taxability. *Moline Properties, Inc.* v. *Commissioner, supra; Burnet* v. *Commonwealth Improvement Co.*, 287 U. S. 415 (1932).[7]

In both of the cases last cited, the agency argument now urged upon us was made and rejected. In both cases, *Southern Pacific Co.* v. *Lowe, supra,* was relied upon by the taxpayers. In both, we found that the contention that the corporation was the agent of its owner was simply the argument that the subsidiary had no corporate identity distinct from its stockholders in a different form. It is true that petitioners here do not ask that they be ignored completely for tax purposes. They are willing to pay taxes on the nominal amounts they retain as Airco's "agents." But this fact serves to emphasize the inapplicability of the *Southern Pacific* case, upon which they rely. There, as in *Commonwealth Improvement Co.* and *Moline Properties* cases, the decision turned upon the question whether the corporate entity was or was not to be completely ignored for tax

[7] The case other than *Southern Pacific* relied upon by the Tax Court was *Munson Steamship Line* v. *Commissioner,* 77 F. 2d 849. That case was explained in *Moline Properties, Inc.* v. *Commissioner, supra,* as depending upon a particular legislative purpose which justified disregarding the separate entity.

purposes. If the Central Pacific had been accorded any tax status in the *Southern Pacific* case, it unquestionably would have been taxed on the entire income it received. In fact, it was so taxed upon all income received after March 1, 1913; only income received prior thereto was considered income of the parent directly.[8]

We think, therefore, that petitioners' argument is without merit because based on an erroneous interpretation of *Southern Pacific Co.* v. *Lowe, supra.* The agency argument, to quote the opinion in *Moline Properties,* "is basically the same argument of identity in a different form. . . . the question of agency or not depends upon the same legal issues as does the question of identity previously discussed."[9] Ownership of a corporation and the control incident thereto can have no different tax consequences when clothed in the garb of agency than when worn as a removable corporate veil.

But it is necessary to go farther. The Tax Court did not, as petitioners seem to think, consider the argument that they were agents of Airco as different from or having any greater validity than the argument of identity of Airco and its subsidiaries. The court, in characterizing petitioners as Airco's agents, used that term exactly as it had been used in the *Southern Pacific, Commonwealth Improvement Co.,* and *Moline Properties* cases. According to the Tax Court's opinion:

> "The issue which [was decided] in this proceeding is whether, as the respondent has determined, the income from the operations of the three petitioners

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[8] Plaintiff's Exhibit P, No. 452, October Term 1917, is an income tax statement of the subsidiary, Central Pacific Co., showing payment of income taxes on $3,333,846.18, its total net income for 1913 less one-sixth (*i. e.,* making an allowance for the two months before the income tax law went into effect March 1).

[9] 319 U. S. at 440–441.

> belonged not to Airco, the parent, but to the petitioners, and was taxable to them; or whether, as the three petitioners contend, the income from the operations of the petitioners in 1938, exclusive of the small amounts paid to petitioners under the contracts, belonged and was taxable to Airco, the parent company, both because the petitioners were in fact incorporated departments, divisions, or branches of Airco's business and because the petitioners operated pursuant to express contract with Airco." [10]

The theory upon which the Tax Court expunged the deficiencies apparently was that since the *Southern Pacific Co.* case was not expressly overruled by *Moline Properties,* the "business purpose" rule laid down in the latter is not absolute, but that the corporate entity may be disregarded (or the corporation treated as an agent of its owner) for tax purposes when the facts of ownership and control of the corporation approximate those presented by the *Southern Pacific* case. The Court of Appeals disagreed. It held that under our decisions, when a cor-

[10] 8 T. C. 594, 611. After enumerating the facts considered pertinent, the court concluded: "It is true, of course, that, taken separately, some of the foregoing facts would not be sufficient in themselves to make inoperative the general rule that corporations are separate juristic persons and are to be so treated for tax purposes. We think, however, that when all these facts are viewed together they bring petitioners within the rule announced by the Supreme Court in *Southern Pacific Co.* v. *Lowe, supra.*" *Id.* at 614.

It should be added that the Court of Appeals, whose opinion was written by its Chief Judge, did not so much as mention the agency argument now made by petitioners. Its only references to agency were isolated quotations from the Tax Court's opinion and the contracts quoted in footnote 1. The court's opinion phrases the question as "when a wholly owned subsidiary of a parent corporation shall be treated for purposes of income taxation as a separate taxable person, and when as merely a part of the corporate activities of the parent." 167 F. 2d 304, 305.

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poration carries on business activity the fact that the owner retains direction of its affairs down to the minutest detail, provides all of its assets and takes all of its profits can make no difference tax-wise. The court concluded that "Even though Southern Pacific Co. v. Lowe, supra, set up a different test, we regard it as pro tanto no longer controlling." [11]

The result reached by the Court of Appeals is clearly required by our later decisions. Our reluctance to erase *Southern Pacific* from the books has been due not to any belief that it lays down a correct rule for tax purposes generally, but to the fact that it concerns "very peculiar facts" which make it clearly distinguishable from later cases involving the tax status of a subsidiary or other wholly owned corporation.[12] For that reason, we have, instead, held that it lays down no rule for tax purposes.

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[11] *Id.* at 307.

[12] Two basic distinctions between the *Southern Pacific* case and subsequent cases (except *Gulf Oil Co.* v. *Lewellyn*, 248 U. S. 71 (1918), which followed *Southern Pacific*) are immediately apparent. First, the *Southern Pacific* case involved taxation of the parent-owner rather than the subsidiary corporation; second, the question was *when* the income had been earned, rather than *who* had earned it. The importance of these distinctions is indicated by the fact that the subsidiary paid income taxes upon income received subsequent to March 1, 1913 (see footnote 8, *supra*), and that the parent did not dispute its tax liability for dividends from post-1913 earnings of the subsidiary. The decision is based on an interpretation of the Income Tax Act of 1913. The Court felt that it was not the intent of the Act to tax earnings prior to the effective date of the Act, and that the Central Pacific's pre-1913 income had actually accrued to the parent before the effective date of the Act. The opinion states that "The case turns upon its very peculiar facts, and is distinguishable from others in which the question of the identity of a controlling stockholder with his corporation has been raised." 247 U. S. at 338–339. By its very terms, the decision is limited to its precise facts.

Burnet v. *Commonwealth Improvement Co., supra* at p. 419; *Moline Properties, Inc.* v. *Commissioner, supra* at p. 439. That the concept of identity of the corporation with its owner set out in the *Southern Pacific* case is incompatible with later decisions of this Court may be demonstrated by a consideration of the facts enumerated and relied upon by the Tax Court, which based such reliance on the emphasis placed upon similar facts in the *Southern Pacific* case. These facts relate to the ownership, control, and right to income reserved by the parent.

So far as control is concerned, we can see no difference in principle between Airco's control of petitioners and that exercised over Moline Properties, Inc., by its sole stockholder. Undoubtedly the great majority of corporations owned by sole stockholders are "dummies" in the sense that their policies and day-to-day activities are determined not as decisions of the corporation but by their owners acting individually. We can see no significance, therefore, in findings of fact such as, "The Airco board held regular meetings and exercised complete domination and control over the business of Airco and each of the petitioners," and "The chairman, vice chairman, and president of Airco were in charge of the administration and management of the activities of each petitioner and carried out the policies and directives with respect to each petitioner as promulgated by the Airco board." [13] We reversed the Board of Tax Appeals in

[13] Much of the testimony introduced by petitioners had to do with the intercorporate relationship between Airco and its subsidiaries, the use of certain facilities by two or more of the subsidiaries, the duties of various officers who held positions with Airco and its subsidiaries, and the services performed for all of the subsidiaries by certain departments of Airco. So far as this testimony shows the integration of the corporate system and its direction by Airco,

Moline Properties in the face of its finding that "Full beneficial ownership was in Thompson [the sole stockholder], who continued to manage and regard the property as his own individually." [14]

Some stress was placed by the Tax Court, and by petitioners in argument here, upon the form of ownership of assets adopted by Airco and its subsidiaries. Petitioners' capital stock was, as has been stated, nominal in amount. Assets of considerable value, to which title was held by the subsidiaries, were balanced by accounts payable to Airco on the books of each. The Tax Court thought it material that "All assets held by each petitioner were furnished to it by Airco, which paid for them with its own cash or stock. Airco supplied all the working capital of each petitioner."

If Airco had supplied assets to its subsidiaries in return for stock valued at amounts equal to the value of the assets, no question could be raised as to the reality of ownership of the assets by the subsidiaries. Airco would then have been in a position comparable, so far as ownership of the assets of petitioners is concerned, to that of the sole stockholder in *Moline Properties*. We think that it can make no difference that financing of the subsidiaries was carried out by means of book indebtednesses in lieu of increased book value of the subsidiaries' stock. A cor-

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it is, as we have indicated, immaterial. So far as it indicates that the subsidiaries received the use of equipment and services for which they were not charged, it is relevant as showing that their income was distorted to that extent, but it does not indicate that the income received "belonged" to Airco at the time of its receipt. The Commissioner made allowance for this distortion by allocating over $400,000 of the expenses reported by Airco to petitioners under the authority given him by § 45 of the Revenue Act of 1938, 26 U. S. C. § 45.

[14] 45 B. T. A. 647, 650.

poration must derive its funds from three sources: capital contributions, loans, and profits from operations. The fact that Airco, the sole stockholder, preferred to supply funds to its subsidiaries primarily by the second method, rather than either of the other two,[15] does not make the income earned by their utilization income to Airco. We need not decide whether the funds supplied to petitioners by Airco were capital contributions rather than loans. It is sufficient to say that the very factors which, as petitioners contend, show that Airco "supplied" and "furnished" their assets also indicate that petitioners were the recipients of capital contributions rather than loans.[16]

Nor do the contracts between Airco and petitioners by which the latter agreed to pay all profits above a

[15] As a practical matter, a considerable part of the assets of petitioners was supplied out of profits from their operations. Even though assets were purchased directly out of the earnings of a subsidiary, however, the amount withdrawn was entered in the accounts payable by the subsidiary and in the accounts receivable of Airco, since substantially all profits of the subsidiaries were, by contract, payable only to the parent.

[16] Since petitioners were required to pay all profits except very small amounts to Airco each year, it was obviously impossible for them to pay the accounts payable to Airco. See note 15. Mr. C. E. Adams, Chairman of Air Reduction Corporation, testified that the assets of the subsidiaries represented by the accounts payable could be realized by Airco only upon dissolution of the subsidiaries. In other words, there was never any expectation that the accounts would be paid prior to dissolution. Since no interest ran on these accounts, the "loans" were identical, except in name, with contributions of capital. See *American Cigar Co.* v. *Commissioner,* 66 F. 2d 425; *Hoyt* v. *Commissioner,* 145 F. 2d 634; *Van Clief* v. *Helvering,* 135 F. 2d 254; *Reading Co.* v. *Commissioner,* 132 F. 2d 306. Levy and Simonds, *Stockholder Advances to Corporations—Are They Loans or Capital Contributions?* 25 Taxes 127, 128, state that "intention to lend and expectation of repayment are necessary to the existence of a valid debt." The fact that no interest ran on these "loans" is, of course, further indication that they are capital

nominal return to the former, on that account, become "agency" contracts within the meaning of our decisions. The Tax Court felt that the fact that Airco was entitled to the profits by contract shows that the income "belonged to Airco" and should not, for that reason, be taxed to petitioners. Our decisions requiring that income be taxed to those who earn it, despite anticipatory agreements designed to prevent vesting of the income in the earners, foreclose this result. *Lucas* v. *Earl,* 281 U. S. 111 (1930); *Helvering* v. *Clifford,* 309 U. S. 331 (1940); *United States* v. *Joliet & Chicago R. Co.,* 315 U. S. 44 (1942); *Commissioner* v. *Sunnen,* 333 U. S. 591 (1948). Of course one of the duties of a collection agent is to transmit the money he receives to his principal according to their agreement.[17] But the fact that petitioners were required by contract to turn over the money received by them to Airco, after deducting expenses and nominal profits, is no sure indication that they were mere collection agents. Such an agreement is entirely consistent with the corporation-sole stockholder relationship whether or not any agency exists, and with other relationships as well.[18]

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contributions. *Berry Motor Car Co.,* B. T. A. Memo. Op. Dkt. 99962, Jan. 25, 1941.

Title to gas cylinders used by petitioners, amounting in value to about $13,000,000, was retained by Airco, but the cylinders were used by the subsidiaries without charge. Whether these, too, were capital contributions we find it unnecessary to decide in this case. Free use of the cylinders by petitioners, if they were merely on loan, may have distorted the subsidiaries' income beyond the allocations made by the Commissioner, but that problem is not before us.

[17] Restatement of Agency, § 427.

[18] In *United States* v. *Joliet & Chicago R. Co.,* 315 U. S. 44 (1942), a lessee railroad agreed to pay rental payments to the lessor's stockholders directly. The lessor thereafter carried on no active business. It was nevertheless held taxable on the income received by its stockholders, since they received the payments only because they held its stock.

What we have said does not foreclose a true corporate agent or trustee from handling the property and income of its owner-principal without being taxable therefor. Whether the corporation operates in the name and for the account of the principal, binds the principal by its actions, transmits money received to the principal, and whether receipt of income is attributable to the services of employees of the principal and to assets belonging to the principal [19] are some of the relevant considerations in determining whether a true agency exists. If the corporation is a true agent, its relations with its principal must not be dependent upon the fact that it is owned by the principal, if such is the case. Its business purpose must be the carrying on of the normal duties of an agent.[20] Absence of the factors mentioned above, and the essentiality of ownership of the corporation to the existence

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[19] Art. 22 (a)–1 of Treasury Regulations 101, promulgated under the Revenue Act of 1938, provides:

"ART. 22(a)–1. *What included in gross income.*—Gross income includes in general compensation for personal and professional services, business income, profits from sales of and dealings in property, interest, rent, dividends, and gains, profits, and income derived from any source whatever, unless exempt from tax by law. (See sections 22(b) and 116.) In general, income is the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets. . . ." See *Eisner* v. *Macomber,* 252 U. S. 189, 207 (1920); *Merchants' Loan & Trust Co.* v. *Smietanka,* 255 U. S. 509, 519 (1921).

In the case of a subsidiary who supplies the labor and the capital with which the income is earned, as is true of petitioners here, it can hardly be contended that it did not earn the income.

[20] Of course even a corporation which satisfies the usual tests of agency may be disregarded by the Commissioner if it is a sham or unreal. *Higgins* v. *Smith,* 308 U. S. 473 (1940); *Gregory* v. *Helvering,* 293 U. S. 465 (1935). Escaping taxation is not a "business" activity. See *National Investors Corp.* v. *Hoey,* 144 F. 2d 466.

of any "agency" relationship in the *Moline Properties, Commonwealth Improvement Co.,* and *Southern Pacific* cases, indicate the fallacy of the agency argument made in those cases.

The same fallacy is apparent in the contention that petitioners are agents of Airco. They claim that they should be taxable on net income aggregating only $1,350, despite the fact that during the tax year (1938) they owned assets worth nearly 20 million dollars, had net sales of approximately 22 million dollars, and earned nearly four and one-half million dollars net. Their employees number in the thousands. We have passed the question whether Airco's interest in these assets is that of owner of the subsidiaries or lender, but whatever the answer, they do not belong to Airco as principal. The entire earnings of petitioners, except for trifling amounts, are turned over to Airco not because the latter could command this income if petitioners were owned by third persons, but because it owns and thus completely dominates the subsidiaries. Airco, for sufficient reasons of its own, wished to avoid the burdens of principalship.[21] See *Moline Properties, Inc.* v. *Commissioner, supra; Sheldon*

[21] The two main purposes for the adoption by Airco of the corporate subsidiary method of operation, as related by Mr. C. E. Adams, Chairman of Air Reduction Corp., were these:

"Frankly, in 1918 and still, Air Reduction, Inc., was and is a New York corporation. Even at that early date it became evident, as I already said, we were going to have plants scattered all over the United States. We didn't want to domicile the parent company in 48 states of the Union and have us subject to service in all those states, that is, have the parent company subject to service in all those states, and that was distinctly a reason for using this corporate setup in connection with operations to be run as divisions, just as the contract sets forth.

"Now, in addition to that, as a practical matter, out in the field and on the firing line, to have a representative, an officer, we will

Building Corp. v. *Commissioner,* 118 F. 2d 835 (1941). Compare *Forshay* v. *Commissioner,* 20 B. T. A. 537 (1930). It cannot now escape the tax consequences of that choice, no matter how bona fide its motives or long-standing its arrangements. When we referred to the "usual incidents of an agency relationship" in the *Moline Properties* case, we meant just that—not the identity of ownership and control disclosed by the facts of this case.

We have considered the other arguments made by petitioners and find them to be without merit. The judgment of the Court of Appeals is

Affirmed.

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say, of Pure Carbonic, when trouble arises with a customer, a vice president of Pure Carbonic, who is not an officer of Air Reduction, Inc., at all, who goes in and straightens that out with that customer, increases his cudos [*sic*], helps him with all his negotiating efforts, with their competitors on the outside."

It is thus apparent that Airco was attempting to avoid the status of principal *vis-à-vis* its subsidiaries. As principal it would have been subject to service of process through its agents; as owner of the subsidiary it was not. See *Peterson* v. *Chicago, R. I. & P. R. Co.,* 205 U. S. 364, 391 (1907); *Cannon Mfg. Co.* v. *Cudahy Co.,* 267 U. S. 333 (1925). The purpose of having officers of subsidiaries who could deal directly with customers does not indicate an agency relationship. On the contrary, the very purpose of the organization adopted was to lead customers to believe that they were dealing with top men in the company actually manufacturing and selling the products they purchased.

KRULEWITCH *v.* UNITED STATES.

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

No. 143. Argued January 10, 1949.—Decided March 28, 1949.

Petitioner was convicted in a federal district court for inducing a woman (the complaining witness) to go from New York to Florida for the purpose of prostitution, transporting her from New York to Miami for that purpose, and conspiring with another woman to commit those offenses. At his trial, there was admitted in evidence over his objection testimony concerning a statement made by the co-conspirator to the complaining witness more than six weeks after the transportation to Miami had been completed, which implied that petitioner was guilty and suggested concealing his guilt. *Held:*

1. The hearsay declaration attributed to the co-conspirator was not admissible on the ground that it was made in furtherance of the conspiracy to transport. Pp. 441–443.

2. Nor was it admissible on the ground that it was in furtherance of a continuing subsidiary phase of the conspiracy—*i. e.*, an implied agreement to conceal the crime. Pp. 443–444.

3. Since it cannot be said on the record in this case that the erroneous admission of the hearsay declaration may not have tipped the scales against petitioner, it cannot be considered a harmless error under 28 U. S. C. (1946 ed.) § 391; and the conviction is reversed. Pp. 444–445.

167 F. 2d 943, reversed.

Petitioner was convicted in a federal district court of violations of the Mann Act and of conspiracy to commit those offenses, 18 U. S. C. §§ 88, 398, 399 (now 18 U. S. C. §§ 371, 2421, 2422). The Court of Appeals affirmed. 167 F. 2d 943. This Court granted certiorari. 335 U. S. 811. *Reversed,* p. 445.

Jacob W. Friedman argued the cause and filed a brief for petitioner.

Robert W. Ginnane argued the cause for the United States. With him on the brief were *Solicitor General*

Perlman, Assistant Attorney General Campbell, John R. Benney, Robert S. Erdahl and *Joseph M. Howard.*

MR. JUSTICE BLACK delivered the opinion of the Court.

A federal district court indictment charged in three counts that petitioner and a woman defendant had (1) induced and persuaded another woman to go on October 20, 1941, from New York City to Miami, Florida, for the purpose of prostitution, in violation of 18 U. S. C. § 399 (now § 2422); (2) transported or caused her to be transported from New York to Miami for that purpose, in violation of 18 U. S. C. § 398 (now § 2421); and (3) conspired to commit those offenses in violation of 18 U. S. C. § 88 (now § 371). Tried alone, the petitioner was convicted on all three counts of the indictment. The Court of Appeals affirmed. 167 F. 2d 943. And see disposition of prior appeal, 145 F. 2d 76. We granted certiorari limiting our review to consideration of alleged error in admission of certain hearsay testimony against petitioner over his timely and repeated objections.

The challenged testimony was elicited by the Government from its complaining witness, the person whom petitioner and the woman defendant allegedly induced to go from New York to Florida for the purpose of prostitution. The testimony narrated the following purported conversation between the complaining witness and petitioner's alleged co-conspirator, the woman defendant.

> "She asked me, she says, 'You didn't talk yet?' And I says, 'No.' And she says, 'Well, don't,' she says, 'until we get you a lawyer.' And then she says, 'Be very careful what you say.' And I can't put it in exact words. But she said, 'It would be better for us two girls to take the blame than Kay (the defendant) because he couldn't stand it, he couldn't stand to take it.' "

The time of the alleged conversation was more than a month and a half after October 20, 1941, the date the complaining witness had gone to Miami. Whatever original conspiracy may have existed between petitioner and his alleged co-conspirator to cause the complaining witness to go to Florida in October, 1941, no longer existed when the reported conversation took place in December, 1941. For on this latter date the trip to Florida had not only been made—the complaining witness had left Florida, had returned to New York, and had resumed her residence there. Furthermore, at the time the conversation took place, the complaining witness, the alleged co-conspirator, and the petitioner had been arrested. They apparently were charged in a United States District Court of Florida with the offense of which petitioner was here convicted.[1]

It is beyond doubt that the central aim of the alleged conspiracy—transportation of the complaining witness to Florida for prostitution—had either never existed or had long since ended in success or failure when and if the alleged co-conspirator made the statement attributed to her. *Cf. Lew Moy* v. *United States,* 237 F. 50. The statement plainly implied that petitioner was guilty of the crime for which he was on trial. It was made in petitioner's absence and the Government made no effort whatever to show that it was made with his authority. The testimony thus stands as an unsworn, out-of-court declaration of petitioner's guilt. This hearsay declaration, attributed to a co-conspirator, was not made pursuant to and in furtherance of objectives of the conspiracy charged in the indictment, because if made, it was after those objectives either had failed or had been achieved. Under these circumstances, the hearsay declaration attributed to the alleged co-conspirator was not admissible

[1] The Florida grand jury failed to indict and the cases there were closed without prosecution in February, 1942. The New York indictments were not returned until January, 1943.

on the theory that it was made in furtherance of the alleged criminal transportation undertaking. *Fiswick* v. *United States,* 329 U. S. 211, 216–217; *Brown* v. *United States,* 150 U. S. 93, 98–99; *Graham* v. *United States,* 15 F. 2d 740, 743.

Although the Government recognizes that the chief objective of the conspiracy—transportation for prostitution purposes—had ended in success or failure before the reported conversation took place, it nevertheless argues for admissibility of the hearsay declaration as one in furtherance of a continuing subsidiary objective of the conspiracy. Its argument runs this way. Conspirators about to commit crimes always expressly or implicitly agree to collaborate with each other to conceal facts in order to prevent detection, conviction and punishment. Thus the argument is that even after the central criminal objectives of a conspiracy have succeeded or failed, an implicit subsidiary phase of the conspiracy always survives, the phase which has concealment as its sole objective. The Court of Appeals adopted this view. It viewed the alleged hearsay declaration as one in furtherance of this continuing subsidiary phase of the conspiracy, as part of "the implied agreement to conceal." 167 F. 2d 943, 948. It consequently held the declaration properly admitted.

We cannot accept the Government's contention. There are many logical and practical reasons that could be advanced against a special evidentiary rule that permits out-of-court statements of one conspirator to be used against another. But however cogent these reasons, it is firmly established that where made in furtherance of the objectives of a going conspiracy, such statements are admissible as exceptions to the hearsay rule. This prerequisite to admissibility, that hearsay statements by some conspirators to be admissible against others must be made in furtherance of the conspiracy charged, has been

scrupulously observed by federal courts. The Government now asks us to expand this narrow exception to the hearsay rule and hold admissible a declaration, not made in furtherance of the alleged criminal transportation conspiracy charged, but made in furtherance of an alleged implied but uncharged conspiracy aimed at preventing detection and punishment. No federal court case cited by the Government suggests so hospitable a reception to the use of hearsay evidence to convict in conspiracy cases. The Government contention does find support in some but not all of the state court opinions cited in the Government brief.[2] But in none of them does there appear to be recognition of any such broad exception to the hearsay rule as that here urged. The rule contended for by the Government could have far-reaching results. For under this rule plausible arguments could generally be made in conspiracy cases that most out-of-court statements offered in evidence tended to shield co-conspirators. We are not persuaded to adopt the Government's implicit conspiracy theory which in all criminal conspiracy cases would create automatically a further breach of the general rule against the admission of hearsay evidence.

It is contended that the statement attributed to the alleged co-conspirator was merely cumulative evidence, that without the statement the case against petitioner was so strong that we should hold the error harmless under 28 U. S. C. (1946 ed.) § 391. In *Kotteakos* v. *United States*, 328 U. S. 750, we said that error should not be held harm-

[2] *Commonwealth* v. *Smith*, 151 Mass. 491, 24 N. E. 677; *People* v. *Mol*, 137 Mich. 692, 707, 100 N. W. 913, 918; *Hooper* v. *State*, 187 Ark. 88, 92, 58 S. W. 2d 434, 435; *State* v. *Gauthier*, 113 Ore. 297, 307, 231 P. 141, 145; *State* v. *Emory*, 116 Kan. 381, 384, 226 P. 754, 756; *Carter* v. *State*, 106 Ga. 372, 376, 32 S. E. 345, 346–347; *Watson* v. *State*, 166 Miss. 194, 213, 146 So. 122, 127; *Baldwin* v. *State*, 46 Fla. 115, 120–121, 35 So. 220, 222; *State* v. *Strait*, 279 S. W. 109 (Mo.).

less under the harmless error statute if upon consideration of the record the court is left in grave doubt as to whether the error had substantial influence in bringing about a verdict. We have such doubt here. The Florida District Court grand jury failed to indict. After indictment in New York petitioner was tried four times with the following results: mistrial; conviction; mistrial; conviction with recommendation for leniency. The revolting type of charges made against this petitioner by the complaining witness makes it difficult to believe that a jury convinced of a strong case against him would have recommended leniency. There was corroborative evidence of the complaining witness on certain phases of the case. But as to all vital phases, those involving the sordid criminal features, the jury was compelled to choose between believing the petitioner or the complaining witness. The record persuades us that the jury's task was difficult at best. We cannot say that the erroneous admission of the hearsay declaration may not have been the weight that tipped the scales against petitioner.

Reversed.

MR. JUSTICE JACKSON, concurring in the judgment and opinion of the Court.

This case illustrates a present drift in the federal law of conspiracy which warrants some further comment because it is characteristic of the long evolution of that elastic, sprawling and pervasive offense. Its history exemplifies the "tendency of a principle to expand itself to the limit of its logic." [1] The unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in

[1] The phrase is Judge Cardozo's—*The Nature of the Judicial Process*, p. 51.

addition thereto,[2] suggests that loose practice as to this offense constitutes a serious threat to fairness in our administration of justice.

The modern crime of conspiracy is so vague that it almost defies definition.[3] Despite certain elementary and

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[2] The Conference of Senior Circuit Judges, presided over by Chief Justice Taft, in 1925 reported:

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

"Although in a particular case there may be no preconcert of plan, excepting that necessarily inherent in mere joint action, it is difficult to exclude that situation from the established definitions of conspiracy; yet the theory which permits us to call the aborted plan a greater offense than the completed crime supposes a serious and substantially continued group scheme for cooperative law breaking. We observe so many conspiracy prosecutions which do not have this substantial base that we fear the creation of a general impression, very harmful to law enforcement, that this method of prosecution is used arbitrarily and harshly. Further the rules of evidence in conspiracy cases make them most difficult to try without prejudice to an innocent defendant." Annual Report of the Attorney General for 1925, pp. 5–6.

Fifteen years later Judge Learned Hand observed: ". . . so many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders. That there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided." *United States* v. *Falcone,* 109 F. 2d 579, 581.

[3] Harno, *Intent in Criminal Conspiracy,* 89 U. of Pa. L. Rev. 624: "In the long category of crimes there is none, not excepting criminal attempt, more difficult to confine within the boundaries of definitive statement than conspiracy."

An English author—Wright, *The Law of Criminal Conspiracies and Agreements,* p. 11—gives up with the remark: "but no intelligible definition of 'conspiracy' has yet been established."

essential elements,[4] it also, chameleon-like, takes on a special coloration from each of the many independent offenses on which it may be overlaid.[5] It is always "pre-

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[4] Justice Holmes supplied an oversimplified working definition in *United States* v. *Kissel,* 218 U. S. 601, 608: "A conspiracy is a partnership in criminal purposes." This was recently restated "A conspiracy is a partnership in crime." *Pinkerton* v. *United States,* 328 U. S. 640, 644. The latter is inaccurate, since concert in criminal purposes, rather than concert in crime, establishes the conspiracy.

Carson offers the following résumé of American cases: "It would appear that a conspiracy must be a combination of two or more persons by some concerted action to accomplish some criminal object; or some object not criminal by criminal means; or, some object not criminal by means which are not criminal, but where mischief to the public is involved; or, where neither the object nor the means are criminal, or even unlawful, but where injury and oppression to individuals are the result." *The Law of Criminal Conspiracies and Agreements, as Found in The American Cases,* p. 123.

[5] See, for example:

8 U. S. C. § 47, Conspiracy to interfere with civil rights; (1) Preventing officer from performing duties; (2) Obstructing justice, intimidating party, witness, or juror; (3) Depriving persons of rights or privileges. 10 U. S. C. § 1566, Conspiracy by persons in military service to defraud the U. S. 12 U. S. C. § 1138d (f), Conspiracy involving Farm Credit Banks, Administration, etc. 15 U. S. C.: §§ 1–3, Conspiracy in restraint of trade; § 8, Conspiracy in restraint of import trade. 18 U. S. C. as revised by the Act of June 25, 1948, 62 Stat. 928 *et seq.*, effective September 1, 1948: § 2384, Seditious conspiracy; §§ 2385, 2387, Conspiracy to impair loyalty of armed forces or advocate overthrow of U. S. Government by force; § 241, Conspiracy to injure person in exercise of civil rights; § 372, Conspiracy to prevent officer from performing duties; § 286, Conspiracy to defraud the Government by obtaining payment of a false claim; § 371, Conspiracy to defraud the United States; §§ 1501–1506, Conspiracy to obstruct justice; §§ 752, 1792, Conspiracy to cause riots at federal penal institutions; § 1201, Conspiracy to transport kidnapped person in interstate commerce; § 2314, Conspiracy to transport stolen property and counterfeiting instruments in interstate commerce; § 1951, Conspiracy to violate Anti-Racketeering Act;

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dominantly mental in composition" because it consists primarily of a meeting of minds and an intent.[6]

The crime comes down to us wrapped in vague but unpleasant connotations. It sounds historical undertones of treachery, secret plotting and violence on a scale that menaces social stability and the security of the state itself. "Privy conspiracy" ranks with sedition and rebellion in the Litany's prayer for deliverance. Conspiratorial movements do indeed lie back of the political assassination, the *coup d'état,* the *putsch,* the revolution, and seizures of power in modern times, as they have in all history.[7]

But the conspiracy concept also is superimposed upon many concerted crimes having no political motivation. It is not intended to question that the basic conspiracy principle has some place in modern criminal law, because to unite, back of a criminal purpose, the strength, opportunities and resources of many is obviously more dangerous and more difficult to police than the efforts of a

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§ 2192, Conspiracy to incite mutiny on shipboard; § 2271, Conspiracy to cast away vessel. 22 U. S. C. § 234, Conspiracy to injure property of foreign government. 31 U. S. C. § 231, Conspiracy to obtain payment of false claims. 34 U. S. C. § 749a, Conspiracy to bid collusively on construction of naval aircraft. 38 U. S. C. § 715, Conspiracy to falsify pension claims. 50 U. S. C. § 34, Conspiracy to disclose national defense information or commit espionage. 50 U. S. C. App. § 311, Conspiracy to violate Selective Service Act.

[6] Harno, *Intent in Criminal Conspiracy,* 89 U. of Pa. L. Rev. 624, 632.

[7] See Senturia, *Conspiracy, Political,* IV Encyc. Soc. Sci. 238 (1931).

On conspiracy principles German courts, on May 30, 1924, adjudged the Nazi Party to be a criminal organization. It also held in 1928 that the Leadership Corps of the Communist Party was a criminal organization and in 1930 entered judgment of criminality against the Union of Red Front Fighters of the Communist Party. See note 15.

lone wrongdoer.[8] It also may be trivialized, as here, where the conspiracy consists of the concert of a loathsome panderer and a prostitute to go from New York to Florida to ply their trade (see 145 F. 2d 76 for details) and it would appear that a simple Mann Act prosecution would vindicate the majesty of federal law. However, even when appropriately invoked, the looseness and pliability of the doctrine present inherent dangers which should be in the background of judicial thought wherever it is sought to extend the doctrine to meet the exigencies of a particular case.

Conspiracy in federal law aggravates the degree of crime over that of unconcerted offending. The act of confederating to commit a misdemeanor, followed by even an innocent overt act in its execution, is a felony and is such even if the misdemeanor is never consummated.[9] The more radical proposition also is well-established that at common law and under some statutes a combination may be a criminal conspiracy even if it contemplates only acts which are not crimes at all when perpetrated by an individual or by many acting severally.[10]

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[8] 8 Holdsworth, *History of English Law,* 383. Miller, *Criminal Law,* p. 110.

[9] 18 U. S. C. A. § 371. Until recently, the punishment for such a felony could have been far in excess of that provided for the substantive offense. However, the Act of June 25, 1948, c. 645, 62 Stat. 683, 701, provides that in such a case the punishment for the conspiracy shall not exceed the maximum provided for such misdemeanor.

[10] This is the federal law applicable to antitrust prosecutions. For the history of this conception and its perversion, particularly in labor cases, see Sayre, *Criminal Conspiracy,* 35 Harv. L. Rev. 393. On the abuse of conspiracy see O'Brian, *Loyalty Tests and Guilt by Association,* 61 Harv. L. Rev. 592, and Note, *The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants,* 62 Harv. L. Rev. 276.

Thus the conspiracy doctrine will incriminate persons on the fringe of offending who would not be guilty of aiding and abetting or of becoming an accessory, for those charges only lie when an act which is a crime has actually been committed.[11]

Attribution of criminality to a confederation which contemplates no act that would be criminal if carried out by any one of the conspirators is a practice peculiar to Anglo-American law. "There can be little doubt that this wide definition of the crime of conspiracy originates in the criminal equity administered in the Star Chamber." [12] In fact, we are advised that "The modern crime of conspiracy is almost entirely the result of the manner in which conspiracy was treated by the court of Star Chamber." [13] The doctrine does not commend itself to jurists of civil-law countries,[14] despite universal recognition that an organized society must have legal weapons for combatting organized criminality. Most other countries have devised what they consider more discriminating principles upon which to prosecute criminal gangs, secret associations and subversive syndicates.[15]

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[11] This statement, of course, leaves out of account the subject of attempts with which conspiracy is said to be allied. 8 Holdsworth, *History of English Law,* 382.

[12] *Id.,* 382.

[13] *Id.,* 379.

[14] "It is utterly unknown to the Roman law; it is not found in modern Continental codes; few Continental lawyers ever heard of it. It is a fortunate circumstance that it is not encrusted so deep in our jurisprudence by past decisions of our courts that we are unable to slough it off altogether. It is a doctrine which has proved itself the evil genius of our law wherever it has touched it." Sayre, *Criminal Conspiracy,* 35 Harv. L. Rev. 393, 427.

[15] Counsel representing the United States, the United Kingdom, the French Republic, and the Soviet Union, and German defendants, indulged in some comparisons of the relevant laws of several nations

A recent tendency has appeared in this Court to expand this elastic offense and to facilitate its proof. In *Pinkerton* v. *United States,* 328 U. S. 640, it sustained a conviction of a substantive crime where there was no proof of participation in or knowledge of it, upon the novel and dubious theory that conspiracy is equivalent in law to aiding and abetting.

Doctrines of conspiracy are not only invoked for criminal prosecution, but also in civil proceedings for damages or for injunction, and in administrative proceedings to apply regulatory statutes. They have been resorted to by military commissions and on at least one notable occasion when civil courts were open at the time and place to punish the offense.[16] This conspiracy concept was employed to prosecute laborers for combining to raise their wages and formed the basis for abuse of the labor injunction.[17] The National Labor Relations Act found it necessary to provide that concerted labor activities otherwise lawful were not rendered unlawful by mere concert.[18] But in other fields concert may still be a crime though it contemplates only acts which each could do lawfully on his own.

The interchangeable use of conspiracy doctrine in civil as well as penal proceedings opens it to the danger, absent in the case of many crimes, that a court having in mind

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before the International Military Tribunal at Nürnberg in connection with organizations there accused as criminal. 8 Trial of Major War Criminals (GPO 1947), pp. 353, *et seq.;* 2 Nazi Conspiracy and Aggression (GPO 1946), p. 1; Jackson, *The Nürnberg Case,* p. 95.

[16] The Assassination of President Lincoln and the Trial of the Conspirators, New York, 1865. See, however, *Ex parte Milligan,* 4 Wall. 2.

[17] See Sayre, *Criminal Conspiracy,* 35 Harv. L. Rev. 393, 403.

[18] *International Union, U. A. W. A.* v. *Wisconsin Employment Relations Board, ante,* p. 245.

only the civil sanctions will approve lax practices which later are imported into criminal proceedings. In civil proceedings this Court frankly has made the end a test of the means, saying, "To require a greater showing would cripple the Act," *United States* v. *Griffith,* 334 U. S. 100, in dispensing with the necessity for specific intent to produce a result violative of the statute. Further, the Court has dispensed with even the necessity to infer any definite agreement, although that is the gist of the offense. "It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. . . ." *United States* v. *Masonite Corp.,* 316 U. S. 265, 275. One might go on from the reports of this and lower courts and put together their decisions condoning absence of proof to demonstrate that the minimum of proof required to establish conspiracy is extremely low, and we may expect our pronouncements in civil cases to be followed in criminal ones also.

Of course, it is for prosecutors rather than courts to determine when to use a scatter-gun to bring down the defendant, but there are procedural advantages from using it which add to the danger of unguarded extension of the concept.

An accused, under the Sixth Amendment, has the right to trial "by an impartial jury of the State and district wherein the crime shall have been committed." The leverage of a conspiracy charge lifts this limitation from the prosecution and reduces its protection to a phantom, for the crime is considered so vagrant as to have been committed in any district where any one of the conspirators did any one of the acts, however innocent, intended to accomplish its object.[19] The Government may, and often

[19] *Hyde* v. *United States,* 225 U. S. 347. Mr. Justice Holmes, on behalf of himself and Justices Hughes, Lurton and Lamar, wrote

does, compel one to defend at a great distance from any place he ever did any act because some accused confederate did some trivial and by itself innocent act in the chosen district. Circumstances may even enable the prosecution to fix the place of trial in Washington, D. C., where a defendant may lawfully be put to trial before a jury partly or even wholly made up of employees of the Government that accuses him. *Cf. Frazier* v. *United States,* 335 U. S. 497.

When the trial starts, the accused feels the full impact of the conspiracy strategy. Strictly, the prosecution should first establish *prima facie* the conspiracy and identify the conspirators, after which evidence of acts and declarations of each in the course of its execution are admissible against all. But the order of proof of so sprawling a charge is difficult for a judge to control. As a practical matter, the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself. In other words, a conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed. The naive assumption that prejudicial effects can be overcome by instructions to the jury, *cf. Blumenthal* v. *United States,* 332 U. S. 539, 559, all practicing lawyers know to be unmitigated fiction. See *Skidmore* v. *Baltimore & Ohio R. Co.,* 167 F. 2d 54.

The trial of a conspiracy charge doubtless imposes a heavy burden on the prosecution, but it is an especially difficult situation for the defendant. The hazard from loose application of rules of evidence is aggravated where

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a vigorous protest which did not hesitate to brand the doctrine as oppressive and as "one of the wrongs that our forefathers meant to prevent." 225 U. S. 347, 387.

the Government institutes mass trials.[20] Moreover, in federal practice there is no rule preventing conviction on uncorroborated testimony of accomplices, as there are in many jurisdictions, and the most comfort a defendant can expect is that the court can be induced to follow the "better practice" and caution the jury against "too much reliance upon the testimony of accomplices." *Caminetti* v. *United States,* 242 U. S. 470, 495.

A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together. If he is silent, he is taken to admit it and if, as often happens, co-defendants can be prodded into accusing or contradicting each other, they convict each other. There are many practical difficulties in defending against a charge of conspiracy which I will not enumerate.[21]

Against this inadequately sketched background, I think the decision of this case in the court below intro-

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[20] An example is afforded by *Allen* v. *United States,* 4 F. 2d 688. At the height of the prohibition frenzy, seventy-five defendants were tried on charges of conspiracy. A newspaper reporter testified to going to a drinking place where he talked with a woman, behind the bar, whose name he could not give. There was not the slightest identification of her nor showing that she knew or was known by any defendant. But it was held that being back of the bar showed her to be a co-conspirator and, hence, her statements were admissible against all. He was allowed to relate incriminating statements made by her.

[21] For courtroom technique employed in the trial of conspiracy cases by both prosecution and defense, see O'Dougherty, *Prosecution and Defense under Conspiracy Indictments,* 9 Brooklyn L. Rev. 263. His survey, which accords with our observation, will hardly convince one that a trial of this kind is the highest exemplification of the working of the judicial process.

duced an ominous expansion of the accepted law of conspiracy. The prosecution was allowed to incriminate the defendant by means of the prostitute's recital of a conversation with defendant's alleged co-conspirator, who was not on trial. The conversation was said to have taken place after the substantive offense was accomplished, after the defendant, the co-conspirator and the witness had all been arrested, and after the witness and the other two had a falling out. The Court of Appeals sustained its admission upon grounds stated as follows:

> ". . . We think that implicit in a conspiracy to violate the law is an agreement among the conspirators to conceal the violation after as well as before the illegal plan is consummated. Thus the conspiracy continues, at least for purposes of concealment, even after its primary aims have been accomplished. The statements of the co-conspirator here were made in an effort to protect the appellant by concealing his role in the conspiracy. Consequently, they fell within the implied agreement to conceal and were admissible as evidence against the appellant. Cf. United States v. Goldstein, 2 Cir., 135 F. 2d 359; Murray v. United States, 7 Cir., 10 F. 2d 409, certiorari denied, 271 U. S. 673 . . . . While Bryan v. United States, 5 Cir., 17 F. 2d 741, is by implication directly to the contrary, we decline to follow it."

I suppose no person planning a crime would accept as a collaborator one on whom he thought he could not rely for help if he were caught, but I doubt that this fact warrants an inference of conspiracy for that purpose. Of course, if an understanding for continuous aid had been proven, it would be embraced in the conspiracy

by evidence and there would be no need to imply such an agreement. Only where there is no convincing evidence of such an understanding is there need for one to be implied.

It is difficult to see any logical limit to the "implied conspiracy," either as to duration or means, nor does it appear that one could overcome the implication by express and credible evidence that no such understanding existed, nor any way in which an accused against whom the presumption is once raised can terminate the imputed agency of his associates to incriminate him. Conspirators, long after the contemplated offense is complete, after perhaps they have fallen out and become enemies, may still incriminate each other by deliberately harmful, but unsworn declarations, or unintentionally by casual conversations out of court. On the theory that the law will impute to the confederates a continuing conspiracy to defeat justice, one conceivably could be bound by another's unauthorized and unknown commission of perjury, bribery of a juror or witness, or even putting an incorrigible witness with damaging information out of the way.

Moreover, the assumption of an indefinitely continuing offense would result in an indeterminate extension of the statute of limitations. If the law implies an agreement to cooperate in defeating prosecution, it must imply that it continues as long as prosecution is a possibility, and prosecution is a possibility as long as the conspiracy to defeat it is implied to continue.

I do not see the slightest warrant for judicially introducing a doctrine of implied crimes or constructive conspiracies. It either adds a new crime or extends an old one. True, the modern law of conspiracy was largely evolved by the judges. But it is well and wisely settled that there can be no judge-made offenses against the

United States and that every federal prosecution must be sustained by statutory authority.[22] No statute authorizes federal judges to imply, presume or construct a conspiracy except as one may be found from evidence. To do so seems to approximate creation of a new offense and one that I would think of doubtful constitutionality even if it were created by Congress.[23] And, at all events, it is one fundamentally and irreconcilably at war with our presumption of innocence.

There is, of course, strong temptation to relax rigid standards when it seems the only way to sustain convictions of evildoers. But statutes authorize prosecution for substantive crimes for most evil-doing without the dangers to the liberty of the individual and the integrity of the judicial process that are inherent in conspiracy charges. We should disapprove the doctrine of implied or constructive crime in its entirety and in every manifestation. And I think there should be no straining to uphold any conspiracy conviction where prosecution for the substantive offense is adequate and the purpose served by adding the conspiracy charge seems chiefly to get procedural advantages to ease the way to conviction.

Although a reversal after four trials is, of course, regrettable, I cannot overlook the error as a harmless one. But I should concur in reversal even if less sure that prejudice resulted, for it is better that the crime go unwhipped of justice than that this theory of implied continuance of conspiracy find lodgment in our law, either by affirmance or by tolerance. Few instruments of in-

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[22] *United States* v. *Hudson*, 7 Cranch 32; *United States* v. *Worrall*, 2 Dall. 384; *United States* v. *Coolidge*, 1 Wheat. 415; *United States* v. *Eaton*, 144 U. S. 677, 687; *United States* v. *Bathgate*, 246 U. S. 220, 225. See, however, Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 73.

[23] *Cf. Tot* v. *United States*, 319 U. S. 463.

justice can equal that of implied or presumed or constructive crimes. The most odious of all oppressions are those which mask as justice.

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

MR. JUSTICE BURTON, dissenting.

While I agree with the opinion of the Court that the hearsay testimony in question was not properly admissible, I regard its admission, under the circumstances of this case, as an absolutely harmless error.

In speaking of harmless errors that may result from the admission of evidence, this Court has said:

> "Errors of this sort in criminal causes conceivably may be altogether harmless in the face of other clear evidence, although the same error might turn scales otherwise level, as constantly appears in the application of the policy of § 269* to questions of the admission of cumulative evidence." *Kotteakos* v. *United States,* 328 U. S. 750, 763.

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*Section 269 of the Judicial Code, as then in effect, and as in effect at the time of the trial of the instant case and of the entry of the judgment below, provided:

"SEC. 269. . . . On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." 40 Stat. 1181, 28 U. S. C. § 391.

Rule 52 (a) of the Federal Rules of Criminal Procedure, as continuously in effect during and since the time of the trial of the instant case and as still in effect, provides:

"RULE 52. HARMLESS ERROR AND PLAIN ERROR.

"(a) HARMLESS ERROR. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded. . . ."

Again, in determining whether error in the admission of evidence should result in a reversal of a judgment, we said that the question is—

> "what effect the error had or reasonably may be taken to have had upon the jury's decision. . . .
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> . . . . . .
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> "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress." *Id.* at pp. 764–765.

The issue before us involves no constitutional question or specific command of Congress. The trial was a long one concerning personal conduct involving simple issues of fact. The record of it covers more than 800 pages. The jury must have been thoroughly familiar with the issues and with the degree of dependability, if any, to be placed upon the oral testimony of the petitioner and of the two witnesses involved in the conversation that is before us as reported by one of them. The evidence supporting the jury's verdict was cumulative, repetitive and corroborated to such a point that I cannot believe that the verdict or the rights of the parties could have been appreciably affected by such weight as the jury may have attached to this reported snatch of conversation between two people of such negligible dependability as was demonstrated here. After this extended fourth trial, to set aside this jury's verdict merely because of this particular bit of hearsay testimony seems to me to be an unrealistic procedure that tends to make a travesty of the jury system which is neither necessary nor deserved. I would affirm the judgment below.

UNITED STATES *v.* WOMEN'S SPORTSWEAR MANUFACTURERS ASSOCIATION ET AL.

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

No. 37. Argued February 28–March 1, 1949.—Decided March 28, 1949.

Women's sportswear jobbers in Boston, selling in interstate commerce about 80% of their annual production approximating $8,800,000, agreed by contract to employ only those stitching contractors who were unionized and also members of a particular trade association, and to divide all their work among association members who, as to price and quality, were comparable with nonmembers. *Held:*

1. The intent and effect of the agreement was substantially to restrict competition, prices and markets in violation of § 1 of the Sherman Act. Pp. 461–463.

2. The effect of the agreement being to restrain interstate commerce, it is immaterial whether or not the stitching contractors themselves may have been engaged only in intrastate business. Pp. 464–465.

3. Inclusion in the contract of a provision which limited the work to union shops which were also members of the trade association did not immunize the agreement from attack under § 1 of the Sherman Act. Pp. 463–464.

75 F. Supp. 112, reversed.

In a suit by the United States to enjoin violations of § 1 of the Sherman Act and for other relief, the District Court, after trial, denied the relief sought. 75 F. Supp. 112. On direct appeal to this Court, *reversed,* p. 465.

Robert L. Stern argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Wm. Amory Underhill* and *Robert G. Seaks.*

Harry Bergson argued the cause and filed a brief for appellees.

MR. JUSTICE JACKSON delivered the opinion of the Court.

The District Court, after trial, has denied the Government's plea for an injunction, and other relief, against appellees under the Sherman Act.[1] 75 F. Supp. 112. The cause is brought here by direct appeal, as Congress has authorized.[2] Defendants below and appellees here are an unincorporated trade association, its officers and members. There is no serious controversy as to facts. Our review must determine whether or not they establish the Government's right to the relief which has been denied.

We first should be satisfied that the activities on which restraints are alleged to have been exerted constitute commerce among states. The industry involved is women's sportswear. It is carried on by jobbers, who maintain sales offices in New York and engage in nation-wide competition for orders, chiefly by means of traveling salesmen who solicit throughout the country. Upon receiving an order, the jobber buys the fabrics and cuts them to the customer's fancy. In most cases he then sends the cut material to a contractor who does the stitching, puts on such accessories as the buttons and the bows, and returns the completed garments to the jobber, who promptly ships them to the customer.

That the jobbers maintain a current of commerce, substantial in volume and interstate in character, seems clear. The Boston area ranks fifth in this country's production of women's sportswear. Its jobbers obtain about 80% of the cloth used from sources outside of Massachusetts. At least 80% of the finished sportswear

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[1] Section 1 of the Act of July 2, 1890, c. 647, 26 Stat. 209, as amended, 15 U. S. C. § 1.

[2] 15 U. S. C. § 29; 28 U. S. C. § 2101.

is sold and shipped to customers outside of that State. Thus the industry in Massachusetts subsists on a constant influx of cloth and outgo of garments which pass through the hands of the stitching contractors for an essential operation.

Our next inquiry is whether the accused combination, which is made up of stitching contractors, has imposed upon this interstate trade restraints of a character and magnitude to violate the Sherman Act. The Association is made up of members who handle at least 50% of all sportswear produced in Boston. The cost of this contractor's operation is about 25% of the jobber's sale price, and its variations are reflected in wholesale and retail prices. The Association's executive director took steps to induce jobbers to enter into a written agreement, among other things, to employ only members of the Association, refrain from dealing with nonmembers, and accept no secret price rebates. When the jobbers hesitated, stoppage of production was threatened; and when they refused because they were advised that it would violate antitrust laws, the Association ordered contractors to stop work for three jobbers, which was done, and work for them was not resumed until the jobbers obtained a state court injunction. The proposed agreement was then revised and ultimately was signed by twenty-one jobbers who handle a gross annual volume of about $8,800,000, that being a substantial portion of the Boston output.

The agreement in final form, together with the circumstances of its making, is alleged to constitute an illegal restraint of trade. Terms relevant to the issue require jobbers to give all of their work to available Association members who are in good standing with the International Ladies' Garment Workers' Union, provided such contractors are "comparable" as to price and quality of work with nonmember contractors having contracts with the same Union. The jobber is to furnish a written order speci-

fying price and is forbidden to receive secret rebates. A jobber can give work to a nonmember only in continuance of an existing relationship. The jobber will give no new contract to any stitcher who ceases to be a member of the Association. The Association agrees to assist the jobber in getting sufficient contractors as the amount of his work "may equitably require," and the jobber agrees that he will divide his work "as equally and equitably as possible among the Association Contractors engaged by him." The District Court found that one of the purposes of the Association was to maintain the standard of prices. The Government also recites evidence suggesting that the Association policed the membership to prevent price competition and excluded from membership "new comers in the trade."

In the light of its origin and the circumstances of the industry, it seems clear that the intent and effect of the agreement is substantially to restrict competition and to control prices and markets. It prohibits the jobbers from awarding work to others (with minor exceptions) unless their prices are not "comparable" to those of Association members. It effects for Association members a virtual monopoly of work at "comparable" prices. Work given to members must be allocated "equitably," not by reference to price or quality of work. And it apparently contemplates boycott by the Association of jobbers who do not subscribe to these terms. That such a contract restrains trade in violation of the Sherman Act is obvious, even if the restraints in actual practice under it do not go beyond its express terms, which the evidence indicates to be likely.

It is argued that inclusion of the labor provisions makes the agreement immune from attack under the antitrust laws. The stitching contractor, although he furnishes chiefly labor, also utilizes the labor through machines and has his rentals, capital costs, overhead and profits. He

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is an *entrepreneur*, not a laborer. *Cf. Columbia River Packers Association* v. *Hinton*, 315 U. S. 143. The labor provisions were incorporated into the second proposal after the first was rejected as violating the antitrust laws and seem to give nothing to labor that it was not already getting for itself from other as well as from these manufacturers. The restraints here went beyond limiting work to Union shops; it limited it to those Union shops also members of the Association. The trial court found no evidence that the Union participated in making the agreement. And if it did, benefits to organized labor cannot be utilized as a cat's-paw to pull employers' chestnuts out of the antitrust fires. *Allen Bradley Co.* v. *Local Union No. 3*, 325 U. S. 797.

The trial court appears to have dismissed the case chiefly on the ground that the accused Association and its members were not themselves engaged in interstate commerce. This may or may not be the nature of their operation considered alone, but it does not matter. Restraints, to be effective, do not have to be applied all along the line of movement of interstate commerce. The source of the restraint may be intrastate, as the making of a contract or combination usually is; the application of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the states. If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.

The manifest purpose and intent of the contract in question was to restrain the jobbers from free choice among stitching contractors on equal terms. The business affected by the restraint is interstate commerce. The volume affected is substantial. While the restraint of the final contract is more moderate than the one first attempted and its dollar-and-cents effect on the commerce

might be difficult to appraise, it is sufficient to warrant judgment canceling the contract and enjoining carrying out of the plan it embodies.

The judgment is

Reversed.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD CO. ET AL. *v.* ACME FAST FREIGHT, INC.

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

No. 65. Argued December 8, 1948.—Decided April 4, 1949.

Under Part IV of the Interstate Commerce Act and specifically 49 U. S. C. § 1013, a freight forwarder is a shipper (rather than an initial carrier) *vis-à-vis* the railroads, and must file loss or damage claims against them within the nine-month period specified in the railroad bill of lading. Pp. 466–489.

1. The language and legislative history of § 1013 clearly indicate that forwarders were not given the right-over under 49 U. S. C. § 20 (12) against the railroads. Pp. 479–476.

2. A contrary construction would be out of harmony with the previously existing relationship between forwarders and carriers regulated by Parts I, II and III of the Interstate Commerce Act, which relationship Part IV accepted and continued. Pp. 476–479.

3. The factors which make the Carmack Amendment workable as between carriers are totally absent when the right-over given by 49 U. S. C. § 20 (12) is sought to be extended to freight forwarders. Pp. 479–483.

4. Equitable considerations do not require a different result. Pp. 483–489.

(a) The Act leaves freight forwarders of the kind regulated by Part IV in substantially the same position they previously held with respect to their liability to shippers and their rights against underlying carriers. Pp. 484–487.

(b) That § 20 (11) forbids forwarders to limit to less than nine months the period within which claims must be filed by their shippers and that forwarders must file their claims against the

railroads within the same period is not sufficient to require a different result. The Interstate Commerce Commission has the experience and authority to prescribe the proper corrective for this inconsistency. Pp. 488–489.

166 F. 2d 778, reversed.

In a suit for a declaratory judgment, a federal district court held that under 49 U. S. C. § 1013 a freight forwarder must file loss or damage claims against a railroad within the nine-month period specified by a railroad bill of lading. The Court of Appeals reversed. 166 F. 2d 778. This Court granted certiorari. 335 U. S. 807. *Reversed,* p. 489.

Joseph Walker and *Rowland L. Davis, Jr.* argued the cause for petitioners. With them on the brief were *William F. Zearfaus, Arthur C. Patterson, Thomas L. Ennis, Joseph Rosch* and *H. Brua Campbell.*

Paul A. Crouch argued the cause and filed a brief for respondent.

Mr. Chief Justice Vinson delivered the opinion of the Court.

In 1942, Congress enacted what is popularly known as the Freight Forwarder Act. This legislation, which appears as Part IV [1] of the Interstate Commerce Act, was designed to define freight forwarders, to prescribe certain regulations governing forwarder operations, and to bring this essential transportation business within the control of the Interstate Commerce Commission. The legislative and judicial history culminating in the Act need not now be detailed. See *United States* v. *Chicago Heights Trucking Co.,* 310 U. S. 344 (1940); *Acme Fast Freight, Inc.* v. *United States,* 30 F. Supp. 968, aff'd 309 U. S. 638 (1940).

[1] 56 Stat. 284, 49 U. S. C. § 1001 *et seq.*

Freight forwarders consolidate less-than-carload freight into carloads for shipment by rail, truck, or water. Their charges approximate rail less-than-carload rates; their expenses and profits are derived from the spread between the carload and l. c. l. rates. Forwarders are utilized by l. c. l. shippers because of the speed and efficiency with which they handle shipments, the unity of responsibility obtained, and certain services which forwarders make available.[2]

Forwarders are required by § 413 of the Act, 49 U. S. C. § 1013, to issue bills of lading to their customers, covering the individual package shipment from time of receipt until delivery to the ultimate consignee. When the freight is consolidated into carloads, the railroad gives the forwarder its bill of lading in which the forwarder is designated as both consignor and consignee. The contents are noted as "one carload of mixed merchandise" and usually move under an "all-commodity" carload rate. The destination set out in the railroad bill of lading is the forwarder's break-bulk point. At that point the carload is broken up; some shipments may be distributed locally, some sent by truck to off-line destinations, and some consolidated into carloads for reshipment to further break-bulk points. The railroad has no knowledge of the contents of the car, the identity of the individual shippers, or the ultimate destinations of the consignments. The forwarder has an unqualified right to select the carrier and route for the transportation of the freight.

The forwarder thus has some of the characteristics of both carrier and shipper. In its relations with its customers, a forwarder is subjected by the Act to many of the requirements and regulations applicable to common

[2] For a full description of freight forwarder practices, see *United States* v. *Chicago Heights Trucking Co.*, 310 U. S. 344 (1940); *Freight Forwarding Investigation*, 229 I. C. C. 201; *Bills of Lading of Freight Forwarders*, 259 I. C. C. 277.

carriers under Parts I, II, and III of the Act. In its relations with these carriers, however, the status of the forwarder is still that of shipper. It is this duality of character that raises the question in this case.

Section 1013 [3] provides that the Carmack Amendment, 34 Stat. 593, as amended, 49 U. S. C. § 20 (11) [4] and

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[3] "§ 1013. *Bills of lading and delivery of property.* The provisions of section 20 (11) and (12) of this title, together with such other provisions of chapter 1 of this title (including penalties) as may be necessary for the enforcement of such provisions, shall apply with respect to freight forwarders, in the case of service subject to this chapter, with like force and effect as in the case of those persons to which such provisions are specifically applicable, and the freight forwarder shall be deemed both the receiving and delivering transportation company for the purposes of section 20 (11) and (12) of this title. When the services of a common carrier by motor vehicle subject to chapter 8 of this title are utilized by a freight forwarder for the receiving of property from a consignor in service subject to this chapter, such carrier may, with the consent of the freight forwarder, execute the bill of lading or shipping receipt for the freight forwarder. When the services of a common carrier by motor vehicle subject to chapter 8 of this title are utilized by a freight forwarder for the delivery of property to the consignee named in the freight forwarder's bill of lading, shipping receipt, or freight bill, the property may, with the consent of the freight forwarder, be delivered on the freight bill, and receipted for on the delivery receipt, of the freight forwarder."

[4] So far as pertinent here, § 20 (11) provides: "*Liability of initial and delivering carrier for loss; limitation of liability; notice and filing of claim.* Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation . . . shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, . . . and any such common carrier, railroad, or transportation company so receiving property for transportation . . . shall be liable to the lawful holder of said receipt or

(12),[5] shall apply to freight forwarders "in the case of service subject to this chapter" (Part IV), and that the freight forwarder shall be deemed both the receiving and delivering transportation company for the purposes of such § 20 (11) and (12). Incorporation of the Carmack Amendment requires, as has been noted, that the forwarder issue bills of lading to its shippers, covering transportation of the individual shipments to their ultimate destinations. There can be no question but that under § 20 (11), the forwarder is liable to its shipper for loss or damage to the freight exactly as if it were an initial carrier subject to Parts I, II, and III. We are now asked to decide whether the right-over given by § 20 (12) to an initial carrier against its connecting carriers applies in the case of forwarders who have paid loss and damage claims to their shippers and seek recompense from the carrier responsible for the loss.

In this action, respondent freight forwarder sought a declaratory judgment that it is not bound by the nine-month limitation period provided in the railroad bill of lading for the filing of loss or damage claims. If § 1013, by its incorporation of § 20 (11) and (12), makes the forwarder an initial carrier with a right-over against

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bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not . . .: *Provided further*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law . . . ."

[5] Section 20 (12) provides: "*Recovery by initial or delivering carrier from connecting carrier.* The common carrier, railroad, or transportation company issuing such receipt or bill of lading, or delivering such property so received and transported shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained, the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof."

the carrier responsible for the loss or damage, the nine-month period is not applicable. If, however, the forwarder is still a shipper *vis-à-vis* the railroads, it must file its claims within the period specified in the railroad bill of lading.[6] The District Court held, on an agreed statement of facts, that the forwarder must file its claims within the nine-month period. The Court of Appeals for the Second Circuit reversed, holding that for the purposes of § 1013 alone forwarders are to be considered carriers and as such are entitled to the right-over given by § 20 (12). 166 F. 2d 778. We granted the petition for a writ of certiorari, 335 U. S. 807, to resolve this important question under Part IV of the Interstate Commerce Act.

First. The railroads contend that Part IV of the Act was not intended to change the shipper-carrier relationship that had for many years existed between forwarder and railroad. Their position is that while the previously prevailing duties and responsibilities owed by the forwarder to the public were changed by the Act, the language of the Act and its legislative history negative the forwarder's claim to carrier status. They read the language of § 1013, that "the provisions of section 20 (11) and (12) of this title . . . shall apply with respect to freight forwarders, in the case of service subject to this chapter . . .," to mean that, while the forwarder is liable to its shippers under § 20 (11) for loss or damage no matter whose the ultimate responsibility, its right-over under § 20 (12) is limited to losses or damage occurring

[6] Petitioners also make the contention that even assuming the forwarder is an initial carrier with right-over under § 20 (12), the limitation period provided in § 2 (b) of the railroad bill of lading is effective to modify that right. They point to numerous modifications of the right-over in the Freight Claims Rules applicable to railroads *inter se*. And see Article I (a) of Principles and Practices for the Investigation and Disposition of Freight Claims. Under the view we take of the case, it is unnecessary to reach that question.

in "service subject to this chapter"—*i. e.*, in the business of forwarding freight. Thus limited, the right-over would apply as against other freight forwarders with whom joint loading agreements authorized by § 1004 (d) were in effect, and against motor carriers who are permitted by § 1013 to issue bills of lading on behalf of the forwarders. The right-over would not, however, apply against railroads, water carriers, and line-haul motor carriers.

"Service subject to this chapter" is defined in § 1002 as "any or all of the service in connection with the transportation in interstate commerce which any person undertakes to perform or provide as a freight forwarder . . . ." While use of the word, "provide," lends some support to respondent's thesis that the definition should be read broadly to include the service performed by common carriers for the forwarders, the House Committee report indicates the contrary. It defines "service subject to this chapter" as:

> "the term used throughout part IV when referring to the business or operations of freight forwarders which it is proposed to regulate. The definition is intended to be broad enough to cover *everything the freight forwarder* does, in connection with forwarding by surface facilities, in the course of carrying out his undertaking to the shipper whom he serves. On the other hand, it is not broad enough, of course, to bring under regulation, under part IV, the service performed by the carriers whose services the freight forwarder utilizes in performing his undertaking." [7] (Italics added.)

The emphasis supplied by the phrase is emphasis on the freight forwarder's activities, not upon the service performed by underlying carriers. Since the forwarder

[7] H. R. Rep. No. 1172, 77th Cong., 1st Sess., p. 6.

contracts with its shipper to deliver the shipment safely to its ultimate destination, its undertaking is obviously part of the "service subject to this chapter." But inclusion of that phrase in § 1013 indicates a limitation of applicability of the right-over under § 20 (12) to the forwarder's business, which, we are told by the House Report, does not include "the service performed by the carriers whose services the freight forwarder utilizes in performing his undertaking."

The importance of the phrase, "service subject to this chapter," in the Freight Forwarder Act is accentuated by a contemporaneous amendment to Part II of the Interstate Commerce Act, which pertains to motor carriers. The Motor Carrier Act had made § 20 (11) applicable to motor carriers but had omitted § 20 (12). As a part of the Freight Forwarder legislation, Congress amended § 219 of the Interstate Commerce Act to make § 20 (12) applicable to motor carriers. It did so without including the qualifying phrase. The amendment reads simply:

> "SEC. 219. The provisions of section 20 (11) and (12) of this Act, together with such other provisions of such part (including penalties) as may be necessary for the enforcement of such provisions, shall apply with respect to common carriers by motor vehicle with like force and effect as in the case of those persons to which such provisions are specifically applicable." 56 Stat. 300.

Unless we are to assume that Congress, in enacting § 1013, included the phrase, "in the case of service subject to this chapter," for no purpose whatsoever, while at the same time approving a similar section which did not include the qualifying phrase, we must give it the effect contended for by petitioners. Respondent suggests no other.

That meaning is supported by the explanation of § 1013 given by Representative Wolverton, a member of the

committee which drafted the section. However, doubt is cast upon the correctness of this interpretation by a contrary statement in the House Committee report. This report states flatly that "in case the loss of or damage to the property transported occurs on the line of a carrier whose service the freight forwarder utilizes, the freight forwarder will have the right of subrogation against the carrier under section 20 (12)." [8]

We are warned, however, that the report is to be discounted in some particulars. Representative Wolverton prefaced his section-by-section analysis of the bill with this significant statement:

> "In some respects the report which accompanies this bill is not as complete as it might be. Due to limitations of time the report was not submitted to the members of the committee or subcommittee, and therefore it may not be out of place to include in these remarks some further explanations which may be helpful to the Members in their consideration of the measure. In a few instances, which will be mentioned later, the report may not be so phrased as to convey fully the sense of what was intended." [9]

That he had § 1013 specifically in mind is clearly shown by his remarks explaining that section:

> "In its explanation of section 413 [§ 1013], the report which accompanied the bill is not strictly accurate in interpreting the intended legal effect of making section 20 (11) and (12) of part I applicable to freight forwarders. It should be understood that, insofar as a given service to its shipper is covered by the published rate of a freight forwarder, the latter is the only person to which such shipper is entitled to look for recovery of damages, and it is

[8] *Id.* at 15.

[9] 87 Cong. Rec. 8216.

> in this sense that the forwarder is to 'be deemed both the receiving and delivering transportation company.' If damage to a shipment occurs on the line of a common carrier whose services are being utilized by the forwarder, the forwarder has no right of subrogation under section 20 (12), since its own shipper never had any right of action against such carrier. The forwarder's recovery against the carrier would be upon the bill of lading issued to it by such carrier and under the provisions of law applicable thereto. The reference to paragraph (12) of section 20 was included in section 413 [§ 1013] to cover a combination of services performed directly for the owner of the goods, such as would occur where the services of two or more forwarders were involved." [10]

In weighing the relative importance of this statement and the committee report, a number of additional facts assume importance. The bill under consideration was reported unanimously by the House Committee on Interstate and Foreign Commerce.[11] Congressman Wolverton, who was the ranking minority member of the committee, spoke in behalf of the bill and presented the only extended exposition of its provisions. His explanation of its meaning was not challenged or contradicted by any member of the committee. On the contrary, his part in its draft-

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[10] 87 Cong. Rec. 8220.

[11] It should be noted that, although the debate technically concerned a bill already passed by the Senate (S. 210), the House Committee on Interstate and Foreign Commerce had struck everything following the enacting clause, so the measure actually under consideration was a House amendment. This amendment was made the basis of the bill reported by the conference, and § 1013 was carried over intact from the House amendment. The conference report was adopted by both houses with little debate.

ing was recognized by the chairman of the committee,[12] and his remarks have been quoted as authority by the Interstate Commerce Commission.[13]

In this posture of events, the committee report can be given little weight. A report not previously submitted to members of the committee and expressly contradicted without challenge on the floor of the House by a ranking member of the committee can hardly be considered authoritative. The Committee of Conference, of which Representative Wolverton was a member, adopted § 1013 exactly as it appeared in the House amendment. It bore, at that time, the gloss placed upon it on the floor of the House.[14] Under those circumstances, we cannot construe

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[12] "Mr. LEA. . . . The gentleman from New Jersey [Mr. WOLVERTON], as the ranking minority member, gave unstinted work to these problems and with an ability of which every member of the committee is well aware. I appreciate his good support of this measure today as well as the fine contributions he has made to other important measures we have brought to the House in recent years." 87 Cong. Rec. 8227. Later, during debate on the bill reported by the conference, Chairman Lea said: "I particularly commend the services of the gentleman from New Jersey [Mr. WOLVERTON] who has given much of his time, experience, and ability to this measure. It is fortunate for this country that this body has Members so well qualified by experience and ability to give such service to the Nation." 88 Cong. Rec. 4064.

[13] *Pacific Coast Wholesalers' Association, Investigation of Status,* 269 I. C. C. 504, 513.

[14] In debate on the bill reported out of conference, Representative Wolverton gave a detailed explanation of the changes made by the Committee of Conference in the House amendment to S. 210. He did not comment specifically on the sections which had not been changed in conference, but said: "In general, the balance of the bill now presented is substantially identical with that which was passed by the House on October 23, 1941. At that time I explained and commented on its principal provisions, and, to the extent that they are retained in the present measure, what I there said of them still remains applicable." 88 Cong. Rec. 4068.

the statute to give forwarders the right-over against underlying carriers under § 20 (12).

Second. Such a construction would, moreover, be out of harmony with the previously existing relationship between forwarders and carriers regulated by Parts I, II, and III of the Interstate Commerce Act, a relationship which Part IV unquestionably accepted and continued. Prior to the enactment of the Forwarder Act, this Court held in a number of cases that forwarders are shippers insofar as carriers are concerned, and that the latter cannot discriminate in favor of or against forwarders, nor enter into joint or proportional rates with them absent legislative authority. *Interstate Commerce Commission* v. *Delaware, L. & W. R. Co.,* 220 U. S. 235 (1911); *Great Northern R. Co.* v. *O'Connor,* 232 U. S. 508 (1914); *Lehigh Valley R. Co.* v. *United States,* 243 U. S. 444 (1917); *United States* v. *Chicago Heights Trucking Co., supra; Acme Fast Freight* v. *United States, supra.*

It is clear that this relationship was not altered by the enactment of Part IV. Nowhere in the Act are freight forwarders referred to as carriers. Congress defined the term "freight forwarder" in § 1002 (5) to mean any person which "otherwise than as a carrier subject to" Part I, II, or III of this title consolidates goods for shipment, etc. In one section where, by inadvertence, forwarders were referred to as carriers, an amendment was passed less than two months later striking out "carrier" and substituting "freight forwarder." [15] The statements by

[15] In explanation of this amendment (S. 2642) to § 1017 (b), Senator Reed said: "When we passed the so-called freight forwarders' legislation there was some question as to whether or not a freight forwarder was a common carrier. The Senate bill offered no difficulty with that subject. We did not treat a freight forwarder as a common carrier. We passed Senate bill 210, which went to the House and was referred to the Committee on Interstate and Foreign Commerce. In the House there were a number of bills dealing with the

committee members on the floor of the House [16] leave no doubt that it was not the intent of Congress to alter the forwarders' status as shippers *vis-à-vis* carriers by rail, highway, and water.

The fact that Congress studiously avoided characterizing forwarders as carriers, while at the same time subjecting them to many of the duties and responsibilities of such carriers, serves to emphasize the distinction drawn by the Act. The reason for this distinction has already been suggested. In their relations with shippers, forwarders unquestionably perform functions and have duties similar to the functions and duties of common carriers. Their activities are not essentially different from those of express companies, which are common carriers by definition, under § 1 (3) of the Interstate Commerce Act, 49 U. S. C. § 1 (3). Nevertheless, Congress recog-

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subject. The House struck out everything after the enacting clause and substituted one of its own bills.

"When the conference committee finished its work we thought we had a perfect bill. Later it was found that the drafting service had made a mistake as to one word, so Senate bill 2642 was introduced for the purpose of correcting that error. At one place in the bill which was passed reference was made to a freight forwarder as a carrier. We desire to correct that reference." 88 Cong. Rec. 6115.

[16] Mr. Youngdahl: "Close analysis developed that in many respects freight forwarders, as regards their relations with the actual carriers, are properly to be considered not as carriers but as shippers, and because of this essential difference in character it became necessary to recommend a form of legislation in keeping with that character. Only so, could gross discriminations against other shippers be avoided." 87 Cong. Rec. 8223.

Mr. Wolverton: "Even though they may assume or incur the obligations of a common carrier toward their own shippers, forwarders nevertheless stand in the role of shippers with respect to the actual carriers whose services they utilize." 88 Cong. Rec. 4065. See also, to the same effect, *J. R. Kelly Freight Forwarder Application,* 260 I. C. C. 315, 321. And see *Freight Forwarding Investigation,* 229 I. C. C. 201, 297–304.

nized that forwarders occupy a different position in their dealings with the carriers whose services they utilize.[17] For that reason, they refused to sanction the joint rates that forwarders had established with certain motor carriers. See *Acme Fast Freight, Inc.* v. *United States, supra.* According to Representative Wolverton's statement on the floor of the House, "it would be illogical and anomalous to permit the making of so-called joint rates in such a situation. The maintenance of a joint rate by a carrier and a shipper would be an absurdity. If nevertheless permitted, it would enable such shipper to receive rebates through the medium of divisions of the joint rate." [18] Carriers subject to Parts I, II, and III were permitted by § 1008 to establish so-called "assem-

[17] That the relation between express companies and underlying carriers is much different than the relations between forwarders and such carriers is clearly indicated in a letter from the Interstate Commerce Commission to Chairman Lea of the House Committee on Interstate and Foreign Commerce, which appears at p. 42 of the Hearings before that Committee on H. R. 2764, 79th Cong., 1st Sess. The Commission there said, p. 43: "There is a vast distinction between the relations of forwarders and the Express Agency to the underlying carriers. The Express Agency has an identical contract with each railroad, which would not be true of the forwarder. The profits, if any, accrue to the railroads, whereas under the forwarder arrangement the profits would accrue, as they do now under the joint rates, to the forwarders. The routing of express shipments, although in the control of the Express Agency, must of necessity depend primarily upon available train service rather than upon solicitation by, or concessions from, the transporting carrier, whereas concessions in the amount of compensation to the carrier would be the most important factor in the case of the forwarder. Thus, the considerations which led to the adoption of laws prohibiting unjust discrimination and undue prejudice and preference as between large and influential shippers on the one hand, and smaller shippers on the other, are practically absent in express service, but are highly prominent in forwarder service."

[18] 87 Cong. Rec. 8218.

bling and distribution" rates, which were designed to give the forwarder the benefit of rates lower than those available to other shippers, because of savings to the carriers effected by some services performed by the forwarder. This was thought to be consistent with the position of the forwarder as shipper, however, and such rates could not be lowered beyond an amount which would reflect the savings. It is significant, too, that these rates were not applicable to line-haul or carload freight, but only to the services performed by carriers in bringing less-than-carload shipments from off-line points to the forwarder's concentration point and from break-bulk point to final destination.[19] It is therefore clear beyond argument that Congress intended to preserve the existing shipper-carrier relationship between forwarders and those carriers regulated by Parts I, II, and III of the Act.

Third. The Court of Appeals, while conceding that forwarders are still shippers *vis-à-vis* carriers under the Act, held that for the purposes of § 1013 alone, they are to be regarded as initial carriers, while the railroads, motor vehicles, and boats whose services are utilized by forwarders are to be considered connecting carriers. Respondent goes farther. It contends not only that the liability provisions of the uniform rail bill of lading issued to the forwarder for his carload shipment may be disregarded, but that the railroad need not issue its bill of lading at all. In its view, *Missouri, Kansas & Texas*

[19] Under § 1009, forwarders were permitted to continue operation under joint rates previously established with motor carriers for eighteen months from the date of enactment of Part IV. This provision was thought necessary "In order to provide a reasonable period of adjustment within which rates and charges may be established pursuant to the provisions of section [1008]." Section 1009 was amended by the Act of February 19, 1946, 60 Stat. 21, to permit the filing of joint rates between forwarders and motor carriers under certain circumstances.

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R. Co. v. *Ward,* 244 U. S. 383 (1917), which struck down conditions in the bill of lading issued without consideration by a connecting carrier, is decisive of the invalidity of the conditions imposed by the rail bill of lading here in controversy.

We do not agree, nor can we believe that the contention is seriously made. The underlying carrier's haul involves a different shipment, a different consideration, a different origin, a different destination, and a different consignor and consignee than are involved in the forwarder's undertaking. Furthermore, respondent's contention leads to the conclusion that railroads, whose bills of lading have long been prescribed by the I. C. C. and filed with rail tariffs, must transport freight on bills of lading subject to change at will by the forwarder and possibly different in many respects from the uniform rail bill. See *e. g., Chain Deliveries Express, Inc.,* 260 I. C. C. 149, 151 (1943). That certainly has not been the position taken by the I. C. C. since enactment of Part IV,[20] nor was the contention accepted by either of the courts below in this case.

The real issue is whether, granting that both forwarder and underlying carrier must issue bills of lading, the liability provisions of bills issued by the latter are to be considered null and void when forwarder freight is being hauled. We think that the whole scheme of the Act, its language and history, negative that proposition. As has been noted, the forwarder remains a shipper in its relations with underlying carriers under the Act. It is a shipper to whom carriers are forbidden to give any undue or unreasonable preference *in any respect whatsoever,* under the specific provisions of the Act. § 1004 (c).

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[20] See *e. g., Twin City Shippers Association Freight Forwarder Application,* 260 I. C. C. 307, 309.

On the other hand, forwarders, like other shippers, may discriminate as they choose between carriers. § 1004 (b).

If the liability provisions of the carrier bill of lading are inapplicable, other difficulties are presented. Since they are not bound to use the uniform bill of lading, forwarders may adopt a limitation period for the submission of claims longer than nine months, the minimum period permitted by § 20 (11). Since the rail bill of lading, which prescribes a nine-month period, would apply to all shippers other than shippers by freight forwarder, the former would thus be discriminated against contrary to § 1004 (c).

Similarly, a shipper by freight forwarder might wish to contract for common-law liability by paying the higher tariff to the forwarder, as he must be permitted to do under § 20 (11). *Cincinnati, N. O. & T. P. R. Co.* v. *Rankin,* 241 U. S. 319 (1916). The forwarder, on the other hand, pays the lower declared value rate to the railroad for the carload shipment. If the shipment were lost or damaged, the shipper could undoubtedly recover its actual value from the forwarder, but under ordinary circumstances the latter would be confined to recovery from the railroad of a proportional part of the declared value of the carload shipment. Section 20 (12) provides, however, that the right-over is in the amount of the loss, damage, or injury as may be evidenced by any receipt, judgment, or transcript thereof. Under respondent's theory, its bill of lading would be controlling, and the forwarder would be entitled to full recovery despite the fact that it had contracted with the carrier at the reduced rate. This result is clearly contrary to *Great Northern R. Co.* v. *O'Connor, supra,* which was relied on by the Court of Appeals in the present case.

In addition, the factors which Congress felt made the original Carmack Amendment workable are totally absent

in the case of freight forwarders. Congressman Richardson, in explaining its purpose to the House, said:

> "The reasons inducing us to do that [make the initial carrier liable for loss or damage] was that the initial carrier has a through-route connection with the secondary carrier, on whose route the loss occurred, and a settlement between them will be an easy matter, while the shipper would be at heavy expense in the institution of a suit. If a judgment is obtained against the initial carrier, no doubt exists but the secondary carrier would pay it at once. Why? Because the arrangement, the concert, the cooperation, the through-route courtesies between them would be broken up if prompt payment was not made. We have done that in conference." [21] See *Atlantic Coast Line R. Co.* v. *Riverside Mills,* 219 U. S. 186, 201 (1911).

The railroads have done exactly as was suggested. Elaborate freight-claim rules have been established covering the investigation, settlement, and defense of claims and the allocation of liability between carriers when, as is frequently the case, responsibility for loss or damage cannot be precisely ascertained. Arbitration boards settle disputes arising between carriers under the rules. As a practical matter, the right-over given by § 20 (12) is very little used by carriers, and indeed it is of no value when responsibility cannot definitely be placed upon any one carrier.

The considerations that made § 20 (12) workable as applied to railroads are not, however, applicable to freight forwarders. They enter into no "arrangements," "concerts," "cooperation," or "through-route courtesies" with railroads. As shippers they are forbidden by law to do

[21] 40 Cong. Rec. 9580.

so. Furthermore, the forwarder will always be in the position of a receiving or delivering carrier seeking the right-over against "connecting" carriers, never in the position of a carrier against whom the right-over is asserted. A railroad against which a claim has been filed as receiving or delivering carrier will ordinarily represent the connecting carrier as if no right-over existed, since it must depend in other cases upon similar representation by other roads. Details of such representation are, in fact, prescribed by the Freight Claim Rules, which are subscribed to by nearly all railroads. But the forwarder is always its own representative, and as between its customer, the shipper, and an underlying carrier allegedly responsible for loss or damage, the forwarder's tendency would naturally be to placate the former at the expense of the latter if the right-over existed and was applicable. These facts are, we feel, persuasive that Congress meant the right-over given in § 1013 to extend no farther than to actions against those with whom forwarders are permitted to enter into cooperative arrangements—*i. e.*, against those to whom the forwarder does not bear the relation of shipper.

Fourth. Two arguments are made as to the inequity that will result from requiring forwarders to comply with the requirements of § 20 (11) without giving them the rights of initial carriers under § 20 (12). It is said that Congress could not have intended to make the forwarder an insurer of freight while requiring at the same time that it file and prove claims against carriers as if it were an ordinary shipper. Secondly, it is argued that the forwarder must, under § 20 (11), allow at least nine months for the filing of claims by shippers, and if the forwarder is subject to a similar limitation period, there will necessarily be some claims filed by shippers at the end of the period which the forwarder will not be able to refile against the carrier in time.

The first contention is the result of a serious misconception as to the liability of freight forwarders prior to enactment of Part IV. This misconception is based on a failure to distinguish between two very different kinds of "forwarders." [22] The term was originally applied to persons who arrange for the transportation by common carrier of the shipper's goods. The forwarder did not necessarily consolidate the individual consignments into carload lots, and its duties, as agent of the shipper, went no farther than procuring transportation by carrier and handling the details of shipment. Forwarders of this type charged fees for their services, which the shipper paid in addition to the freight charges of the carrier utilized for the actual transportation.

Later, a different type of forwarding service was offered. This forwarder picked up the less-than-carload shipment at the shipper's place of business and engaged to deliver it safely at its ultimate destination. The freight forwarder charged a rate covering the entire transportation and made its profit by consolidating the shipment with others in carload quantities to take advantage of the spread between carload and l. c. l. rates. It held itself out not merely to arrange with common carriers for the transportation of the goods, but rather to deliver them safely to the consignee. The shipper seldom if ever knew which carrier would be utilized in the carriage of his shipment.

This difference in function was recognized very early by the courts, and differing standards of liability were imposed. When goods handled by an agent-forwarder were lost or damaged, it was liable to the shipper only for its own negligence, including negligence in selecting

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[22] See 1 Hutchinson on Carriers (3d ed.) §§ 71, 80–84; Bunge, Law of Draymen, Freight Forwarders and Warehousemen, p. 111.

a carrier.[23] If, on the other hand, the shipment had been entrusted to a forwarder of the second type—*i. e.*, one who contracted to deliver the goods to the consignee at rates set by itself—the forwarder was subjected to common carrier liability for loss or damage whether it or an underlying carrier had been at fault.[24] The fact that the forwarder did not own the carriers whose services it utilized was held to be immaterial. Its undertaking was to deliver the shipment safely at the destination. Common carrier liability was the penalty for failure of fulfilment of that undertaking.

The Freight Forwarder Act encompasses only the second type of forwarder described above. Section 1002 (a) (5) defines "freight forwarder" as

> "Any person which . . . holds itself out to the general public to transport or provide transportation of property . . . and which, in the ordinary and usual

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[23] *Krender* v. *Woolcott,* 1 Hilt. (N. Y.) 223 (1856); *Heath* v. *Judson Freight Forwarding Co.,* 47 Cal. App. 426, 190 P. 839 (1920); *Mansfield* v. *Chicago Title & Trust Co.,* 199 F. 95 (1912).

[24] The distinction is made in a number of cases, of which the following is typical:

"The defendants were not forwarders, but carriers. . . . A simple engagement to forward goods at New York, marked for a particular destination, is discharged by shipping the goods, by the usual or most direct conveyance, to the place designated; but an agreement to forward them from New York to the place of destination, the charge for freight for the whole distance being specified in the agreement, is very different. It is an agreement to carry them for that distance, or to be responsible for their safe carriage and delivery at the place designated in the agreement." *Krender* v. *Woolcott,* 1 Hilt. (N. Y.) 223, 227 (1856). See also, *Christenson* v. *American Express Co.,* 15 Minn. 270 (1870); *Bare* v. *American Forwarding Co.,* 146 Ill. App. 388 (1909); *Kettenhofen* v. *Globe Transfer & Storage Co.,* 70 Wash. 645, 127 P. 295 (1912); *Highway Freight Forwarding Co.* v. *Public Service Comm'n,* 108 Pa. Super. Ct. 178, 164 A. 835 (1933).

course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) *assumes responsibility for the transportation of such property from point of receipt to point of destination,* and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to chapters 1, 8, or 12 of this title." [25] (Italics added.)

As to this group, as has been pointed out, the liability of common carrier to its shippers has always been the rule. By making § 20 (11) applicable to these forwarders, Congress did two things: (1) required forwarders to issue bills of lading; [26] and (2) made a matter of federal law what had been uniformly adopted by the states as the rule of liability for loss or damage. As applied to railroads, the Carmack Amendment made a significant change, since it prevented the initial carrier from exercising the right given by decision in a majority of states to limit its liability to loss or damage occurring on its own lines. But that right had never been granted to forwarders of the type regulated by Part IV. Their liability has, from the beginning, been extended to loss or damage to the con-

[25] For discussion of the problem of assumption of responsibility for the through transportation of property by freight forwarders, see *Judson-Sheldon Corp. Application,* 260 I. C. C. 473; *Universal Transcontinental Corp. Application,* 260 I. C. C. 521; *J. Nelson Kagarise Application,* 260 I. C. C. 745. Cf. *United States* v. *American Union Transport, Inc.,* 327 U.S. 437 (1946).

[26] Section 20 (11), of course, also includes the Cummins Amendments, 38 Stat. 1196 and 39 Stat. 441, which relate to limitation of liability to the declared value of the shipment. The section adds no new liability, however, to that previously borne by the forwarder.

signment occurring at any time between pick-up at the point of origin and delivery at destination. As shippers, they have, of course, always had a right of action against the underlying carrier at fault. The defense that the goods are not those of the forwarder is not open to the carrier, since, as we have held, the carrier is not concerned with questions of ownership, but must treat the forwarder as shipper. *Interstate Commerce Commission* v. *Delaware, L. & W. R. Co., supra.*

The Act thus leaves the freight forwarder in substantially the same position it had previously held with respect to its liability to shippers and its rights against underlying carriers. The hearings, committee reports and debates are bare of any suggestion that forwarders needed relief from the requirement that they file their claims against carriers like other shippers. They have done so for over a century. They have continued to do so since enactment of the Freight Forwarder Act. See, *e. g., Merchant Shippers Assn.* v. *Kellogg Express & Draying Co.,* 28 Cal. 2d 594, 170 P. 2d 923 (1946); *J. R. Kelly Freight Forwarder Application,* 260 I. C. C. 315, 318 (1944); *Hugh F. Gannon, Inc:, Freight Forwarder Application,* 260 I. C. C. 219, 220 (1944). We would require a much clearer showing than has been made to find that Congress intended, without increasing the liabilities of forwarders regulated by the Act, to give them a right-over against railroads, ship lines, and line-haul motor carriers as initial carriers under § 20 (12).[27]

[27] The Court of Appeals rejected Representative Wolverton's analysis of § 1013 as based on the erroneous premise that the shipper by freight forwarder never had any right of action against the carrier, and therefore the forwarder can have no right of subrogation under § 20 (12). The court felt that this rationale indicates a withdrawal of the shipper's common-law right of recovery against the responsible carrier, and consequently the placing of the forwarder in the position

It is true that under the provisions of § 20 (11) forwarders are now forbidden to limit the period within which claims must be filed by shippers to less than nine months. If forwarders must, in turn, file claims with

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of an insurer with no right against the carrier responsible for loss or damage.

We do not so read that analysis. Of course shippers by freight forwarder have for many years been permitted to sue underlying carriers for loss or damage occasioned by the latter. *New Jersey Steam Navigation Co.* v. *Merchants' Bank*, 6 How. 344 (1848); *Great Northern R. Co.* v. *O'Connor*, 232 U. S. 508 (1914). The theory of these actions was that the shipper is the undisclosed principal of its agent, the forwarder, in the latter's contract with the carrier. The forwarder, as agent of an undisclosed principal, could, of course, sue on the contract. *Merchant Shippers Association* v. *Kellogg Express & Draying Co.*, 28 Cal. 2d 594, 170 P. 2d 923. See Bunge, Law of Draymen, Freight Forwarders and Warehousemen, p. 117. See also Restatement of Agency, §§ 322, 364. On the other hand, when a shipper sued a connecting carrier for loss of goods delivered to an initial carrier by railroad, it did so as a *disclosed* principal. The initial carrier, like the forwarder, acted as agent to contract with the connecting carrier for carriage of goods on the latter's lines, but since it acted for a disclosed principal, it was not a party to the contract. See *Bichlmeir* v. *Minneapolis, St. P. & S. S. M. R. Co.*, 159 Wis. 404, 150 N. W. 508 (1915); 1 Roberts, Federal Liabilities of Carriers, § 386. See also Restatement of Agency § 320.

When the Carmack Amendment was passed, the theory of the liability imposed upon the initial carrier was that it became a principal and all its connecting carriers agents for the transportation of the goods. *Northern Pacific R. Co.* v. *Wall*, 241 U. S. 87 (1916); *Atlantic Coast Line R. Co.* v. *Riverside Mills*, 219 U. S. 186 (1911). Since the initial carrier, unlike the forwarder, did not have a contract right of action against its connecting carriers (*i. e.* was not a shipper), § 20 (12) was passed to insure that the burden would fall on the carrier responsible for the loss. The forwarder, however, is a party to the contract with the carrier. It has no need for subrogation to the shipper's rights, as Representative Wolverton indicated. Its recovery against the carrier has always been upon "the bill of lading issued to it by such carrier and under the provisions of law applicable thereto." That right remains.

carriers within nine months, respondent contends that in the case of claims filed against a forwarder during the last day or two of the period, it will not have enough time to refile the claim with the proper carrier and will thus have no recourse after having paid the claim. This objection obviously applies to an insignificant proportion of the total claims. Furthermore, if the Interstate Commerce Commission considers the matter to be of sufficient importance, it has the experience and authority to prescribe the proper corrective. In any event, this single inconsistency is hardly sufficient to justify the contention that Congress intended that § 1013 be interpreted to make the forwarder an initial carrier with right-over against common carriers who must treat the forwarder as a shipper for all purposes.

The decision of the Court of Appeals is

Reversed.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE RUTLEDGE would affirm the judgment for reasons stated by Judge Frank, writing for the Court of Appeals. See 166 F. 2d 778.

GIBONEY ET AL. *v.* EMPIRE STORAGE & ICE CO.

APPEAL FROM THE SUPREME COURT OF MISSOURI.

No. 182. Argued January 4–5, 1949.—Decided April 4, 1949.

A state court enjoined officers and members of a union of ice peddlers from peacefully picketing appellee's place of business, finding that the sole purpose of the picketing was to induce appellee to agree not to sell ice to non-union peddlers. The State Supreme Court affirmed, holding that picketing for this purpose violated a state statute forbidding agreements in restraint of trade. *Held:* The state law, as construed and applied in this case, does not violate the Federal Constitution, and the judgment is affirmed. Pp. 491–504.

1. States have constitutional power to prohibit dealers and their aiders and abettors from combining to restrain freedom of trade. P. 495.

2. The guaranties of freedom of speech and press stemming from the First and Fourteenth Amendments to the Federal Constitution do not immunize members of labor unions from such a valid state law. Pp. 495–497.

3. Nor do they prevent state courts from enjoining peaceful picketing by members of a labor union in violation of such a valid state law, even though the picketing involves dissemination of truthful information about a labor dispute. *Thornhill* v. *Alabama*, 310 U. S. 88; *Carlson* v. *California*, 310 U. S. 106, distinguished. Pp. 497–504.

(a) The constitutional freedom of speech and press does not immunize speech or writing used as an integral part of conduct in violation of a valid criminal statute. P. 498.

(b) The circumstances here justified restraint of the picketing, since it was engaged in for the sole purpose of inducing a violation of a valid state law. Pp. 501–504.

(c) The State, and not the labor union, has paramount constitutional power to regulate and govern the manner in which certain trade practices may be carried on. P. 504.

357 Mo. 671, 210 S. W. 2d 55, affirmed.

A state trial court enjoined officers and members of a labor union from picketing appellee's place of business

in order to force appellee to enter into an agreement in restraint of trade in violation of Mo. Rev. Stat. Ann., § 8301. The State Supreme Court affirmed. 357 Mo. 671, 210 S. W. 2d 55. On appeal to this Court, *affirmed,* p. 504.

Clif Langsdale argued the cause and filed a brief for appellants. *Clyde Taylor* was also of counsel.

Richard K. Phelps submitted on brief for appellee.

Arthur J. Goldberg, Frank Donner and *Thomas E. Harris* filed a memorandum for the Congress of Industrial Organizations and its affiliated organizations, as *amici curiae,* urging reversal.

MR. JUSTICE BLACK delivered the opinion of the Court.

This case here on appeal under 28 U. S. C. § 1257 raises questions concerning the constitutional power of a state to apply its anti-trade-restraint law [1] to labor union activities, and to enjoin union members from peaceful picketing carried on as an essential and inseparable part of a course of conduct which is in violation of the state

[1] "*Combinations in restraint of trade declared a conspiracy*

"Any person who shall create, enter into, become a member of or participate in any pool, trust, agreement, combination, confederation or understanding with any person or persons in restraint of trade or competition in the importation, transportation, manufacture, purchase or sale of any product or commodity in this state, or any article or thing bought or sold whatsoever, shall be deemed and adjudged guilty of a conspiracy in restraint of trade, and shall be punished as provided in this article." Mo. Rev. Stat. Ann. § 8301 (1939).

And § 8305 provides that anyone violating § 8301 "shall be adjudged guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the penitentiary not exceeding five years, or by imprisonment in the county jail not exceeding one year, or by a fine of not less than five hundred dollars nor more than five thousand dollars, or by both such fine and imprisonment." Mo. Rev. Stat. Ann. § 8305 (1939).

law. The picketing occurred in Kansas City, Missouri. The injunction was issued by a Missouri state court.

The appellants are members and officers of the Ice and Coal Drivers and Handlers Local Union No. 953, affiliated with the American Federation of Labor. Its membership includes about 160 of 200 retail ice peddlers who drive their own trucks in selling ice from door to door in Kansas City. The union began efforts to induce all the nonunion peddlers to join. One objective of the organizational drive was to better wage and working conditions of peddlers and their helpers. Most of the nonunion peddlers refused to join the union. To break down their resistance the union adopted a plan which was designed to make it impossible for nonunion peddlers to buy ice to supply their retail customers in Kansas City. Pursuant to the plan the union set about to obtain from all Kansas City wholesale ice distributors agreements that they would not sell ice to nonunion peddlers. Agreements were obtained from all distributors except the appellee, Empire Storage and Ice Company. Empire refused to agree. The union thereupon informed Empire that it would use other means at its disposal to force Empire to come around to the union view. Empire still refused to agree. Its place of business was promptly picketed by union members although the only complaint registered against Empire, as indicated by placards carried by the pickets, was its continued sale of ice to nonunion peddlers.

Thus the avowed immediate purpose of the picketing was to compel Empire to agree to stop selling ice to nonunion peddlers. Missouri statutes, set out in note 1, make such an agreement a crime punishable by a fine of not more than $5,000 and by imprisonment in the penitentiary for not more than five years. Furthermore, under § 8308 of the Missouri Revised Statutes Ann.

(1939), had Empire made the agreement, the ice peddlers could have brought actions for triple damages for any injuries they sustained as a result of the agreement.

About 85% of the truck drivers working for Empire's customers were members of labor unions. These union truck drivers refused to deliver goods to or from Empire's place of business. Had any one of them crossed the picket line he would have been subject to fine or suspension by the union of which he was a member.

Because of the foregoing facts shown either by admissions, by undisputed evidence, or by unchallenged findings, the picketing had an instantaneous adverse effect on Empire's business. It was reduced 85%. In this dilemma, Empire was faced with three alternatives: It could continue to sell ice to nonunion peddlers, in which event it would be compelled to wage a fight for survival against overwhelming odds; it could stop selling ice to nonunion peddlers thereby relieving itself from further conflict with the union, in which event it would be subject to prosecution for crime and suits for triple damages; it could invoke the protection of the law. The last alternative was adopted.

Empire's complaint charged that the concerted efforts of union members to restrain Empire from selling to nonunion members was a violation of the anti-trade-restraint statute and that an agreement by Empire to refuse to make such sales would violate the same statute. It prayed for an injunction against the picketing. In answering, appellants asserted a constitutional right to picket Empire's premises in order to force it to discontinue sale of ice to nonunion peddlers. They contended that their right to do so was "guaranteed by the First and Fourteenth Amendments" because there was "a labor dispute existing" between appellants and appellee, and because the picketers publicized only the truthful infor-

mation that appellee was "selling ice to peddlers who are not members of the said defendants' union."

The trial court heard evidence, made findings and issued an injunction restraining the appellants from "placing pickets or picketing around or about the buildings" of Empire.

The State Supreme Court affirmed. 357 Mo. 671, 210 S. W. 2d 55. It agreed with the findings of the trial court that the conduct of appellants was pursuant to a local transportation combination used to compel Empire to stop selling ice to nonunion peddlers and that the purpose of the picketing was to force Empire to become a party to such combination. It held that such activities were unlawful because in violation of § 8301 of the Missouri statutes and further held that the injunction to prevent picketing for such unlawful purpose did not contravene the appellants' right of free speech.

In this Court appellants do not raise problems similar to those discussed in *Near* v. *Minnesota,* 283 U. S. 697, relating to censorship prior to publication as distinguished from sanctions to be imposed after publication, nor are their objections to the form, language, or scope of the injunction. See *Milk Wagon Drivers* v. *Meadowmoor Dairies,* 312 U. S. 287, 297–298, also dissenting opinion, 299–303. Attacking the Missouri statute as construed and applied, appellants broadly challenge the power of the state to issue any injunction against their conduct since, they assert, the primary objective of their combination and picketing was to improve wage and working conditions. On this premise they argue that their right to combine, to picket, and to publish must be determined by focusing attention exclusively upon their lawful purpose to improve labor conditions, and that their violation of the state anti-trade-restraint laws must be dismissed as merely incidental to this lawful purpose.

First. That states have constitutional power to prohibit competing dealers and their aiders and abettors from combining to restrain freedom of trade is beyond question. *Watson* v. *Buck,* 313 U. S. 387, 403–404. In speaking of the Missouri statutory antecedent of the statute here challenged, this Court said: "The purpose of such statutes is to secure competition and preclude combinations which tend to defeat it. . . . There is nothing in the Constitution of the United States which precludes a State from adopting and enforcing such policy. To so decide would be stepping backwards." *International Harvester Co.* v. *Missouri,* 234 U. S. 199, 209. Agreements and combinations not to sell to or buy goods from particular persons, or to dictate the terms under which transportation will be supplied, are well recognized trade restraint practices which both state and national legislation can and do prohibit. *Grenada Lbr. Co.* v. *Mississippi,* 217 U. S. 433, 440–441; *Eastern States Lbr. Assn.* v. *United States,* 234 U. S. 600, 612–614; *Fashion Guild* v. *Trade Comm'n,* 312 U. S. 457, 465; *United States* v. *Freight Assn.,* 166 U. S. 290, 324–325.

Second. It is contended that though the Missouri statute can be applied validly to combinations of businessmen who agree not to sell to certain persons, it cannot be applied constitutionally to combinations of union workers who agree in their self-interest to use their joint power to prevent sales to nonunion workers. This contention appears to be grounded on the guaranties of freedom of speech and press stemming from the Fourteenth and First Amendments. Aside from the element of disseminating information through peaceful picketers, later discussed, it is difficult to perceive how it could be thought that these constitutional guaranties afford labor union members a peculiar immunity from laws against trade restraint combinations, unless, as appellants contend, labor unions are

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given special constitutional protection denied all other people.[2]

The objective of unions to improve wages and working conditions has sometimes commended itself to Congress and to state legislatures. To the extent that the states or Congress, for this or other reasons, have seen fit to exempt unions from antitrust laws, this Court has sustained legislative power to grant the exemptions. *International Harvester Co.* v. *Missouri,* 234 U. S. 199; *Allen Bradley Co.* v. *Union,* 325 U. S. 797, 810–811; *United States* v. *Hutcheson,* 312 U. S. 219, 232–234; and see *Tigner* v. *Texas,* 310 U. S. 141. On the other hand, where statutes have not granted exemptions, we have declared that violations of antitrust laws could not be defended on the ground that a particular accused combination would not injure but would actually help manufacturers, laborers, retailers, consumers, or the public in general. *Fashion Guild* v. *Trade Comm'n,* 312 U. S. 457, 467–468. More than thirty years ago this Court said (*International Harvester Co.* v. *Missouri, supra,* at 209): "It is too late in the day to assert against statutes which forbid combinations of competing companies that a particular combination was induced by good intentions . . . ." See also *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 220–221; *Mandeville Farms* v. *Sugar Co.,* 334 U. S. 219, 242–243.

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[2] Appellants say, after quoting from a concurring opinion in *United States* v. *Hutcheson,* 312 U. S. 219, 243, "We believe, therefore, that it is perfectly clear that a state may not apply either statutory or common law policies concerning restraint of trade to illegalize combinations among workingmen for the purpose of eliminating wage competition throughout a trade or industry." And petitioners further argue that a state may not "make it unlawful for an employer to acquiesce in union demands that he refrain from supplying goods to nonunion peddlers . . . ."

The foregoing holdings rest on the premise that legislative power to regulate trade and commerce includes the power to determine what groups, if any, shall be regulated, and whether certain regulations will help or injure businessmen, workers, and the public in general.[3] In making this determination Missouri has decided to apply its law without exception to *all* persons who combine to restrain freedom of trade. We are without constitutional authority to modify or upset Missouri's determination that it is in the public interest to make combinations of workers subject to laws designed to keep the channels of trade wholly free and open. To exalt all labor union conduct in restraint of trade above all state control would greatly reduce the traditional powers of states over their domestic economy and might conceivably make it impossible for them to enforce their anti-trade-restraint laws. See *Allen Bradley Co.* v. *Union,* 325 U. S. 797, 810. More than that, if for the reasons here contended states cannot subject union members to such anti-trade-restraint laws as Missouri's, neither can Congress. The Constitution has not so greatly impaired the states' or nation's power to govern.

Third. It is contended that the injunction against picketing adjacent to Empire's place of business is an unconstitutional abridgment of free speech because the

[3] In the *International Harvester Co.* case, 234 U. S. 199, the then Missouri statute was construed as inapplicable to combinations of purchasers and laborers. For this reason the statute was challenged as denying equal protection of the laws. Replying to the challenge, this Court said at p. 210: "Whether it would have been better policy to have made such comprehensive classification it is not our province to decide. In other words, whether a combination of wage earners or purchasers of commodities called for repression by law under the conditions in the State was for the legislature of the State to determine."

picketers were attempting peacefully to publicize truthful facts about a labor dispute. See *Thornhill* v. *Alabama,* 310 U. S. 88, 102, and *Allen Bradley Co.* v. *Union,* 325 U. S. 797, 807, note 12. But the record here does not permit this publicizing to be treated in isolation. For according to the pleadings, the evidence, the findings, and the argument of the appellants, the sole immediate object of the publicizing adjacent to the premises of Empire, as well as the other activities of the appellants and their allies, was to compel Empire to agree to stop selling ice to nonunion peddlers. Thus all of appellants' activities—their powerful transportation combination, their patrolling, their formation of a picket line warning union men not to cross at peril of their union membership, their publicizing—constituted a single and integrated course of conduct, which was in violation of Missouri's valid law. In this situation, the injunction did no more than enjoin an offense against Missouri law, a felony.

It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now. Nothing that was said or decided in any of the cases relied on by appellants calls for a different holding.

Neither *Thornhill* v. *Alabama, supra,* nor *Carlson* v. *California,* 310 U. S. 106, both decided the same day, supports the contention that conduct otherwise unlawful is always immune from state regulation because an integral part of that conduct is carried on by display of placards by peaceful picketers. In both these cases this Court struck down statutes which banned all dissemination of information by people adjacent to certain premises, pointing out that the statutes were so broad that they could not only be utilized to punish conduct plainly

illegal but could also be applied to ban all truthful publications of the facts of a labor controversy. But in the *Thornhill* opinion, at pp. 103–104, the Court was careful to point out that it was within the province of states "to set the limits of permissible contest open to industrial combatants." See *Lincoln Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U. S. 525, 536; *Allen-Bradley Local* v. *Board,* 315 U. S. 740, 748–751. Further emphasizing the power of a state "to set the limits of permissible contest open to industrial combatants" the Court cited with approval the opinion of Mr. Justice Brandeis in *Duplex Printing Co.* v. *Deering,* 254 U. S. 443, at 488. On that page the opinion stated:

> "The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands. This is the function of the legislature which, while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat."

After emphasizing state power over industrial conflicts, the Court in the *Thornhill* opinion went on to say, at p. 104, that states may not "in dealing with the evils arising from industrial disputes . . . impair the effective exercise of the right to discuss freely industrial relations . . . ." This statement must be considered in its context. It was directed toward a sweeping state prohibition which this Court found to embrace "nearly every practicable, effective means whereby those interested—including the employees directly affected—may enlighten the public on the nature and causes of a labor dispute."

That the general statement of the limitation of a state's power to impair free speech was not intended to apply to the fact situation presented here is further indicated by the cases cited with approval in note 21 of the *Thornhill* opinion.[4]

Appellants also rely on *Carpenters Union* v. *Ritter's Cafe,* 315 U. S. 722, and *Bakery Drivers Local* v. *Wohl,* 315 U. S. 769, decided the same day. Neither lends support to the contention that peaceful picketing is beyond legislative control. The Court's opinion in the *Ritter* case approvingly quoted a part of the *Thornhill* opinion which recognized broad state powers over industrial conflicts. In the *Wohl* case, the Court's opinion at p. 775 found no "violence, force or coercion, or conduct otherwise unlawful or oppressive" and said that

[4] *Eastern States Lumber Dealers* v. *United States,* 234 U. S. 600, was cited in note 21. In that case the lumber association was a combination of retail lumber dealers found by the court to have conspired to prevent wholesale dealers from selling directly to consumers of lumber. The sole basis for the injunction was the distribution and dissemination of truthful information by the association to its members in an official report. This Court sustained the decree which broadly enjoined the distribution of this truthful information.

The cases cited in note 21 of the *Thornhill* opinion include the following, strongly emphasizing states' powers to regulate their internal industrial and economic affairs and rejecting contentions that challenged regulations violated the Federal Constitution. *Senn* v. *Tile Layers Union,* 301 U. S. 468; *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379; *Nebbia* v. *New York,* 291 U. S. 502; *Dorchy* v. *Kansas,* 272 U. S. 306; *Aikens* v. *Wisconsin,* 195 U. S. 194; *Holden* v. *Hardy,* 169 U. S. 366. Another case cited in note 21 of the *Thornhill* opinion was *Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436. It also involved a violation of the federal antitrust laws, and once again this Court sustained the power of the Government to enjoin trade practices deemed in violation of those laws. The only other case cited in note 21, *Labor Board* v. *Newport News Co.,* 308 U. S. 241, sustained an order against an employer which restrained it from using its influence over employees to interfere with their activities.

"A state is not required to tolerate in all places . . . even peaceful picketing by an individual." A concurring opinion in the *Wohl* case, at pp. 776–777, pointed out that picketing may include conduct other than speech, conduct which can be made the subject of restrictive legislation. No opinions relied on by petitioners assert a constitutional right in picketers to take advantage of speech or press to violate valid laws designed to protect important interests of society.[5]

We think the circumstances here and the reasons advanced by the Missouri courts justify restraint of the picketing which was done in violation of Missouri's valid law for the sole immediate purpose of continuing a violation of law. In holding this, we are mindful of the essential importance to our society of a vigilant protection of freedom of speech and press. *Bridges* v. *California,* 314 U. S. 252, 263. States cannot consistently

[5] Both parties here rely on the *Ritter* case. Empire contends that this Court affirmed the action of the Texas courts on the basis of the state's antitrust law. Appellants argue that this Court upheld the Texas injunction on the ground that the business picketed did not bear a sufficiently close relation to the labor dispute to justify picketing at that place. Since the Court relied on this ground, appellants contend that the Court impliedly rejected the contention that the injunction was justified because of an alleged violation of the antitrust laws. This Court's opinion in the *Ritter* case, as well as the dissents, did emphasize questions other than the antitrust act contentions. The Court of Civil Appeals of Texas had not mentioned the Texas antitrust laws in its first or second opinion in the *Ritter* case. 138 S. W. 2d 223, 149 S. W. 2d 694. A third opinion, denying rehearing, did make reference for the first time to the state's antitrust laws, but did not definitely point out in what way the picketers' conduct violated any specific provision of these laws. 149 S. W. 2d 694, 699. Under these circumstances nothing that was said in the *Ritter* opinion stands for the principle that speech and writings, utilized as a part of conduct engaged in only to break a valid anti-trade-restraint law, render that course of conduct immune from state control.

with our Constitution abridge those freedoms to obviate slight inconveniences or annoyances. *Schneider* v. *State,* 308 U. S. 147, 162. But placards used as an essential and inseparable part of a grave offense against an important public law cannot immunize that unlawful conduct from state control. *Virginia Electric Co.* v. *Board,* 319 U. S. 533, 539; *Thomas* v. *Collins,* 323 U. S. 516, 536, 537, 538, 539–540. Nor can we say that the publication here should not have been restrained because of the possibility of separating the picketing conduct into illegal and legal parts. *Thomas* v. *Collins, supra,* at 547. For the placards were to effectuate the purposes of an unlawful combination, and their sole, unlawful immediate objective was to induce Empire to violate the Missouri law by acquiescing in unlawful demands to agree not to sell ice to nonunion peddlers. It is true that the agreements and course of conduct here were as in most instances brought about through speaking or writing. But it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. See *e. g., Fox* v. *Washington,* 236 U. S. 273, 277; *Chaplinsky* v. *New Hampshire,* 315 U. S. 568. Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society.

The interest of Missouri in enforcement of its antitrust laws cannot be classified as an effort to outlaw only a slight public inconvenience or annoyance. The Missouri policy against restraints of trade is of long standing and is in most respects the same as that which the Federal Government has followed for more than half a century. It is clearly drawn in an attempt to afford all persons an equal oppor-

tunity to buy goods. There was clear danger, imminent and immediate, that unless restrained, appellants would succeed in making that policy a dead letter insofar as purchases by nonunion men were concerned. Appellants' power with that of their allies was irresistible. And it is clear that appellants were doing more than exercising a right of free speech or press. *Bakery Drivers Local* v. *Wohl,* 315 U. S. 769, 776–777. They were exercising their economic power together with that of their allies to compel Empire to abide by union rather than by state regulation of trade.[6]

What we have said emphasizes that this is not a case in which it can be assumed that injury from appellants' conduct would be limited to this single appellee. *Thornhill* v. *Alabama,* 310 U. S. 88, 104–105. Missouri, acting within its power, has decided that such restraints of trade as petitioners sought are against the interests

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[6] "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulation." *Bakery Drivers Local* v. *Wohl, supra,* at 776–777.

The opinion in *Thomas* v. *Collins,* 323 U. S. 516, 537–538 stated: ". . . When to this persuasion other things are added which bring about coercion, or give it that character, the limit of the right has been passed. . . . But short of that limit the employer's freedom cannot be impaired. The Constitution protects no less the employees' converse right. Of course espousal of the cause of labor is entitled to no higher constitutional protection than the espousal of any other lawful cause. It is entitled to the same protection."

A concurring opinion in *Thomas* v. *Collins,* at 543–544, stated this: "But once he uses the economic power which he has over other men and their jobs to influence their action, he is doing more than exercising the freedom of speech protected by the First Amendment. That is true whether he be an employer or an employee. But as long as he does no more than speak he has the same unfettered right, no matter what side of an issue he espouses."

of the whole public. This decision is in accord with the general ideas underlying all anti-trade-restraint laws. It is not for us to overrule this clearly adopted state policy.

While the State of Missouri is not a party in this case, it is plain that the basic issue is whether Missouri or a labor union has paramount constitutional power to regulate and govern the manner in which certain trade practices shall be carried on in Kansas City, Missouri. Missouri has by statute regulated trade one way. The appellant union members have adopted a program to regulate it another way. The state has provided for enforcement of its statutory rule by imposing civil and criminal sanctions. The union has provided for enforcement of its rule by sanctions against union members who cross picket lines. See *Associated Press* v. *United States,* 326 U. S. 1, 19; *Fashion Guild* v. *Trade Comm'n, supra,* at 465; *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211, 242. We hold that the state's power to govern in this field is paramount, and that nothing in the constitutional guaranties of speech or press compels a state to apply or not to apply its anti-trade-restraint law to groups of workers, businessmen or others. Of course this Court does not pass on the wisdom of the Missouri statute. We hold only that as here construed and applied it does not violate the Federal Constitution.

Affirmed.

Syllabus.

UNITED STATES *v.* KNIGHT.

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

No. 406. Argued March 4, 1949.—Decided April 4, 1949.

1. Respondent was indicted for aiding and abetting a trustee in bankruptcy to appropriate property of the bankruptcy estate in violation of the Bankruptcy Act, and for conspiring to do so. The case hinged on whether certain funds received by the trustee and his counsel, and for which they did not account, were funds of the estate or gifts by a third party from his own property. There was substantial evidence to support either view. The jury found respondent guilty and he was sentenced to pay a fine. The Court of Appeals reversed his conviction and directed entry of a judgment of acquittal. *Held:* The Court of Appeals' reversal was an improper interference with the jury function, and its judgment is reversed. Pp. 506–509.
2. All of the consideration which is paid for a bankrupt's assets becomes part of the estate; and no device or arrangement, however subtle, can subtract or divert any of it. Pp. 508–509.
3. A different result is not required in this case by the claim that the funds in question were paid by the purchaser of the assets at a time when the rights of creditors and stockholders in the estate had been fixed and all allowances had been determined. P. 509.

169 F. 2d 1001, reversed.

Respondent was convicted for aiding and abetting a violation of the Bankruptcy Act and for conspiracy. The Court of Appeals reversed. 169 F. 2d 1001. This Court granted certiorari. 335 U. S. 901. *Reversed,* p. 509.

Philip R. Monahan argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Campbell* and *Robert S. Erdahl.*

Robert T. McCracken argued the cause for respondent. With him on the brief were *George G. Chandler* and *J. Julius Levy.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Robert Michael was trustee in bankruptcy of the Central Forging Co. and Donald Reifsnyder was his counsel. Maxi Manufacturing Co. was a competitor of Central and one of its creditors. George Fenner and respondent Harry S. Knight were attorneys for Maxi. After negotiations which it is unnecessary to relate here, a plan of reorganization under ch. X of the Bankruptcy Act, 52 Stat. 883, 11 U. S. C. § 501 *et seq.*, was approved by the court and accepted by more than two-thirds of the creditors. Under this plan Maxi was to acquire all the assets of Central; the stockholders of Central were to receive nothing; the secured creditors of Central were to receive 20 per cent and its unsecured creditors 5 per cent of their claims in bonds of Maxi; and all taxes, costs, and expenses of the reorganization were to be paid in full in cash by the trustee. The cash requirements of the plan were to be furnished by Maxi.

The amount of those requirements and the nature of Maxi's commitment are sources of the present controversy. Michael and Reifsnyder concededly obtained funds in connection with the reorganization for which they did not account. It is the theory of the prosecution that those funds were part of the bankruptcy estate. It is the theory of the defense that they were gifts by Maxi of its own property.

There was evidence (including Michael's testimony in this case and one construction of respondent's testimony concerning the same transactions in an earlier contempt case against Michael) that Maxi agreed to pay $26,404.33 in cash for Central's net current assets in addition to the $17,000 in bonds. If this version of the transaction were believed, there was a scheme to value the assets of Central at $3,000 less than $26,404.33 and to divert the $3,000 to Michael's and Reifsnyder's own ends.

There was another version of this phase of the plan which is also supported by evidence, *viz.* that Maxi was to pay in cash all expenses of the reorganization provided they did not exceed $26,404.33. In this view the difference between $26,404.33 and the expenses allowed by the Court, $23,404.33, was Maxi's to do with as it pleased.

The court confirmed the plan and ordered the transfer of all of Central's assets to Maxi on receipt of the bonds and on payment of the costs and expenses as allowed by the court, "within the limits of the funds as set forth in the Trustee's report filed April 15, 1942." That report listed the net current assets of Central at $23,404.33. There was some evidence that the value of those assets had been falsified in the report by deducting $3,000 from the accounts receivable.

The expenses approved by the court and paid by Maxi included allowances for the fees and expenses of Michael and Reifsnyder. Knight arranged for Maxi also to draw a check for $3,000 to Fenner which Fenner cashed and, after deducting $500 for income tax, paid over to Michael and Reifsnyder who never accounted to the court for it.

Knight and Fenner were indicted for aiding and abetting Michael to appropriate property of the bankruptcy estate in violation of the Bankruptcy Act, 30 Stat. 554, as amended, 11 U. S. C. § 52 (a),[1] and for conspiring with Michael and others to do the same. Knight and Fenner were found guilty by a jury on all counts. Knight was fined $1,000. The Court of Appeals reversed his conviction and directed entry of a judgment of acquittal, one

[1] "A person shall be punished by imprisonment for a period of not to exceed five years or by a fine of not more than $5,000, or both, upon conviction of the offense of having knowingly and fraudulently appropriated to his own use, embezzled, spent, or unlawfully transferred any property or secreted or destroyed any document belonging to the estate of a bankrupt which came into his charge as trustee, receiver, custodian, marshal, or other officer of the court."

judge dissenting. 169 F. 2d 1001. The case is here on a petition for certiorari which we granted because of the importance of the ruling in the administration of the Bankruptcy Act.

There was substantial evidence that Maxi agreed to pay $26,404.33 for the net current assets of Central and that Knight was party to a scheme to divert $3,000 of that consideration to the personal ends of Michael and Reifsnyder. It was therefore an improper interference with the jury's function for the Court of Appeals to reject that theory of the case and to accept one which to it seemed more credible. See *Glasser* v. *United States,* 315 U. S. 60, 80; *Kotteakos* v. *United States,* 328 U. S. 750, 763–764.

But even if, as the defense urges, Maxi only agreed to pay expenses up to $26,404.33, the result is the same. Maxi in fact paid that amount. It was paid in connection with the reorganization. It was paid for services allegedly rendered by Michael and Reifsnyder in the proceedings. It was paid secretly and in a devious way. The assets of the estate which were transferred to Maxi were worth $26,404.33. This is a substantial showing that $26,404.33 was in fact paid for the assets and that the form of the arrangement served only to syphon a part of the consideration to Michael and Reifsnyder without court approval.

All the consideration which is paid for a bankrupt's assets becomes part of the estate. No device or arrangement, however subtle, can subtract or divert any of it. It is the substance of the transaction, not its form, which controls. If that requirement were not rigidly enforced, control of the plan of reorganization [2] and control of

[2] Even after confirmation of the plan of reorganization under § 221 of ch. X, it may be altered or modified pursuant to the procedure prescribed in § 222.

allowances [3] would pass from the court to the parties. That would subvert the statutory scheme.

This consequence is sought to be avoided here by the argument that when the $3,000 was diverted to Michael and Reifsnyder, the rights of creditors and stockholders in the estate had been fixed and all the allowances had been determined. It is therefore said that there would have been no rightful claimants to the money had it been paid into court. By that procedure parties would arrogate to themselves the control over the estate which Congress has entrusted to the bankruptcy judge.[4]

Reversed.

MR. JUSTICE MURPHY, MR. JUSTICE JACKSON, and MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this case.

MR. JUSTICE FRANKFURTER, dissenting.

The Court of Appeals, speaking through one of the most conscientious and experienced of judges, thus summarized the problem of the case:

> "The whole transaction was highly reprehensible and it may well have involved the commission of a criminal offense. Indeed under another indictment defendant Michael pleaded guilty to another charge growing out of these occurrences. The question before us, however, is not whether the defendant Knight committed any crime but only whether he aided and abetted Michael to violate Section 29, sub. a, in the manner described in the indictment." 169 F. 2d 1001, 1005.

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[3] See §§ 241–244 of ch. X; *Leiman* v. *Guttman,* 336 U. S. 1.

[4] See note 2, *supra.*

The court concluded that the evidence did not support the charges made in the indictment and that the motion for a directed verdict should have been granted. At the bar of this Court the Government disavowed the presence of any question of law in the case except the question whether the record warranted submission of the case to the jury as the District Court thought, and as the Court of Appeals thought not. The Government conceded unreservedly that the correctness of this decision turns entirely on the facts of this particular case. We ought not to be called upon to canvass a record of 870 pages to determine whether the District Court properly viewed the facts in relation to the charge, or whether the appraisal made by the Court of Appeals was right. I do not propose to do so. One appellate review of the facts should suffice, even when the review goes against the Government.

It having appeared, after the writ of certiorari was granted, that the case merely involves weighing evidence, I think the writ should be dismissed as having been improvidently granted.

FARRELL *v.* UNITED STATES ET AL.

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

No. 267. Argued January 14, 1949.—Decided April 4, 1949.

1. A seaman serving on a merchant vessel, owned and operated by the United States in wartime and docked at a conquered port in the war area, was injured while returning to the ship after overstaying shore leave. He was treated in government hospitals until discharged as completely disabled. There was no possibility of further cure, although medical attention might be required from time to time to relieve recurring conditions. *Held:* The liability for maintenance and cure does not extend beyond the time when the maximum cure possible has been effected, and petitioner is not entitled to maintenance so long as he is disabled or for life. Pp. 512–519.
2. The ship's articles which petitioner signed provided for a foreign voyage from the United States and return and for a term "not exceeding" twelve months. *Held:* He was entitled to wages only until the completion of the voyage and not for twelve months from the date of signing. Pp. 519–521.

167 F. 2d 781, affirmed.

In a suit in admiralty by petitioner against the United States and others, the District Court awarded petitioner less than the amounts he had claimed for maintenance and cure and for wages. The Court of Appeals affirmed. 167 F. 2d 781. This Court granted certiorari. 335 U. S. 869. *Affirmed,* p. 521.

Silas Blake Axtell and *Myron Scott* argued the cause for petitioner. With them on the brief was *G. Lester W. Curry.*

Newell A. Clapp argued the cause for the United States, respondent. With him on the brief were *Solicitor Gen-*

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eral Perlman, Assistant Attorney General Morison, Samuel D. Slade and *Alvin O. West.*

MR. JUSTICE JACKSON delivered the opinion of the Court.

Petitioner, a seaman, brought suit in admiralty to recover damages under the Jones Act, 41 Stat. 1007, 46 U. S. C. § 688, and maintenance, cure and wages under maritime law. The issue of negligence was decided against him by both courts below and the claim is abandoned here. Petition for certiorari to review other issues was granted. 335 U. S. 869.

I. MAINTENANCE AND CURE.

The facts which occasion maintenance and cure for this seaman are not in dispute. The claimant, 22 years of age and in good health, was a member of the Merchant Marine. He was in the service of the S. S. *James E. Haviland,* a merchant vessel owned and operated by the United States as a cargo and troop ship. On February 5, 1944, she was docked at Palermo, Sicily, and Farrell was granted shore leave which required his return to the ship by 6 p. m. of the same day. He overstayed his leave and about eight o'clock began, in rain and darkness, to make his way to the ship. He became lost and was misdirected to the wrong gate, by which he entered the shore-front area about a mile from where the ship lay moored. The area generally was blacked out but petitioner's companion, forty or fifty feet away, saw him fall over a guard chain into a drydock which was lighted sufficiently for night work then in progress. Farrell was grievously injured.

He was treated without expense to himself in various government hospitals until June 30, 1944, when he was

discharged at Norfolk, Virginia, as completely disabled. He is totally and permanently blind and suffers post-traumatic convulsions which probably will become more frequent and are without possibility of further cure. From time to time he will require some medical care to ease attacks of headaches and epileptic convulsions. The court below concluded that the duty of a shipowner to furnish maintenance and cure does not extend beyond the time when the maximum cure possible has been effected. Petitioner contends that he is entitled to maintenance as long as he is disabled, which in this case is for life.

Admittedly there is no authority in any statute or American admiralty decisions for the proposition that he is entitled to maintenance for life. But an argument is based upon the ancient authority of Cleirac, *Jugmens d'Oleron,* Arts. 6 and 7 and notes by Cleirac; *Consolato del Mare,* cc. 182, 137; 2 Pard Coll. Mar. 152; to which American authorities have paid considerable respect. See Story, Circuit Justice, in *Reed* v. *Canfield,* Fed. Cas. No. 11,641, p. 429. A translation of the note relied upon reads:

> "If in defending himself, or fighting against an enemy or corsairs, a mariner is maimed, or disabled to serve on board a ship for the rest of his life, besides the charge of his cure, he shall be maintained as long as he lives at the cost of the ship and cargo. Vide the *Hanseatic* law, art. 35." 1 Peters' Admiralty Decisions (1807), Appendix, p. xv.

Article 35 of the Laws of the Hanse Towns referred to reads:

> "ART. XXXV. The seamen are obliged to defend their ship against rovers, on pain of losing their wages; and if they are wounded, they shall be healed and cured at the general charge of the concerned in

a common average. If anyone of them is maimed and disabled, he shall be maintained as long as he lives by a like average." *Ibid.*, p. civ.

We need not elaborate upon the meanings or weight to be given to these medieval pronouncements of maritime law. As they show, they were written when pirates were not operatic characters but were real-life perils of the sea. When they bore down on a ship, all was lost unless the seaman would hazard life and limb in desperate defense. If they saved the ship and cargo, it was something in the nature of salvage and for their sacrifice in the effort a contribution on principles of average may have been justly due. Perhaps more than humanitarian considerations, inducement to stand by the ship generated the doctrine that saving the ship and her cargo from pirates entitles the seaman to lifelong maintenance if he is disabled in the struggle.

But construe the old-time law with what liberality we will, it cannot be made to cover the facts of this case. This ship was not beset but was snug at berth in a harbor that had capitulated to the United States and her allied forces six months before. No sea rovers, pirates or corsairs appeared to have menaced her. It is true that the ship was engaged in warlike operations and was a legitimate target for enemy aircraft or naval vessels, which made her service a war risk, but at that time and place no enemy attack was in progress or imminent. Even if we pass all this and assume the ship always to have been in potential danger and in need of defense, this seaman at the time of his injury had taken leave of her and he is in no position to claim that he was a sacrifice to her salvation. Far from helping to man the ship at the moment, he was unable to find her; he was lost ashore and not able adequately to take care of himself. However patriotic his motive in enlisting in the service and

however ready he may have been to risk himself for his country, we can find no rational basis for awarding lifetime maintenance against the ship on the theory that he was wounded or maimed while defending her against enemies.

It is claimed, however, even if the basis for a lifetime award does not exist, that he is entitled to maintenance and cure beyond the period allowed by the courts below. This is based largely upon statements in the opinion of the Court in *Calmar Steamship Corp.* v. *Taylor,* 303 U. S. 525. There the question as stated by the Court was whether the duty of a shipowner to provide maintenance and cure for a seaman falling ill of an incurable disease while in its employ, extends to the payment of a lump-sum award sufficient to defray the cost of maintenance and cure for the remainder of his life. The Court laid aside cases where incapacity is caused by the employment and said, "We can find no basis for saying that, if the disease proves to be incurable, the duty extends beyond a fair time after the voyage in which to effect such improvement in the seaman's condition as reasonably may be expected to result from nursing, care, and medical treatment. This would satisfy such demands of policy as underlie the imposition of the obligation. Beyond this we think there is no duty, at least where the illness is not caused by the seaman's service."

It is claimed that when the Court reserved or disclaimed any judgment as to cases where the incapacity is caused "by the employment" or "by the seaman's service" it recognized or created such cases as a separate class for a different measure of maintenance and cure. We think no such distinction exists or was premised in the *Calmar* case. In *Aguilar* v. *Standard Oil Co.,* 318 U. S. 724, the Court pointed out that logically and historically the duty of maintenance and cure derives from

a seaman's dependence on his ship, not from his individual deserts, and arises from his disability, not from anyone's fault. We there refused to look to the personal nature of the seaman's activity at the moment of injury to determine his right to award. Aside from gross misconduct or insubordination, what the seaman is doing and why and how he sustains injury does not affect his right to maintenance and cure, however decisive it may be as to claims for indemnity or for damages for negligence. He must, of course, at the time be "in the service of the ship," by which is meant that he must be generally answerable to its call to duty rather than actually in performance of routine tasks or specific orders.

It has been the merit of the seaman's right to maintenance and cure that it is so inclusive as to be relatively simple, and can be understood and administered without technical considerations. It has few exceptions or conditions to stir contentions, cause delays, and invite litigations. The seaman could forfeit the right only by conduct whose wrongful quality even simple men of the calling would recognize—insubordination, disobedience to orders, and gross misconduct. On the other hand, the master knew he must maintain and care for even the erring and careless seaman, much as a parent would a child. For any purpose to introduce a graduation of rights and duties based on some relative proximity of the activity at time of injury to the "employment" or the "service of the ship," would alter the basis and be out of harmony with the spirit and function of the doctrine and would open the door to the litigiousness which has made the landman's remedy so often a promise to the ear to be broken to the hope.

Nor is it at all clear to us what this particular litigant could gain from introduction of the distinction for which contention is made. If we should concede that larger

measure of maintenance is due those whose injury is caused by the nature of their employment, it would seem farfetched to hold it applicable here. Claimant was disobedient to his orders and for his personal purposes overstayed his shore leave. His fall into a drydock that was sufficiently lighted for workmen to be carrying on repairs to a ship therein was due to no negligence but his own. These matters have not been invoked to forfeit or reduce his usual seaman's right, but it is difficult to see how such circumstances would warrant enlargement of it. We hold that he is entitled to the usual measure of maintenance and cure at the ship's expense, no less and no more, and turn to ascertainment of its bounds.

The law of the sea is in a peculiar sense an international law, but application of its specific rules depends upon acceptance by the United States. The problem of the sick or injured seaman has concerned every maritime country and, in 1936, the General Conference of the International Labor Organization at Geneva submitted a draft convention to the United States and other states. It was ratified by the Senate and was proclaimed by the President as effective for the United States on October 29, 1939. 54 Stat. 1693. Article 4, paragraph 1, thereof, provides: "The shipowner shall be liable to defray the expense of medical care and maintenance until the sick or injured person has been cured, or until the sickness or incapacity has been declared of a permanent character."

While enactment of this general rule by Congress would seem controlling, it is not amiss to point out that the limitation thus imposed was in accordance with the understanding of those familiar with the laws of the sea and sympathetic with the seaman's problems.

The Department of Labor issued a summary of the Convention containing the following on this subject: "The shipowner is required to furnish medical care and

maintenance, including board and lodging, until the disabled person has been cured or the disability has been declared permanent." Robinson, *Admiralty,* p. 300.

Representatives of the organized seamen have recognized and advised Congress of this traditional limitation on maintenance and cure. When Congress has had under consideration substitution of a system of workmen's compensation on the principles of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U. S. C. §§ 901–950, organized seamen, as we have heretofore noted, have steadfastly opposed the change. *Hust* v. *Moore-McCormack Lines,* 328 U. S. 707, 715. In doing so the legal representative of one maritime union advised the Committee on Merchant Marine of the House of Representatives that maintenance extended during "(a) the period that a seaman receives treatment at a hospital either as an in-patient or an out-patient; and (b) during a period of convalescence, and until the maximum cure is obtained."[1] Another representative, after defining it to include hospitalization, said, "In addition a seaman is entitled to recover maintenance while outside of the hospital until his physical condition becomes fixed."[2]

That the duty of the ship to maintain and care for the seaman after the end of the voyage only until he was so far cured as possible, seems to have been the doctrine of the American admiralty courts prior to the adoption of the Convention by Congress,[3] despite occasional ambiguity of language or reservation as to possible

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[1] Hearings before the House Committee on Merchant Marine and Fisheries, 76th Cong., 1st Sess., on H. R. 6726 and H. R. 6881, p. 83.

[2] *Id.,* p. 131.

[3] See, for example, *The Wensleydale,* 41 F. 829; *The Bouker No. 2,* 241 F. 831; *Skolar* v. *Lehigh Valley R. Co.,* 60 F. 2d 893; *The Point Fermin,* 70 F. 2d 602.

situations not before the court. It has been the rule of admiralty courts since the Convention.[4]

Maintenance and cure is not the only recourse of the injured seaman. In an appropriate case he may obtain indemnity or compensation for injury due to negligence or unseaworthiness and may recover, by trial before court and jury, damages for partial or total disability. But maintenance and cure is more certain if more limited in its benefits. It does not hold a ship to permanent liability for a pension, neither does it give a lump-sum payment to offset disability based on some conception of expectancy of life. Indeed the custom of providing maintenance and cure in kind and concurrently with its need has had the advantage of removing its benefits from danger of being wasted by the proverbial improvidence of its beneficiaries. The Government does not contend that if Farrell receives future treatment of a curative nature he may not recover in a new proceeding the amount expended for such treatment and for maintenance while receiving it.

The need of this seaman for permanent help is great and his plight most unfortunate. But as the evidence has afforded no basis for supplying that need by finding negligence, neither does the case afford a basis for distortion of the doctrine of maintenance and cure. This seaman was in the service of the United States and extraordinary measures of relief while not impossible are not properly addressed to the courts.

II. Wages.

The two courts below have held the petitioner entitled to wages until the completion of the voyage at the port

[4] See, for example, *Lindgren* v. *Shepard S. S. Co.*, 108 F. 2d 806; *The Josephine & Mary*, 120 F. 2d 459; *Luksich* v. *Misetich*, 140 F. 2d 812.

of New York on March 28, 1944. The petitioner contends that he has a right to wages for twelve months from December 16, 1943, the date he joined the vessel. The articles of the *Haviland,* signed by petitioner, were on a printed form which left a vacant space subject to the following footnote: "Here the voyage is to be described, and the places named at which the ship is to touch; or, if that cannot be done, the general nature and probable length of the voyage is to be stated, and the port or country at which the voyage is to terminate." The *Haviland's* articles, for security reasons during the war, did not describe the voyage in such terms but provided, "from the Port of Philadelphia, to A point in the Atlantic Ocean to the eastward of Phila. and thence to such ports and places in any part of the world as the Master may direct or as may be ordered or directed by the United States Government or any department, commission or agency thereof . . . and back to a final port of discharge in the United States, for a term of time not exceeding 12 (Twelve) calendar months." It is not questioned that the general custom in ships, other than the coastwise trade, is to sign on for a voyage rather than for a fixed period. But it is contended that the last clause of this contract obligated the petitioner to serve for twelve calendar months, irrespective of the termination of the voyage, and therefore gave him the right to wages for a similar period. The contract is not an uncommon form and complied with war-time requirements as to voyage contracts.[5] We think, in the light of the custom of the industry and the condition of the times, there is nothing ambiguous about it and that it obligated the petitioner only for the voyage on which the ship was engaged when he signed on and that, when it terminated at a port of

[5] 7 Fed. Reg. 2477.

discharge in the United States, he could not have been required to reimbark for a second voyage. The twelve-month period appears as a limitation upon the duration of the voyage and not as a stated period of employment. We think the court below made no error in determining the wages.

For the reasons set forth, the judgment is

Affirmed.

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

I. *Wages.*—The articles bound Farrell to a voyage on the vessel which was en route to "a point in the Atlantic Ocean to the eastward of Phila. and thence to such ports and places in any part of the world as the Master may direct or as may be ordered or directed by the United States Government or any department, commission or agency thereof . . . and back to a final port of discharge in the United States, for a term of time not exceeding 12 (Twelve) calendar months." If this were a coastwise voyage, there would be little question that Farrell could recover his wages for the entire twelve-month period. See *Enochasson* v. *Freeport Sulphur Co.*, 7 F. 2d 675; *Jones* v. *Waterman S. S. Corp.*, 155 F. 2d 992, 996. I agree with Judge Kirkpatrick that the principle of those cases is likewise applicable to foreign voyages. *Shields* v. *United States*, 73 F. Supp. 862, 866. Any difference is not apparent. In each the seaman binds himself for the period. The obligations to pay wages should be coterminous with that responsibility. *Enochasson* v. *Freeport Sulphur Co., supra.* The number of voyages made is therefore immaterial. It is the extent of the voyage that could be demanded that is controlling.

II. *Maintenance and Cure.—Calmar S. S. Corp.* v. *Taylor,* 303 U. S. 525, involved maintenance and cure[1] for an incurable disease which manifested itself during the seaman's employment but was not caused by it. The Court held that the shipowner's liability ended when the seaman was cured as far as possible, reserving the question whether a different rule would apply if the incapacity arose from the employment. P. 530. The question reserved is now presented, for an injury received on returning to a ship from shore leave is plainly incurred in the service. *Aguilar* v. *Standard Oil Co.,* 318 U. S. 724; *Reed* v. *Canfield,* Fed. Cas. No. 11,641. Justice Story was of the view that the ship remained liable until the cure was completed. *Reed* v. *Canfield, supra.* That was in 1832. Intervening decisions in the lower courts qualified that view. It was held that the right to maintenance and cure extended to a reasonable time beyond the end of the voyage.[2] The problem of what was a reasonable time remained. The test adopted by the Court is that it extends through the period when the maximum cure within the reach of medical science has been achieved.

But that test is not sufficiently discriminating.

Even though a maximum cure has been effected, two entirely different states of being may result when the injured man is left totally disabled.

(1) He may be totally disabled but no longer in need of medical aid to care for the condition created by the injury nor without means of providing maintenance. That is not the present case, at least so far as medical care is concerned. And we need not determine what rights to maintenance and cure one so situated has.

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[1] Maintenance includes food and lodging; and cure means care. *The Bouker No. 2,* 241 F. 831, 835.

[2] *The Bouker No. 2, supra; The Mars,* 149 F. 729; *The Eastern Dawn,* 25 F. 2d 322; *The Troy,* 121 F. 901; *Geistlinger* v. *International Mercantile Marine Co.,* 295 F. 176.

(2) One injured in the service of a ship may not only be permanently disabled after reaching the point of maximum cure. He may also be in need of future medical aid to sustain that condition and be without means of maintenance. These needs may extend to end of life. That is the present case, at least so far as medical care is concerned.[3] In this situation payments to give continuing needed care of wounds have been allowed, even though a maximum cure has been effected. *The Josephine & Mary,* 120 F. 2d 459, 462, 464. Cf. *Saunders* v. *Luckenbach Co.,* 262 F. 845, 847.

In the present case an award for maintenance and cure to cover a six-month period after discharge from the hospital was allowed. Nevertheless even though Farrell's expenses of care may be continuing, the district court judge refused any further award. I do not believe that these future expenses should be any less a charge on the ship than past expenses. To conclude as the Court now does that they are not is to ignore in part the salutary policy supporting the doctrine of maintenance and cure.

Maintenance and cure is an ancient doctrine. It reflects in part the concern which the state has had from an early date in a poor and improvident class of workers. See Mr. Justice Story in *Harden* v. *Gordon,* Fed. Cas. No. 6,047. It also recognizes the imperative necessity of the nation to maintain in peace and war a merchant marine.

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[3] The District Court said:

"He will continue to have these spells and to have pain in the area of the fracture. He will need treatment and medical care from time to time and probably some care for the rest of his life. He was always a healthy individual before his accident and never showed any signs of epilepsy before then. The medical testimony also shows that his condition of blindness is permanent, that in all likelihood his convulsive attacks will continue, and possibly become more frequent, and without any possibility of a further cure. The attacks and headaches mentioned will require some care from time to time whenever they persist."

If men are to go down to the sea in ships and face the perils of the ocean, those who employ them must be solicitous of their welfare. Maintenance and cure is an inducement on the part of masters and owners to be solicitous of the health, safety, and welfare of seamen while they are in the service. It gives a degree of security, though injury or sickness be incurred. It gives service in the merchant marine a dignity equal to the important function it performs. It reflects "the great public policy of preserving this important class of citizens for the commercial service and maritime defence of the nation." *Id.* at p. 483.

Accordingly, the injuries of seamen arising out of the service were made a charge against the enterprise to the extent at least of maintenance and cure. Their maintenance and cure was indeed part of the cost of the business. It is nonetheless a legitimate cost though the expense continues beyond the time when a maximum cure has been effected.[4]

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[4] The Shipowners' Liability Convention of 1936, 54 Stat. 1693, does not require a contrary result. Article 4, paragraph 1, provides:

"The shipowner shall be liable to defray the expense of medical care and maintenance until the sick or injured person has been cured, or until the sickness or incapacity has been declared of a permanent character."

But Art. 12 contains a power to depart from that standard in this type of case. It provides:

"Nothing in this Convention shall affect any law, award, custom or agreement between shipowners and seamen which ensures more favourable conditions than those provided by this Convention."

Syllabus.

H. P. HOOD & SONS, INC. *v.* DU MOND, COMMISSIONER OF AGRICULTURE AND MARKETS.

CERTIORARI TO THE SUPREME COURT OF NEW YORK, ALBANY COUNTY.

No. 92. Argued December 13–14, 1948.—Decided April 4, 1949.

Petitioner, a distributor of milk in Massachusetts operating three receiving plants licensed under the Agriculture & Markets Law of New York, applied to the New York Commissioner for a license for an additional plant. The application was denied on the grounds that the proposed expansion of petitioner's facilities would reduce the supply of milk for local markets and would result in destructive competition in a market already adequately served. *Held:* The New York law, so applied, violates the Commerce Clause of the Federal Constitution. Pp. 526–545.

1. A State may not promote its own local economic advantages by curtailing the volume of interstate commerce. Pp. 530–539.

2. The fact that petitioner is licensed to operate its existing plants without condition or limitation as to the quantities of milk it may purchase, does not justify denial of the license for an additional plant. Pp. 539–540.

3. The State's denial of the license on the grounds assigned is not consistent with nor authorized by the Federal Agricultural Marketing Agreement Act. Pp. 540–545.

297 N. Y. 209, 78 N. E. 2d 476, reversed.

Petitioner's application for an extension of its license under the New York Agriculture & Markets Law was denied by the State Commissioner, whose action was affirmed by the New York Court of Appeals over objections to its validity under the Commerce Clause of the Federal Constitution. 297 N. Y. 209, 78 N. E. 2d 476. This Court granted certiorari. 335 U. S. 808. *Reversed,* p. 545.

Warren F. Farr argued the cause and filed a brief for petitioner.

Nathaniel L. Goldstein, Attorney General of New York, and *Robert G. Blabey* submitted on brief for respondent.

MR. JUSTICE JACKSON delivered the opinion of the Court.

This case concerns the power of the State of New York to deny additional facilities to acquire and ship milk in interstate commerce where the grounds of denial are that such limitation upon interstate business will protect and advance local economic interests.

H. P. Hood & Sons, Inc., a Massachusetts corporation, has long distributed milk and its products to inhabitants of Boston. That city obtains about 90% of its fluid milk from states other than Massachusetts. Dairies located in New York State since about 1900 have been among the sources of Boston's supply, their contribution having varied but during the last ten years approximating 8%. The area in which Hood has been denied an additional license to make interstate purchases has been developed as a part of the Boston milkshed from which both the Hood Company and a competitor have shipped to Boston.

The state courts have held and it is conceded here that Hood's entire business in New York, present and proposed, is interstate commerce. This Hood has conducted for some time by means of three receiving depots, where it takes raw milk from farmers. The milk is not processed in New York but is weighed, tested and, if necessary, cooled and on the same day shipped as fluid milk to Boston. These existing plants have been operated under license from the State and are not in question here as the State has licensed Hood to continue them. The controversy concerns a proposed additional plant for the same kind of operation at Greenwich, New York.[1]

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[1] The New York Court of Appeals described the geographical situation with respect to petitioner's present and proposed plants

Article 21 of the Agriculture and Markets Law of New York [2] forbids a dealer to buy milk from producers unless licensed to do so by the Commissioner of Agriculture and Markets. For the license he must pay a substantial fee and furnish a bond to assure prompt payment to producers for milk. Under § 258, the Commissioner may not grant a license unless satisfied "that the applicant is qualified by character, experience, financial responsibility and equipment to properly conduct the proposed business." [3] The Hood Company concededly has met all the foregoing tests and license for an additional plant was not denied for any failure to comply with these requirements.

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as follows: "The extension would have permitted petitioner to operate a milk receiving plant at Greenwich, New York, in addition to petitioner's other similar plants already licensed and operating at Eagle Bridge, Salem and Norfolk, in this State. Eagle Bridge is in Rensselaer County and Salem and Greenwich are in Washington County, Rensselaer County being adjacent to Washington County on the south, and both these counties being on the easterly edge of New York State, bordering on Massachusetts and Vermont. Petitioner's Norfolk establishment is in St. Lawrence County in another part of New York State, and serves a different area and a different group of milk producers. The present Eagle Bridge and Salem depots, however, are quite close together and the proposed Greenwich plant, for which a license has been refused, is ten miles from Salem and twelve miles from Eagle Bridge." 297 N. Y. 209, 212; 78 N. E. 2d 476, 477.

[2] Laws of 1934, c. 126.

[3] Section 258-c provides in pertinent part as follows:

"No license shall be granted to a person not now engaged in business as a milk dealer except for the continuation of a now existing business, and no license shall be granted to authorize the extension of an existing business by the operation of an additional plant or other new or additional facility, unless the commissioner is satisfied that the applicant is qualified by character, experience, financial responsibility and equipment to properly conduct the proposed business, that the issuance of the license will not tend to a destructive competition in a market already adequately served, and that the issuance of the license is in the public interest. . . ."

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The Commissioner's denial was based on further provisions of this section which require him to be satisfied "that the issuance of the license will not tend to a destructive competition in a market already adequately served, and that the issuance of the license is in the public interest."

Upon the hearing pursuant to the statute, milk dealers competing with Hood as buyers in the area opposed licensing the proposed Greenwich plant. They complained that Hood, by reason of conditions under which it sold in Boston, had competitive advantages under applicable federal milk orders, Boston health regulations, and OPA ceiling prices. There was also evidence of a temporary shortage of supply in the Troy, New York market during the fall and winter of 1945–46. The Commissioner was urged not to allow Hood to compete for additional supplies of milk or to take on producers then delivering to other dealers.

The Commissioner found that Hood, if licensed at Greenwich, would permit its present suppliers, at their option, to deliver at the new plant rather than the old ones and for a substantial number this would mean shorter hauls and savings in delivery costs. The new plant also would attract twenty to thirty producers, some of whose milk Hood anticipates will or may be diverted from other buyers. Other large milk distributors have plants within the general area and dealers serving Troy obtain milk in the locality. He found that Troy was inadequately supplied during the preceding short season.

In denying the application for expanded facilities, the Commissioner states his grounds as follows:

> "If applicant is permitted to equip and operate another milk plant in this territory, and to take on producers now delivering to plants other than those which it operates, it will tend to reduce the volume of milk received at the plants which lose those pro-

ducers, and will tend to increase the cost of handling milk in those plants.

"If applicant takes producers now delivering milk to local markets such as Troy, it will have a tendency to deprive such markets of a supply needed during the short season.

"There is no evidence that any producer is without a market for his milk. There is no evidence that any producers not now delivering milk to applicant would receive any higher price, were they to deliver their milk to applicant's proposed plant.

"The issuance of a license to applicant which would permit it to operate an additional plant, would tend to a destructive competition in a market already adequately served, and would not be in the public interest." [4]

Denial of the license was sustained by the Court of Appeals [5] over constitutional objections duly urged under the Commerce Clause [6] and, because of the importance of the questions involved, we brought the case here by certiorari.[7]

Production and distribution of milk are so intimately related to public health and welfare that the need for regulation to protect those interests has long been recognized and is, from a constitutional standpoint, hardly controversial. Also, the economy of the industry is so eccentric that economic controls have been found at once necessary and difficult. These have evolved detailed, intricate and comprehensive regulations, including price-fixing. They have been much litigated but were generally sustained by this Court as within the powers of

[4] This finding follows the statutory language. See Note 3.

[5] 297 N. Y. 209, 78 N. E. 2d 476.

[6] U. S. Const., Art. I, § 8, cl. 3, granting Congress power "To regulate Commerce . . . among the several States . . . ."

[7] 335 U. S. 808.

the State over its internal commerce as against the claim that they violated the Fourteenth Amendment.[8] *Nebbia* v. *New York,* 291 U. S. 502; *Hegeman Farms Corp.* v. *Baldwin,* 293 U. S. 163; *Borden's Co.* v. *Ten Eyck,* 297 U. S. 251. But see *Mayflower Farms* v. *Ten Eyck,* 297 U. S. 266. As the states extended their efforts to control various phases of export and import also, questions were raised as to limitations on state power under the Commerce Clause of the Constitution.

Pennsylvania enacted a law including provisions to protect producers which were very similar to those of this New York Act. A concern which operated a receiving plant in Pennsylvania from which it shipped milk to the New York City market challenged the Act upon grounds thus defined by this Court: "The respondent contends that the act, if construed to require it to obtain a license, to file a bond for the protection of producers, and to pay the farmers the prices prescribed by the Board, unconstitutionally regulates and burdens interstate commerce." *Milk Board* v. *Eisenberg Co.,* 306 U. S. 346, 350. This Court, specifically limiting its judgment to the Act's provisions with respect to license, bond and regulation of prices to be paid to producers, *id.* at 352, considered their effect on interstate commerce "incidental and not forbidden by the Constitution, in the absence of regulation by Congress." *Id.* at 353.

The present controversy begins where the *Eisenberg* decision left off. New York's regulations, designed to assure producers a fair price and a responsible purchaser, and consumers a sanitary and modernly equipped handler, are not challenged here but have been complied with. It is only additional restrictions, imposed for the avowed purpose and with the practical effect of curtailing

[8] ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

the volume of interstate commerce to aid local economic interests, that are in question here, and no such measures were attempted or such ends sought to be served in the Act before the Court in the *Eisenberg* case.[9]

Our decision in a milk litigation most relevant to the present controversy deals with the converse of the present situation. *Baldwin* v. *Seelig,* 294 U. S. 511. In that case, New York placed conditions and limitations on the local sale of milk imported from Vermont designed in practical effect to exclude it, while here its order proposes to limit the local facilities for purchase of additional milk so as to withhold milk from export. The State agreed then, as now, that the Commerce Clause prohibits it from directly curtailing movement of milk into or out of the State. But in the earlier case, it contended that the same result could be accomplished by controlling delivery, bottling and sale after arrival, while here it says it can do so by curtailing facilities for its purchase and receipt before it is shipped out. In neither case is the measure supported by health or safety considerations but solely by protection of local economic interests, such as supply for local consumption and limitation of competition. This Court unanimously rejected the State's contention in the *Seelig* case and held that the Commerce Clause, even in the absence of congressional action, prohibits such regulations for such ends.

The opinion was by Mr. Justice Cardozo, experienced in the milk problems of New York and favorably disposed toward the efforts of the State to control the industry. *Hegeman Farms Corp.* v. *Baldwin,* 293 U. S. 163; *Borden's Co.* v. *Baldwin,* 293 U. S. 194, concurrence at 213; *Mayflower Farms* v. *Ten Eyck,* 297 U. S. 266, dissent at 274. It recognized, as do we, broad power in the State to pro-

[9] The Court said: "The Commonwealth [of Pennsylvania] does not essay to regulate or to restrain the shipment of the respondent's milk into New York . . . ." 306 U. S. 346, 352.

tect its inhabitants against perils to health or safety, fraudulent traders and highway hazards, even by use of measures which bear adversely upon interstate commerce. But it laid repeated emphasis upon the principle that the State may not promote its own economic advantages by curtailment or burdening of interstate commerce.

The Constitution, said Mr. Justice Cardozo for the unanimous Court, "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." [10] He reiterated that the economic objective, as distinguished from any health, safety and fair-dealing purpose of the regulation, was the root of its invalidity. The action of the State would "neutralize the economic consequences of free trade among the states." [11] "Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported." [12] "If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation." [13] And again, "Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the

[10] 294 U. S. 511, 523.

[11] *Id.*, 526.

[12] *Id.*, 521.

[13] *Id.*, 522.

place of origin. They are thus hostile in conception as well as burdensome in result." [14]

This distinction between the power of the State to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law.

When victory relieved the Colonies from the pressure for solidarity that war had exerted, a drift toward anarchy and commercial warfare between states began. ". . . each State would legislate according to its estimate of its own interests, the importance of its own products, and the local advantages or disadvantages of its position in a political or commercial view." This came "to threaten at once the peace and safety of the Union." Story, *The Constitution,* §§ 259, 260. See Fiske, *The Critical Period of American History,* 144; Warren, *The Making of the Constitution,* 567. The sole purpose for which Virginia initiated the movement which ultimately produced the Constitution was "to take into consideration the trade of the United States; to examine the relative situations and trade of the said States; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony" and for that purpose the General Assembly of Virginia in January of 1786 named commissioners and proposed their meeting with those from other states. Documents, *Formation of the Union,* H. R. Doc. No. 398, 12 H. Docs., 69th Cong., 1st Sess., p. 38.

The desire of the Forefathers to federalize regulation of foreign and interstate commerce stands in sharp contrast to their jealous preservation of the state's power over its

[14] *Id.,* 527.

internal affairs. No other federal power was so universally assumed to be necessary, no other state power was so readily relinquished. There was no desire to authorize federal interference with social conditions or legal institutions of the states. Even the Bill of Rights amendments were framed only as a limitation upon the powers of Congress. The states were quite content with their several and diverse controls over most matters but, as Madison has indicated, "want of a general power over Commerce led to an exercise of this power separately, by the States, wch [*sic*] not only proved abortive, but engendered rival, conflicting and angry regulations." 3 Farrand, *Records of the Federal Convention,* 547.

The necessity of centralized regulation of commerce among the states was so obvious and so fully recognized that the few words of the Commerce Clause were little illuminated by debate. But the significance of the clause was not lost and its effect was immediate and salutary. We are told by so responsible an authority as Mr. Jefferson's first appointee to this Court that "there was not a State in the Union, in which there did not, at that time, exist a variety of commercial regulations; concerning which it is too much to suppose, that the whole ground covered by those regulations was immediately assumed by actual legislation, under the authority of the Union. But where was the existing statute on this subject, that a State attempted to execute? or by what State was it ever thought necessary to repeal those statutes? By common consent, those laws dropped lifeless from their statute books, for want of the sustaining power, that had been relinquished to Congress." *Gibbons* v. *Ogden,* 9 Wheat. 1, concurring opinion at 226.

The Commerce Clause is one of the most prolific sources of national power and an equally prolific source of conflict with legislation of the state. While the Constitution vests in Congress the power to regulate commerce among

the states, it does not say what the states may or may not do in the absence of congressional action, nor how to draw the line between what is and what is not commerce among the states. Perhaps even more than by interpretation of its written word, this Court has advanced the solidarity and prosperity of this Nation by the meaning it has given to these great silences of the Constitution.

Baldwin v. *Seelig,* 294 U. S. 511, is an explicit, impressive, recent and unanimous condemnation by this Court of economic restraints on interstate commerce for local economic advantage, but it does not stand alone. This Court consistently has rebuffed attempts of states to advance their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state, while generally supporting their right to impose even burdensome regulations in the interest of local health and safety. As most states serve their own interests best by sending their produce to market, the cases in which this Court has been obliged to deal with prohibitions or limitations by states upon exports of articles of commerce are not numerous. However, in a leading case, *Oklahoma* v. *Kansas Natural Gas Co.,* 221 U. S. 229, the Court denied constitutional validity to a statute by which Oklahoma, by regulation of gas companies and pipe lines, sought to restrict the export of natural gas. The Court held that when a state recognizes an article to be a subject of commerce, it cannot prohibit it from being a subject of interstate commerce; that the right to engage in interstate commerce is not the gift of a state, and that a state cannot regulate or restrain it.

Later West Virginia, by act of the Legislature, undertook regulation of pipe-line companies intended to keep within West Virginia all natural gas there produced that might be required for local needs. This Court held that the State could not accord to its own consumers a pre-

ferred right of purchase over consumers in other states and in language applicable to the case before us now said, "Much of the business is interstate and has grown up through a course of years. West Virginia encouraged and sanctioned the development of that part of the business and has profited greatly by it. Her present effort, rightly understood, is to subordinate that part to the local business within her borders. In other words, it is in effect an attempt to regulate the interstate business to the advantage of the local consumers. But this she may not do." *Pennsylvania* v. *West Virginia,* 262 U. S. 553, at 597, 598.

In *Foster Packing Co.* v. *Haydel,* 278 U. S. 1, the Court cited these two cases as authority for the proposition that "A State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the State." 278 U. S. 1, 10. The Court also pointed out that "the purpose [of the statute there involved] is not to retain the shrimp for the use of the people of Louisiana; it is to favor the canning of the meat and the manufacture of bran in Louisiana . . . ." *Id.,* at 13. Thus in the *Foster* case, and in the companion case *Johnson* v. *Haydel,* 278 U. S. 16, although the articles sought to be regulated were shrimp and oysters, which under ordinary conditions might not be considered subjects of commerce, the Court invalidated state enactments attempting to promote local interests at the expense of interstate commerce.

In *Parker* v. *Brown,* 317 U. S. 341, California's restrictions on sales of raisins within the State to those who were there processing and packing them were attacked as invalid because approximately 95% of the crop would find its way into interstate commerce after processing and packing. However, the Court said: ". . . no case has

gone so far as to hold that a state could not license or otherwise regulate the sale of articles within the state because the buyer, after processing and packing them, will, in the normal course of business, sell and ship them in interstate commerce. . . . The regulation is thus applied to transactions wholly intrastate before the raisins are ready for shipment in interstate commerce." 317 U. S. 341, at 361. This regulation of sale to local processors was distinguished from those which were held invalid in *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50, and *Shafer* v. *Farmers Grain Co.,* 268 U. S. 189, because the regulation in the earlier cases was "of the business of those who purchased grain within the state for immediate shipment out of it." *Ibid.* In those cases, the regulation was of interstate commerce itself. Another element in the *Parker* case which led the Court to sustain the California regulation was that it was one which the policy of Congress was to aid and encourage, and the Secretary of Agriculture had approved the State program by loans.

The most recent case of this kind, *Toomer* v. *Witsell,* 334 U. S. 385, involved, among other things, a South Carolina requirement that the owners of shrimp boats fishing off its shores dock at a South Carolina port and unload, pack and stamp their catch with a tax stamp before shipping or transporting it to another state. It was considered that the effect of this section of the statute was to divert to South Carolina employment and business which might otherwise go to other states, and the Court pointed out that "the necessary tendency of the statute is to impose an artificial rigidity on the economic pattern of the industry." 334 U. S. 385, 403–404. It was held that the Commerce Clause was violated by such a provision.

This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting

customs barriers against foreign competition, has as its corollary that the states are not separable economic units. As the Court said in *Baldwin* v. *Seelig,* 294 U. S. 541, 527, "what is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation." In so speaking it but followed the principle that the state may not use its admitted powers to protect the health and safety of its people as a basis for suppressing competition. In *Buck* v. *Kuykendall,* 267 U. S. 307, the Court struck down a state act because, in the language of Mr. Justice Brandeis, "Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition." The same argument here advanced, that limitation of competition would itself contribute to safety and conservation, and therefore indirectly serve an end permissible to the State, was there declared "not sound." 267 U. S. 307, 315. It is no better here. This Court has not only recognized this disability of the state to isolate its own economy as a basis for striking down parochial legislative policies designed to do so, but it has recognized the incapacity of the state to protect its own inhabitants from competition as a reason for sustaining particular exercises of the commerce power of Congress to reach matters in which states were so disabled. *Cf. Steward Machine Co.* v. *Davis,* 301 U. S. 548; *Carmichael* v. *Southern Coal Co.,* 301 U. S. 495; *Helvering* v. *Davis,* 301 U. S. 619.

The material success that has come to inhabitants of the states which make up this federal free trade unit has been the most impressive in the history of commerce, but the established interdependence of the states only emphasizes the necessity of protecting interstate movement of goods against local burdens and repressions. We need only consider the consequences if each of the few states that produce copper, lead, high-grade iron ore,

timber, cotton, oil or gas should decree that industries located in that state shall have priority. What fantastic rivalries and dislocations and reprisals would ensue if such practices were begun! Or suppose that the field of discrimination and retaliation be industry. May Michigan provide that automobiles cannot be taken out of that State until local dealers' demands are fully met? Would she not have every argument in the favor of such a statute that can be offered in support of New York's limiting sales of milk for out-of-state shipment to protect the economic interests of her competing dealers and local consumers? Could Ohio then pounce upon the rubber-tire industry, on which she has a substantial grip, to retaliate for Michigan's auto monopoly?

Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

The State, however, insists that denial of the license for a new plant does not restrict or obstruct interstate commerce, because petitioner has been licensed at its other plants without condition or limitation as to the quantities it may purchase. Hence, it is said, all that has been denied petitioner is a local convenience—that of being able to buy and receive at Greenwich quantities of milk it is free to buy at Eagle Bridge and Salem. It suggests that, by increased efficiency or enlarged capacity at its other plants, petitioner might sufficiently increase its supply through those facilities.

The weakness of this contention is that a buyer has to buy where there is a willing seller, and the peculiarities of the milk business necessitate location of a receiving and cooling station for nearby producers. The Commissioner has not made and there is nothing to persuade us that he could have made findings that petitioner can obtain such additional supplies through its existing facilities; indeed he found that "applicant has experienced some difficulty during the flush season because of the inability of the plant facilities to handle the milk by 9:00 a. m.," the time its receipt is required by Boston health authorities unless it is cooled by the farmer before delivery, and a substantial part of it is not.

But the argument also asks us to assume that the Commissioner's order will not operate in the way he found that it would as a reason for making it. He found that petitioner, at its new plant, would divert milk from the plants of some other large handlers in the vicinity, which plants "can handle more milk." This competition he did not approve. He also found it would tend to deprive local markets of needed supplies during the short season. In the face of affirmative findings that the proposed plant would increase petitioner's supply, we can hardly be asked to assume that denial of the license will not deny petitioner access to such added supplies. While the state power is applied in this case to limit expansion by a handler of milk who already has been allowed some purchasing facilities, the argument for doing so, if sustained, would be equally effective to exclude an entirely new foreign handler from coming into the State to purchase.

The State, however, contends that such restraint or obstruction as its order imposes on interstate commerce does not violate the Commerce Clause because the State regulation coincides with, supplements and is part of the federal regulatory scheme. This contention that Congress has taken possession of "the field" but shared it with

the State, it is to be noted, reverses the contention usually made in comparable cases, which is that Congress has not fully occupied the field and hence the State may fill the void.

Congress, as a part of its Agricultural Marketing Agreement Act,[15] authorizes the Secretary of Agriculture to issue orders regulating the handling of several agricultural products, including milk, when they are within the reach of its commerce power. As to milk, it sets up, § 8c (5), 7 U. S. C. § 608c (5), a rather complicated system of fixing prices to be paid to producers through equalization pools which distribute the total value of all milk sold in a specified market among the producers supplying that market. This federal regulation was sustained and explained in *United States* v. *Rock Royal Co-operative,* 307 U. S. 533; *H. P. Hood & Sons* v. *United States,* 307 U. S. 588; see also *Stark* v. *Wickard,* 321 U. S. 288. Section 10 of the Federal Act [16] also authorizes federal officials to engage in conferences, joint hearings and cooperation with the state authorities.

New York State, in its present and antecedent statutes, has authorized its state authorities to confer with federal officials on milk control problems [17] and a series of conferences and joint hearings have been held. The two authorities formalized their collaboration in 1938 by signing a "Memorandum of the Principles of Cooperation to be Observed in the Formulation and Administration of Complementary Orders for Milk for Marketing Areas Located Within the State of New York to be Issued Concurrently by the Secretary of Agriculture and the Commissioner of Agriculture and Markets."

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[15] Act of June 3, 1937, c. 296, 50 Stat. 246, as amended, 7 U. S. C. § 601 *et seq.*

[16] 7 U. S. C. § 610 (i).

[17] See Laws of 1937, c. 798, § 258–n.

But no federal approval or responsibility for the challenged features of this order appears in any of these provisions or arrangements. The "memorandum of the principles of cooperation" relates only to marketing areas in New York, while the marketing area served by Hood is entirely outside of New York and is controlled by Federal Order No. 4, applicable to the greater Boston market.[18] Federal Order No. 27 is applicable to the New York metropolitan market [19] and it is as to this order that the State of New York is recognized by the memorandum as entitled to consultation. There is no such financial support as was given in *Parker* v. *Brown,* 317 U. S. 341.

The Congressional regulation contemplates and permits a wide latitude in which the State may exercise its police power over the local facilities for handling milk. We assume, though it is not necessary to decide, that the Federal Act does not preclude a state from placing restrictions and obstructions in the way of interstate commerce for the ends and purposes always held permissible under the Commerce Clause. But here the challenge is only to a denial of facilities for interstate commerce upon the sole and specific grounds that it will subject others to competition and take supplies needed locally, an end, as we have shown, always held to be precluded by the Commerce Clause. We have no doubt that Congress in the national interest could prohibit or curtail shipments of milk in interstate commerce, unless and until local demands are met. Nor do we know of any reason why Congress may not, if it deems it in the national interest, authorize the states to place similar restraints on movement of articles of commerce. And the provisions looking to state cooperation may be sufficient to warrant the state in imposing regulations approved by the federal au-

[18] 7 C. F. R. §§ 904–904.202 (1947 Supp.).

[19] 7 C. F. R. §§ 927–927.202 (1947 Supp.).

thorities, even if they otherwise might run counter to the decisions that coincidence is as fatal as conflict when Congress acts. See *Bethlehem Steel Co.* v. *New York State Labor Relations Board,* 330 U. S. 767. It is, of course, a quite different thing if Congress through its agents finds such restrictions upon interstate commerce advance the national welfare, than if a locality is held free to impose them because it, judging its own cause, finds them in the interest of local prosperity.

When it is considered that the Federal Act was passed expressly to overcome "disruption of the orderly exchange of commodities in interstate commerce" and conditions found to "burden and obstruct the normal channels of interstate commerce," 7 U. S. C. § 601, it seems clear that we can not sustain the State's argument that its restrictions here involved supplement and further the federal scheme.

Moreover, we can hardly assume that the challenged provisions of this order advance the federal scheme of regulation because Congress forbids inclusion of such a policy in a federal milk order. Section 8c (5) (G) of the Act provides:

> "No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States." [20]

While there may be difference of opinion as to whether this authorizes the Federal Order to limit, so long as it does not prohibit, interstate shipment of milk, see *Bailey Farm Dairy Co.* v. *Anderson,* 157 F. 2d 87, 96; *Bailey Farm Dairy Co.* v. *Jones,* 61 F. Supp. 209, 221—a question upon which we express no opinion—it is clear

[20] 7 U. S. C. § 608c (5) (G).

that the policy of the provision is inconsistent with the State's contention that it may, in its own interest, impose such a limitation as a coincident or supplement to federal regulation.

The only federal restriction of handlers' purchases from new producers, found in § 8c (5) (B), authorizes inclusion, in orders concerning milk or milk products, of a clause providing that for deliveries made during the first sixty days a new producer shall be paid only the minimum price applicable for milk of the particular use classification, subject to adjustments not relevant here.[21] This provision was included in the 1935 amendment,[22] "to prevent assaults upon the price structure by the sporadic importation of milk from new producing areas, while permitting the orderly and natural expansion of the area supplying any market . . . ." S. Rep. No. 1011, 74th Cong., 1st Sess., p. 11. And, it was added, "this is the only limitation upon the entry of new producers—wherever located—into a market, and it can remain effective only for the specified . . . period." *Ibid.* The bill originally provided for a ninety-day minimum price period but in conference the less restrictive sixty-day period was adopted. H. R. Rep. No. 1757, 74th Cong., 1st Sess., p. 21.[23]

These sections and reports indicate that it is the deliberate policy of the Congress to prevent federal officers from placing barriers in the way of the interstate flow of milk. While a statutory prohibition against federal

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[21] See 7 U. S. C. § 608c (5) (B).

[22] The Act of August 24, 1935, 49 Stat. 750, amended the Agricultural Adjustment Act of 1933, 48 Stat. 31. Section 8c first appeared in the 1935 Act, which was amended and reenacted by the 1937 Act, 50 Stat. 246, cited in note 15.

[23] See also H. R. Rep. No. 1241, 74th Cong., 1st Sess., pp. 7–11. And see debates at 79 Cong. Rec. 9461–63; 9572–73; 9602–04; 11134–41; and 13022.

interference with certain phases of it may not always imply that the state too is precluded, it is obvious that a state limitation on export for the benefit of its own consumers is not authorized by this Federal Act. The purpose as expressed in § 1, 7 U. S. C. § 601, is to avoid conditions which burden and obstruct the normal channels of interstate commerce. The object of the federal program to raise and stabilize the price of products was to stimulate interstate commerce. The order of the Commissioner avows itself to have the opposite effect. It can claim neither federal sponsorship nor congressional sanction.

Since the statute as applied violates the Commerce Clause and is not authorized by federal legislation pursuant to that Clause, it cannot stand. The judgment is reversed and the cause remanded for proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK, dissenting.

In this case the Court sets up a new constitutional formula for invalidation of state laws regulating local phases of interstate commerce. I believe the New York law is invulnerable to constitutional attack under constitutional rules which the majority of this Court have long accepted. The new formula subjects state regulations of local business activities to greater constitutional hazards than they have ever had to meet before. The consequences of the new formula, as I understand it, will not merely leave a large area of local business activities free from state regulation. All local activities that fall within the scope of this new formula will be free from any regulatory control whatever. For it is inconceivable that Congress could pass uniform national legislation capable of adjustment and application to all the local phases of interstate activities that take place in

the 48 states. See *Robertson* v. *California,* 328 U. S. 440, 449, 459–460. It is equally inconceivable that Congress would attempt to control such diverse local activities through a "swarm of statutes only locally applicable and utterly inconsistent." *Kidd* v. *Pearson,* 128 U. S. 1, 21.

First. New York has a comprehensive set of regulations to control the production, distribution and sale of milk. Their over-all purposes are two: (1) to promote health by maintaining an adequate supply and an orderly distribution of uncontaminated milk; (2) to promote the general welfare by saving farmer milk-producers from impoverishment and insolvency. The state legislature concluded that achievement of these goals demanded elimination of destructive competition among milk dealers. The legislature believed that while cutthroat competition among purchaser dealers temporarily raises the price of farmers' milk, the end result of the practice in New York had been economic distress for the farmers. After destructive dealer competition had driven financially weak dealers from the contest, the more opulent survivors had pushed producers' prices far below production costs. *Nebbia* v. *New York,* 291 U. S. 502, 515–516, gives a graphic description of the plight of these farmers prior to the enactment of these regulations and makes clear that the chief incentive for the regulations was the promotion of health and the general welfare by financial rehabilitation of the farmers. And despite due-process objections, the *Nebbia* case sustained the state's constitutional power to apply its law to New York dealers in order to promote the health, economic stability and general welfare of the state's people.

That part of the regulatory plan challenged here bars issuance of licenses for additional milk-handling plants if new plants would "tend to destructive competition in a market already adequately served" or would be con-

trary to "the public interest." In determining whether a milk market is "adequately served," the state follows a plan similar to the federal law in that both divide the country into "marketing areas." Under this plan, the state legislature did not attempt to prescribe one rule applicable throughout the whole state limiting the number of milk dealers or the number of their plants. A single rule of this kind would have lacked the necessary flexibility to accommodate the varying needs of markets in different parts of the state. So a state commissioner was authorized to hold hearings and make findings of fact to determine whether existing plants could adequately supply a given local producer's market or whether new plants would bring about the destructive competition among dealers that the law was designed to prevent. The commissioner's findings and orders were subject to judicial review. There is no challenge to the constitutional validity of the New York law as applied to New York milk dealers who sell milk in New York.

Second. Petitioner, a milk dealer, has two plants in New York. It buys milk, cools it, and ships it to Boston. It applied to the commissioner for a license to operate a third plant in the same local market area. After evidence the commissioner found that petitioner's two plants plus the others in the vicinity were adequate outlets for all the milk produced in that vicinity; some of the dealers in the area had plant capacities already in excess of the available supply. Petitioner was one of these. From this the commissioner found that more plants would bring about the kind of destructive competition against which the law was aimed. That finding is not challenged. Nor is it charged that the order was prompted by desire to prevent New York milk from going to Boston.

There was a finding that the destructive competition incident to the operation of a new plant probably would

reduce the volume of milk purchased by some existing dealers who supplied milk to certain New York cities. One of these cities had recently suffered a milk shortage. But this finding neither proves nor implies that petitioner's application was denied to keep milk from going to Boston or to aid local economic interests. In gauging the effect of an order denying an application for additional milk plants in a purchasing area, it seems essential to intelligent administration that the commissioner consider the available supply in that area in relation to the consumer demand on dealers as sellers. For if existing area plants already are unable to buy enough milk to supply their consumer demands, new plants, striving to buy a portion of the short supply, will inevitably intensify competition among purchasing dealers, thus bringing one kind of destructive competition the New York law was designed to prevent. Consequently, in determining whether new plants would tend to destructive competition, the commissioner cannot ignore a fundamental economic truth—the interrelation of supply and demand. Whether the new plants would service Troy, Boston, or elsewhere, the effect new plants would have on the available supply to existing consumers is a relevant consideration. And the New York law requires that consideration without regard to the geographical location of the consumers.

Had a dealer supplying New York customers applied for a license to operate a new plant, the commissioner would have been compelled under the Act to protect petitioner's plants supplying Boston consumers in the same manner that this order would have protected New York consumers. In protecting inter- or intra-state dealers from destructive competition which would endanger the milk farmers' price structure or the continued supply of healthful milk to the customers of existing dealers, the commissioner would be faithful to the Act's avowed pur-

poses. The commerce clause should not be stretched to forbid New York's fair attempt to protect the healthful milk supply of consumers, even though some of the consumers in this case happen to live in Troy, New York. And unless this Court is willing to charge an unfairness to the commissioner that has not been charged by petitioner or shown by the evidence, the Court cannot attribute to the commissioner an invidious purpose to discriminate against petitioner's interstate business in order to benefit local intrastate competitors and their local consumers. Of course if this were a case involving such discrimination, relief could be obtained under the principles announced in *Best & Co.* v. *Maxwell,* 311 U. S. 454.

The language of this state Act is not discriminatory, the legislative history shows it was not so intended, and the commissioner has not administered it with a hostile eye. The Act must stand or fall on this basis notwithstanding the overtones of the Court's opinion. If petitioner and other interstate milk dealers are to be placed above and beyond this law, it must be done solely on this Court's new constitutional formula which bars a state from protecting itself against local destructive competitive practices so far as they are indulged in by dealers who ship their milk into other states.

Third. The number of plants petitioner can have in the New York market is of concern to petitioner, to New York, and to the nation. Petitioner's business interest, however, under the *Nebbia* rule must be subordinated to the public interest. New York's concern derives from its interest in the health and well-being of its people deemed by the legislature of New York to be threatened by competitive trade practices of dealers who buy and sell milk produced in the state. That its concern is great is manifested by the state law, its background, its purposes, and its administration. The national concern, reflected in the commerce clause, flows from federal solicitude for

freedom of trade among the states. That solicitude is great.

Reconciliation of state and federal interests in regulation of commerce always has been a perplexing problem. The claims of neither can be ignored if due regard be accorded the welfare of state and nation. For in the long run the welfare of each is dependent upon the welfare of both. Injury to commercial activities in the states is bound to produce an injurious reaction on interstate commerce, and vice versa. The many local activities which are parts of interstate transactions have given rise to much confusion. The basic problem has always been whether the state or federal government has power to regulate such local activities, whether the power of either is exclusive or concurrent, whether the state has power to regulate until Congress exercises its supreme power, and the extent to which and the circumstances under which this Court should invalidate state regulations in the absence of an exercise of congressional power. This last question is the one here involved.

Fourth. Gibbons v. *Ogden,* 9 Wheat. 1, decided in 1824, held invalid a New York statute regulating commerce which conflicted with an Act of Congress. The Court there left undecided the question strongly urged that the commerce clause of itself forbade New York to regulate commerce. In 1847 this undecided question was discussed by Chief Justice Taney.[1] His view was that the commerce clause of itself did no more than grant power to Congress to regulate commerce among the states; that until Congress acted states could regulate the commerce; and that this Court was without power to strike down state regulations unless they conflicted with a valid federal law. This the Chief Justice thought

[1] *The License Cases,* 5 How. 504, 578–579. And see Frankfurter, *The Commerce Clause,* 50–58 (1937).

was the intention of the Constitution's framers, drawing his inference of their intent from his belief that they knew "a multitude of minor regulations must be necessary, which Congress amid its great concerns could never find time to consider and provide . . . ." [2]

In 1852 this Court rejected in part the Taney interpretation of the commerce clause. *Cooley* v. *Board of Wardens,* 12 How. 299. The opinion there stated that the commerce clause *per se* forbade states to regulate commerce under some circumstances but left them free to do so under other circumstances. The dividing line was not precisely drawn, but the Court outlined broad principles to guide future determinations of the side of the line on which commercial transactions would be held to fall. In doing so, it apparently took into consideration Mr. Chief Justice Taney's 1847 belief that absolute prohibition of all state regulation of commerce would create an area immune from any regulation at all. For in the *Cooley* case the Court held at p. 319 that the commerce clause *per se* only prohibited state regulation of local interstate commerce activities which "are in their nature national, or admit only of one uniform system." It was also held at p. 320 that the commerce clause left states free to regulate interstate commerce activities where diverse conditions incident to different customs, habits and trade practices, could best be treated and regulated by different regulations "drawn from local knowledge and

[2] State legislation which patently discriminates against interstate commerce has long been held to conflict with the commerce clause itself. The writer has acquiesced in this interpretation, *Adams Mfg. Co.* v. *Storen,* 304 U. S. 307, 331–332, although agreeing with the views of Chief Justice Taney that the commerce clause was not intended to grant courts power to regulate commerce even to this extent. The equal protection clause would seem to me a more appropriate source of judicial power in respect to such discriminatory laws.

experience, and conformed to local wants." Thus cautiously did the Court enter this new field of judicial power. It decided no more than that this Court in passing upon state regulations of commerce would always weigh the conflicting interests of state and nation. Moreover, implicit in the rule, as shown by what the Court said, was a determined purpose not to leave areas in which interstate activities could be insulated from any regulation at all.

Fifth. The basic principles of the *Cooley* rule have been entangled and sometimes obscured with much language. In the main, however, those principles have been the asserted grounds for determination of all commerce cases decided by this Court from 1852 until today. Pertinent quotations from some of these cases appear in MR. JUSTICE FRANKFURTER'S dissenting opinion and he refers to others. Many of the cases have used the words "restraints," "obstructions," "in commerce," "on commerce," "burdens," "direct burdens," "undue burdens," "unreasonable burdens," "unfair burdens," "incidental burdens," etc., but such words have almost always been used, as the opinions reveal, to aid in application of the *Cooley* balance-of-interests rule.[3]

There have been some sporadic deviations from the *Cooley* principle as illustrated by *Di Santo* v. *Pennsylvania,* 273 U. S. 34. The powerful dissents of Mr. Justice Brandeis and Mr. Justice Stone, concurred in by Mr.

[3] Dowling, *Interstate Commerce and State Power,* 27 Va. L. Rev. 1 (1940); and see for illustration *Southern Pacific Co.* v. *Arizona,* 325 U. S. 761, 768–769; *United States* v. *Underwriters Assn.,* 322 U. S. 533, 547–549; *Cloverleaf Co.* v. *Patterson,* 315 U. S. 148, 154–155; *California* v. *Thompson,* 313 U. S. 109, 113; *Milk Board* v. *Eisenberg Co.,* 306 U. S. 346; *S. C. Hwy. Dept.* v. *Barnwell Bros.,* 303 U. S. 177, 184–191; *Hartford Indemnity Co.* v. *Illinois,* 298 U. S. 155; *Kidd* v. *Pearson,* 128 U. S. 1. And see cases collected by Mr. Justice Brandeis, in his dissenting opinion in *Di Santo* v. *Pennsylvania,* 273 U. S. 34, 39–40.

Justice Holmes, pointed out the *Di Santo* deviation. The necessity for delicate adjustment of the conflicting state and federal claims was pointed out. It was emphasized that decision on such an issue required a consideration of facts such as the nature of the regulation, the character of the business, the regulation's actual effect on interstate commerce. Mr. Justice Brandeis pointed out the dangers in deviating from these principles, and, perhaps with prophetic insight as to the future fate of the *Di Santo* case, cited a long list of cases in which such deviations had required this Court later to overrule or explain away the prior deviations. P. 43, n. 4. In *California* v. *Thompson,* 313 U. S. 109, 115–116, this Court explained away the *Di Santo* case. It could not stand, so said the Court, because it was a departure from the principle that had been recognized ever since *Cooley* v. *Board of Wardens, supra.*

In this Court, challenges to the *Cooley* rule on the ground that the rule was an ineffective protector of interstate commerce from state regulations have been confined to dissents and concurring opinions.[4] *Duckworth* v. *Arkansas,* 314 U. S. 390, 400–401; *Bob-Lo Excursion Co.* v. *Michigan,* 333 U. S. 28, 37–38, 41, 42, 45; *Independent Warehouses* v. *Scheele,* 331 U. S. 70, 85, 95. In the *Duckworth* case by application of the *Cooley* rule the majority of this Court sustained a state regulation of interstate transportation. A concurring opinion expressed the view that the Court's opinion written by Chief Justice Stone, rooted as it was in the *Cooley* principle, "let commerce struggle for Congressional action to

[4] The writer's view has been that the *Cooley* rule resulted in this Court's invalidating state statutes that should be left operative unless Congress should strike them down. See dissenting opinion in *Southern Pac. Co.* v. *Arizona,* 325 U. S. 761, 784–796. But since my views were rejected, I joined in disposition of *Morgan* v. *Virginia,* 328 U. S. 373, 386–388, by application of the *Cooley* rule.

make it free," and expressed the writer's unwillingness to follow the Court's "trend" [5] beyond the "plain requirements" of existing cases, at p. 401.

The philosophy of this *Duckworth* concurring opinion which the Court rejected, can alone support the holding and opinion today. That philosophy commends itself to many thoughtful people. Some people believe in this philosophy because of fear that judicial toleration of any state regulations of local phases of commerce will bring about what they call "Balkanization" of trade in the United States—trade barriers so high between the states that the stream of interstate commerce cannot flow over them.[6] Other people believe in this philosophy because of an instinctive hostility to any governmental regulation of "free enterprise"; this group prefers a *laissez faire* economy.[7] To them the spectre of "Bureaucracy" is more frightening than "Balkanization."

The *Cooley* balancing-of-interests principle which the Court accepted and applied in the *Duckworth* case is today supplanted by the philosophy of the *Duckworth* concurring opinion which though presented in the *Duckworth* case gained no adherents.[8] For the New York statute is killed by a mere automatic application of a new mechanistic formula. The Court appraises nothing, unless its stretching of the old commerce clause interpretation results from a reappraisal of the power and duty

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[5] Dowling, *Interstate Commerce and State Power*, 27 Va. L. Rev. 1 (1940); Braden, *Umpire to the Federal System*, 10 U. of Chi. L. Rev. 27 (1942).

[6] Bane, *Interstate Trade Barriers*, 16 Ind. L. J. 121 (1940); and see the collection of articles on the subject of *Trade Barriers* in 9 Geo. Wash. L. Rev. 755 (1941).

[7] Melder, *The Economics of Trade Barriers*, 16 Ind. L. J. 127, 131 (1940); Reynolds, *The Distribution of Power to Regulate Interstate Carriers Between the Nation and the States*, 379 (1928).

[8] Barnett, *Interstate Commerce—State Control*, 21 Ore. L. Rev. 385, 391–392 (1942); Note, 26 Minn. L. Rev. 654, 655 (1942).

of this Court under the commerce clause. Numerous cases, for examples *Parker* v. *Brown,* 317 U. S. 341, and *Milk Board* v. *Eisenberg Co.,* 306 U. S. 346, which made judicial appraisals under the *Cooley* rule, are gently laid to rest. Their interment is tactfully accomplished, without ceremony, eulogy, or report of their demise. The ground beneath them has been deftly excavated by a soothing process which limits them to their facts, their precise facts, their "plain requirements." The vacancy left by the *Cooley* principle will be more than filled, however, by the new formula which without balancing interests, automatically will relieve many businesses from state regulation. This Court will thereby be relieved of much trouble in attempting to reconcile state and federal interests. State regulatory agencies too will be relieved of a large share of their traditional duties when they discover that bad local business practices are now judicially immunized from state regulation. But it is doubtful if the relief accorded will promote the welfare of the state or nation since Congress cannot possibly undertake the monumental task of suppressing all pernicious local business practices.

Sixth. The Court strongly relies on *Baldwin* v. *Seelig,* 294 U. S. 511. The crucial facts of that case were these. New York law fixed a minimum price for milk bought by New York dealers from New York farmers. Vermont's legislative policy left Vermont farmers and milk dealers free to fix milk prices by bargaining. Seelig, a New York dealer, sold milk in New York which had been bought from Vermont farmers at prices below that fixed for New York farmers by New York law. New York law forbade sale of Seelig's milk in New York because the Vermont farmers had not received the New York fixed price for their milk. New York's object was to save its farmers from competition with Vermont milk. And the Court saw the New York law as a discriminatory "barrier to

traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported." *Baldwin* v. *Seelig, supra,* at 521. The effect of the law, therefore, was precisely the same as though in order to protect its farmers from competition with Vermont milk, New York had imposed substantially higher taxes on sellers of Vermont produced articles than it imposed on sellers of New York produced articles. Under many previous decisions of this Court such discriminations against interstate commerce were not permitted. See *Best & Co.* v. *Maxwell,* 311 U. S. 454.

Even though the Court regarded the *Baldwin* v. *Seelig* law as discriminatory, other considerations were added to weight the scales on the side of invalidation. Its impact on Vermont economy and Vermont legislative power was weighed. To whatever extent it is desirable to reform the economic standards of Vermont, "the legislature of Vermont and not that of New York must supply the fitting remedy." *Baldwin* v. *Seelig, supra,* at 524. This is a due process concept.[9] In emphasizing the due process objectionable phase of New York's law, the Court was well within the *Cooley* philosophy.[10] Furthermore under the *Cooley* rule, aside from due process, a state's regulation that immediately bears upon nothing but activities wholly within its boundaries is far less vulnerable than one which casts burdens on activities within the boundaries of another state.[11]

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[9] *Allgeyer* v. *Louisiana,* 165 U. S. 578; *cf. Hoopeston Co.* v. *Cullen,* 318 U. S. 313, 318–319; *Hartford Ind. Co.* v. *Delta Co.,* 292 U. S. 143, 149–150.

[10] *Morgan* v. *Virginia,* 328 U. S. 373, 386; and compare dissenting opinion at pp. 391, 394; *Bob-Lo Excursion Co.* v. *Michigan,* 333 U. S. 28, 37, n. 16, 40, 41–42.

[11] *Southern Pac. Co.* v. *Arizona,* 325 U. S. 761, 767–768, n. 2; *S. C. Hwy. Dept.* v. *Barnwell Bros.,* 303 U. S. 177, 184–186.

It was because New York attempted to project its law into Vermont that even its admitted health purpose was insufficient to outweigh Vermont's interest in controlling its own local affairs. *Baldwin* v. *Seelig, supra,* p. 524. Added to this was the Court's appraisal of the law as a plain discrimination against interstate commerce that would inescapably erect a barrier to suppress competitive sales of Vermont milk in New York, thus leading to retaliatory "rivalries and reprisals," at p. 522. Quite differently here New York has not attempted to regulate the price of milk in Massachusetts or the manner in which it will be distributed there; it has not attempted to put pressure on Massachusetts to reform its economic standards; its law is not hostile to interstate commerce in conception or operation; its purpose to conserve health and promote economic stability among New York producers is not stretched to the breaking point by an argument that New York cannot safely aid its own people's health unless permitted to trespass upon the power of Massachusetts to regulate local affairs in Massachusetts. Nor is this New York law, fairly administered as it has been, the kind that breeds "rivalries and reprisals." The circumstances and conditions that brought about invalidation of the law considered in the *Baldwin* case are too different from those here considered to rest today's holding on the *Baldwin* decision.

Seventh. Milk Board v. *Eisenberg Co.,* 306 U. S. 346, would control this case but for the Court's limiting that case to its precise facts. That law required a state license of all persons who handled or purchased milk within the commonwealth for sale within or without the commonwealth. It required all dealers, interstate and intrastate, to keep records and to make bonds. Dealers who sold their products within or without the state were required to pay state-fixed prices. The state granted or denied licenses on the Act's enumerated terms and suspended

or revoked them for cause. Avowed purposes of the Pennsylvania law were identical with the stated purposes of the New York law. Like New York the method chosen to achieve these purposes was protection of milk farmers from what were deemed to be the evil consequences of cutthroat competition. The law was applied against interstate dealers in Pennsylvania, who like petitioner in New York, bought, weighed, tested, and cooled milk in Pennsylvania preparatory to shipment outside the state.

The *Eisenberg* case thus sustained the power of a state to require licenses from interstate dealers and to impose conditions on their interstate commerce transactions in order to effectuate legitimate state policies. And the conditions Pennsylvania imposed were burdensome, as this Court recognized. They erected obstacles which were bound to limit the number of interstate dealers. The limited number of interstate dealers who could get and hold state licenses were compelled to incur expenses that added to the costs of state-fixed milk prices they were required to pay as a condition precedent to the state's allowing them to buy and ship out any milk at all. Pennsylvania imposed these burdens on interstate commerce to promote health and to protect its farmers from the consequences of destructive competition among dealers. This New York law was designed to promote health and to protect New York farmers from destructive competition in New York.

It requires more than invocation of the spectre of "Balkanization" and eulogy of the Constitution's framers to prove that there is a gnat's heel difference in the burdens imposed on commerce by the two laws. It cannot even be said that one regulation was "on commerce" and one was not (whatever "on commerce" means), for both affected the capacity of dealers to buy milk for interstate sales. There is this difference. The handicap

of state-fixed high-priced milk, big bonds, and large bookkeeping expenses would probably reduce the volume of interstate shipments far more than the New York limitation of new plants in particular localities. True, this New York regulation might reduce the volume of milk this particular dealer might get and ship. But the commerce clause was not written to let one particular dealer's interests destroy a state's orderly marketing system.

There has certainly been no proof here that New York is wrong in believing that its law will rehabilitate farmers, induce more of them to get and stay in the milk business, and thus provide a greater New York production of better milk available for sale both in and out of New York. Should this result follow, interstate commerce will not be burdened, it will be helped. And it seems to me that here as in the *Eisenberg* case, this Court should not pit its legal judgment against a legislative judgment that is in harmony with the views of persons who have devoted their lives to a practical study of the milk problem.

Eighth. I think that Congress and its authorized federal agency have knowingly acquiesced in, if they have not actually encouraged and approved, enactment and enforcement of the New York law here held invalid. The New York law authorizes its administrator to act in cooperation with federal milk-control authorities and after consultation to make such supplementary orders as might be helpful in accomplishing the joint state-federal program. So also, 7 U. S. C. § 610 (i) authorizes and directs the Secretary of Agriculture to confer and hold joint hearings with the authorities of any state in order to "obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities . . . ." The section further authorizes the Secretary to "issue orders . . . complementary to orders or

other regulations issued by such [State] authorities; and to make available to such State authorities the records and facilities of the Department of Agriculture . . . ."

In the foregoing provisions Congress manifested its purpose to subject the milk industry to two cooperating authorities: (1) state legislatures and their selected administrative authorities, and (2) the Secretary of Agriculture. Congress did far more than direct a formal, polite cooperation between New York and the Secretary of Agriculture. Recognizing the compelling necessity for a state-federal integrated regulatory system for the milk industry, Congress was careful to leave the door open for the Secretary of Agriculture and state authorities working together to formulate mutually complementary orders in the field. These complementary state-federal laws and orders were to be aimed at precisely the same evils believed to have been generated by chaotic competitive conditions in the milk industry. The objective of both laws was to help impoverished farmers. 48 Stat. 31, 7 U. S. C. § 601.

This record does not reveal the extent to which there was state-federal cooperation in connection with enactment and enforcement of the New York law here involved. Absence of a full showing of such cooperation is doubtless due to the failure of the petitioner to raise any commerce questions in the hearing before the New York Commissioner. This in itself should be enough to cause this Court, at the very least, to follow MR. JUSTICE FRANKFURTER'S suggestion and remand the case. This would afford the state opportunity to develop the facts concerning federal and state cooperation. New York's law should not be condemned on the basis of abstract rhetoric about the "fathers" and the commerce clause. Surely a state is still entitled to present its side of a constitutional controversy, though perhaps today's new rule makes it an exercise in futility.

New York has presented some evidence in its brief of such state-federal cooperation. Without such showing we should assume that the Secretary has followed congressional directions. If such an assumption be not made we cannot ignore the action of Congress in selecting the Secretary of Agriculture to protect interstate commerce in milk. Congress has even given him power to limit milk shipments as between different federal marketing areas.[12] This is hardly consistent with a congressional purpose to deny the Secretary power to approve this state regulation and order complementary to his own basic program. And here there is no evidence whatever to show that fair enforcement of the New York law would limit the total volume of New York milk available for shipment into other states. The basic purpose of the New York law like that of the federal law was to protect producers from low prices on the theory that this protection would insure an adequate milk supply for inter- as well as intra-state shipments.

From the foregoing, it seems to me that the Court now steps in where Congress wanted it to stay out. The Court puts itself in the position of guardian of interstate trade in the milk industry. Congress, with full constitutional power to do so, selected the Secretary of Agriculture to do this job. Maybe this Court would be a better guardian, but it may be doubted that authority for the Court

[12] 7 U. S. C. § 608c (5) (G). This section restricts the Secretary of Agriculture's power in two respects: (1) It forbids him to "prohibit" shipment of "milk" from one federal marketing area to another. (2) It forbids him to "limit" market-to-market shipment of "milk products." The Chairman of the Committee in charge of the Act in which this provision appeared explained to the House that a failure to grant the Secretary power to "limit" milk shipments "would absolutely wreck the whole milk program." 79 Cong. Rec. 9572–9573. See also 79 Cong. Rec. 13022, 13023; *Bailey Farm Dairy Co.* v. *Anderson,* 157 F. 2d 87–96; *Bailey Farm Dairy Co.* v. *Jones,* 61 F. Supp. 209, 221–224.

to undertake the task can be found in the Constitution—even in its "great silences." At any rate, I had supposed that this Court would not find conflict where Congress explicitly has commanded cooperation.[13]

The sole immediate result of today's holding is that petitioner will be allowed to operate a new milk plant in New York. This consequence standing alone is of no great importance. But there are other consequences of importance. It is always a serious thing for this Court to strike down a statewide law. It is more serious when the state law falls under a new rule which will inescapably narrow the area in which states can regulate and control local business practices found inimical to the public welfare. The gravity of striking down state regulations is immeasurably increased when it results as here in leaving a no-man's land immune from any effective regulation whatever. It is dangerous to assume that the aggressive cupidity of some need never be checked by government in the interest of all.

The judicially directed march of the due process philosophy as an emancipator of business from regulation appeared arrested a few years ago. That appearance was illusory. That philosophy continues its march. The due process clause and commerce clause have been used like Siamese twins in a never-ending stream of challenges to government regulation. See for example, *Pacific Tel. Co.* v. *Tax Comm'n,* 297 U. S. 403, 420. The reach of one twin may appear to be longer than that of the other, but either can easily be turned to remedy this apparent handicap.

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[13] *Union Brokerage Co.* v. *Jensen,* 322 U. S. 202, 209; *Parker* v. *Brown,* 317 U. S. 341; *Townsend* v. *Yeomans,* 301 U. S. 441, 454; *Rice* v. *Bd. of Trade,* 331 U. S. 247, 255; *Prudential Ins. Co.* v. *Benjamin,* 328 U. S. 408, 433–436.

Both the commerce and due process clauses serve high purposes when confined within their proper scope. But a stretching of either outside its sphere can paralyze the legislative process, rendering the people's legislative representatives impotent to perform their duty of providing appropriate rules to govern this dynamic civilization. Both clauses easily lend themselves to inordinate expansions of this Court's power at the expense of legislative power.[14] For under the prevailing due process rule, appeals can be made to the "fundamental principles of liberty and justice" which our "fathers" wished to preserve. In commerce clause cases reference can appropriately be made to the far-seeing wisdom of the "fathers" in guarding against commercial and even shooting wars among the states. Such arguments have strong emotional appeals and when skillfully utilized they sometimes obscure the vision.

The basic question here is not the greatness of the commerce clause concept, but whether all local phases of interstate business are to be judicially immunized from state laws against destructive competitive business practices such as those prohibited by New York's law. Of course, there remains the bare possibility Congress might attempt to federalize all such local business activities in the forty-eight states. While I have doubt about the wisdom of this New York law, I do not conceive it to be the function of this Court to revise that state's eco-

[14] Other constitutional provisions with vague contours are available as instruments for the judiciary to protect business from legislative regulation. Appealing phases of these vague contour provisions can be judicially integrated to provide a variety of techniques to accomplish a single purpose, the protection of business against legislative regulations obnoxious to courts. Under such a constitutional philosophy courts can invalidate business regulations on substantive grounds or they can put obstacles in the path of enforcement making it impossible to suppress business practices outlawed by valid legislation.

nomic judgments. Any doubt I may have concerning the wisdom of New York's law is far less, however, than is my skepticism concerning the ability of the Federal Government to reach out and effectively regulate all the local business activities in the forty-eight states.

I would leave New York's law alone.

MR. JUSTICE MURPHY joins in this opinion.

MR. JUSTICE FRANKFURTER, with whom MR. JUSTICE RUTLEDGE joins, dissenting.

If the Court's opinion has meaning beyond deciding this case in isolation, its effect is to hold that no matter how important to the internal economy of a State may be the prevention of destructive competition, and no matter how unimportant the interstate commerce affected, a State cannot as a means of preventing such competition deny an applicant access to a market within the State if that applicant happens to intend the out-of-state shipment of the product that he buys. I feel constrained to dissent because I cannot agree in treating what is essentially a problem of striking a balance between competing interests as an exercise in absolutes. Nor does it seem to me that such a problem should be disposed of on a record from which we cannot tell what weights to put in which side of the scales.

In the interest of clarity, the controlling facts in this case may thus be fairly summarized.

Hood, the petitioner, is a Massachusetts corporation engaged in supplying the Boston market with fluid milk. In New York State, on the border of Vermont and Massachusetts, it operates two milk-receiving plants to which milk is delivered by local producers and whence it is shipped to Boston without processing. These two plants—at Eagle Bridge and Salem—are quite close together. On January 30, 1946, Hood applied to the Com-

missioner of Agriculture and Markets of New York for an extension of its New York license to purchase milk which would permit it to operate an additional receiving plant at Greenwich, New York. Greenwich is ten miles from Salem and twelve miles from Eagle Bridge. Hood proposed to divert to the plant at Greenwich milk deliveries of producers living in that vicinity who were then delivering to its more distant plants at Eagle Bridge and Salem and to take on at Greenwich twenty or thirty additional producers then delivering to competing dealers in the vicinity of Greenwich.

The Commissioner of Agriculture and Markets denied Hood's application for extension of its license. In so doing, it rested its decision upon the following "conclusions":

> "If applicant is permitted to equip and operate another milk plant in this territory, and to take on producers now delivering to plants other than those which it operates, it will tend to reduce the volume of milk received at the plants which lose those producers, and will tend to increase the cost of handling milk in those plants.
>
> "If applicant takes producers now delivering milk to local markets such as Troy, it will have a tendency to deprive such markets of a supply needed during the short season. . . .
>
> "The issuance of a license to applicant which would permit it to operate an additional plant, would tend to a destructive competition in a market already adequately served, and would not be in the public interest."

Hood instituted proceedings in the Supreme Court of New York to review the order which were transferred without hearing to the Appellate Division. The Appellate Division sustained the Commissioner's action in a

per curiam opinion, and leave to appeal to the Court of Appeals was granted. That court considered Hood's claim that the order violated the commerce clause and denied it on the ground that "any interference with the free flow of interstate commerce was incidental only." 297 N. Y. 209, 215, 78 N. E. 2d 476, 478–79.

Some of the principles relevant to decision of this case are settled beyond dispute. One of these is that the prevention of destructive competition is a permissible exercise of the police power. *Nebbia* v. *New York,* 291 U. S. 502; *United States* v. *Rock Royal Co-operative,* 307 U. S. 533; *Sunshine Coal Co.* v. *Adkins,* 310 U. S. 381, 395. Another is that a State is not barred from licensing an activity merely because it is interstate commerce.[1] Even more basic is the principle that as to matters which do not demand that regulation be uniformly present or uniformly absent, see *Cooley* v. *Board of Wardens,* 12 How. 299, the State may impose its own requirements "even though they materially interfere with interstate commerce." *South Carolina State Highway Dept.* v. *Barnwell Bros.,* 303 U. S. 177, 188. And only recently, be it noted, this Court has characterized the buying of milk

[1] Among considerations of State concern which have been found sufficient to allow State licensing are the maintenance of sanitary conditions, *Milk Control Board* v. *Eisenberg Farm Products,* 306 U. S. 346; and adequate prices, see Brief of Petitioner in *Milk Control Board* v. *Eisenberg Farm Products, supra,* at pp. 20–21; control of the transportation of liquor, *Ziffrin, Inc.* v. *Reeves,* 308 U. S. 132; *Duckworth* v. *Arkansas,* 314 U. S. 390; the prevention of "fraud and overreaching" by transportation agents, *California* v. *Thompson,* 313 U. S. 109, 113; "safeguarding the interests of its [the State's] own people in business dealings with corporations not of its own chartering but who do business within its borders," *Union Brokerage Co.* v. *Jensen,* 322 U. S. 202, 208; and protection of the public from "fraud, misrepresentation, incompetence and sharp practice" on the part of insurance agents, *Robertson* v. *California,* 328 U. S. 440, 447.

for out-of-state shipment as an "essentially local" business. *Milk Control Board* v. *Eisenberg Farm Products,* 306 U. S. 346, 352.

Behind the distinction between "substantial" and "incidental" burdens upon interstate commerce is a recognition that, in the absence of federal regulation, it is sometimes—of course not always—of greater importance that local interests be protected than that interstate commerce be not touched.

> "When Congress has not exerted its power under the Commerce Clause, and state regulation of matters of local concern is so related to interstate commerce that it also operates as a regulation of that commerce, the reconciliation of the power thus granted with that reserved to the state is to be attained by the accommodation of the competing demands of the state and national interests involved." *Parker* v. *Brown,* 317 U. S. 341, 362.
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> "But the Commerce Clause does not cut the States off from all legislative relation to foreign and interstate commerce. *South Carolina Highway Dept.* v. *Barnwell Bros.,* 303 U. S. 177; *Western Live Stock* v. *Bureau,* 303 U. S. 250. Such commerce interpenetrates the States, and no undisputed generality about the freedom of commerce from state encroachment can delimit in advance the interacting areas of state and national power when Congress has not by legislation foreclosed state action. The incidence of the particular state enactment must determine whether it has transgressed the power left to the States to protect their special state interests although it is related to a phase of a more extensive commercial process." *Union Brokerage Co.* v. *Jensen,* 322 U. S. 202, 209–10.
>
> ". . . in the necessary accommodation between local needs and the overriding requirement of freedom for

> the national commerce, the incidence of a particular type of State action may throw the balance in support of the local need because interference with the national interest is remote or unsubstantial. A police regulation of local aspects of interstate commerce is a power often essential to a State in safeguarding vital local interests. At least until Congress chooses to enact a nation-wide rule, the power will not be denied to the State." *Freeman* v. *Hewit,* 329 U. S. 249, 253.

See also *Southern R. Co.* v. *King,* 217 U. S. 524, 533; *Illinois Natural Gas Co.* v. *Central Illinois Pub. Serv. Co.,* 314 U. S. 498, 506.[2]

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[2] Every case determining whether or not a local regulation amounts to a prohibited "burden" on interstate commerce belongs at some point along a graduated scale. Considering only those decided since *Milk Control Board* v. *Eisenberg Farm Products,* 306 U. S. 346, at one end are the tax cases; since a State has other sources of revenue, the need for a tax "on" interstate commerce is hard to justify. It is to be expected, therefore, that State revenue laws should constitute the largest group of laws invalidated as "burdening" commerce. And so they do. *McCarroll* v. *Dixie Greyhound Lines,* 309 U. S. 176; *McGoldrick* v. *Gulf Oil Corp.,* 309 U. S. 414; *McLeod* v. *Dilworth Co.,* 322 U. S. 327; *Nippert* v. *City of Richmond,* 327 U. S. 416; *Freeman* v. *Hewit,* 329 U. S. 249; *Joseph* v. *Carter & Weekes Co.,* 330 U. S. 422; *Central Greyhound Lines* v. *Mealey,* 334 U. S. 653, 662. Yet there has been an increasing recognition of the States' interest in seeing that interstate commerce "pays its way," and a consequent disposition to classify the object of the tax as intrastate. *McGoldrick* v. *Berwind-White Co.,* 309 U. S. 33; *McGoldrick* v. *Felt & Tarrant Co.,* 309 U. S. 70; *McGoldrick* v. *Compagnie Generale Transatlantique,* 309 U. S. 430; *Nelson* v. *Sears, Roebuck & Co.,* 312 U. S. 359; *Nelson* v. *Montgomery Ward & Co.,* 312 U. S. 373; *Northwest Airlines* v. *Minnesota,* 322 U. S. 292; *General Trading Co.* v. *State Tax Comm'n,* 322 U. S. 335; *International Harvester Co.* v. *Department of Treasury,* 322 U. S. 340; *Independent Warehouses* v. *Scheele,* 331 U. S. 70; cf. *Aero Mayflower Transit Co.* v. *Board of R. Comm'rs,* 332 U. S. 495. By the same principle, a regulation which makes a good deal of trouble for

The Court's opinion deems the decision in *Baldwin* v. *Seelig,* 294 U. S. 511, as most relevant to the present controversy. But it is the essential teaching of that case that "considerations of degree" determine the line of decision between what a State may and what a State may not regulate, when what is sought to be regulated is part of the shuttle-work of interstate commerce. *Id.* at 525. What was there held and all that was held was accurately defined in *Milk Control Board* v. *Eisenberg Farm Products,* 306 U. S. 346, 353: "In *Baldwin* v. *G. A. F. Seelig,* 294 U. S. 511, this Court condemned an enactment aimed solely at interstate commerce attempting to affect and regulate the price to be paid for milk in a sister state, and

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an interstate railroad must be struck down in the absence of any very convincing showing that the regulation is a reasonable response to a serious local need. *Southern Pacific Co.* v. *Arizona,* 325 U. S. 761; *Morgan* v. *Virginia,* 328 U. S. 373. But a more impressive showing of such a contribution on the one hand and a less persuasive demonstration of inconvenience on the other has brought about the opposite result. *Terminal Railroad Assn. of St. Louis* v. *Brotherhood of Railroad Trainmen,* 318 U. S. 1; *Bob-Lo Excursion Co.* v. *Michigan,* 333 U. S. 28. Where motor carriers are concerned, a State is regarded as having a proprietary interest in its highways which justifies a generally more aggressive assertion of its self-interest. *Welch Co.* v. *New Hampshire,* 306 U. S. 79; *Clark* v. *Paul Gray, Inc.,* 306 U. S. 583; *Maurer* v. *Hamilton,* 309 U. S. 598. And the protection of its own citizens through maintenance of high standards of business dealing by such regulations as those involved in *California* v. *Thompson,* 313 U. S. 109; *Union Brokerage Co.* v. *Jensen,* 322 U. S. 202; and *Robertson* v. *California,* 328 U. S. 440, is a matter of local concern that has been given almost as much latitude as the protection of health, *Clason* v. *Indiana,* 306 U. S. 439. But at the opposite extreme from revenue measures, perhaps, is control of the transportation of intoxicating liquor, in the name of which quite confining hobbles have been put upon interstate commerce and sustained under the Commerce Clause, without resorting to the Twenty-first Amendment. *Ziffrin, Inc.* v. *Reeves,* 308 U. S. 132; *Duckworth* v. *Arkansas,* 314 U. S. 390; *Carter* v. *Virginia,* 321 U. S. 131.

we indicated that the attempt amounted in effect to a tariff barrier set up against milk imported into the enacting state." The nakedness of New York's purpose to reach into Vermont was ill-concealed by the tenuous justification that if Vermont farmers got cheap prices for their milk they would be tempted to save the expense of sanitary precautions and thereby affect the health of New York consumers. "If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation." 294 U. S. at 522. But guarding against out-of-state competition is a very different thing from curbing competition from whatever source. A tariff barrier between States, moreover, presupposes a purpose to prefer those who are within the barrier; where no such preference appears there can be no justification for reprisals and there is consequently little probability of them. In the determination that an extension of petitioner's license would tend to destructive competition, the fact that petitioner intended the out-of-state shipment of what it bought was, so far as the record tells us, wholly irrelevant; under the circumstances, any other applicant, no matter where he meant to send his milk, would presumably also have been refused a license.

As I see the central issue, therefore, it is whether the difference in degree between denying access to a market for failure to comply with sanitary or book-keeping regulations and denying it for the sake of preventing destructive competition from disrupting the market is great enough to justify a difference in result. But for that difference in degree, the judgment below would fully rest on the *Eisenberg* case. If, on the other hand, petitioner's competitors were like itself engaged in interstate com-

merce, *Buck* v. *Kuykendall,* 267 U. S. 307, and *Bush & Sons Co.* v. *Maloy,* 267 U. S. 317, would be powerful precedents in favor of reversal. See also *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50; *Shafer* v. *Farmers Grain Co.,* 268 U. S. 189.

This case falls somewhere between these most nearly decisive authorities. It is closer to the *Buck* and *Bush* cases than to the *Eisenberg* case in that the denial of a license to enter a market because the market is "adequately served" imposes a disqualification beyond the power of the applicant to remove. In that respect the effect upon the free flow of commerce is more enduring than is the case where all that is required is compliance with a local regulation. The State's interest in restricting competition, moreover, is less obvious than its interest in preserving health or insuring probity in business dealings. Yet the commerce involved in the *Buck* and *Bush* cases—the operation of busses between Seattle, Washington, and Portland, Oregon—was exclusively interstate. Here, however, it does not appear that any of Hood's competitors sent milk out of the State, and, in fact, only about 8% of New York's entire production of milk is sent out.[3] In this respect the case resembles the *Eisenberg* case, in which it appeared that only slightly more than 10% of the milk produced in Pennsylvania was exported. 306 U. S. at 350. In upholding the State's licensing power in that case, the Court remarked that this percentage was "only a small fraction of the milk produced by farmers in Pennsylvania" and concluded that as a consequence "the effect of the law on interstate commerce is incidental." *Id.* at 353. But comparison could be carried further and still the similarities and dissimilarities of the facts in the record before us to the

[3] For this information I am indebted to the Department of Agriculture of the United States.

Eisenberg case and the *Buck* and *Bush* cases would be inconclusive. In an area where differences of degree depend on slight differences of fact, precedent alone is an inadequate guide.

It is argued, however, that New York can have no interest in the restriction of competition great enough to warrant shutting its doors to one who would buy its products for shipment to another State. This must mean that the protection of health and the promotion of fair dealing are of a different order, somehow, than the prevention of destructive competition. But the fixing of prices was a main object of the regulation upheld in the *Eisenberg* case, and it is obvious that one of the most effective ways of maintaining a price structure is to control competition.[4] The milk industry is peculiarly subject to internecine warfare, as this Court recognized in sustaining against due-process attack the precursor of New York's present milk-control law. *Nebbia* v. *New York*, 291 U. S. 502. A picture of ruthless and wasteful competition was painted in that case as in each of the other cases in which the Court has upheld the regulation of the milk industry. *United States* v. *Rock Royal Co-operative*, 307 U. S. 533; *H. P. Hood & Sons* v. *United States*, 307 U. S. 588; *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110. And,

[4] Thus, in the Interstate Commerce Act of 1920, Congress gave the Interstate Commerce Commission power to limit competition both by withholding certificates of public convenience and necessity and by permitting consolidations beyond the reach of the antitrust laws and at the same time gave it power to prescribe minimum rates; the two forms of control supplement each other. See 41 Stat. 477–478, as amended, 49 U. S. C. § 1 (18), (19), (20); 41 Stat. 480–481, as amended, 49 U. S. C. § 5 (11); 41 Stat. 484–85, as amended, 49 U. S. C. § 15 (1); Biklé, *Power of the Interstate Commerce Commission to Prescribe Minimum Rates*, 36 Harv. L. Rev. 5, 26; see also Mr. Justice Brandeis, dissenting in *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 280, 308–10, and authorities there cited. Compare the Miller-Tydings Act, 50 Stat. 693, 15 U. S. C. § 1.

so far as appears, State action to maintain the price structure in conjunction with complementary regulation by the Secretary of Agriculture is no less necessary for the dairy industry than for the raisin industry. Compare *Parker* v. *Brown,* 317 U. S. 341; see *United States* v. *Rock Royal Co-operative, Inc.,* 307 U. S. 533, 548–49. In view of the importance that we have hitherto found in regulation of the economy of agriculture, I cannot understand the justification for assigning, as a matter of law, so much higher a place to milk dealers' standards of bookkeeping than to the economic well-being of their industry.

As matters now stand, however, it is impossible to say whether or not the restriction of competition among dealers in milk does in fact contribute to their economic well-being and, through them, to that of the entire industry. And if we assume that some contribution is made, we cannot guess how much. Why, when the State has fixed a minimum price for producers, does it take steps to keep competing dealers from increasing the price by bidding against each other for the existing supply? Is it concerned with protecting consumers from excessive prices? Or is it concerned with seeing that marginal dealers, forced by competition to pay more and charge less, are not driven either to cut corners in the maintenance of their plants or to close them down entirely? Might these consequences follow from operation at less than capacity? What proportion of capacity is necessary to enable the marginal dealer to stay in business? Could Hood's potential competitors in the Greenwich area maintain efficient and sanitary standards of operation on a lower margin of profit? How would their closing down affect producers? Would the competition of Hood affect dealers other than those in that area? How many of those dealers are also engaged in interstate commerce? How much of a strain would be put on the price structure maintained by the State by a holding that it cannot regulate

the competition of dealers buying for an out-of-state market? Is this a situation in which State regulation, by supplementing federal regulation, is of benefit to interstate as well as to intrastate commerce?

We should, I submit, have answers at least to some of these questions before we can say either how seriously interstate commerce is burdened by New York's licensing power or how necessary to New York is that power. The testimony of the dealers with whom Hood seeks to compete is too inexplicit to supply the answers. Since the needed information is neither accessible to judicial notice nor within its proper scope, I believe we should seek further light by remanding the case to the courts of the State. It is a course we have frequently taken upon records no more unsatisfactory than this one. Compare *Chastleton Corp.* v. *Sinclair,* 264 U. S. 543; *Hammond* v. *Schappi Bus Line,* 275 U. S. 164; *Borden's Farm Products Co.* v. *Baldwin,* 293 U. S. 194; *Polk Co.* v. *Glover,* 305 U. S. 5; *Gibbs* v. *Buck,* 307 U. S. 66; *Mayo* v. *Canning Co.,* 309 U. S. 310—all cases remanded to avoid constitutional adjudication without adequate knowledge of the relevant facts.

Nor should we now dispose of the case upon the claim that New York cannot discriminate against interstate commerce by keeping its milk for absorption by "local markets such as Troy." In support of this claim reliance is placed on *Oklahoma* v. *Kansas Natural Gas Co.,* 221 U. S. 229, and *Pennsylvania* v. *West Virginia,* 262 U. S. 553, and there is much force in the argument that if a State cannot keep for its own use a natural resource like gas, as it can keep its wild game, *Geer* v. *Connecticut,* 161 U. S. 519; see *New York ex rel. Silz* v. *Hesterberg,* 211 U. S. 31, 41, then *a fortiori* it cannot prefer its own inhabitants in the consumption of a product that would not have come into existence but for its commercial value. But compare *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245; *Oliver Iron Mining Co.* v. *Lord,* 262

U. S. 172. It is only as to this aspect of the case, at any rate, that I can see the relevance of *Baldwin* v. *Seelig,* 294 U. S. 511, as dealing with what is characterized as "the converse of the present situation." Support is also sought in *Foster-Fountain Packing Co.* v. *Haydel,* 278 U. S. 1, and *Toomer* v. *Witsell,* 334 U. S. 385, but in these cases what the State had done was to halt for the benefit of local processors a product already moving in interstate commerce without entirely withholding the product from interstate commerce.

Broadly stated, the question is whether a State can withhold from interstate commerce a product derived from local raw materials upon a determination by an administrative agency that there is a local need for it. For me it has not been put to rest by *Pennsylvania* v. *West Virginia, supra.* More narrowly, the question is whether the State can prefer the consumers of one community to consumers in other States as well as to consumers in other parts of its own territory. It is arguable, moreover, that the Commissioner was actuated not by preference for New York consumers, but by the aim of stabilizing the supply of all the local markets, including Boston as well as Troy, served by the New York milkshed. It may also be that he had in mind the potentially harmful competitive effect of efforts by dealers supplying the Troy market to repair, by attracting new producers, the aggravation of Troy's shortage which would result from the diversion to Boston of part of Troy's supply. These too are matters as to which more light would be needed if it were now necessary to decide the question.

In the view I take of the issue of destructive competition, however, this question need not now be decided. It is impossible to say from a reading of the opinions below that the Commissioner's finding that extension of Hood's license would tend to destructive competition

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would not by itself have been a sufficient basis for his order; and it is a basis which evidence adduced upon remand might put upon solid constitutional ground. A decision at this stage of the question of preferment of local needs, assuming that the record presents it, would prove to be purely advisory, therefore, if when the case came back to the State court, it found the order adequately supported by the justification of preventing destructive competition. It may be answered, to be sure, that the State would have no reason to decide whether or not the latter justification was adequate in the absence of an indication by this Court that the former—the retention of locally needed milk—is constitutionally invalid. And such an indication would amount to decision of the very constitutional issue professedly left open. To which my reply would be that it is a very different thing to recognize the difficulty of a constitutional issue and to point out circumstances in which it would not arise than it is to decide the issue.

My conclusion, accordingly, is that the case should be remanded to the Supreme Court of Albany County for action consistent with the views I have stated.

Syllabus.

FEDERAL POWER COMMISSION ET AL. *v.* INTERSTATE NATURAL GAS CO. ET AL.

NO. 109. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.*

Argued January 11, 1949.—Decided April 18, 1949.

An order issued by the Federal Power Commission under the Natural Gas Act directed a natural gas company to reduce its rates on interstate sales of natural gas for resale. Pending judicial review, the Court of Appeals issued a stay order pursuant to which the company paid into the registry of the court the monthly difference between the existing rates and the lower rates prescribed by the Commission. The rate order was finally sustained and the Court of Appeals ordered the fund distributed to the pipe-line companies which were the immediate purchasers. *Held:*

1. Apart from the case of a pipe-line company claiming that its rates have been so low that it is entitled as a matter of law to share in the refund and the case of a pipe-line company which has passed on to its customers the rate reductions from the date of the Commission's order, it is the duty of the court to look beyond the pipe-line companies for the rightful claimants of the fund. Pp. 580–583.

(a) Since the pipe-line companies themselves are engaged in the transportation or sale at wholesale of natural gas in interstate commerce and are thus subject to the jurisdiction of the Federal Power Commission, their claims to the fund are determinable solely with reference to federal law. *Central States Co.* v. *Muscatine,* 324 U. S. 138, distinguished. Pp. 580–581.

(b) The fact that the fund consisted of payments made by the pipe-line companies does not entitle them to the fund as of right. P. 581.

(c) The aim of the Natural Gas Act was to protect ultimate consumers of natural gas from excessive charges. P. 581.

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*Together with No. 188, *Public Service Commission of Missouri* v. *Interstate Natural Gas Co. et al.;* No. 209, *Memphis Light, Gas & Water Division* v. *Interstate Natural Gas Co. et al.;* and No. 212, *Illinois Commerce Commission et al.* v. *Interstate Natural Gas Co. et al.,* also on certiorari to the same court.

(d) The responsibility of the court to correct what has been wrongfully done by virtue of its process can not be discharged by payment of the fund to those who show no loss by reason of the court's action. P. 582.

(e) The fund having been created by the court through exercise of equity powers, its disposition should be made in accord with equitable principles. Pp. 582–583.

2. If distribution of the fund is to be made to claimants other than the pipe-line companies, and if local law provides a standard for determining which of two or more claimants would have been entitled to the benefits of the rate reduction, the federal court should apply such local law. P. 583.

3. If clear and speedy state remedies are available, the federal court might hold the fund until those having the final say on the state law questions have spoken. P. 583.

4. But in absence of such a showing, the federal court in the interest of dispatch should proceed to determine the questions, relying on such sources of local law as may be available, including information from state regulatory agencies. P. 584.

5. The federal court may in its discretion disburse the funds directly to either the local distributing companies or the ultimate consumers or work out an administrative scheme whereby the distribution is made pursuant to directives of state agencies. P. 584.

6. Distribution of the fund is an administrative matter involving the exercise of an informed judgment by the federal court and should have the flexibility and dispatch which characterize the administrative process. P. 584.

166 F. 2d 796, reversed.

Pending review of an order of the Federal Power Commission directing a natural gas company to reduce its interstate wholesale rates, the Court of Appeals issued a stay order under which a fund representing the difference between the rates charged and the lower rates ordered accumulated in the registry of the court. The order of the Commission having been finally sustained, 156 F. 2d 949, 331 U. S. 682, the Court of Appeals ordered distribution of the fund to the pipe-line companies which were the immediate purchasers from the natural gas company. 166 F. 2d 796. Petitioners here had intervened in oppo-

sition to distribution to the pipe-line companies. This Court granted certiorari. 335 U. S. 808. *Reversed,* p. 584.

Bradford Ross argued the cause for petitioner in No. 109. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Morison, Stanley M. Silverberg, Paul A. Sweeney, Melvin Richter* and *Howard E. Wahrenbrock.*

John P. Randolph argued the cause and filed a brief for petitioner in No. 188.

William C. Wines argued the cause for the Illinois Commerce Commission, petitioner in No. 212. *George F. Barrett,* Attorney General of Illinois, and *Albert E. Hallett,* Assistant Attorney General, were on the brief.

Charles C. Crabtree submitted on brief for petitioner in No. 209.

William A. Dougherty argued the cause for the Interstate Natural Gas Co. et al., respondents. With him on the brief for the Interstate Natural Gas Co. were *Henry P. Dart, Jr.* and *James Lawrence White. Mr. Dougherty* and *Mr. White* also filed a brief for the Mississippi River Fuel Corp., respondent.

John T. Cahill argued the cause for the Memphis Natural Gas Co., respondent. With him on the brief were *Edward P. Russell, Thurlow M. Gordon* and *Harold F. Reindel.*

Forney Johnston argued the cause for the Southern Natural Gas Co., respondent. With him on the brief was *Jos. F. Johnston.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case, here on certiorari, involves the proper disposition of a fund accumulated under a stay order issued

by the Court of Appeals pending review of a rate order issued by petitioner. That order reduced the rates for natural gas on sales by Interstate Natural Gas Co. to Mississippi River Fuel Corp., Southern Natural Gas Co., and United Gas Pipe Line Co. for resale to Memphis Natural Gas Co., and on sales by Interstate to Memphis. The Court of Appeals sustained the order, 156 F. 2d 949, and we affirmed its judgment, 331 U. S. 682.

Interstate deposited in the registry of the court pending review the monthly difference between payments under existing rates and those required under the order of the commission. Interstate has now moved in the Court of Appeals for a distribution of the fund. The pipe-line companies—Mississippi, Southern, United,[1] and Memphis—claimed the fund and asked that it be distributed to them. Petitioner and certain state and municipal agencies also intervened, opposing distribution to the pipe-line companies and claiming that it should be made to the ultimate consumers of the gas or to such others as may be equitably entitled to it. The Court of Appeals, relying on *Central States Co.* v. *Muscatine,* 324 U. S. 138, ordered the fund to be paid to those from whom Interstate wrongfully exacted the payments, *viz.,* the pipe-line companies, without prejudice to such rights as others may have to hold those companies accountable for the amounts involved. 166 F. 2d 796.

First. Here, unlike *Central States Co.* v. *Muscatine, supra,* the distributing companies that seek return of the fund created from their payments of the excessive rates are subject to the jurisdiction of the Federal Power Commission, since they are natural gas companies engaged in the transportation or sale at wholesale of natural gas in interstate commerce. See *Illinois Gas Co.* v. *Public Service Co.,* 314 U. S. 498. The claims of these pipe-

[1] United claimed an allocable share on behalf of Memphis to which it had resold the gas which it had purchased from Interstate.

line companies to the fund are therefore determinable solely with reference to federal law, since the Natural Gas Act, 52 Stat. 821, 15 U. S. C. § 717, is designed to regulate the segment of the industry occupied by such distributors. See *Interstate Natural Gas Co.* v. *Federal Power Commission,* 331 U. S. 682, 689–690; *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U. S. 591, 610. We may not therefore sustain the action of the Court of Appeals unless it is clear as a matter of federal law that the pipe-line companies are entitled to the fund.

The basis of the claim stated in their petitions for intervention is that they are entitled to the fund as of right, since it was created by their payments. But we would be unmindful of the purpose of the Act and the responsibility of the federal courts under it, if we so ruled. The aim of the Act was to protect ultimate consumers of natural gas from excessive charges. See *Federal Power Commission* v. *Hope Natural Gas Co., supra,* at 610, 612. They were the intended beneficiaries of rate reductions ordered by the federal commission, though state machinery might have to be invoked to obtain lower rates at the consumer level. The rates charged a wholesaler are part of its costs, reflected in its rate base. Reduction of those costs normally will lead in due course to reduction in its resale rates, unless we are to assume that the passage of the Natural Gas Act was an exercise in futility. It is of course conceivable that a wholesaler might be warranted in keeping all or a part of the rate reduction under the standards of reasonableness prescribed by the Act. But a court would not be warranted in assuming that the rates which have been charged are so low as to be unreasonable. No such presumption attends rates which have been fixed pursuant to rate orders of the commission. Nor can we make any such presumption as respects rates fixed

by the utilities themselves without the compulsion of a rate order. For experience does not indicate that utilities are wont to charge themselves out of business.

The pipe-line companies in their petitions for intervention make no claim that their rates have been so low that they are entitled to these refunds as a matter of law. Were that issue tendered, the court would need to resolve it and could call upon the Federal Power Commission for information relevant to it. Moreover, if the pipeline companies passed on to their customers the rate reductions from the date of the commission's order (as Mississippi alleges it did), they would be entitled to a return of the payments they made into the fund. They would then have done all that was in their power to effectuate the policy of the Act in this regard. But apart from those exceptions, it is the duty of the court to look beyond those companies for the rightful claimants of the fund. It is the responsibility of the court which distributes the fund accumulated under its stay order "to correct that which has been wrongfully done by virtue of its process." *United States* v. *Morgan,* 307 U. S. 183, 197. That responsibility plainly cannot be discharged by payment of the fund to those who show no loss by reason of the court's action.

It is said that the federal court could not by-pass the pipe-line companies without undertaking to pass on the reasonableness of the rates which they have charged—a matter beyond its competence except on review of orders of the commission. But it is not rate-making to determine the equity of the claim of the pipe-line companies to the fund. The federal court, through exercise of its power under § 19 of the Act, issued the stay order under which the fund was accumulated. When a federal court of equity grants relief by way of injunction it has a responsibility to protect all the interests whom its injunction may affect. *Inland Steel Co.* v.

United States, 306 U. S. 153. It assumes the duty to make disposition of the fund in accord with equitable principles. *United States* v. *Morgan, supra,* at 191. If in a particular case the court reaches the question of reasonableness of rates, it does so only for purposes of distributing the fund for whose creation it alone was responsible. It does not fix or prescribe rates for the past or the future. The reasonableness of rates charged by the companies who claim the fund is wholly ancillary to the problem of determining what claimants are equitably entitled to share in it. See *Atlantic Coast Line R. Co.* v. *Florida,* 295 U. S. 301; *United States* v. *Morgan, supra.*

Second. The problem is somewhat more complicated if distribution of the fund is to be made to claimants other than the pipe-line companies. The latter sell gas to at least two types of customers—industrial users over whose rates the Federal Power Commission has no jurisdiction [2] and over which state regulatory bodies may or may not, depending on local law; and numerous distributing companies selling to customers in eight states. If the pipe-line companies had passed the rate reductions on to the distributing companies, those reductions may or may not have reached the ultimate consumers. We likewise do not know whether the reductions would have reached the industrial users either by terms of the contracts or by virtue of the assertion of regulatory authority.

If in this situation local law provides a standard for determining which of two or more claimants would have been entitled to the benefits of the rate reduction, the federal court should apply it. If clear and speedy state remedies are available, the federal court might hold the fund until those having the final say on the state law questions have spoken. Cf. *Thompson* v. *Magnolia Petroleum Co.,* 309 U. S. 478, 483; *Spector Motor Co.* v.

[2] § 1 (b).

McLaughlin, 323 U. S. 101. But in absence of such a showing the federal court in the interest of dispatch should proceed to determine the questions, relying on such sources of local law as may be available, including information from state regulatory agencies. The federal court may in its discretion disburse the funds directly to either the local distributing companies or the ultimate consumers or work out an administrative scheme whereby the distribution is made pursuant to directives of state agencies.

In conclusion, the task of the federal court in distributing the fund accumulated by virtue of its stay order is to undo the wrong which its process caused. The basic problem, therefore, is not to fix rates but to determine who suffered a loss as a result of the court's action in granting the stay. What in fact would have happened as a consequence of federal or state law if the stay had not been issued, no one can know for a certainty. But the federal court must make its prognostication, whether an excursion into federal or state law questions is entailed. Distribution of the fund should not involve prolonged litigation. It is an administrative matter involving the exercise of an informed judgment by the federal court and should have the flexibility and dispatch which characterize the administrative process.

Reversed.

MR. JUSTICE FRANKFURTER, concurring.

While agreeing in substance with MR. JUSTICE DOUGLAS' opinion, because of the conflict of views to which the case has given rise I deem it desirable to spell out with particularity what I regard as the controlling considerations.

1. The controversy concerns the proper disposition of a fund impounded in the Court of Appeals by virtue of the court's suspension of a rate reduction order of the

Federal Power Commission. Interstate paid into the registry of the court the sums collected by it in excess of the rates fixed by the Commission. After the order was finally sustained Interstate moved the court for distribution of the fund to the three companies which, as customers of Interstate, paid the unlawfully exacted amounts. The motion was supported by the three purchasers from Interstate; it was resisted by the Federal Power Commission which asked that distribution be made to the ultimate consumers; it was also resisted by the City of Jackson and by the regulatory commissions of Illinois and Missouri, which likewise urged that distribution be made to the ultimate consumers within their respective territories. One of Interstate's purchasers, United Gas Pipe Line Company, although intervening as a claimant, advised the court that it would pass on its share of the refund to the Memphis Natural Gas Company, to which United had resold the gas purchased from Interstate.

2. The court below thus had before it claims upon the fund by two immediate purchasers from Interstate, which asserted their right to the amounts paid into the fund by them, by a third purchaser from Interstate which made claim upon the fund but merely as a conduit for its passage to a subpurchaser, and by public agencies—national, state and municipal—which urged that the entire fund be distributed to the ultimate consumers.

The respondents—Interstate and the three immediate purchasers from it—basically rely on *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531, in urging that the fund should go to the immediate depositors from whom it was found to have been wrongfully exacted. They deem that case to be the foundation of our decision in *Central States Electric Co.* v. *City of Muscatine*, 324 U. S. 138. The Government on the other hand asks that the *Muscatine* case be overruled and that the fund should go to the ultimate consumers.

In the *Muscatine* case this Court rejected the notion that as between a utility like Interstate and its immediate purchasers a rate reduction makes the distributors mere conduits of the reduction for the exclusive benefit of the ultimate consumers. In short, the rationale of the *Muscatine* case is that that which is in fact not true in the process of rate-fixing ought not to be erected into a principle of law merely because the effect of a rate reduction is postponed through an exercise of the right to judicial review afforded by the Congress.

3. It would, therefore, appear to be clear that the judicial duty is to deal fairly with a trust fund held to await the outcome of judicial review to the end that it may be distributed on the basis of what would have taken place had the Power Commission's order gone into effect at once.

The task, then, for the Court of Appeals is to reconstruct, as far as it can possibly be done, what would have happened had no fund accrued. Reasons of equity produced the fund; equitable considerations must determine its distribution. The governing principle is that of unjust enrichment. Since the task of the court is to place the parties in the position in which they would have been had there not been a postponement of the effective date of the rate reduction, it is now the duty of the court to make that retrospective determination not by unfounded assumptions erected into rigid legal rules, but by an ascertainment of what actually would have happened contemporaneously had purchasers from Interstate obtained their gas at the lower rate.

4. A utility is entitled to charge a reasonable rate. It would be dealing with a fiction and not a fact to hold as a matter of law either that the immediate purchasers from Interstate should keep the benefit of the reduced rate or that it should all go to the ultimate consumers. Whether the three purchasers or the intervening distribu-

tors are entitled to any part of the reduction depends on the ascertainable condition of the three purchasers from Interstate and the intermediate purchasers from them. A merely compensatory rate below which no rate may be fixed by a regulatory commission may not be a reasonable rate. See Brandeis, J., in *Southwestern Bell Telephone Co.* v. *Public Service Commission,* 262 U. S. 276, 296. For various reasons a utility may charge, as is well known, less than what as a matter of law it could be compelled to charge. On the other hand, it may charge the maximum of what is reasonable.

To distribute the entire fund among the immediate purchasers from Interstate may give them a complete windfall, since they might have been compelled, under their duty to charge only a reasonable rate, to reduce their rates so as to keep none of the Interstate reductions. Since all these purchasers are subject to regulation by the Power Commission, the Power Commission could have ordered such rate reductions in whole or in part. On the other hand, to take it all away from them now might work an injustice because they might have been allowed to keep at least part of the reduction. As to the intermediate purchasers that were not subject to the Federal Power Commission, the allowable retention of any part of a reduced rate from a distributor would have turned contemporaneously on state law. To deny both these classes of the intermediate purchasers the right to establish just claim against the fund and to distribute it all among the consumers, moreover, would inevitably leave a sizable unclaimed amount, and this, of course, would have to go to the depositors as the residuary claimant—it would have to go, that is, to Interstate, the one party least entitled to any of the fund.

These arbitrary alternatives—to distribute the whole fund to the immediate purchasers from Interstate or to distribute it all to the ultimate consumers—have at least

the support of logic though not of justice. A suggested compromise—to go beyond the immediate purchasers and at the same time stop short with those purchasers over whom the Federal Power Commission has authority—is said to be justified by the fact that a federal court cannot engage in rate regulation. This suggestion has the support neither of logic nor of justice. If a federal court is barred from inquiring, because such an inquiry amounts in effect to rate regulation, what would have been the consequences to all those affected had the reduction of Interstate's rate gone into immediate effect, rates administered by the Federal Power Commission should be no more open to such an inquiry than are those beyond the power of the Commission. And if it would be unjust to let an immediate distributee which had passed on the higher rate to its purchasers retain the benefit of the reduction, it would be equally unjust to let any succeeding distributee which had done the same thing enjoy the benefit merely because it was the last distributee subject to the Commission's jurisdiction.

At all events, in preventing unjust enrichment a court of equity is not exercising the functions of rate-making; it is neither awarding reparations for the past nor fixing a future schedule as does a rate-regulating body. Granting that a federal court does not have the power to regulate rates, it does not follow that in discharging the duty to distribute a fund of its own creation it is barred from an inquiry which has some aspects—though I believe very minor ones—that would also appear in a rate proceeding. In short, issues that may be pertinent to a rate investigation before a regulatory commission are not therefore beyond the power of judicial inquiry when they arise in a totally different relation.

5. Accordingly, the task for the court below is to determine in 1949 how the Interstate rate reduction would have affected all the intermediate distributors in '43 and

'44 had it not been suspended by the court's injunction. The Court of Appeals has inherent powers to bring to its aid all effective means to discharge this task. This Court, in *Ex parte Peterson,* 253 U. S. 300, showed the resources available to our District Courts even in an action at law when due regard must be had for the requirements of the Seventh Amendment. The more clearly available are procedures for doing justice where a court of equity is called upon to distribute a trust fund of its own creation.

In the light of the foregoing, the Court of Appeals should ask the Federal Power Commission for an advisory report as to what the Commission might have determined had it in the original proceeding for the reduction of the rates of Interstate exercised its power to bring in all the parties. There is nothing novel in this. District Courts may call upon the Federal Trade Commission to help shape decrees in Sherman Law cases. To be sure, the Clayton Act explicitly so provides. But a court of equity has inherent powers to invite such help from a great agency of the Government. While the Federal Power Commission could, if it chose, decline to render that help, it is inconceivable that it would do so. As to the intermediate purchasers, subject not to the Power Commission but to State or city regulation, the local agencies could be similarly resorted to for aid in the ultimate problem before the lower court of distributing a commingled fund as to which none of the interested parties can fairly be said, as a matter of law, to have an obvious, demonstrated claim.

Various obstacles are conceived to stand in the way of the lower court's fulfillment of this task. But it is, to say the least, premature to conjure up abstract difficulties which, as a practical matter, may evaporate in the light of the informed advice which these various regulatory agencies may be able to furnish readily on the

basis of their available records of the financial condition of the utilities subject to them. It will be time enough to distribute the fund by some makeshift rule of thumb if what is concededly a rule of intrinsic fairness should be found judicially unenforceable. Accordingly, I would remand the case to the Court of Appeals to take steps consistent with the foregoing views.

By MR. JUSTICE JACKSON.

MR. JUSTICE BURTON and I view this case in a different light than do any of our brethren but we have joined in the judgment and the opinion of MR. JUSTICE DOUGLAS because we deem it important that instructions to the court below carry the concurrence of a majority of this Court. We agree with much but not all of that opinion and where our views differ we are closer to that opinion than to other views expressed here. We repeat our concurrence so that there may be no misunderstanding but wish also to express for the record our individual views.

The way this case appears to us is this:

1. The three pipe-line companies whose excessive payments made up this fund may not, under the terms of the impounding order, have an absolute right to recover it. However, since this Court found that the money was illegally exacted from them, it would seem to make at least a *prima facie* case for returning it to their possession. The minimum to which they are entitled is a chance to be heard as to whatever claim they may have to it. As these companies are subject to the Federal Natural Gas Act, a federal court might properly weigh their claims under federal law.

2. Assuming, however, what is not improbable, that none of the pipe-line companies establishes a claim to the fund, the next in right to receive it would be their customers, the local distributing companies. The latter

are under protection of federal law as to the rates which may be exacted from them by the pipe-line companies but are in no respect under federal law as to the rates they may charge customers. If all of the federal power exerted in the Natural Gas Act had been exercised by the Federal Power Commission, it could not reach or control their customer relations. We do not see, therefore, how a federal court in this litigation can derive from the Act any greater power to enter the local field with refunds than the Power Commission had to enter it for rate-making. There are many legal and practical reasons why the court's function should not be expanded beyond the point where Congress ended the functions of the Power Commission.

3. The manner and amount by which any repayments to distributing companies would be reflected in reduced rates to consumers, and therefore in rebates, is exclusively for state law. Twenty-one of these distributing companies are involved and they operate in eight states, each with its own principles to govern local rate-making and separate authorities to apply them. We solve no problem by saying that computation of this refund is not rate-making. Of course it is not, but it is so like unto it that no one suggests that any body of law except that of rate-making is applicable. Disguise it with what sophistry we will, the disposition of refunds as between operating companies and customers must be generally based on the local law of rate-making or on no law at all. Some of these companies and their customers are located within the territorial jurisdiction of the Court of Appeals for the Fifth Circuit; others are in the Sixth, Seventh and Eighth Circuits. I know of no legal or practical justification for requiring the Fifth Circuit Court of Appeals to undertake interpretation and application as an original matter of the laws of eight states, several of them beyond its jurisdiction.

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4. The application of these funds, if they are held to go to the local distributing companies, present difficult questions of policy which it is the responsibility of the states to resolve in their own ways. The federal court should not undertake to resolve them, even if they were less complex. These problems are not solved or evaded by saying that refunds shall go to consumers rather than to the companies. It oversimplifies these problems to treat consumers in the abstract as a class all alike. And it does not dispose of the problems to declare that refunds should be on "equitable principles" as if there were a defined and accepted body of principles of equity on this subject. Equity in the historical sense—equity jurisprudence—has no guidance to give beyond maxims, such, for example, as "equality is equity." But here, what is equality? Of course, what no doubt is meant is that the court should apply a sort of natural justice based on popular notions of right dealing. But this does not answer some of the concrete questions which someone must face in final disposition of these funds. I shall mention but few.

At the very outset one is faced with the question as to what is an "equitable" basis of refund as between industrial and domestic consumers. Direct sales to industrial consumers by the three pipe-line companies amounted to 63% of the total for Mississippi River Fuel Company, 18% in the case of Southern Natural Gas Company, and 11% for United Gas Pipe Line Company. In addition to this, other industrial consumers may be served by local distributing companies. The Federal Power Commission proposal, which this Court seems to think should prevail, is that refunds both to industrial and domestic consumers be calculated by dividing the money in proportion to feet of gas sold to each one. On this basis, the Power Commission's exhibit proposes a refund to direct industrial consumers alone of over a million dollars from this fund. The Commission does

not tell us the prices paid by various classes of consumers. But it is common knowledge that, for a variety of reasons, industries get a much lower price per m. c. f. than domestic users. If we assume it is 50%, then the refund would repay industrials twice as large a proportion of what they have paid for gas per m. c. f. as it would household users. Is this "equity"? In my dissent in *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U. S. 591, I pointed out the uneconomic use of gas in industry and the waste and exhaustion of irreplaceable natural resources that it causes, and the great differential that exists between their low contract price and the price paid by domestic users. I have great doubt whether the industrial users have any just basis for participating in this refund; but if they could, and they certainly are entitled to try, their share should not be greater than their proportion of the *revenues contributed,* rather than of their proportion of the *consumption.* The latter measures only the benefits they already have derived from exhausting the Nation's supplies, not at all what they have contributed to the fund. This Court refused to consider these equities, as did also the Power Commission, in the *Hope* case. Why not then leave the states free to solve the issue? Some of the states may have an intelligent policy with reference to the rapid depletion of our gas reserves, *vis-à-vis* domestic and industrial consumption, and the relation of price to uneconomic uses. The Federal Government has none.

The Power Commission has furnished a tabulation showing the share of each local distributing company under its theory. But it has not provided any of the data which would disclose the magnitude and complexity of the task it is asking us to visit upon the Court of Appeals by directing it to go beyond this and distribute each company's share among its consumers. By reference to Moody's Manual, however, we can learn the

approximate number of customers served by each company. Then by applying the Power Commission's tabulation of the share of refunds, it would appear that refunds for some companies would be so trivial that a state supervising authority might conclude that to cover this refund into the current revenues of the operating company for whatever effect it might have on its present or future rates would be a more sensible procedure than to spend it in expense of special proceedings to refund to consumers. For instance, Arkansas-Louisiana Gas Co. serves 142,481 customers in 109 communities. The Power Commission allocates it $20,911, or an average 15¢ per consumer. The Illinois Power serves 116,000 customers in 56 communities and is allocated $50,065, or about 43¢ per consumer. Birmingham Gas serves 61,000 consumers in 9 communities and is allocated $30,133, making an average refund of about 49¢.

The foregoing estimate of consumer refunds assumes an equal amount to each consumer. Another permissible basis, and I should think, a fairer one where substantial amounts were involved, would be a refund in ratio to the bills paid for gas. The Power Commission, however, if consistent, would use another method and refund in proportion to the feet of gas purchased by the consumer. Different local conditions precipitate some nice questions in applying any fair method as between consumers. From Moody's Manual, for example, we learn that one of the largest of the distributing companies, the Atlanta Gaslight Co., which serves approximately 133,000 consumers in 28 communities, has a graduated scale of rates, so that consumers pay different rates for gas consumed in different quantity brackets. I should think the practical effect of its schedule would be that a very large consumer would make an average payment much less per thousand feet than would a moderate household consumer. Equality of refund may not be equality of treatment. It will take

more than equalitarian generalities to get this cash into consumers' hands. Is not the manner of refund under such local conditions one to be worked out by local authorities rather than the federal court of a distant circuit?

The problems do not end here. Consumers during what period are entitled to refund? Certainly the rate reduction which caused this fund to accumulate could not in normal course have reached local retail consumers until sometime after reduction in wholesale rates, and the period would differ according to local conditions. The individuals who are entitled to refund, for whatever period may be adopted, must be identified and questions settled as who is entitled to the refund of a deceased consumer, what becomes of the share of one who has removed or is unknown. Disputes between landlord and tenant, husband and wife, and many other questions will arise; all of which are for local authorities.

For these reasons it seems to us that the functions of the federal court end when it has granted these refunds to the last purchaser whose purchase price the federal authority can lawfully reduce. This would be the distributing companies. From there on it is a local problem with which neither the Power Commission nor the court has any legitimate concern. The machinery of some of the states may be somewhat inadequate for dealing with the problem, but that does not, in our view, warrant usurpation of their functions.

However, for reasons stated at the beginning of this opinion, MR. JUSTICE BURTON and I have joined the judgment and opinion of the Court.

MR. JUSTICE BLACK, concurring in part and dissenting in part.

I concur in reversal of the judgment of the Court of Appeals, but dissent from the directions given that court for disposition of the impounded funds. In the first

place I think those directions rest on erroneous legal principles. Secondly, without precise definition of issues or standards, the directions impose an almost impossible task on the Court of Appeals, a task which is bound to dissipate a large part of the funds in diverse, protracted, involved and confused litigation. Furthermore, I see little assurance that the fund's remnant at the end of this litigation could ever reach the consumers who are in my judgment the equitable and legal beneficiaries of the funds.

Acting pursuant to the Natural Gas Act,[1] the Federal Power Commission ordered the Interstate Natural Gas Company to reduce its rates to certain wholesale pipe-line companies. Challenging this order as illegal, the wholesale companies sought and obtained from a District Court an injunction against enforcement of the rate reduction order. By reason of the injunction the pipe-line companies were compelled to continue to pay the higher gas rates. But the court required the Natural Gas Company to make monthly payment into court of amounts equal to the rate reduction. For more than four years these funds have been collected and paid into court. When this case was submitted the total amount collected was in excess of two and a half million dollars. The rate reduction order was sustained by this Court[2] and consequently Interstate is not entitled to and asserts no claim to the fund. The wholesale pipe-line companies claim it on the ground that but for the injunction they would have obtained the gas at the lower rate.[3] The

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[1] 52 Stat. 821, 15 U. S. C. § 717.

[2] *Interstate Natural Gas Co.* v. *Federal Power Commission,* 331 U. S. 682.

[3] One pipe-line company claims to have passed on the rate reduction to its customers which if proved would put it in an entirely different category.

Federal Power Commission and certain state agencies here contend that since the purpose of the Natural Gas Act was to provide benefits to the ultimate consumers the total impounded funds should be distributed to the consumers.

First. I agree with the Court that the aim of the Federal Act was to protect ultimate consumers of gas from excessive charges. To protect the ultimate consumer, however, the Act went no further than to fix the interstate rates of producers and wholesalers. Congress intended that these federal rate reductions would lower the costs of gas to local retailers thus enabling state and local agencies to fix lower consumer rates on the federally fixed lower wholesale rates. Consequently, where courts leave the Act's scheme free to function, ultimate consumers of gas get no benefits from the federally reduced producer rates until and unless state or local authorities fix reduced rates for companies whose sales fall within their respective jurisdictions. Under such circumstances rate relationships and cost consequences as between consumers and dealers under state jurisdiction would raise questions of state law only. But here, the normal consequences of the valid federal rate reduction were not allowed to take place. The injunction placed an insuperable obstacle to state reduction of wholesale or retail rates on the basis of the federal rate reduction order. Thus the court's stay blocked the congressional mechanism intended to produce lower consumer rates. *Central States Co.* v. *Muscatine,* 324 U. S. 138, 149 (dissenting opinion). Furthermore, no practical remedy is available in the state courts or state or federal regulatory agencies to determine retroactively what is a proper distribution of the impounded funds. The judicial stay therefore effectually frustrated the congressional purpose to provide a timely opportunity for state or national

regulatory agencies to accord consumers the Act's benefits. Consequently, rights in the fund as between ultimate consumers and the pipe-line companies must be determined under the new situation created by the federal court.

Second. Differing from the Court, I think that distribution of the fund in this new situation is wholly a matter of federal law and that the fund should be distributed without a futile effort to determine the extent consumer rates might have been reduced by state or national regulatory agencies had they been left free to act on the reduced rate cost of gas. It was a federal court acting under authority of federal law that created the fund. And having deprived consumers of an opportunity to get the reduced rates Congress intended them to have as the result of an integrated federal-state course of conduct, it became the duty of the federal court to administer this fund under federal rules that would as nearly as possible afford these congressionally intended benefits to consumers. Nothing short of this will accord with the congressional purpose or with equitable principles by which the court must be governed in administering the fund. *Inland Steel Co.* v. *United States,* 306 U. S. 153; *United States* v. *Morgan,* 307 U. S. 183.

All gas the wholesale price of which was affected by the Commission's order had its ultimate price to the consumer fixed by law or by agreement of parties.[4] In neither event can it be assumed that the price paid failed to give the seller a reasonable value. Under such circumstances, where rates were fixed by law or contract on the basis of the high wholesale rate, neither statutes nor equitable principles require the Court of Appeals to seek standards of reasonableness different from those under which gas merchants voluntarily had already sold their product to

[4] As the Court points out, industrial purchasers' rates may not have been fixed by law but by contracts.

retailers and consumers. All regulatory statutes permit utilities to complain of unreasonable rates, and the failure of these utilities to prosecute claims for excess rates until this windfall was in sight should bar them from making retroactive claims now. And of course, where the price was fixed by voluntary contracts, the court should not be required to re-examine those contracts on the naive assumption that consumers took an unconscionable advantage of the pipe-line companies.

My belief is that under the circumstances here the only way even partially to carry out the purpose of Congress to afford consumer relief is by distributing this fund to the consumers. This itself will impose a tedious, onerous, and perhaps expensive burden on the court and the consumers. Such a burden, however, is one of the prices to be paid for the practice of judicial suspension of rate orders. But the burden in distribution to consumers would be small in comparison to that imposed by requiring the court in 1949 and 1950 to make expensive and extensive explorations to speculate on what rates state administrative agencies would have found reasonable in separate years from 1943 to 1947.[5] Neither the procedure I suggest nor that adopted by the Court can achieve with scientific accuracy the result that would have followed had the court not suspended the rate reduction order. But under the Court's plan to require the Court of Appeals to reconstruct hypothetical rate situations in several states a major part of the funds might be dis-

[5] How is this reasonableness to be determined, on the fair value theory, the reproduction cost theory, or some other theory? And how many more years would it take the Court to complete the several extensive inquiries required to reach its conclusions as to reasonableness of the prices charged by the several companies in the several states where they sold gas? See *McCart* v. *Indianapolis Water Co.*, 302 U. S. 419, 428–439 (dissenting opinion).

sipated in a costly but vain search for an unattainable goal.[6] Consumers at least can get a substantial part of the funds under the procedure I suggest.[7] Nor can I see any possible intrusion into state functions by following such a course.

Neither state laws nor state courts are responsible for the tangled situation here. I cannot see where it could possibly offend the states or encroach on their power for the federal court to distribute these funds to the very state people the federal law was passed to protect. And the state representatives here arguing for the distribution of this fund to the ultimate consumers, citizens of their states, are apparently unable to detect in distribution to these consumers any invasion of state rights by the federal courts.

This seems an appropriate time to reverse *Central States Co.* v. *Muscatine*, 324 U. S. 138. I regret to see that holding survive even in part.

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

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[6] It is interesting to note the unchallenged assertion in the Government brief that although in *Central States Co.* v. *Muscatine*, 324 U. S. 138, "this Court required that the way be left open for the ultimate consumers to utilize the remedies, if any, provided by local law, no such proceeding has been brought." The illusion that state relief is somehow available to the consumers here seems to persist despite the realities that consumers in the *Central States* case, similarly situated to the consumers here, have not received a dime from the "available" state remedies.

[7] Apprehension is expressed in this Court that the procedure I suggest would result in making the producing company the residuary beneficiary of funds not claimed by consumers. Such an apprehension is not justified since the Court of Appeals can direct any unclaimed consumer funds to be distributed to whatever company might show a superior equity.

Syllabus.

TRANSCONTINENTAL & WESTERN AIR, INC. *v.* CIVIL AERONAUTICS BOARD.

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

No. 387. Argued February 8–9, 1949.—Decided April 18, 1949.

1. The Civil Aeronautics Board is without authority, under the Civil Aeronautics Act of 1938 as amended, to fix a new mail rate for air carriers and to make it retroactive for a period in which a final rate previously fixed by the Board was in effect and unchallenged by the initiation of the mail rate proceeding. Pp. 602–608.
2. Section 406 (a) of the Act, which empowers the Board to fix rates for the transportation of mail by aircraft and "to make such rates effective from such date as it shall determine to be proper," is not to be construed as authorizing the Board to make a rate retroactive to a date earlier than the date of the commencement of the rate proceeding. Pp. 604–607.

83 U. S. App. D. C. 358, 169 F. 2d 893, affirmed.

A petition to the Civil Aeronautics Board by an air transport company to fix a new rate for the transportation of mail was dismissed insofar as the petition sought to have the new rate made retroactive to a date earlier than the date of the petition. 8 C. A. B. 685. The Court of Appeals affirmed. 83 U. S. App. D. C. 358, 169 F. 2d 893. This Court granted certiorari. 335 U. S. 884. *Affirmed,* p. 608.

Gerald B. Brophy argued the cause for petitioner. With him on the brief were *Charles Pickett* and *Joseph S. Iseman.*

Emory T. Nunneley, Jr. argued the cause for respondent. With him on the brief were *Solicitor General Perlman, Stanley M. Silverberg* and *Warren L. Sharfman.*

Charles H. Murchison filed a brief for Capital Airlines, Inc., as *amicus curiae,* urging reversal.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The question in this case is whether the Civil Aeronautics Board has authority to fix a new mail rate for air carriers and to make it retroactive for a period in which a final rate previously fixed by the Board was in effect and unchallenged by the initiation of a mail rate proceeding. The answer turns primarily on the meaning of § 406 (a) of the Civil Aeronautics Act of 1938 as amended, 52 Stat. 998, 49 U. S. C. § 486 (a), which empowers the Board to fix and determine the fair and reasonable rates of compensation for the transportation of mail by aircraft and "to make such rates effective from such date as it shall determine to be proper . . . ."[1]

[1] Section 406 provides:

"(a) The Authority is empowered and directed, upon its own initiative or upon petition of the Postmaster General or an air carrier, (1) to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith (including the transportation of mail by an air carrier by other means than aircraft whenever such transportation is incidental to the transportation of mail by aircraft or is made necessary by conditions of emergency arising from aircraft operation), by each holder of a certificate authorizing the transportation of mail by aircraft, and to make such rates effective from such date as it shall determine to be proper; (2) to prescribe the method or methods, by aircraft-mile, pound-mile, weight, space, or any combination thereof, or otherwise, for ascertaining such rates of compensation for each air carrier or class of air carriers; and (3) to publish the same; and the rates so fixed and determined shall be paid by the Postmaster General from appropriations for the transportation of mail by aircraft.

. . . . . .

"(b) In fixing and determining fair and reasonable rates of compensation under this section, the Authority, considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different

The Board in an order dated October 26, 1945, fixed a mail rate of 45 cents per mail ton-mile for petitioner.[2] From that date until March 14, 1947, petitioner was paid at that rate for its air carrier services. During that time no action was taken by petitioner or by the government to initiate a change in that rate. On March 14, 1947, petitioner filed a petition with the Board alleging that its mail rate had not been fair and reasonable since January 1, 1946, and requesting the Board to fix a fair and reasonable rate "from and after January 1, 1946." After hearing, the Board by a divided vote ruled that it had no authority to fix a mail rate for a period prior to March 14, 1947, and dismissed the petition insofar as it sought that relief. 8 C. A. B. 685. The Court of Appeals affirmed the order of the Board. 83 U. S. App. D. C. 358, 169 F. 2d 893. The case is here on a petition for a writ of certiorari which we granted because of the importance of the question to the carriers and public alike.

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air carriers or classes of air carriers, and different classes of service. In determining the rate in each case, the Authority shall take into consideration, among other factors, the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail; such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law; and the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense."

The Civil Aeronautics Board took the place of the Authority on June 30, 1940. See 54 Stat. 1235.

[2] See 6 C. A. B. 595.

The language of § 406 (a), which empowers the Board to "fix and determine" after notice and hearing "the fair and reasonable rates of compensation" for the transportation of mail by aircraft,[3] reads like a typical public utility rate-making authority. Both subdivisions (a) and (b) of § 406, to be sure, reflect some characteristics of rate-making which are peculiar to air carriers. That is true of the methods specified in § 406 (a) for ascertaining the rates of compensation—"aircraft-mile, pound-mile, weight, space, or any combination thereof, or otherwise . . . ." Special standards for rate-making are also prescribed. The Board is authorized to consider "the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers" in fixing different rates for different air carriers or classes of air carriers and different classes of service. § 406 (b). And the Board in determining the rate is authorized and directed to consider "the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense." § 406 (b).

Considerable reliance is placed on this last provision for the view that the Board has authority under the "make effective" clause to order such retroactive adjustments of rates as the "need" of the air carrier makes appropriate. But such a standard has its counterparts in other legislation dealing with rate-making[4] and does not necessarily

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[3] See note 1, *supra*.

[4] See § 1 of Title I of the Transportation Act of 1940, 54 Stat. 899, 49 U. S. C., note prior to § 1: "It is hereby declared to be the

mark a departure from the customary pattern of fixing rates prospectively. Yet, unless we found a congressional purpose to make a radical break with tradition, we would be most reluctant to give the "make effective" clause the broad meaning which petitioner urges. For the rates of carriers and other utilities fixed by public authorities, while usually prospective, are sometimes made retroactive to the date of the commencement of the rate-making proceeding. See *United States* v. *New York Central R. Co.*, 279 U. S. 73. But, so far as we are aware, they have never been retroactive to an earlier date.

The language of the Act does not suggest that Congress intended to break with these traditions of rate-making.[5] Moreover, the legislative history indicates that the "make effective" clause was inserted only to make clear that the rates could be made retroactive to the date of the application.[6] Finally the scheme of the Act

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national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act . . . to . . . foster sound economic conditions in transportation and among the several carriers; . . . all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

[5] The other rate-making provisions of the Act likewise follow the conventional pattern. See § 1002 (d) and (e).

[6] The Interstate Commerce Commission in its administration of the Air Mail Act of 1934 as amended, 48 Stat. 933, 935, 49 Stat. 614, 616, had asserted the power to make its orders effective as of the date of initiation of the proceeding. But there was a sharp divergence of views within the Commission over its authority to do so. See *Air Mail Compensation*, 216 I. C. C. 166, 222 I. C. C. 602. The congressional committees seemed primarily concerned with that problem in their consideration of the "make effective" clause

and its underlying policy seem to us to preclude the more expansive reading of the clause urged on us by petitioner.

Petitioner's reading of the Act would in practical effect have the tendency to transform it into a cost-plus system of regulation, a construction which would not harmonize with the apparent design of the Act. Thus § 406 (b) authorizes the Board to fix rates for "classes of air carriers." [7] It is plain that the uniform rate for the class is an important regulatory device. For § 2 (d) of the Act looks to the sound development of an air transportation system through competition.[8] A uniform rate forces carriers within a given class to compete in secur-

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in the bills which preceded the ones resulting in the Act. See Senate Hearings, Committee on Interstate Commerce, on S. 2 and S. 1760, 75th Cong., 1st Sess. 179, 180, 239, 291, 343, 483–485, 523. And see H. R. Hearings, Committee on Interstate and Foreign Commerce, on H. R. 5234 and H. R. 4652, 75th Cong., 1st Sess. 325–327. The policy of adhering to conventional rate-making is suggested by H. R. Rep. No. 911, 75th Cong., 1st Sess. 18, and by the statements of Senator Truman who was in charge of the bill in the Senate. 81 Cong. Rec. 9202, 9203, 9204.

This history is relevant to our problem, for though it relates to the 1937 bill which was not passed, the "make effective" clause crystallized at that time and appeared in the 1938 bill which was enacted. The Conference Report on the latter bill is silent on the "make effective" clause, though the following passage from it, H. R. Rep. No. 2635, 75th Cong., 3d Sess. 71–72, by its brief exposition of the power conferred suggests that Congress did not depart from the conventional pattern of rate-making when it enacted the measure:

"This section [§ 406] empowers the Authority to fix mail rates and sets forth the congressional policy to guide the Authority in fixing such rates and enables the Authority to adjust rates so that the policy of Congress may be properly carried out in the case of each carrier or class of carriers according to the needs of the particular case."

[7] § 406 (b) *supra*, note 1.

[8] Section 2 provides:

"In the exercise and performance of its powers and duties under this Act, the [Board] shall consider the following, among other

ing revenue and in reducing or controlling costs. If the Board had authority on the basis of the carrier's needs to make rates retroactive to any point of time, there would be a powerful incentive to seek relief from the uniform rate, not to live within it.

In sum a construction which would make it possible to revise rates retroactively to any point of time would be a real innovation which should have a more solid basis than our own predilections. We cannot but feel that if the rate-making power were to be put to such a novel use, the purpose would have been made clear. It is too unprecedented a departure from the conventions of rate-making to rest on mere inference.

It is pointed out that the Board apparently considers past operating losses in fixing rates[9] and that therefore it is a matter of no great consequence if the rates are

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things, as being in the public interest, and in accordance with the public convenience and necessity—

. . . . . .

"(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense . . . ."

[9] After the present case was argued in this Court, the Civil Aeronautics Board, on February 21, 1949, awarded a temporary mail rate increase to TWA effective March 14, 1947, to compensate it for losses sustained prior thereto as the result of grounding the Constellation aircraft. *American Airlines, Inc., et al., Mail Rate Increases,* C. A. B. Docket No. 2849, Serial No. E–2484 (Feb. 21, 1949). That action does not render the present case moot, for the new temporary mail rate covers only a part of the losses on the basis of which a rate increase was sought here. Nor do we have in this case any question concerning the power of the Board over temporary, as distinguished from final, mail rates. See *Essair, Inc., Temporary Mail Rate,* 6 C. A. B. 687, 690–691; *In the Matter of National Airlines, Inc.,* C. A. B. Docket No. 3037, Serial No. E–1271, March 5, 1948.

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made retroactive to one date rather than another. But the power to fix rates to recoup past losses is a distinct question not before us.

Affirmed.

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

MR. JUSTICE JACKSON, dissenting.

The Civil Aeronautics Board asks us to hold that it is denied by its organic Act any power retroactively to fix rates for carrying air mail. It has not convinced me that it has no *power,* whatever it should wisely do with it as matter of policy.

The fundamental premise of the Court's opinion is that the function of the Board in fixing the air-mail rate is analogous to rate-making for a railroad or a public utility. The two types of rates are not comparable. "Rate" as applied to the Government's air-mail payments is an euphemism to embrace a subsidy as well as compensation. The statute requires the Board, in fixing the "rate" for transportation of mail, to take into consideration the "need of each such air carrier for compensation . . . to insure the performance of such service, . . . and to enable such air carrier . . . to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense." § 406 (b). These considerations are inappropriate in applying ordinary utility rate-making principles. Moreover, utility rates apply to a multitude of customers; the air-mail rate is paid by only one—the Government. Utility services must be paid for currently; air-mail payments can be and are being paid in lump sums on account of items long past.

Congress, in the Act before us, set up a scheme for dealing with each according to its separate nature. The rate for public carriage of passengers and goods by air lines, of course, cannot be fixed retroactively on the basis of experience, for the public must know at the time they take service what they are to pay for it and the carrier must collect then or never. The Act recognizes this necessity with respect to passengers and cargo. Rates for transporting them are required by § 403 to be embodied in filed and published tariffs, which may be altered only after hearing and notice and only prospectively. Section 1002 provides that the Board may institute proceedings to modify these rates and may, after prescribed procedures, set the rates *thereafter* to be charged. Thus, when Congress was dealing with utility rates for passengers and shippers, it permitted only prospective changes, and said so.

But Congress believed that, in the interest of the national defense and commercial aviation, it had to subsidize pioneering air lines and underwrite revenues above those to be realized from passenger and cargo carriage. A feasible way to do it was through air-mail payments. Its plan to that effect was detailed in § 406. But as to this subsidy rate, it enacted no prohibition against retroactivity and, if it had, it is difficult to see how the Board would have authority to go back even to the date of the petition. On the contrary, however, § 406 (a) empowers and directs the Board to determine the air-mail rate and "to make such rates effective from such date as it shall determine to be proper." I see no justification for holding that this language means anything less than just what it says, or for holding that two such opposite kinds of payments must be governed by identical rules.

The Civil Aeronautics Board, however, asks us to hold that the same rules as to retrospective rates are "appli-

cable equally to mail, passenger and property rates under the Act." It urges that its provisions do not "convert the Board's primary function of fixing rates of compensation for the future into a duty to award amounts of compensation for the past" and that, if it sets too low a rate, "the carrier has no redress save a new hearing and the fixing of a more adequate rate for the future." It contends for application of decisions by which this Court "has refused to require the capitalization of past losses in the rate base for the purpose of fixing future rates" or to allow "current reimbursement out of new rates of deficiencies arising from a failure to earn a reasonable return in past years, or the capitalization of costs of maintaining excess capacity during the early period of operation." And the Board argued that it has adhered to such rules and advances policy reasons why we should hold that it is without power to do otherwise.

I have not been able to reconcile the position which the Board took before this Court at its argument on February 8 and 9 with what appears to be its almost contemporaneous action. On February 21, 1949, the Board handed down an order in which it allowed to this very petitioner, in a lump sum, $2,748,000 for the period July 14, 1947, to December 31, 1948, and $33,333 in a lump sum each month thereafter. It said, "The above payments for each of these carriers are in addition to, and not inclusive of, the mail rates provided for in previous *temporary or final mail rate orders,* for the respective periods stated." (Emphasis supplied.) The TWA lump sum of $2,748,000 was to make them whole for the year 1948 and also to pay their "grounding losses" for *1946,* a year prior to the filing of its petition, which the Board asks us to hold as the limit of backward operation of rates. The Board said:

> "In 1946, TWA incurred substantial costs because of the grounding of the Constellation aircraft. Sim-

> ilar costs were incurred by United and American in 1947 and 1948 when the DC–6 was grounded. These costs are merely another form of developmental costs attributable to the introduction of a new aircraft type. It is clear that they are, in these cases, of such magnitude as to impose a financial burden upon the carriers of such severity as to obstruct their current development. Under our statutory mandate to develop air transportation we should underwrite such costs in some appropriate manner."

At the same time the Board issued a statement of policy. As to the grounding costs which the Board had argued to this Court it had no power to reimburse retroactively, it said that it had originally felt they would not be high enough to require special mail-pay allowance for their "reimbursement." But it continued: "Experience has not supported this view" and it is "desirable to make special mail-rate provision for *established losses of this character.*" It announced that this petitioner, among others, is being paid for grounding losses. "In addition, in view of its obligations under Section 406(b) of the Act, discussed above, the Board has concluded that the temporary mail rates for United and TWA should be increased to an extent sufficient to meet the remainder of their approximate breakeven needs for the year 1948. With respect to the *entire retroactive period* and the future, the Board will determine final rates after formal proceedings which will give consideration to the full reasonable requirements of these two carriers." (Emphasis supplied.)

What I get from the Board's orders and statements is that it is acting in a spirit completely contrary to its argument to this Court and to this Court's opinion, even if there may be a technical consistency, which I doubt. It appears to have authorized capitalization of losses for periods before any rate petition was filed and the amorti-

zation of those losses from subsidy payments afterward. I find far less statutory authorization for such a device for carrying losses forward into current rates than for forthright fixing of effective rates from such prior date as shall be proper. If the need for retroactivity is so imperative that it must be met by evasion, the policy arguments of the Board against construing the statute to permit retroactivity fail. I do not know that these matters of policy should influence the Court in any event, but if they do, my own predilections, unlike the Court's, favor fixing the subsidy on experience rather than on prophecy. In the light of what appears to be the practice, I see no reason why the statute should not be applied so as to carry out what its language conveys and why the subsidy rates should not be regarded as always tentative and subject to revision either to meet unforeseen contingencies or to recapture excessive payments. The Commission would no more be bound to reimburse extravagant management or improvident outlay after it has occurred than to allow for it in advance. In fact, excessive expense would probably be easier to detect in actual statements of operations than in estimates.

But if I were to consider accepting the Board's argument, I would at least set this case for reargument and require a candid explanation of what appears to be a material discrepancy between what the Board has led this Court to hold and the premises on which it seems actually to be proceeding.

MR. JUSTICE FRANKFURTER joins in this opinion.

NYE & NISSEN, A CORPORATION, ET AL. *v.* UNITED STATES.

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

No. 228. Argued March 3, 1949.—Decided April 18, 1949.

Petitioners are a corporation and its president. An indictment charged them (and three employees of the corporation), in the first count, with conspiracy to defraud the United States from 1938 to 1945, in violation of § 37 of the Criminal Code (now 18 U. S. C. § 371); and, in six substantive counts, with filing false invoices with an agency of the United States, in violation of § 35 of the Criminal Code (now 18 U. S. C. § 1001). The case involved fraudulent practices in the sale of eggs and cheese to the Army, Navy and other government agencies. Petitioners were convicted on all counts. *Held:*

1. As to the individual petitioner, there was no fatal variance between the conspiracy charged and the proof, since the evidence amply supported a finding by the jury of a single conspiracy continuing during the entire period. Pp. 616–617.

2. Evidence of the presentation of false invoices other than and in addition to those charged in the indictment was admissible on the issue of intent. P. 618.

3. The evidence was sufficient to support the finding of the jury that the individual petitioner aided and abetted the commission of the offenses charged in the substantive counts; and, since the case was submitted to the jury on that theory and the charge of the trial court to the jury was adequate, the conviction must be affirmed. *Pinkerton* v. *United States,* 328 U. S. 640, distinguished. Pp. 618–620.

(a) The fact that some of the evidence of the substantive offenses was also evidence of the conspiracy is immaterial. P. 619.

(b) Where a conspiracy as well as a substantive offense is charged, it makes no difference so far as aiding and abetting is concerned whether the substantive offense is committed pursuant to the conspiracy. Pp. 619–620.

(c) The fact that, as to substantive offenses charged, a case might conceivably be submitted to the jury on either the con-

spiracy theory or on the theory of aiding and abetting, is irrelevant; it is sufficient if the proof adduced and the basis on which it was submitted are sufficient to support the verdict. P. 620.
168 F. 2d 846, affirmed.

Petitioners, a corporation and its president, were convicted on all counts of an indictment charging them and others with conspiracy to defraud the United States in violation of § 37 of the Criminal Code (now 18 U. S. C. § 371), and with filing false invoices with an agency of the United States in violation of § 35 of the Criminal Code (now 18 U. S. C. § 1001). The Court of Appeals affirmed. 168 F. 2d 846. This Court granted certiorari. 335 U. S. 852. *Affirmed,* p. 620.

Joseph B. Keenan argued the cause for petitioners. With him on the brief were *Robert T. Murphy* and *Harold C. Faulkner.*

Philip Elman argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl* and *Philip R. Monahan.*

Mr. Justice Douglas delivered the opinion of the Court.

Nye & Nissen is a corporation which during the years covered by the indictment was engaged in the business of purchasing and selling eggs, butter, and cheese in San Francisco. Throughout this period Moncharsh was president of the corporation, one of its directors, and the owner of one-third of the stock of the holding company which had sole ownership of Nye & Nissen. Moncharsh's mother owned a one-third interest in the holding company, while the other third was owned by one Baum who lived in New York. Berman and Goddard were brothers-in-law of Moncharsh—the former being city sales manager of Nye & Nissen in charge of the company's

retail salesmen, the latter being shipping and receiving clerk. Menges was another employee.

During the period from 1938 to 1944, Nye & Nissen made large sales of its products to the Army and Navy and, after December, 1943, to operators of various vessels having general agency contracts with the War Shipping Administration.

An indictment in seven counts was returned on June 20, 1945, against Nye & Nissen, Moncharsh, Berman, Goddard and Menges. The first count charged the defendants with having conspired to defraud the United States from 1938 to 1945, in violation of § 37 of the Criminal Code, 18 U. S. C. § 88,[1] now § 371, by designated fraudulent practices to which we will refer. The other six counts charged the defendants with violations of § 35 of the Criminal Code, 18 U. S. C. § 80,[2] now § 1001, by mis-

[1] "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

[2] "Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation

representing in invoices presented to the War Shipping Administration in April and May, 1944, the weights, grades, and prices of specified sales of eggs and cheese.

Menges was acquitted. Berman and Goddard were found guilty on all counts, sentenced to a year and a day on each count, the terms to run concurrently, and fined $700. They did not appeal. Nye & Nissen was found guilty on all counts and fined $5,000 on each. Moncharsh was convicted on all counts and sentenced to two years' imprisonment on the first and to five years on each of the other six, all seven terms to run concurrently. He was also fined $5,000 on each count. On appeal the judgments of conviction of Nye & Nissen and Moncharsh were affirmed. 168 F. 2d 846. The case is here on a petition for certiorari which we granted because of doubts whether the conviction of Moncharsh on the substantive counts could be sustained under the theory of *Pinkerton* v. *United States,* 328 U. S. 640, on which the Court of Appeals seemed to rely.

Two preliminary questions are presented. It is argued in the first place that there was a variance prejudicial to Moncharsh between the conspiracy charged and the proof, in that the evidence tended to show the existence of two separate conspiracies of different characters and involving different persons. The contention is that the conspiracy charged was a continuing one from 1938 to 1945, and involved the circumvention of the Government's inspection system with relation to the sale of eggs. It is said that the proof showed two separate and distinct conspiracies—the first embracing Berman, Goddard, Moncharsh and Menges in an undertaking to defraud the United States by impeding and impairing the

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in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

Government's inspection system with relation to the sales of eggs to the Army and Navy from 1938 to 1942; the second embracing Berman and Goddard alone in an agreement in 1943 and 1944, to file false vouchers with the War Shipping Administration. We need not take the space to relate why under that theory Moncharsh is said to have been prejudiced, because the argument that there was a variance seems to us to lack merit. The case was submitted to the jury on the basis of a single conspiracy throughout the period alleged in the indictment. That was proper, for as we read the indictment it charged a single conspiracy to defraud the United States in various ways: by grading and selling to agencies of the Government inferior products through frauds practiced upon its inspectors and representatives; by impeding and defeating the functions of government agencies in the inspection, grading, weighing, and purchase of eggs, butter, and cheese; by utilizing various schemes to circumvent and avoid the standards, grades, weights, and specifications to which the orders were subject; and by misrepresenting the grade, weight, and price of eggs, butter, and cheese. The fact that certain types of fraudulent practices occurred during one period and other types at different periods is without significance. The circumvention of the inspection system and the presentation of false invoices were part and parcel of the same conspiracy as charged and proved. There was an abundance of evidence, as the Court of Appeals held, from which the jury could conclude that there was one continuous and persistent conspiracy to defraud. It is conceivable that the jury might conclude that beginning in 1943 or thereabouts Moncharsh severed himself from the conspiracy and that his subordinates carried it forward on their own. But we could not reverse them if that theory taxed their credulity.

It is argued in the second place that the trial court erred in admitting against Moncharsh evidence of crimes similar to those charged in the substantive counts to prove the guilty intent with which the substantive acts were committed. Each of the six substantive counts charged the presentation of a separate false invoice. The evidence showed the presentation of eleven other false invoices. This was part of the evidence received in support of the conspiracy count. The trial court also admitted it at the conclusion of the case "for the sole purpose of proving guilty intent, motive, or guilty knowledge" of the defendants. Evidence that similar and related offenses were committed in this period tended to show a consistent pattern of conduct highly relevant to the issue of intent.[3]

The principal question in the case pertains to the charge concerning the substantive offenses and the sufficiency of the evidence to support them.

In *Pinkerton* v. *United States, supra,* a conspiracy and substantive offenses were charged. We held that a conspirator could be held guilty of the substantive offense even though he did no more than join the conspiracy, provided that the substantive offense was committed in furtherance of the conspiracy and as a part of it. A verdict on that theory requires submission of those fact issues to the jury. That was not done here. Hence Moncharsh argues that he is entitled to a new trial.

The difficulty with that argument is that the case was submitted to the jury on an equally valid theory. The trial court charged that one "who aids, abets, counsels, commands, induces, or procures the commission of an act is as responsible for that act as if he committed it directly." That theory is well engrained in the law. See

[3] See 2 Wigmore, Evidence (3d ed., 1940) §§ 302–304; 1 Wharton, Criminal Evidence (11th ed., 1935) §§ 349–352.

§ 332 of the Criminal Code, 18 U. S. C. § 550,[4] now § 2; *United States* v. *Johnson,* 319 U. S. 503, 518; *United States* v. *Dotterweich,* 320 U. S. 277, 281. In order to aid and abet another to commit a crime it is necessary that a defendant "in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed." L. Hand, J., in *United States* v. *Peoni,* 100 F. 2d 401, 402.

There is no direct evidence tying Moncharsh to the six false invoices involved in the substantive counts. Yet there is circumstantial evidence wholly adequate to support the finding of the jury that Moncharsh aided and abetted in the commission of those offenses. Thus there is evidence that he was the promoter of a long and persistent scheme to defraud, that the making of false invoices was a part of that project, that the makers of the false invoices were Moncharsh's subordinates, that his family was the chief owner of the business, that he was the manager of it, that his chief subordinates were his brothers-in-law, that he had charge of the office where the invoices were made out.

Those activities extended throughout the period when the substantive crimes were committed. They constitute ample evidence in a record reeking with fraud that Moncharsh was associated with the presentation of the six false invoices. The fact that some of that evidence may have served double duty by also supporting the charge of conspiracy is of course immaterial.

We see therefore no reason to exculpate him as an aider and abettor. There was no inadequacy in the charge to the jury on that theory. Nor was the submission in con-

[4] "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

flict with *Pinkerton* v. *United States, supra.* The rule of that case does service where the conspiracy was one to commit offenses of the character described in the substantive counts. Aiding and abetting has a broader application. It makes a defendant a principal when he consciously shares in any criminal act whether or not there is a conspiracy. And if a conspiracy is also charged, it makes no difference so far as aiding and abetting is concerned whether the substantive offense is done pursuant to the conspiracy. *Pinkerton* v. *United States* is narrow in its scope. Aiding and abetting rests on a broader base; it states a rule of criminal responsibility for acts which one assists another in performing. The fact that a particular case might conceivably be submitted to the jury on either theory is irrelevant. It is sufficient if the proof adduced and the basis on which it was submitted were sufficient to support the verdict.

Affirmed.

MR. JUSTICE FRANKFURTER, dissenting.

Scarcely more than a recital of the history of these proceedings will expose the reasons why I cannot agree with the Court.

Moncharsh, with the other defendants, was indicted on seven counts. The first count charged conspiracy to defraud the United States. The other six counts charged the presentation of false invoices to the War Shipping Administration. The trial court correctly instructed the jury as to the findings necessary to support a conviction of guilty on the conspiracy count; it also correctly defined what is necessary to conclude that the defendant had aided and abetted commission of the substantive crimes charged in the remaining counts. On April 6, 1946, the jury found Moncharsh guilty as charged on all counts. He appealed, challenging, *inter alia,* the sufficiency of the evidence as to each.

To sustain on appeal the conviction for the substantive crimes, the Government chose not to insist upon the sufficiency of the evidence to sustain a finding by the jury that Moncharsh had aided and abetted the commission of the substantive offenses. It urged instead the applicability of the decision of this Court in *Pinkerton* v. *United States,* 328 U. S. 640, decided June 10, 1946. The Court of Appeals, regarding that case as controlling, was eloquently silent as to the sufficiency of the evidence to sustain a finding of aiding and abetting.

This Court now finds that the theory of the *Pinkerton* case cannot support the conviction. I agree that it cannot. The charge to the jury in that case made explicit that in order to supply the lack of direct evidence of participation in the substantive offenses, the jury could regard their finding, if they made one, that a conspiracy existed as sufficient to support a conviction on those counts, but it could do so only "provided the acts referred to in the substantive counts were acts in furtherance of the unlawful conspiracy . . . ." 328 U. S. 640, 645–46, n. 6. Here also direct evidence was lacking, but there was no such charge, and so I join the Court in rejecting the applicability of the *Pinkerton* theory.

The Court thus recognizes that the *Pinkerton* doctrine is available only if (1) there is a connection between the conduct of the conspiracy and the commission of the substantive offenses, and (2) the jury has been instructed that evidence establishing guilt of conspiracy cannot be used as a basis for conviction upon the substantive counts unless it has found the necessary connection to exist. The importance of these requirements lies in this: only when a jury has been properly instructed as to the relevant standards to be applied to the evidence does a basis exist for determining whether evidence sufficient to support the verdict was presented to it. See *Bollenbach* v. *United States,* 326 U. S. 607, 613–615. The

relevant question is not was the evidence sufficient, but was it sufficient to fulfill the required standards.

If this were all, we should reverse even though the record contained evidence which would have supported a finding that the acts referred to in the substantive counts were acts in furtherance of the unlawful conspiracy. But there remains the possibility of affirming on the ground that the record nevertheless contains evidence sufficient to support conviction for the substantive counts upon the theory of aiding and abetting, since the trial court did submit the substantive counts to the jury on a legally proper exposition of that theory and the jury apparently found that the evidence fulfilled the standards established. But the defendant challenges the jury's right so to find; he insists that the evidence is insufficient to establish his responsibility as an aider and abettor. As the case came before the Court of Appeals it did not feel called upon to meet this challenge. This was evidently due to the fact that the Government had shifted its position—a shift doubtless induced by the fact that the *Pinkerton* decision, rendered after the case went to the jury, offered a tempting short-cut by which to sustain the verdict.

It may well be that the record supports the jury's finding of guilt on the substantive counts. But that question can be answered only by facing petitioner's challenge to the insufficiency of the evidence. This challenge is hardly met by examining bits and pieces of the record or by reliance on atmospheric emanations of guilt. The whole record must be canvassed, and the state of this Court's business precludes such an undertaking. It is a task especially to be avoided in view of the provision of the Evarts Act of 1891, underlined by the Judiciary Act of 1925, making criminal appeals final in the Courts of Appeals, reserving to this Court to grant further review in those rare instances where a serious issue of law or a

conflict between the Courts of Appeals presents an issue of true public importance. The question of evidentiary sufficiency here at issue exemplifies precisely those burdensome features which led Congress to free this Court from such a wasteful responsibility. The record comprises twelve volumes, including 4,630 pages. It is not conceivable that the case would have been brought here for the purpose of canvassing such a record. We should not now undertake the task merely because the need to do so is unexpectedly presented, nor do we contribute to sound judicial administration by adopting a conclusion, on a necessarily partial examination of the record, which the Court of Appeals itself, though it must have examined the record, refrained from adopting.[1] Our duty is

[1] The following excerpts from the opinion of the Court of Appeals make clear how firmly it placed its decision upon the *Pinkerton* doctrine rather than upon a determination of the sufficiency of the evidence.

". . . Here the case was submitted to the jury with an instruction under 18 U. S. C. A. § 550 that 'one who aids, abets, counsels, commands, induces, or procures the commission of an act is as responsible for that act as if he committed it directly.' It is the gist of appellant's [*sic*] contention in this respect that unless there is substantial evidence to support the verdict under the instructions which were given, the verdict cannot be sustained on the ground that the evidence was sufficient under a theory as to which the jury was uninstructed.

"No authority is cited in support of the point so raised and our search fails to reveal any federal case in which it has been expressly considered. . . .

"Whatever the answer to this problem may be, we are of the opinion that the verdict of the jury on the substantive counts did not disregard or go beyond the scope of the instructions given. Appellants' contention to the contrary is answered by the Pinkerton case itself.

"So long as the conspiracy existed, the members acted for each other in carrying it forward. The criminal intent to commit substantive offenses in furtherance of the unlawful project was established by the formation of the conspiracy." 168 F. 2d at 854.

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not to sustain merely on the basis of a general sense that crime has been committed; our duty is to sustain only if the applicable procedural requirements have been satisfied. Now that the theory has been rejected which made it unnecessary for the Court of Appeals to pass on the sufficiency of the evidence to support the charge of aiding and abetting, we should remand the case so that it may do so. *Bates* v. *United States,* 323 U. S. 15.

Plainly the Court cannot undertake the task from which Congress has happily relieved it. By failing to do so, however, it leaves room for doubt whether it has regarded the conviction for conspiracy as the damning fact which establishes guilt of the substantive offenses. Granted that evidence tending to establish guilt of the conspiracy may also be relevant to establish association with the substantive crimes, it is wholly immaterial, in the absence of such an instruction as that given in the *Pinkerton* case, that the defendant has been found guilty of conspiracy. Yet the Court points to the "evidence that he was the promoter of a long and persistent scheme to defraud," and adds that "those activities extended throughout the period when the substantive crimes were committed." The former statement on its face is no more than a way of saying that he was convicted of a conspiracy to defraud, and surely the fact that this scheme was contemporaneous with the commission of unrelated crimes does not supply the lack of an instruction which would make guilt of participation in it available as proof of aiding and abetting those crimes.

The instruction given in the *Pinkerton* case was needed to inform the jury of the conditions under which they might use a finding that the defendants were guilty of conspiracy as circumstantial evidence of guilt of the substantive offenses. An instruction as to aiding and abetting serves no such function, for it leaves wholly at large

the bearing of the crime of conspiracy upon the substantive offenses. For the same reasons, therefore, that it cannot be assumed, in the absence of such an instruction as that given in the *Pinkerton* case, that the acts referred to in the substantive counts were acts in furtherance of the unlawful conspiracy, so it cannot be assumed that the acts constituting the conspiracy were found by the jury to be acts aiding and abetting the substantive offenses. Without more, the aiding and abetting instruction was sufficient only to entitle the jury to draw inferences supplying the lack of evidence of the defendant's direct participation in the substantive offenses from the circumstantial evidence offered to establish commission of those offenses. Lacking a *Pinkerton* instruction, the finding that a conspiracy existed cannot be used to fill out that circumstantial evidence.

I am left in doubt, therefore, whether in lieu of a charge to the jury the Court is fabricating a rule of law. The Court itself seems to draw the inference that the defendant, because of his position and connection with the conspiracy, must inevitably have been associated as an aider and abettor in the commission of the substantive crimes. For an appellate court to draw such an inference is to make it a rule of law that the same inference must be drawn in every similar case. It is to create, in other words, a presumption that whenever A has been found guilty of conspiring with B and C to bring X, Y and Z to pass, and A and B commit the substantive offenses L, M and N, during the life of this conspiracy, C is an aider and abettor with A and B in the commission of L, M and N.

Clarity as to the ground on which a criminal conviction is sustained is indispensable to Anglo-American notions of criminal justice; it is no less indispensable for the guidance of district courts in future prosecutions for con-

spiracy. Such prosecutions are appropriate to reach a combination united to accomplish defined criminal purposes; the concept of conspiracy is not an invitation to circumvent the safeguards in the prosecution of crime which are the special boast of our democratic society by making it a device to establish guilt, not on the basis of personal responsibility, but by association, and we should be at pains to forestall the implication that we have so extended it. My brother JACKSON has impressively shown the grave dangers of abuse to which conspiracy charges so readily lend themselves. *Krulewitch* v. *United States,* 336 U. S. 440, 445. They are dangers which the Conference of Senior Circuit Judges has strikingly pointed out, and long before that judges who had observed these abuses in practice had warned against them.

> "There seems to be an increasing tendency in recent years for public prosecutors to indict for conspiracies when crimes have been committed. A conspiracy to commit a crime may be a sufficiently serious offense to be properly punished; but, when a crime has been actually committed by two or more persons, there is usually no proper reason why they should be indicted for the agreement to commit the crime, instead of for the crime itself. . . . Prosecutors seem to think that by this practice all statutes of limitations and many of the rules of evidence established for the protection of persons charged with crime can be disregarded. But there is no mysterious potency in the word 'conspiracy.' If a conspiracy to commit a crime has been carried out, and the crime committed, the crime, in my opinion, cannot be made something else by being called a conspiracy." *United States* v. *Kissel,* 173 F. 823, 828 (C. C. S. D. N. Y.).

Neither can a conspiracy to commit one crime be made to establish another crime by resort to the doctrine of aiding and abetting.

As to other issues canvassed by the Court of Appeals, among them the admission of proof of similar crimes to show intent, I do not mean to imply agreement with its views. For the reasons I have stated, I believe that the judgment should be reversed and the case remanded to the Court of Appeals.

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

MR. JUSTICE MURPHY, dissenting.

The petitioners were indicted for seven offenses. The first was a conspiracy to defraud the Government between 1938 and 1945. The remaining counts charged six specific instances of that fraud. Serious attack has been made in this Court on the petitioners' convictions under the six substantive counts. The Court upholds those convictions. It finds sufficient evidence to establish the fact that petitioners aided or abetted the perpetration of the substantive offenses; and since 18 U. S. C. § 2 makes an aider or abettor a principal, the petitioners are guilty of the substantive offenses.

The trial lasted nearly three months. The judge's charge to the jury began with an analysis of the conspiracy count, and offered several definitions of the term "conspiracy." Some were traditional. But one was this: "If a person, understanding the unlawful character of a transaction, encourages, advises, or in any manner, with a purpose to forward the enterprise or scheme, assists in the prosecution, he becomes a conspirator." Later in the analysis of the conspiracy count, a definition of "abetting" was given. It was immediately followed by this statement: "In this connection" the acts and dec-

larations of a *conspirator* are admissible against other conspirators.

The judge then passed to the substantive offenses. And he charged: "One who aids, abets, counsels, commands, induces, *or* procures the commission of an act is as responsible for that act as if he committed it directly." [1] The jurors were not told what the terms "counsel" or "induce" signified. Abetting, in the context of the substantive crimes, was not defined. Most important, the jurors were not told how to use a belief that conspiracy existed as evidence in itself of the substantive crimes. There was no attempt to sketch differences between abetting, counseling, inducing, and conspiring.

Yet the convictions are upheld in this Court on the theory that the jury found aiding or abetting. In this Court, then, aiding or abetting fraud becomes the substantive offense. Finding sufficient evidence to support the verdict on this theory of the substantive counts, the Court holds that failure to instruct of the relationship between conspiracy and aiding or abetting is unimportant.

I cannot agree. Conviction of the guiltless bystander is, of course, the great danger when conspiracy counts and substantive counts are tried together. A letter is written, a call is made, and the foundation is laid. The jury is subject to the temptation of generalizing; its confusion makes that temptation harder to resist. *Pinkerton* v. *United States,* 328 U. S. 640, as interpreted today, attempted to place limitations on this process. A conspiracy's mere joiner is not guilty of the substantive offense unless the substance was part of the conspiracy and in furtherance of it. The trial judge must so warn the jury.

The policy which required cautions in the *Pinkerton* case requires the same cautions here. This voluminous

[1] Emphasis added.

record, and the judge's instructions in particular, are replete with possibilities of confusion for the juror. The Court states that the crime of aiding or abetting the commission of a substantive offense is "well engrained in the law." And so it is. 18 U. S. C. § 2; *United States* v. *Peoni,* 100 F. 2d 401.

Attorneys may have an accurate idea what action constitutes aiding, abetting, counseling, inducing, or procuring. Counseling, in this context, means advising, or recommending. Although "conspiracy" means a variety of things, see *Krulewitch* v. *United States,* 336 U. S. 440, concurring opinion, we realize that the concept of at least implicit agreement may mark it somewhat apart from counseling, for example, or inducing. See *Thomas* v. *United States,* 57 F. 2d 1039, 1042; *United States* v. *Mack,* 112 F. 2d 290, 292.

Precise use of words is part of the lawyer's craft. But we expect too much of a juror when we ask him to make intelligent distinctions after a three-month trial and after instructions such as those I have quoted above—in an area of law which is difficult enough for the seasoned attorney. See *United States* v. *Sall,* 116 F. 2d 745, overruled in *Pinkerton* v. *United States, supra.*

In this case an intelligent verdict on the substantive counts seems scarcely possible. The jury may have used the proof of conspiracy as proof in itself of the other offenses—the substantive crimes of aiding or abetting fraud on the Government. As the Court interprets *Pinkerton,* it is beyond question that such use would be improper, without a warning that the substantive crime must be committed in furtherance of the conspiracy and as a part of it. We do not know, we cannot know, what evidence was determinative of guilt in the jury room.

An appellate court has no business deciding for itself that there is sufficient evidence to convict, when the triers of fact may have considered improper evidence their

basis for the finding of guilt. The presence of proper evidence has no relevance whatever. At the very least, the judge should instruct the jury that there is a difference between the real participation contemplated in aiding or abetting, and the more remote plotting embraced by simple "conspiracy," *United States* v. *Peoni, supra,* at 402, although one may be both conspirator and abettor.

Guilt by association is a danger in any conspiracy prosecution. Its consequences are more serious when a substantive crime is also charged. But when the magic words "counseling" or "inducing" are injected to "define" the substantive crimes, the danger and its consequences reach a new high. It is hard to assess the effect of a trial judge's charge upon a jury's unsophisticated belief in defendants' bad conduct. But it is our duty to do what we can by way of warning. Clarity is indispensable.

The guilt or innocence of Moncharsh and Nye & Nissen is relatively unimportant. The effect of today's decision on future trials, however, will be serious indeed. The Court gives further comfort to the dragnet theory of criminal justice. The judgment should be reversed.

Syllabus.

DEFENSE SUPPLIES CORP. ET AL. *v.* LAWRENCE WAREHOUSE CO. ET AL.

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

No. 298. Argued February 3, 1949.—Decided April 18, 1949.

The Joint Resolution of June 30, 1945, 59 Stat. 310, dissolved the Defense Supplies Corporation (D. S. C.) as of July 1, 1945, transferred all of its functions, assets and liabilities to the Reconstruction Finance Corporation (R. F. C.), and provided that no suit by or against D. S. C. should abate by reason thereof but that R. F. C. might be substituted as a party at any time within twelve months after the date of enactment. In a suit brought by D. S. C. against respondents before its dissolution, a federal district court entered judgment in its favor less than twelve months after enactment of the Resolution. On an appeal noted before, but argued and decided after, expiration of the twelve months, the Court of Appeals affirmed, although the R. F. C. had not been substituted as plaintiff. On reconsideration, the Court of Appeals denied a motion to substitute R. F. C., vacated its judgment of affirmance, and remanded the cause to the District Court with instructions to dismiss the action. *Held:* Judgment of the Court of Appeals vacated and cause remanded to that court with directions to dismiss the appeal. Pp. 632–640.

1. The motion to substitute R. F. C. after expiration of the twelve months was out of time. P. 636.

2. The District Court's judgment, having been entered within twelve months after passage of the Resolution, was valid when entered. Pp. 636–637.

3. The Court of Appeals was without jurisdiction to review the merits of the cause, since respondents called for review after the period allowed for substitution had expired. P. 638.

4. The judgment of the District Court was not robbed of its vitality by the abatement of the appellate proceedings. P. 638.

5. That the Court of Appeals had no jurisdiction to review the merits does not affect the power of this Court to set aside the erroneous action of the Court of Appeals. P. 639.

6. After dismissal of the appeal, R. F. C., as the real party in interest, may bring action on the judgment of the District Court. P. 639.

168 F. 2d 199, vacated and remanded.

Within a year after passage of the Joint Resolution of June 30, 1945, 59 Stat. 310, a federal district court entered a judgment for Defense Supplies Corporation in a suit for damages instituted before passage of the Joint Resolution. 67 F. Supp. 16. On an appeal argued and decided more than a year after passage of the Joint Resolution, the Court of Appeals affirmed, although R. F. C. had not been substituted as plaintiff. 164 F. 2d 773. On reconsideration, the Court of Appeals denied a motion to substitute R. F. C., vacated the judgment entered in favor of Defense Supplies Corporation, and ordered the action dismissed. 168 F. 2d 199. This Court granted certiorari. 335 U. S. 857. *Judgment of the Court of Appeals vacated with directions to dismiss the appeal.* P. 640.

Morton Liftin argued the cause for petitioners. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Morison* and *Samuel D. Slade.*

W. R. Wallace, Jr. argued the cause for the Lawrence Warehouse Co., and *Morris Lavine* argued the cause for the Capitol Chevrolet Co., respondents. With them on the brief was *W. F. Williamson.*

Mr. Justice Murphy delivered the opinion of the Court.

We are asked to assess the effect of the Defense Supplies Corporation's dissolution on an action to which it was a party at the time of dissolution. Petitioners are the Defense Supplies Corporation and the Reconstruc-

tion Finance Corporation. Both are arms of the United States Government.[1]

Defense Supplies Corporation brought action against respondents in the District Court for the Northern District of California, in February, 1944, alleging respondents' negligent destruction of automobile tires owned by Defense Supplies and stored by respondents. Respondents denied their negligence. The District Judge tried the cause without a jury in February, 1945. He ordered the case submitted on July 16, 1945, and in January, 1946, found negligence and ordered judgment for Defense Supplies Corporation in the amount of $41,975.15 and costs, 67 F. Supp. 16; engrossed findings and final judgment were entered in April, 1946. Respondents filed notice of appeal on June 14, 1946; the appeal was argued in the Court of Appeals for the Ninth Circuit in October, 1947, and in December the court affirmed the judgment below. 164 F. 2d 773. In January, 1948, rehearing was denied.

Then respondents discovered that Defense Supplies Corporation "did not exist." Congress had dissolved the theretofore successful litigant as of July 1, 1945, by the Joint Resolution of June 30, 1945, 59 Stat. 310, and transferred all its assets to the Reconstruction Finance Corporation—after trial, but before judgment, in the District Court. The Court of Appeals, one judge dissenting, granted respondents' second petition for reconsideration; denied a motion to substitute the Reconstruction Finance Corporation as out of time; and vacated the judgment entered in favor of the Defense Supplies Corporation, ordering the action dismissed. 168 F. 2d 199. We brought the case here on certiorari, 335 U. S. 857, because of alleged conflict with *Gaynor* v. *Metals Reserve*

[1] Reconstruction Finance Corporation, 15 U. S. C. § 601 *et seq.*; Defense Supplies Corporation, see footnote 6, *infra*.

Co., 166 F. 2d 1011, in the Court of Appeals for the Eighth Circuit.

Our decision rests upon interpretation of the statute dissolving Defense Supplies Corporation. For although our conception of a corporation centers upon legislative grant rather than spontaneous existence, see *Petrogradsky M. K. Bank* v. *National City Bank*, 253 N. Y. 23, 30–31, 170 N. E. 479, 481–482, the courts have generally treated a corporation's demise much as they have that of a natural litigant. *Mumma* v. *Potomac Co.*, 8 Pet. 281, 287; *National Bank* v. *Colby*, 21 Wall. 609; *Pendleton* v. *Russell*, 144 U. S. 640; *Oklahoma Natural Gas Co.* v. *Oklahoma*, 273 U. S. 257. The parallel has not been the subject of universal admiration, see Marcus, *Suability of Dissolved Corporations*, 58 Harv. L. Rev. 675; and is by no means exact, *Shayne* v. *Evening Post Publishing Co.*, 168 N. Y. 70, 78, 61 N. E. 115, 117; *Bruun* v. *Katz Drug Co.*, 351 Mo. 731, 173 S. W. 2d 906. But at least one facet of the analogy has seemed too clear to permit change without an "independent lift of power" [2] from the Congress. Whether phrased in terms of adherence to precedent, congressional acceptance of that precedent,[3] or the "impossibility" of proceeding "without a defendant," [4] most courts have held that the dissolution of a corporation works an abatement of pending actions.[5]

But a time-honored feature of the corporate device is that a corporate entity may be utterly dead for most

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[2] L. Hand, J., in another context, *Helvering* v. *Proctor*, 140 F. 2d 87 at 89.

[3] The statute dissolving Defense Supplies Corporation, footnote 6, *infra*, is an example.

[4] *Mumma* v. *Potomac Co.*, *supra*; *Peora Coal Co.* v. *Ashcraft*, 123 W. Va. 586, 595, 17 S. E. 2d 444, 448.

[5] The problem is distinct from that of survival of causes of action. *Fix* v. *Philadelphia Barge Co.*, 290 U. S. 530.

purposes, yet have enough life remaining to litigate its actions. All that is necessary is a statute so providing. *Oklahoma Gas Co.* v. *Oklahoma, supra; Pease* v. *Rathbun-Jones Engineering Co.,* 243 U. S. 273, 277. Unless the statutory terms are observed, however, the consequences of total dissolution attach, and, if we follow *Oklahoma Natural Gas Co.* v. *Oklahoma, supra,* and cases cited, the actions abate.

The controlling statute is set out in full in the margin.[6] The first section dissolves several Government

[6] "*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That, notwithstanding any other provision of law, all functions, powers, duties, and authority of the corporations hereinafter designated, are hereby transferred, together with all their documents, books of account, records, assets, and liabilities of every kind and nature, to Reconstruction Finance Corporation and shall be performed, exercised, and administered by that Corporation in the same manner and to the same extent and effect as if originally vested in Reconstruction Finance Corporation, and the designated corporations are hereby dissolved: Defense Plant Corporation, Metals Reserve Company, Rubber Reserve Company, and Defense Supplies Corporation, created by Reconstruction Finance Corporation pursuant to the Act of June 25, 1940 (54 Stat. 572), and Disaster Loan Corporation, created by the Act of February 11, 1937 (50 Stat. 19), are hereby designated as the corporations to which this joint resolution applies.

"SEC. 2. The Reconstruction Finance Corporation shall assume and be subject to all liabilities, whether arising out of contract or otherwise, of the corporations dissolved by this joint resolution. No suit, action, or other proceeding lawfully commenced by or against any of such corporations shall abate by reason of the enactment of this joint resolution, but the court, on motion or supplemental petition filed at any time within twelve months after the date of such enactment, showing a necessity for the survival of such suit, action, or other proceeding to obtain a determination of the questions involved, may allow the same to be maintained by or against the Reconstruction Finance Corporation.

"SEC. 3. This joint resolution shall take effect on July 1, 1945." 59 Stat. 310.

corporations, including Defense Supplies, and transfers all their assets and authority to the Reconstruction Finance Corporation. Section 2 provides that "no suit, action, or other proceeding lawfully commenced by or against any of such corporations shall abate . . ., but the court, on motion or supplemental petition filed at any time within twelve months after" July 1, 1945, showing necessity for survival, "may allow the same to be maintained by or against" Reconstruction Finance. The question presented now is whether the failure to substitute by July 1, 1946, deprives petitioner Defense Supplies Corporation of its $42,000 judgment.

First. We agree with the Court of Appeals that the motion to substitute Reconstruction Finance was out of time. The statute provides for substitution during the year after July 1, 1945, and Reconstruction Finance's motion was presented to the court below on March 2, 1948. We do not think Congress intended a gesture of futility when it stated a twelve-month period for substitution.

Second. But the court read the substitution provision as conditioning the action's continuance: unless Reconstruction Finance became the litigant, the action abated. It therefore held that the District Court was without jurisdiction to enter judgment for Defense Supplies after July 1, 1945, and vacated the judgment so entered.

We disagree. The statute states categorically that "no action shall abate." Following that command, provision is made for substituting Reconstruction Finance. If Reconstruction Finance is not substituted within one year, the action by or against Defense Supplies is, of course, at an end and the parties are left in *statu quo;* but there is nothing to show that during the year in which Reconstruction Finance may be substituted, action by or against Defense Supplies cannot continue in Defense Supplies' name. If Congress states that no ac-

tion shall abate, we fail to see why we should make additional language a proviso. And since the District Court entered its judgment during the year allowed for substitution of the Reconstruction Finance Corporation, we conclude that it was valid when entered.

The Court of Appeals thought that *LeCrone* v. *McAdoo,* 253 U. S. 217; *Payne* v. *Industrial Board,* 258 U. S. 613; and *United States ex rel. Claussen* v. *Curran,* 276 U. S. 590, dictated a contrary result. They do not. They rather demonstrate the validity of our interpretation. The statutory language construed in the *LeCrone* and *Payne* cases was substantially the same as that under scrutiny now,[7] and the court held only that the actions were "at an end" in this court after the year given for substitution had expired—that after that year, we had no jurisdiction to review the merits. The court did not suggest that the courts below had entered their judgments improperly. It simply dismissed the writs of error.[8] But in 1925 the statute was amended. The

[7] "*Be it enacted* . . . That no suit, action, or other proceeding lawfully commenced by or against the head of any Department or Bureau or other officer of the United States in his official capacity, or in relation to the discharge of his official duties, shall abate by reason of his death, or the expiration of his term of office, or his retirement, or resignation, or removal from office, but, in such event, the Court, on motion or supplemental petition filed, at any time within twelve months thereafter, showing a necessity for the survival thereof to obtain a settlement of the questions involved, may allow the same to be maintained by or against his successor in office . . . ." 30 Stat. 822.

[8] Mr. McAdoo resigned as Secretary of the Treasury on November 22, 1918. The resignation was to be effective when his successor took office. New York Times, Nov. 23, 1918, p. 1, col. 8. Carter Glass took office as Secretary of the Treasury on December 16, 1918. New York Times, Dec. 17, 1918, p. 17, col. 2. The writ in *LeCrone* v. *McAdoo* was dismissed on June 1, 1920.

John Barton Payne resigned as Director General of Railroads in

command, "no action shall abate," was omitted; the new provision made it unmistakably clear that the validity of the judgment was conditional upon substitution.[9] And when called upon to interpret the new statute, we went further than we had in *Payne* and *LeCrone*. We vacated the judgments below, and remanded to the District Court with a direction to dismiss the cause as abated. *United States ex rel. Claussen* v. *Curran, supra.*

Three conclusions follow from our interpretation of the statute, plus the *Payne* and *LeCrone* interpretations of a statute with nearly identical language. The first is that the Court of Appeals was without jurisdiction to review the merits of the cause, since respondents called for review after the period given for substitution had expired. In addition, the District Court judgment was valid when entered, since it was entered during the one-year period. And finally the judgment was not robbed of its vitality by the abatement of appellate proceedings. The latter conclusion adheres to the familiar rule that a judgment against or in favor of a corporation is not erased by subsequent dissolution. *Pendleton* v. *Russell,*

April, 1921. Who Was Who in America (Chicago, 1943), p. 946. The writ in *Payne* v. *Industrial Board* was dismissed on May 1, 1922.

[9] "*Be it enacted* . . . SEC. 11. (a) That where, during the pendency of an action, suit, or other proceeding brought by or against an officer of the United States, or of the District of Columbia, or the Canal Zone, or of a Territory or an insular possession of the United States, . . . such officer dies, resigns, or otherwise ceases to hold such office, it shall be competent for the court wherein the action, suit, or proceeding is pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved." 43 Stat. 936, 941.

supra, at 646. See 47 A. L. R. 1385, n. 1. There is no good sense in departing from that principle because a notice of appeal was filed in this case before the corporation ended for all purposes. For even if the judgment had been stayed—a fact that does not appear in the record before us—the stay would have been conditional upon perfecting the appeal. And we do not think respondents are in a position to object that they could not perfect an appeal because the Court of Appeals had no jurisdiction, when respondents could have remedied the defect by a motion to substitute the Reconstruction Finance Corporation.

We have held, above, that the Court of Appeals had no jurisdiction to review the merits. *LeCrone* and *Payne* show that we likewise have no jurisdiction so far as the merits are concerned. But that, of course, does not affect our power to set aside the erroneous action of the Court of Appeals. Our supervisory appellate jurisdiction would be of little value if the injustice caused by the decision below were to stand uncorrected. We are not so constricted. The *Claussen* case, *supra,* indicates that. And *Walling* v. *Reuter, Inc.,* 321 U. S. 671, 676, and cases cited, is conclusive against respondents' argument.

We conclude that the Court of Appeals erred in depriving petitioner Defense Supplies of its valid judgment in the District Court, and we vacate the judgment of the Court of Appeals and remand to that court with directions to dismiss the appeal from the judgment of the District Court. Reconstruction Finance, as the real party in interest, Rule 17 (a), Federal Rules of Civil Procedure; see *Heisen* v. *Smith,* 138 Cal. 216, 219, 71 P. 180, 181, may then bring action on the judgment. Rule 81 (b); *Mitchell* v. *St. Maxent's Lessee,* 4 Wall. 237, 242–243; Freeman, Judgments (5th ed.), § 1091, p. 2268; *Town of Fletcher* v. *Hickman,* 165 F. 403; *Thomas* v.

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Thomas, 14 Cal. 2d 355, 358, 94 P. 2d 810, 812. *Scire facias* revival, while often considered merely a continuation of the original suit, *United States* v. *Payne,* 147 U. S. 687, 690, is a separate action for this purpose, and in the setting of this statute. See *Browne* v. *Chavez,* 181 U. S. 68.[10]

Vacated and remanded.

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[10] The view we take of this case makes it unnecessary to decide whether principles of estoppel might not foreclose respondents' attack upon the failure to substitute. Compare *Habich* v. *Folger,* 20 Wall. 1; *Pease* v. *Rathbun-Jones Engineering Co., supra,* at 277; with *United States ex rel. Claussen* v. *Curran, supra;* and *Mumma* v. *Potomac Co., supra.* Nor need we determine whether the entry of a *nunc pro tunc* order by the Court of Appeals would have properly avoided the problem of statutory construction. Compare *Jackson* v. *Smietanka,* 272 F. 970, with *Mitchell* v. *Overman,* 103 U. S. 62; *Quon Quon Poy* v. *Johnson,* 273 U. S. 352, 359; *Shakman* v. *United States Credit System Co.,* 92 Wis. 366, 377–378, 66 N. W. 528, 532; *State* v. *Waldo Bank,* 20 Me. 470.

Syllabus.

UNITED STATES *v.* JONES, RECEIVER.

NO. 135. CERTIORARI TO THE COURT OF CLAIMS.*

Argued February 2–3, 1949.—Decided April 18, 1949.

1. After the Interstate Commerce Commission had twice denied applications by a railroad for increased compensation for carrying the mail, on the ground that the general rates fixed by the Commission under the Railway Mail Pay Act, 39 U. S. C. §§ 523–568, and already paid were "fair and reasonable" as applied to such railroad, the Court of Claims awarded the railroad a money judgment for additional compensation. *Held:* This amounted to a review and revision of the Commission's findings and orders and was beyond the jurisdiction of the Court of Claims. Pp. 651–653, 662–671.

(a) Congress has not expressly empowered the Court of Claims to review rate orders of the Commission either to set them aside or to render a money judgment for additional amounts found due upon a determination of the invalidity of such an order; and to infer an intention to confer such jurisdiction would be contrary to the limitations Congress has placed upon review of such orders wherever expressly provided as well as to the whole history and practice of Congress in conferring jurisdiction on the Court of Claims. Pp. 651–653.

(b) No such jurisdiction was intended to be suggested by the language of this Court's opinion in *United States* v. *Griffin*, 303 U. S. 226, 238. Pp. 666–671.

(c) In this case, the Court of Claims has not "given effect" to the Commission's rate order, but, in the guise of finding "error of law," has set it aside together with the Commission's findings, has substituted "findings" of its own, and, in effect, has made a new order by its judgment. Pp. 653, 662–665, 669.

(d) The same result would follow if this suit could be regarded as one for just compensation under the Fifth Amendment, since respondent has not shown that the Commission's order was con-

*Together with No. 198, *Jones, Receiver,* v. *United States,* also on certiorari to the same court.

fiscatory and since the entry of a money judgment by the Court of Claims would short-circuit the Commission in the rate-making process. Pp. 670–671.

(e) Where the Commission is alleged to have acted in excess of its authority or otherwise illegally, a more appropriate remedy would be a suit in a district court as one arising under the postal laws, 28 U. S. C. § 1339, since, unlike the Court of Claims, a district court is not confined to rendering a money judgment by way of relief against the United States but, if it found a rate order invalid, would have power under its general equity jurisdiction to remand the cause to the Commission for further proceedings. Pp. 671–673.

2. After reviewing the extended litigation arising out of application to this carrier of the Commission's general orders fixing rates for transporting mail, this Court finds (1) that the carrier has not sustained its burden of showing that the Commission acted arbitrarily or unreasonably, and (2) that the general rates fixed by the Commission's 1928 order are, upon the record made, fair and reasonable as applied to this carrier. Pp. 653–666.

110 Ct. Cl. 330, 77 F. Supp. 197, reversed.

In a suit by the receiver of a railroad, the Court of Claims awarded a judgment for increased compensation for the transportation of mail, notwithstanding findings and orders of the Interstate Commerce Commission (192 I. C. C. 779; 214 I. C. C. 66) denying any increase beyond the amounts already paid for that service under the general rates fixed by the Commission. 110 Ct. Cl. 330, 77 F. Supp. 197. This Court granted certiorari. 335 U. S. 883. *Reversed and remanded,* p. 673.

Solicitor General Perlman argued the cause for the United States. With him on the brief were *Assistant Attorney General Morison, Stanley M. Silverberg, Samuel D. Slade, Morton Liftin, Arne C. Wiprud* and *Daniel W. Knowlton.*

Moultrie Hitt argued the cause and filed a brief for Jones, Receiver.

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

This controversy began in 1931, when respondent's[1] predecessors as receivers of the Georgia & Florida Railroad filed an application with the Interstate Commerce Commission for a reexamination of rates then applicable to it for transporting the mails. Since then, in one form or another, the dispute has found its way back and forth through the Commission and the courts, finally to come here now for the second time. See *United States* v. *Griffin,* 303 U. S. 226.

Through all these years the carrier and the Commission have been at odds over whether the railroad is entitled to an increase in the rates prescribed for its service for the period beginning April 1, 1931, and ending, as covered by the present suit, February 28, 1938. The case is now here on certiorari to the Court of Claims, 335 U. S. 883, which has rendered a judgment awarding respondent $186,707.06 as increased compensation due for the years 1931 to 1938, *Griffin* v. *United States,* 110 Ct. Cl. 330, contrary to the findings and orders of the Commission denying any increase beyond the amounts already paid for that service under the rates fixed by it. *Railway Mail Pay, Georgia & Florida R. Co.,* 192 I. C. C. 779; *id.,* 214 I. C. C. 66.

I.

A statement of the background and course of the litigation will aid in understanding the rather complicated problems presented, both on the merits and affecting jurisdiction.

[1] The present receiver, Alfred W. Jones, was substituted as respondent in No. 135 by order of this Court dated December 6, 1948. 335 U. S. 883. He is referred to as "respondent" in this opinion, although he is also the petitioner in No. 198.

In 1916 Congress enacted the Railway Mail Pay Act. 39 U. S. C. §§ 523–568. This embodied a comprehensive scheme for regulating transportation of the mails by railroad common carriers. Such carriers were required to transport the mails pursuant to the Act's provisions. These included that the carriers should be compensated at "fair and reasonable rates" to be fixed and determined by the Interstate Commerce Commission. The rates were to be established only after notice and hearing. But after six months from the entry of a rate order the Postmaster General or a carrier was authorized to apply for a reexamination of the order. 39 U. S. C. §§ 541, 542, 544–554.

The Commission was authorized to prescribe "the method or methods by weight, or space, or both, or otherwise, for ascertaining such rate," 39 U. S. C. § 542, and for the same purpose "to make such classification of carriers as may be just and reasonable and, where just and equitable, fix general rates applicable to all carriers in the same classification." 39 U. S. C. § 549. Other sections specify and define four classes of service, namely, full railway post-office car service, apartment service, storage-car service and closed-pouch service. 39 U. S. C. §§ 525–530.[2] Only apartment service and closed-pouch service are involved in this case.

On December 23, 1919, after extended investigation and hearings, the Commission entered its first general mail rate order. *Railway-Mail Pay,* 56 I. C. C. 1. This

[2] Full railway post-office car service involves service in which an entire car of specified length and equipment is authorized. Apartment-car service involves authorized use of thirty- or fifteen-foot apartments partitioned off from the remaining portion of the car. Closed-pouch service involves handling by railroad employees where full or apartment railway post-office cars are not authorized and where space authorizations are for units of seven feet and three feet in space, unenclosed, on both sides of the car.

adopted the space basis for determining "fair and reasonable rates." On July 10, 1928, in proceedings for reexamination the Commission granted a general increase of 15% over the preexisting rates. *Railway Mail Pay,* 144 I. C. C. 675. The Georgia & Florida Railroad accepted these general rates until April 1, 1931.

At that time it applied to the Commission for a reexamination of the rates as applied to itself. The application was heard and determined by Division 5. On May 10, 1933, the Commission denied any increase, holding the general rates established by the order of July 10, 1928, fair and reasonable as applied to this carrier. *Railway Mail Pay, Georgia & Florida R. Co.,* 192 I. C. C. 779. This order is in substance, though not technically, the one now involved.

After the Commission had denied reconsideration, the railroad sued in the United States District Court for the Southern District of Georgia to set aside the Commission's order. A special three-judge court was convened, cf. the Urgent Deficiencies Act, former 28 U. S. C. §§ 41 (28), 47; held the order unlawful; and remanded the case to the Commission for further proceedings. This decree was filed on January 23, 1935.

Thereupon the full Commission conducted further hearings and in a report filed February 4, 1936, again found the rates previously fixed to be fair and reasonable in their application to the Georgia & Florida Railroad. The order therefore denied any increase. *Railway Mail Pay, Georgia & Florida R. Co.,* 214 I. C. C. 66.

Again the carrier resorted to the District Court, filing a supplemental bill. And again that court, composed of the same three judges, held the Commission's order unlawful in a decree filed on February 23, 1937. The Government appealed directly to this Court, which, in *United States* v. *Griffin, supra,* held that the order was not of a type reviewable under the Urgent Deficiencies

Act.[3] Accordingly, on February 28, 1938, the District Court's judgment was reversed with directions to dismiss the bill and without determination of the cause on the merits.

After nearly four years the receivers renewed the litigation by filing this suit in the Court of Claims. The amended petition sets forth in some detail the history of the previous stages of controversy before the Commission and the courts. The carrier's basic claims on the merits are substantially the same as in those proceedings. They are, in effect, (1) that the Commission's orders denying any increase are confiscatory, in that the rates prescribed by the general rate order of July 10, 1928, and continued in effect specifically as to this carrier by the orders of May 10, 1933, and February 4, 1936, do not afford just compensation under the Fifth Amendment on the ground that they do not provide for payment of the cost of the service rendered plus a reasonable return upon invested capital allocated to that service; and (2) that the Commission's orders do not afford the "fair and reasonable" compensation required by the Railway Mail Pay Act.[4] Both claims rest upon attacks made on the Commission's findings as being unsupported by the evidence before it and on its conclusions as being contrary to that evidence.

To sustain jurisdiction in the Court of Claims, respondent rests upon § 145 of the Judicial Code, 28 U. S. C.

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[3] See note 6.

[4] The amended petition and the brief assign both grounds. Nevertheless, respondent insists that his case is in fact grounded upon the constitutional basis. Indeed, so strongly does respondent insist upon this point of view that, without challenging the award or its amount, except for the disallowance of interest, he has sought and we granted certiorari in No. 198, in effect to have the judgment of the Court of Claims grounded solely on the Fifth Amendment footing as the basis for establishing his claim of accrued interest. See note 7 *infra*.

§ 250, now 28 U. S. C. § 1491, and upon statements made in part Fourth of the opinion in *United States* v. *Griffin,* 303 U. S. at 238.[5]

II.

Although the Railway Mail Pay Act contains no explicit provision for judicial review of orders of the Interstate Commerce Commission fixing rates of pay for transporting the mails pursuant to authorizations of the Postmaster General for such service, it had been thought, until the decision in *United States* v. *Griffin, supra,* that such orders were of the kind reviewable under the Urgent Deficiencies Act. The effect of that decision, however, was to rule out such orders as those now in question from the jurisdiction conferred by the latter Act.

While the "negative order" basis for the Court's ruling is no longer effective, *Rochester Tel. Corp.* v. *United States,* 307 U. S. 125, the alternative grounding remains in full force. 303 U. S. at 234.[6] Since the very orders now in issue were involved in the *Griffin* case, it is settled that the railroad or its receivers had no recourse to

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[5] As has been stated, the Court of Claims, accepting jurisdiction, rendered judgment for the respondent for $186,707.06. Its determination was based upon the various reports of the Commission above cited, although evidence was received by the court's commissioner which was not before the Interstate Commerce Commission. He made extensive special findings of fact based in part upon this evidence which were adopted by the court and filed, together with its opinion. 110 Ct. Cl. 330. Both the Government and the respondent applied for certiorari and both petitions were granted. See note 4.

[6] This was in brief that Congress could not be assumed to have made the extraordinary remedy of the Urgent Deficiencies Act applicable to such orders as the one here involved, since "There is no wide public interest in its speedy determination"; "no danger of temporarily interrupting the mail service through the improvident issue of an injunction by a single judge"; and "only the method or amount of payments currently to be made would be affected."

a district court, under the Urgent Deficiencies Act, for securing review of the Commission's orders or relief of the type now sought.

The Court in the *Griffin* case, however, was not content to rest merely with this negative jurisdictional ruling. In part Fourth of the opinion the Court went on to say that its ruling did not "preclude every character of judicial review." 303 U. S. at 238. The opinion then suggested three possible other methods, two in the Court of Claims and one in the district courts.

Without doubt it was due to these suggestions that respondent's predecessors chose to bring this suit in the Court of Claims. The language in which the suggestions were made has assumed such importance, in view of the problems raised by the receivers' choice in following them, that it seems wise here to quote in full what the Court said:

> "If the Commission makes the appropriate finding of reasonable compensation but fails, because of an alleged error of law, to order payment of the full amount which the railroad believes is payable under the finding, the Court of Claims has jurisdiction of an action for the balance, as the claim asserted is one founded upon a law of Congress. *Missouri Pacific R. Co.* v. *United States,* 271 U. S. 603. Compare *United States* v. *New York Central R. Co.,* 279 U. S. 73, affirming 65 Ct. Cl. 115, 121. And since railway mail service is compulsory, the Court of Claims would, under the general provisions of the Tucker Act, have jurisdiction also of an action for additional compensation if an order is confiscatory. *United States* v. *Great Falls Mfg. Co.,* 112 U. S. 645; *North American Transportation & Trading Co.* v. *United States,* 253 U. S. 330, 333; *Jacobs* v. *United States,* 290 U. S. 13, 16. Moreover, as district courts have jurisdiction of every suit at law or in equity 'arising

> under the postal laws,' 28 U. S. C., § 41 (6), suit would lie under their general jurisdiction if the Commission is alleged to have acted in excess of its authority, or otherwise illegally. Compare *Powell* v. *United States,* 300 U. S. 276, 288, 289." 303 U. S. at 238.

Respondent and the Court of Claims are at odds over whether the carrier's claims now asserted fall under the first or the second class of cases of which this Court said the Court of Claims would have jurisdiction. Respondent insists, both in the complaint and in the brief filed here, that his claim is grounded on the basis that the Commission's orders are confiscatory and have the effect of depriving the carrier of its property and services without just compensation due under the Fifth Amendment.

On the other hand, the Court of Claims expressly disclaims that it was exercising any jurisdiction over constitutional matters. This was done in denying the carrier's claim to interest on the award.[7] In the court's view therefore the jurisdiction which it was exerting fell within the first class of cases stated in the *Griffin* opinion to be within the Court of Claims' jurisdiction, namely, where the Commission makes the appropriate finding of reasonable compensation but fails, because of an alleged error of law, to order payment of the full amount the carrier believes payable under the finding.

The Government, however, insists that the Court of Claims did not exercise jurisdiction under this category.

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[7] The opinion, quoting the Court of Claims' language in an earlier railway mail pay case, *New York Central R. Co.* v. *United States,* 65 Ct. Cl. 115, 128–129, affirmed 279 U. S. 73, stated: " 'We do not think the plaintiff can have judgment for interest on the deferred payments. We are not determining just compensation but are giving effect to an authorized order of the Interstate Commerce Commission. In such case the statute forbids the allowance of interest. Sec. 177, Judicial Code, as amended.' " 110 Ct. Cl. at 373. Cf. notes 10 and 29 *infra.*

It disputes that the court "gave effect," as the court stated,[8] to the Commission's order or ordered payment of any balance due under the Commission's finding. Rather, the Government urges, the court flouted that order, substituted its own judgment for the Commission's concerning the appropriate order to be entered, and in effect entered a wholly new and different order from that made by the Commission, together with a money judgment giving its own view effect.

Ordinarily it would be sufficient for us to take the Court of Claims at its word and accept its stated view of the nature of the jurisdiction it was exerting. But the three differing views of its action taken by itself, by the Government, and by the respondent, together with the difficulties each raises on the record for disposing of the cause, compel us to examine those claims.

If, as the court asserts, it was "giving effect" to the Commission's order and doing so without substituting its own judgment for the Commission's as to what was a "fair and reasonable rate," there should be little difficulty in sustaining the jurisdiction; [9] that is, unless respondent is right in his contention that the Court was called upon to and, notwithstanding its disclaimer, in fact did adjudicate his claim for just compensation under the Fifth Amendment. In that event and on the assumption that the award was proper on the merits, reversal would be required in order that the court might make appropriate allowance for interest.[10]

On the other hand, if the Government is correct in the view that the court did not give effect to the Commission's order, but instead disregarded that order and

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[8] See note 7.

[9] See the cases cited at note 26 *infra*.

[10] Cf. *Jacobs* v. *United States*, 290 U. S. 13.

substituted its own judgment for the Commission's concerning what constituted a "fair and reasonable rate," the question arises whether the *Griffin* statements were intended to give that power to the Court of Claims under either category of jurisdiction the opinion said that court might have.

III.

The Railway Mail Pay Act gives the Interstate Commerce Commission exclusive jurisdiction to determine "fair and reasonable rates." The Urgent Deficiencies Act provided for judicial review of the Commission's rate orders in "cases brought to enjoin, set aside, annul or suspend" such orders. No power was given the reviewing court to revise them when found invalid, or to render judgment for any amount thought to be due under such a revision.

It would be strange, indeed anomalous in the extreme, if this Court by its *Griffin* pronouncements intended to confer on the Court of Claims, by implication in the cases there held not reviewable under the Urgent Deficiencies Act, a broader, more conclusive and final power of judicial review than that Act expressly provided for like orders within its purview. The assumption is hardly tenable that Congress intended such a result when it enacted the Railway Mail Pay Act or the Urgent Deficiencies Act or both. Congress in no instance has expressly empowered the Court of Claims to review rate orders of the Commission,[11] either to set them aside or to render a money judgment for additional amounts found due upon a determination of an order's invalidity. To infer such an intention would be contrary not only in spirit to the limitations Congress has placed upon review of such orders wherever expressly provided, but

[11] See the cases cited at note 27 *infra*.

also to the whole history and practice of Congress in conferring jurisdiction on the Court of Claims.

Thus, when these very orders were twice before the district court, under the assumption that it had jurisdiction, that court found the orders invalid. But in each instance it remanded the cause to the Commission for further proceedings; there was no attempt to render a money judgment for the carrier.

Necessarily this restraint reflected the jurisdictional limitations placed upon the court by the Urgent Deficiencies Act. But those limitations themselves reflected another policy, quite apart from and in addition to that giving effect to the constitutional limitations of Article III.[12] The limitations exemplify settled congressional policy concerning the relations of rate-making bodies and reviewing courts. Not only is rate making essentially legislative in the first instance. The policy of judicial restraint is one having regard for the expertise of special agencies charged with performing the rate-making function and for the inherent actual, as well as legal, disability of courts to execute that function. Such doctrines or policies as those of "primary jurisdiction" [13] and exhaustion of administrative remedies [14] lie at the very root of the problem. And this is as true of the juris-

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[12] Which, among other things, forbid non-District of Columbia courts created pursuant to that Article to exercise legislative functions such as rate making. Cf. *Keller* v. *Potomac Electric Co.*, 261 U. S. 428; *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693; *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 226.

[13] *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; cf. *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 139; *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41. See 51 Harv. L. Rev. 1251.

[14] *United States* v. *Illinois Central R. Co.*, 291 U. S. 457, 463–464 (and cf. concurring opinion, *id.* at 465); *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50–52. See Berger, Exhaustion of Administrative Remedies, 48 Yale L. J. 981; 44 Mich. L. Rev. 1035.

diction of the Court of Claims, which is not restricted by Article III, as it is of courts so limited.[15]

Hardly can it be conceived therefore that Congress would have provided expressly for review of the Commission's rate-making orders by the Court of Claims; or that, if it had done so, it would have authorized a money judgment for such amount as that court in its own judgment considered the rate should have produced.

It is equally significant, we think, that when the three-judge district court twice set aside the Commission's order it did so on grounds substantially similar to those used by the Court of Claims in this case for holding the order invalid. In other words, what the district court did by way of examining the orders on their merits, factual as well as legal, the Court of Claims has done in this case. Indeed, it has gone much further, since it has rendered a money judgment for the carrier covering the period 1931–1938, having the effect in the particular circumstances of a new and final order.

IV.

A full understanding of the Commission's orders and of the effects of the action taken regarding them, both by the three-judge district court and by the Court of Claims, can be had only by reading and comparing the reports and opinions.[16] The limitations of space prevent summarizing their content here in substantial detail. But the gist of the controversy between the Commission and the courts may be indicated.

We note, to begin with, that the court awarded to the respondent $186,707.06, or some 87 per cent more than the amount allowable under the Commission's orders.

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[15] See the authorities cited at note 27 *infra*.

[16] The opinions of the three-judge court rendered when this controversy was twice before it are not reported.

This in itself shows the wide discrepancy between the Commission's view and the court's concerning the amount of a "fair and reasonable rate."

Moreover, the Commission's task in fixing that rate was both gigantic and complex. It was authorized to make classification of carriers where "just and reasonable" and, "where just and equitable," to "fix general rates applicable to all carriers in the same classification." 39 U. S. C. § 549. That authority of course was not to be ignored in applying the requirement for compensation of carriers at "fair and reasonable rates." 39 U. S. C. § 542. The two were not entirely separate, but were merely different prongs of the same fork.

In its first general rate proceeding the Commission classified the nation's carriers, for mail-pay compensation purposes, placing the Georgia & Florida Railroad in Class I.[17] It also decided generally upon the space basis as an appropriate method of determining fair and reasonable compensation. 56 I. C. C. 1.

Railroad accounting, however, does not, and concededly cannot, accurately reflect actual operating costs of each type of service rendered, or the proportionate amounts of capital employed in rendering each service. The Commission therefore sought a method or methods for making such allocations tentatively as the initial stage of performing its rate-making function. This required, first, segregating freight service from passenger train service; then dividing the latter into three cate-

[17] Class I included all railroads of more than 100 miles in length. At the general rate hearings the Georgia & Florida Railroad was represented by representatives of another class and seems to have contended that it should be classified with or treated as though it were a member of that class. But no question concerning its classification has been made in the proceedings begun in 1931 or afterward.

gories: passenger service proper (including baggage service), express service, and mail service.

The problem arose both in the proceedings culminating in the first general rate order, 56 I. C. C. 1, and in those resulting in the general rate increase of 1928. 144 I. C. C. 675. In the latter the initial separation of total operating expenses between freight and passenger services was made on the basis of the Commission's rules governing such separation on large steam railways. *Id.* at 685–688. But, for determining the cost of service in respect to the further allocation and apportionment of passenger-train service among its three components, the Commission, having determined upon the space basis for this initial stage in fixing "fair and reasonable rates," was faced with the problem of what should be done with unused space.

That problem presents the crux of this case, as it did of the Commission's action. In the proceedings leading to the 1928 order, three general plans were given primary consideration for distributing space. They are described in the report last cited. See *id.* at 681, 689. In general they were alike in allocating full-car [18] space to the service it performed. But they differed widely in allocating unused space in so-called combination cars and mixed cars.[19] Without going into further detail here, suffice it to say that Plan 3 allocated the largest amounts of unused space to passenger and express service and correspondingly the smallest amount to mail service; Plan 2, more nearly approximating the carrier's proposals, worked out in inverse proportions; and Plan 1 lay between the two. See 144 I. C. C. at 681, 689.

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[18] See note 2.

[19] Combination cars include space separated by partitions into "apartments," cf. note 2, with each apartment devoted exclusively to a different use. Mixed cars contain no partitions or "apartments," but are used for several different services, *e. g.*, baggage, express and mail-pouch services. See note 2; 144 I. C. C. at 679.

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The differences in results following from use of the various plans were highly significant, making the difference between net return and net deficit, or deficits of different sizes, depending upon which plan was used.[20] In each plan after the ultimate space ratios were determined by complicated statistical studies, they were applied to total passenger-train service expense to determine expense ratios for the three constituent services. And those expense ratios were also used to apportion investment in road and equipment assigned to passenger-train service.

The Commission rejected Plan 3 because, it said, that plan had departed from the car-operating unit which it had adopted for making space allocations. 144 I. C. C. 689–691. While not specifically eliminating Plan 1 from consideration for purposes of comparison, the Commission primarily rested its allocations of space for purposes of tentative or preliminary apportionment of costs and capital on Plan 2. *Id.* at 691.

In utilizing the ratios derived from using Plan 2, however, the Commission expressly stated:

> "In connection with the cost studies under *any* of the plans for dividing the train space, it should be borne in mind that in computations of this character where the direct allocations are relatively small and the great bulk of expenses and investment are necessarily divided, subdivided, apportioned, and reapportioned *upon various theories and assump-*

[20] See *Railway Mail Pay*, 144 I. C. C. at 688–689. Plan 3, the Commission said in that general rate proceeding, would result in a "net railway operating income from mail of $18,759,056 instead of a deficit of $1,104,744 under plan 2, and a net income of $12,844,643 under plan 1," *id.* at 689, giving a net return under Plan 3 of 5.94 per cent but requiring an increased rate of 26.48 per cent under Plan 2 and of 7.43 per cent under Plan 1 to meet the computed deficits and give a net return of 5.75 per cent on the invested capital allocated to mail.

> *tions,* the results can not be accepted as an accurate ascertainment of the costs of service. *At best,* they are approximations to be given such weight as seems proper in view of all the circumstances under which they have been obtained and the theories underlying the assumptions and the various steps in the computations." 144 I. C. C. at 691–692. (Emphasis added.)

The Commission proceeded to consider the results obtained by the use of the Plan 2 formula in the light of other circumstances and considerations deemed relevant, including comparison with results obtained upon the basis of the total equated 60-foot-car miles (see 144 I. C. C. at 692), the fact that there was no such incentive to limit the amount of space utilized for passenger, baggage and express services as existed in the case of mail service, *id.* at 693, and other factors. The Commission then concluded:

> "Giving consideration to all the figures *based upon the respective cost studies;* to the fact that none of these figures except those in the carriers' exhibits, includes any charge against the passenger-train service for its proportion of the cost of handling nonrevenue freight; giving special weight to the figures based on the plan for the division of train space followed in the original proceeding and subsequent reexaminations; and making allowance for weaknesses of theories and methods, an increase of 15 per cent in mail revenues for the carriers as a whole in this group is justified." 144 I. C. C. at 695. (Emphasis added.)

This increase, very much smaller than a use of the results obtained by unqualified application of Plan 2 would have produced, resulted in general rates of 14.5 cents per mile of service in a "15-foot apartment car"

and 4.5 cents per mile of service in a "3-foot closed-pouch service space." Those rates became applicable to the Georgia & Florida Railroad, were accepted by it from 1928 to 1931, and are the rates now in question.

In this suit and in the prior proceedings since 1931, no attack has been made on the validity of these rates as general rates applicable to Class I carriers. But the 1931 proceedings challenged their validity as applied to this particular carrier. This has been the bone of contention throughout the subsequent phases of controversy.

When in 1931 the carrier's application for reexamination was filed, the Commission by its Division 5 first proceeded to make a cost study of the railroad's individual operations, conducted along the same lines as the cost studies in its general rate hearings. A test period of 28 days from September 28 to October 25, 1931, was selected for obtaining space and other data. Space ratios were determined on the data secured, applied to expenses, and the resulting expense ratios used to apportion investment, all under Plan 2. After adjustments made to reflect the year's operations for 1931, the Plan 2 formula worked out to show a net operating deficit for mail service of $4,945, which, together with a return of 5.75 per cent on the capital allocated by the formula to mail service, brought the carrier's claim for increased compensation for that year to $31,227. 192 I. C. C. 779, 781. To meet this, an increase of 87.40 per cent would have been necessary.

As in the general rate investigations and for the same reasons, the Division was unwilling to rest exclusively upon the results obtained by the computations under Plan 2, and went on to consider other factors which it deemed relevant in determining the fairness and reasonableness of the rates. It found that of the three component services in passenger-train service, "the mail service makes the best showing with respect to reve-

nue." [21] The Division further pointed out that in the period 1929 to 1931, mail revenues had been more stable than revenues from other passenger-train services, passenger service proper having decreased 67 per cent, express service 64 per cent, and mail service 12 per cent. Consideration also was given to the special facts shown relating to use of unused space.

Pointing out that the carrier's claim was based on the special cost study and the fact that "because of its low traffic density and low earnings per mile of road, it is not comparable with many class I roads which receive the same rates of pay," the Division reiterated that "The cost study is not considered to be an accurate ascertainment of the actual cost of service. It is an approximation to be given such weight as seems proper in view of all the circumstances. See *Railway Mail Pay, supra.*" 192 I. C. C. at 783. It then concluded:

> "The comparison of mail revenue with other revenue received for services in passenger-train operations shows that mail with relation to the other services is bearing its fair share of the expenses of operation and is contributing relatively more than the other services for the space furnished. Applicant receives the same rates as those received by other roads for the same kind of service. Many of these other roads are, as applicant points out, roads which are very much larger and which have greater traffic and lower unit operating costs. On the other hand many are

[21] The report continued: "The total mail revenue of $35,728 for the year 1931 on a space ratio of 12.96 was only $594 less than the total revenue from passenger service proper, including baggage, and miscellaneous service, with a space ratio of 80.35 . . . . The distribution of expense upon the space ratios shows that the operating ratio for mail service was 102.79 as compared with 630.41 for passenger proper, including baggage, etc., and 249.67 for express." 192 I. C. C. at 781–782.

in much the same situation as the applicant in respect of passenger-train operations. The data submitted fail to justify giving the applicant rates higher than those now paid other railway common carriers for like service.

"We find that the rates of pay now received by applicant for the transportation of mail, established in *Railway Mail Pay,* 144 I. C. C. 675, for railroads over 100 miles in length, are fair and reasonable. The application for increased compensation is denied." *Ibid.*

When the cause was returned to the Commission by the Georgia District Court in 1935, the full Commission reopened the proceeding and held a further hearing at which further evidence was received. In remanding the cause the district court had stressed the computed finding under Plan 2 that "The distribution of expense upon the space ratios shows that the operating ratio for mail service was 102.79" [22] or, as the court added, "that for every dollar applicants received for transporting mails they expended one dollar and 2.79 cents." The court then asserted that other considerations taken into account by Division 5 "do not refute or impair the fact that the compensation allowed this railroad for the transportation of mail does not equal the cost of so doing."

Counsel for the carrier stressed this before the Commission as "an adjudication" that the previous rates of pay were "totally inadequate." But the Commission rejected the apparent district court inference that abandonment of mail service would save the carrier money: "Considering the character of the expenses included in the study it is clear that no such saving could be made. The importance of the operating-ratio figure has been overemphasized. Relative costs derived from a series

[22] See note 21.

of studies of expenditures for operations common to a number of services cannot be converted into absolute costs by using a single-figure relation derived from such studies." 214 I. C. C. at 69.

The Commission then again repeated its insistence that cost computed under such a formula as Plan 2 "is a hypothetical cost and not an actual cost," *ibid.;* that in other mail-pay proceedings consideration had been given to other factors; [23] and, again taking such factors into account, concluded upon the augmented record that the rates then applicable to the carrier were fair and reasonable. 214 I. C. C. at 70–76.

On return of the cause, the district court disclaimed entertaining the view "that the hypothetical cost is 'necessarily conclusive.'" Rather, the court said, "It is merely the fairest method that has been devised." It held inapplicable to the carrier the considerations utilized by the Commission to qualify the results computed by

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[23] "In other mail-pay proceedings, in which space authorized and paid for was found to be the space that should be charged to mail in cost studies similar to that here, consideration was given to other factors as well, such as the amount and character of the unused space reported as operated (*Railway Mail Pay,* 85 I. C. C. 157, 170, 123 I. C. C. 33, 39); the actual space occupied by mail, as distinguished from authorized space, determined by the mail load carried, based upon a count of bags and of packages outside of bags, and, in some instances, by the weight (*Railway Mail Pay,* 95 I. C. C. 493, 500, 511, 120 I. C. C. 439, 446); comparisons with compensation received from other services in passenger-train cars (*Railway Mail Pay,* 144 I. C. C. 675, 706); comparisons with freight rates (*Railway Mail Pay,* 144 I. C. C. 675, 705, 151 I. C. C. 734, 742); comparisons per car-mile and per car-foot mile of the computed cost of mail service and the revenue from authorized mail service with the computed cost of corresponding units in passenger-train service as a whole (*Railway Mail Pay,* 144 I. C. C. 675, 699); and the character of the service performed in connection with transporting the mail (*Railway Mail Pay,* 56 I. C. C. 1, 8, *Electric Railway Mail Pay,* 58 I. C. C. 455, 464, 98 I. C. C. 737, 755)." 214 I. C. C. at 69–70.

the cost formula, such as "comparisons with compensation received from other services in passenger train cars"; and "comparisons per car-mile and per car-foot mile of the computed cost of mail service and the revenue from authorized mail service with the computed cost of corresponding units in passenger-train service as a whole." The court accordingly again found the Commission's order unlawful and remanded the cause to it a second time for further proceedings.

It is obvious, from the foregoing account, that the basic difference between the Commission and the district court lay in whether the Commission's statistical and mathematical computations under Plan 2 alone should be taken as determinative of costs and thus of fair and reasonable rates [24] or whether those computations were rightly taken by the Commission as merely tentative estimates or approximations, applicable in the initial stage of rate determination, but subject to qualification by comparison with results obtained under other plans and, in the final stage, by consideration of other factors found pertinent in the Commission's judgment.

This is exactly the question which was crucial in the judgment rendered by the Court of Claims. In its opinion, much more extended than either of those rendered by the district court, it said:

"Under finding 16 herein, it is shown that the Interstate Commerce Commission found and determined that plaintiff would require an increase in its mail revenue of 87.4% in order to secure for itself, under Plan 2 adopted by the Commission, a return of 5.75% theretofore fixed by the Commission, on its investments in road and equipment engaged in mail traffic. . . . *The Commission has, by its*

[24] It is to be recalled that the expense ratios based upon the space ratios accepted under Plan 2 were applied also to capital allocated to passenger-train service to apportion that capital among the three component services making up passenger-train service.

use of Plan No. 2, adjudged it to be a fair and reasonable basis. And out of that basis there has been ascertained, by formulae prescribed by the Commission, what is the fair and reasonable compensation for plaintiffs' carriage of the mails beginning the first of April 1931, and ending at the close of February 1938. Fair and reasonable compensation cannot be both a deficit and the amount of $186,707.06 so found. It is, we conclude, the latter." 110 Ct. Cl. at 366–367, 369. (Emphasis added.)

The court then quoted the Commission's concluding language in 192 I. C. C. 779, 783, set out above in the text, and said:

"We are of the opinion that the 'approximation' [Plan 2] should be given greater weight than the Commission affords it, because, as we have said, and the Commission in effect admits, there is no such thing as certainty in actual cost. Approximate, or as it is called, 'computed' cost must be relied upon, and as a matter of law must be decisive. There is no alternative, at least no satisfying alternative. Of course there were other methods of computing cost, but the Commission, put to the choice, selected Plan No. 2." 110 Ct. Cl. at 370.

Then followed rejection of the factors considered by the Commission in qualifying the computations obtained under Plan 2 as "not convincing or even persuasive." *Id.* at 372. According to the court: "It was for the Commission to demonstrate that the general rates prescribed gave the plaintiffs a fair and reasonable return. This the Commission failed to do. More than that, the Commission has by its findings, using its adopted plan and its own methods as applied to plaintiffs' circumstances, proved that plaintiffs have been underpaid $186,707.06 in fair and reasonable compensation for the period in question." *Ibid.*

In view of these groundings, the court's decision tied the Commission exclusively and finally to the results

which it had obtained by using Plan 2 in the initial stage of the rate-making process. It rejected the Commission's repeated assertion, in both the general rate hearings and the special hearings given this carrier, that the cost studies under Plan 2 (or any other such plan) could not be taken as an accurate ascertainment of actual costs of service and should be given only such weight as seemed proper in view of all the circumstances. The court likewise rejected as "not convincing or even persuasive" the numerous factors the Commission considered not only proper, but highly important to be taken into account in qualifying the computed results under Plan 2.

In doing all this the court substituted its own judgment for the Commission's concerning the relevance of facts to be taken into account in fixing a fair and reasonable rate; the weight to be given to those facts, including the computations under Plan 2 as well as the other facts utilized to check and qualify them; and the burden of proof on the whole case.

In the latter respect the court disregarded not only the general rule which gives administrative determinations in such matters presumptive weight,[25] but also the effect of the statute itself. As has been noted the Railway Mail Pay Act expressly authorized the Commission to classify carriers and "where just and equitable, fix general rates applicable to all carriers in the same classification." 39 U. S. C. § 549. While this general authority did not preclude examination of the general rate's application to a particular carrier, it gave that rate *prima facie* validity as to all within the classification. Indeed, contrary to the court's holding that the Commission could not consider rates paid to other carriers or their effects, the statute required the Commission to take those rates

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[25] See, *e. g.*, *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, 184–185. Cf. *Norton* v. *Warner Co.*, 321 U. S. 565, 568–569.

into account. *Ibid.* The burden of proof was therefore clearly upon the carrier to show that the general rate was unfair and unreasonable as applied to it and not, as the court held, upon the Commission to show that that rate as applied was fair and reasonable.

We cannot say that the Commission acted arbitrarily or unreasonably in respect to its use of Plan 2 or of the factors used in checking the plan's results and qualifying them. Contrary to the court's conclusion, Plan 2 was never intended or accepted by the Commission as furnishing a final and exclusive basis for fixing rates. Certainly it was not arbitrary or unreasonable to use such a plan, which proceeded step by step upon "various theories and assumptions," as merely a preliminary and wholly tentative step in the process of rate making; or to check its results against those produced by other such plans differing in detail of theories and assumptions employed; or to qualify the computations by the factors which the Commission took into account in the final stages of judgment.

In holding the initial formula conclusive, the court has disregarded the Commission's informed contrary judgment in matters committed to its special competence. This the court did in the guise of "giving effect" to the Commission's "finding," namely, its preliminary computations under Plan 2, and by disregarding all else the Commission took into account as "error of law." The "finding" was in fact no finding at all, but only a preliminary figure. And the matters thrown out as "error of law" were matters of fact and expert judgment, not legal questions.

We think the carrier has not sustained its burden of showing that the Commission acted arbitrarily or unreasonably and we conclude that the general rates fixed by its 1928 order are, upon the record made, fair and reasonable as applied to the Georgia & Florida Railroad. But

for the matter of jurisdiction, this determination would end the case. But the question of jurisdiction remains and is important. Moreover, the determination on the merits is relevant to its disposition.

V.

In sustaining its jurisdiction, the Court of Claims stated: "As the Supreme Court has said, this Court has jurisdiction to render judgment of recovery for an amount sufficient to constitute fair and reasonable compensation *under the facts as found by the Commission,* unpaid through failure of the Commission, *because of an error of law,* to order payment thereof." 110 Ct. Cl. at 366. (Emphasis added.) That language on its face seems fully in accord with the *Griffin* pronouncement. As will be recalled, it was: "If the Commission makes the appropriate finding of reasonable compensation but fails, *because of an alleged error of law,* to order payment of the full amount which the railroad believes is payable *under the finding,* the Court of Claims has jurisdiction of an action for the balance, as the claim asserted is one founded upon a law of Congress." (Emphasis added.)

On its face this language does not authorize revision of the Commission's findings or of the rate it prescribes by the Court of Claims. The claim of which it is said to have jurisdiction is one for "the full amount which the railroad believes is payable *under the finding,*" some part of which the Commission has failed to order paid by reason of an error of law. There was no intimation of authority for the court to reexamine the facts or to substitute its own judgment concerning the facts to be considered or the weight to be given them in determining the rate. True, the wording reads "appropriate" finding. But we cannot construe that single word to mean that this Court intended the Court of Claims to reopen the entire question of the order's appropriateness and sub-

stitute its own judgment, either on the record made before the Commission or on independent evidence, for the Commission's findings and conclusions on that question.

Such a construction is sustained by none of the cases cited in the *Griffin* opinion to support the statement [26]

[26] Cited in the text, 303 U. S. at 238, were *Missouri Pacific R. Co.* v. *United States,* 271 U. S. 603, upholding the Court of Claims' view on demurrer that Congress, in enacting 39 U. S. C. § 536, not only intended to but had power to provide that land-grant railroads were to receive only 80% of whatever mail pay rate the Commission should set not only for mere transportation of mail (*e. g.,* closed-pouch space) but for space in which postal employees sorted mail (*e. g.,* apartment mail-cars), and *United States* v. *New York Central R. Co.,* 279 U. S. 73, affirming the Court of Claims' conclusion that the Commission had power to make mail rate revisions applicable as of the date of the carrier's request for reexamination of rates rather than as of the date of the Commission order raising the rate.

Court of Claims mail pay decisions cited in a footnote, 303 U. S. at 238, n. 10, included: *Chicago & E. I. R. Co.* v. *United States,* 63 Ct. Cl. 585; *Nevada County N. G. R. Co.* v. *United States,* 65 Ct. Cl. 327; *Chicago & E. I. R. Co.* v. *United States,* 72 Ct. Cl. 407; *Macon, D. & S. R. Co.* v. *United States,* 78 Ct. Cl. 251; 79 Ct. Cl. 298. In each of these cases the claimant carrier recovered compensation in excess of that allowed it by the Postmaster General, but in each case the dispute centered around the *meaning* of a Commission rate order or the Commission's *power* to enter the order made; in none was there any challenge to the rate itself: Thus, in the first *Chicago & E. I. R. Co.* case, *supra,* the question was whether the Commission had, *in accordance with 39 U. S. C. § 535,* ordered compensation for the return to their departure points of mail storage cars. In the second *Chicago & E. I. R. Co.* case, *supra,* the question was whether "closed-pouch space" was a "lesser unit" within the meaning of a rate order setting compensation for a "storage car or lesser unit." The *Nevada County N. G. R. Co.* case, *supra,* was a companion to *New York Central R. Co.* v. *United States,* 65 Ct. Cl. 115, affirmed 279 U. S. 73, holding that the Commission had power to order a rate increase effective as of the date of the application for such increase. Similarly, the two opinions in *Macon, D. & S. R. Co., supra,* held that the Commission had power retroactively to reclassify the claimant carrier in a higher compensation bracket as of a date prior to the carrier's application for reclassification so as

and is directly contrary to previous decisions by the Court of Claims with reference to its power to review such orders of the Commission.[27] Moreover, to conceive

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to impose on the United States liability for additional compensation from that retroactively determined date of reclassification.

With the prefatory admonition, "Compare," the *Griffin* footnote, 303 U. S. at 238 n. 10, cited two other Court of Claims railway mail pay decisions, *Pere Marquette R. Co.* v. *United States,* 59 Ct. Cl. 538, and *New Jersey & N. Y. R. Co.* v. *United States,* 80 Ct. Cl. 243: these decisions held the court powerless to fix mail pay rates or classifications, both functions being found to be within the exclusive purview of the Commission. See note 27 *infra.*

[27] In *Pere Marquette R. Co.* v. *United States,* 59 Ct. Cl. 538, the carrier sought compensation for mail car space furnished by the carrier where that space was neither authorized by the Post Office Department nor in fact used for mail transportation, and where the Commission had not ordered compensation; the Court of Claims said, *id.* at 545, in dismissing the petition:

"The act of July 28, 1916, clearly intended that all questions of the compensation to be paid railroad companies for carrying the mails should be determined by the Interstate Commerce Commission. The commission having acted within the scope of its authority, having fixed the reasonable compensation to which the plaintiff is entitled, this court can not review the action of the commission and undertake to fix a different compensation from that arrived at by the commission. If the plaintiff has performed any service which the commission has failed to provide for in its order fixing compensation, then the plaintiff's remedy is before the Interstate Commerce Commission and not in this court."

In *New Jersey & N. Y. R. Co.* v. *United States,* 80 Ct. Cl. 243, the Court of Claims dismissed a claim for compensation based on a classification which had been denied the carrier by the Commission; the dismissal was grounded on the proposition that "This court has no jurisdiction to classify railroads or to fix the compensation for the carrying of the mails." 80 Ct. Cl. at 248. Of the cases allowing money judgments for compensation, discussed in note 26 *supra,* the court observed that there "the recovery in this court merely carried into effect the Commission's determination, that is to say, this court did not undertake to make a classification or to fix a rate of compensation." 80 Ct. Cl. at 248. Cf. *Denver & Rio Grande R. Co.* v. *United States,* 50 Ct. Cl. 382, 391.

the *Griffin* statement as sanctioning the broad authority assumed by the court would be, for reasons already stated, to give it by implication a jurisdiction which Congress has never expressly conferred.

We think the *Griffin* language contemplated a much narrower jurisdiction. The purpose was, in our judgment, to indicate that review might be had of the carrier's claim whenever it does not run in the teeth of the Commission's findings or order or seek revision of that order. In other words, the claim must be one consistent with the Commission's order fixing the rate, but asserting underpayment by reason of some error of law in its application which would not require the Commission's further consideration for fixing a new rate. This view is consistent with all of the authorities cited in *Griffin* to sustain the first category of jurisdiction said to reside in the Court of Claims. It is the view we think this Court meant to be taken.

As we have pointed out, however, here the Court of Claims, though asserting the contrary, has not "given effect" to the rate order, but in the guise of finding "error of law" has set it aside, together with the Commission's findings; has substituted "findings" of its own; and has made, in effect, a new order by its judgment. It follows, in our view of what was intended by the *Griffin* statement, that the Court of Claims had no jurisdiction in this case, since it involves no such "error of law" as that statement contemplated, but relates only to questions essentially of fact going to the order's appropriateness on the merits. The case is wholly unlike *Missouri Pacific R. Co.* v. *United States,* 271 U. S. 603; *United States* v. *New York Central R. Co.,* 279 U. S. 73, and other cases cited in the *Griffin* opinion.

The same result would follow if, contrary to the Court of Claims' disclaimer, the suit could be regarded as one for just compensation under the Fifth Amendment, as

respondent insists it was. For the reasons already stated, respondent has not shown that the Commission's order was confiscatory in its effects. Moreover, jurisdictionally speaking, none of the cases cited by the *Griffin* opinion to sustain the second category [28] of jurisdiction in the Court of Claims involved any problem of reviewing rate orders of the Interstate Commerce Commission. All related to questions of compensation resulting from takings of private property for public use, in which the only questions determined were the value of the property taken or that value coupled with the right to interest on the award.[29] While respondent contends that the effect of the Commission's order here has been to deprive it of its property without just compensation and justifies the Court of Claims' award on that basis, the court did not so ground its decision and, as we have said, respondent has not made out any such case.

Moreover, in view of the fact that the Court of Claims has jurisdiction only to render a money judgment against the United States and none to remand to the Commission for further consideration a rate order which it might find confiscatory, we do not think the *Griffin* ruling can be taken to have contemplated that upon such a finding, made after reviewing the Commission's order on the merits, the Court of Claims could foreclose the Commission from further consideration of the order and render

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[28] "And since railway mail service is compulsory, the Court of Claims would, under the general provisions of the Tucker Act, have jurisdiction also of an action for additional compensation if an order is confiscatory. *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645; *North American Transportation & Trading Co.* v. *United States*, 253 U. S. 330, 333; *Jacobs* v. *United States*, 290 U. S. 13, 16." 303 U. S. at 238.

[29] As to interest compare the *Great Falls* case with the *Jacobs* case, both cited in note 28.

final judgment for the amount by which it had found the order confiscatory. This not only would short-circuit the Commission in the rate-making process, but would involve substituting the court's judgment for the Commission's as to the amount of any new rate which might be fixed. Consequently, we do not think this case falls within either category of jurisdiction indicated by the *Griffin* statement as possibly available in the Court of Claims.

There remains the third remedy suggested in the *Griffin* opinion, namely, by suit in the district court as one at law or in equity "arising under the postal laws," former 28 U. S. C. § 41 (6) (cf. present 28 U. S. C. § 1339), where the Commission is alleged to have acted in excess of its authority, or otherwise illegally. Strictly speaking, it is not necessary to consider whether this remedy would have been available to respondent, since it has not been followed.

However, notwithstanding some obvious difficulties in making district court jurisdiction available for review in such a proceeding as this,[30] that jurisdiction possesses one outstanding advantage over review in the Court of Claims. It is that the district courts are not confined, as is the Court of Claims, to rendering a money judgment by way of relief against the United States. Under their general equity jurisdiction they would have power, on finding a rate order invalid, whether as confiscatory or as not complying with the statute, to remand the cause to the Commission for further proceedings. In this respect the review afforded and the relief given would more

[30] Our attention has not been called to attacks on railway mail rate orders based on this grant of jurisdiction; but it may be noted that district court suits to enjoin the Postmaster General's fraud orders are commonplace. See, *e. g., Williams* v. *Fanning,* 332 U. S. 490, 492, n. 2.

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nearly approximate that given by the Urgent Deficiencies Act in similar cases reviewable under its terms.

Since the *Griffin* case was decided, Congress has adopted the so-called Administrative Procedure Act,[31] which by § 10, entitled "Judicial Review," provides:

> "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> "(a) . . . Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.
>
> "(b) . . . The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. . . ." 5 U. S. C. § 1009.

This provision, we think, adds force to the suggestion made in the *Griffin* case concerning the jurisdiction of the district courts in relation to review of rate orders like those now in question. Such review under the equity or declaratory jurisdiction of those courts would seem to afford a remedy consonant with § 10 of the Administrative Procedure Act and also more nearly like that afforded by the Urgent Deficiencies Act, though without its expediting features. The relief afforded, unlike that required in the Court of Claims, could thus be limited to setting aside or enjoining the Commission's order and remanding the cause to it for further consideration, as

[31] 5 U. S. C. §§ 1001–1011.

is done in like cases reviewable by three-judge courts. Consistently with that jurisdiction also the review could be confined to the record made before the Commission [32] rather than one compiled by independent evidence not presented to the Commission or considered by it.

These suggestions, as we have said, are not strictly necessary for disposition of this case. But we think them appropriate in order to prevent a recurrence in the future and in other cases of long and chiefly jurisdictional litigation such as this cause has involved with profit to no one.

The judgment is reversed, and the cause is remanded to the Court of Claims with instructions to dismiss it.

Reversed and remanded.

MR. JUSTICE REED and MR. JUSTICE JACKSON took no part in the consideration or decision of this case.

[32] See *Tagg Bros.* v. *United States,* 280 U. S. 420, 444, n. 4. Cf. *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 227; *Shields* v. *Utah Idaho R. Co.,* 305 U. S. 177, 185.

RICE *v.* RICE.

CERTIORARI TO THE SUPREME COURT OF ERRORS OF CONNECTICUT.

No. 117. Argued December 14, 1948.—Decided April 18, 1949.

After being domiciled in Connecticut, respondent's husband went to Nevada, where he obtained a divorce decree without personal service upon, or participation in the proceedings by, her. He immediately married petitioner, but died shortly thereafter without having returned to Connecticut. In a suit brought by respondent to determine the widowhood status of the parties, the Connecticut courts, having placed upon respondent the burden of proving that decedent had not obtained a *bona fide* domicile in Nevada, which was sustained by adequate evidence after a full trial, declined to give effect to the Nevada decree. *Held:* Having given proper weight to the claims of power by the Nevada court, the courts of Connecticut did not deny full faith and credit to the Nevada decree. Pp. 674–676.

134 Conn. 440, 58 A. 2d 523, affirmed.

In a suit for a declaratory judgment, a Connecticut court adjudged a Nevada divorce decree void for want of jurisdiction. The State Supreme Court of Errors affirmed. 134 Conn. 440, 58 A. 2d 523. This Court granted certiorari. 335 U. S. 842. *Affirmed,* p. 676.

Daniel D. Morgan argued the cause for petitioner. With him on the brief was *Thomas F. Seymour.*

Ralph H. Clark and *Samuel A. Persky* argued the cause and filed a brief for respondent.

PER CURIAM.

The question for decision here is whether the courts of Connecticut gave to a Nevada divorce decree the full faith and credit required by Art. IV, § 1 of the Constitution. Respondent brought the action in a Connecticut Superior Court, seeking a declaratory judgment that a decree of divorce entered against her and in favor of her

husband, the late Herbert N. Rice, by a Nevada court is not entitled to full faith and credit because he was not domiciled in that state at the time the decree was entered. Petitioner, who had married Herbert N. Rice following his divorce, and the administrator of his estate were joined as defendants. The purpose of the action was to determine the widowhood status of the parties and to decide questions concerning the inheritance of the property of the decedent, who died intestate.

After a full trial, judgment was entered in favor of respondent, and the court's finding that Herbert N. Rice had never established a bona fide domicile in Nevada was affirmed on appeal by the Supreme Court of Errors of Connecticut. 134 Conn. 440, 58 A. 2d 523. We granted the petition for certiorari, 335 U. S. 842, to consider petitioner's contention that the Connecticut courts did not fairly discharge the duty of respect owed the Nevada decree under this Court's decisions in *Williams* v. *North Carolina,* 325 U. S. 226, and *Esenwein* v. *Commonwealth,* 325 U. S. 279.

Upon full consideration of the record, the opinion of the Supreme Court of Errors, and the argument of counsel, we have concluded that the Connecticut courts gave proper weight to the claims of power by the Nevada court, that the burden of proving that the decedent had not acquired a domicile in Nevada was placed upon respondent, that this issue of fact was fairly tried according to appropriate procedure, and that the findings of the Connecticut courts are amply supported in evidence. Our statement in the *Esenwein* opinion, 325 U. S. at 281, that "It is not for us to retry the facts, and we cannot say that in reaching their conclusion the [Connecticut] courts did not have warrant in evidence and did not fairly weigh the facts," is appropriate here.

Sherrer v. *Sherrer,* 334 U. S. 343, and *Coe* v. *Coe,* 334 U. S. 378, decided by this Court last term, are not in point.

No personal service was made upon respondent, nor did she in any way participate in the Nevada proceedings. She was not, therefore, precluded in the present action from challenging the finding of the Nevada court that Herbert N. Rice was, at the time of the divorce, domiciled in that state.

Affirmed.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE RUTLEDGE dissent.

MR. JUSTICE JACKSON, dissenting.

Since this case involves only reappraisal of evidence, and we decline to do that, it is hard to see a reason for granting certiorari unless it was to record in our reports an example of the manner in which, in the law of domestic relations, "confusion now hath made his masterpiece." The question is whether property owned in Connecticut by one who has obtained a Nevada divorce and remarried in that State can be taken from his acting widow and bestowed upon the woman she superseded. The facts are these:

After twenty years of married life in Connecticut with Lillian, Rice arrived at Reno, Nevada, on March 23, 1944, and began a divorce action on May 5. The complaint and process were handed to Lillian at her home in Connecticut. She was not served with process in Nevada. She was teaching school in Connecticut, never had lived in Nevada, and did not appear personally or by attorney in the action, which she claims was a surprise maneuver on the part of Rice.

Rice had rented a furnished room in Reno and testified that he intended to remain there "indefinitely." He was awarded a divorce from Lillian on June 13 and wired Hermoine, who arrived there on July 3. They were immediately married and never returned to Connecticut. They retained the room in Reno, which they occupied

from time to time, and both obtained war employment in California where six months later Rice died.

Lillian brought an action in Connecticut to have herself declared his widow insofar as Connecticut real estate was concerned. The court reviewed the evidence as to whether Rice established a good faith domicile in Nevada and held that he had not and was not entitled to maintain an action there for divorce. The question comes here as to whether this holding by Connecticut courts gave full faith and credit to the Nevada decree of divorce as required by the Constitution.

In *Williams* v. *North Carolina,* 317 U. S. 287, this Court rode roughshod over the precedents and held that a state court, without personal service of process on the defendant, can on short residence grant a divorce which is valid and entitled to faith and credit in all states. If Rice could have relied on that pronouncement, his divorce from Lillian and his marriage to Hermoine would be without legal flaw, and the latter's widowhood clear.

But in the second case of *Williams* v. *North Carolina,* 325 U. S. 226, the Court held that jurisdictional findings by the Nevada court in such a case do not preclude reexamination and a different conclusion on the part of another state. And in *Estin* v. *Estin,* 334 U. S. 541, the Court held that the second state is free to arrive at its own determination as to plaintiff's domicile in determining property rights, even though required, under the *Williams* cases or either of them, to recognize the divorce judgment as terminating the marriage. Now comes *Rice* v. *Rice* to demonstrate the consequences of these doctrines.

Congress, as it is empowered to do by the Full Faith and Credit Clause of the Constitution, has enacted that judgments "shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the

said records are or shall be taken." 1 Stat. 122. There is no doubt that under the law and usage of Nevada, Hermoine was wife and widow of Rice, and on its face the statute would seem to require that she be recognized as such elsewhere. But things sometimes are not what they seem.

In order to have anything which courts of the Western World recognize as a judgment, except in an action *in rem,* it is necessary that the rendering court have within its power both the party who seeks relief and the one against whom relief is sought.

This Court, while acknowledging that personal service of process on the defendant ordinarily is necessary to a valid judgment in a personal action, held in the first *Williams* case that a state could bring a nonresident defendant within its power merely by publication or out-of-state service of its summons. It overruled former decisions to introduce what it has aptly characterized in *Sherrer* v. *Sherrer,* 334 U. S. 343, 349 n. 11, and 356, as the "*ex parte* divorce." To me *ex parte* divorce is a concept as perverse and unrealistic as an *ex parte* marriage. The vice of the system sanctioned in *Williams* v. *North Carolina,* 317 U. S. 287, is that one of the parties may leave the state where both for years have made their home, seek a forum of his choice, and pretty much on his own terms alter the pattern of two lives without affording the other even a decent chance to be heard—as this case illustrates. Lillian either had to leave her teaching and means of support to follow her husband two thousand miles from any place where she ever had lived, or let her marriage go by default. If she chose to follow and contest under Nevada law, she had little real chance to succeed. But this Court had called this due process of law for Lillian.

Hermoine relied on the Nevada court, which did only what this Court authorized it to do—grant an *ex parte* divorce. She married a man whom this Court says Nevada had a right to make free by such process. She

had every right to believe her marriage complete and valid in all places and for all purposes. Certainly under the law of Nevada where she continued to reside it was valid, and this Court had held the out-of-state service sufficient to empower Nevada to take jurisdiction of Lillian for the purpose of dissolving her marriage. But now we say that Connecticut may find that Rice was not sufficiently domiciled in Nevada to give that State power to act on his complaint. This presents a study in contrasts.

We have said that Nevada does have power to dissolve the marriage of a woman who never was there in her life, never invoked its law or its courts, did not submit herself to its jurisdiction, refused to answer its summons, and took no benefits from its judgments.

On the other hand, we say that courts of any state may find that Nevada does not get power to dissolve the marriage of a man who went to that State and never came back, who invoked its law, went into its court and submitted himself to its jurisdiction, testified he was domiciled there, and during the rest of his life held quarters within that State.

But even under the two *Williams* cases, a quick Nevada divorce was either conclusive (first *Williams* case) or vulnerable (second *Williams* case) in its entirety. However, in addition to the rights grouped under the term *consortium,* which are terminated by divorce, there are subsidiary rights of a property nature such as support, alimony, distributive interests in personalty, dower and inheritance. These presented difficulties in case of the divorce on constructive service of process on a nonresident dependent in which there was no real chance to defend. So the Court improvised the concept of "divisible" divorce, *Estin* v. *Estin,* 334 U. S. 541, 549, a divorce good to end a marriage but invalid to affect dependent property rights.

I think that the judgment of the Connecticut court, but for the first *Williams* case and its progeny, might properly

have held that the Rice divorce decree was void for every purpose because it was rendered by a state court which never obtained jurisdiction of the nonresident defendant and which had no power to reach into another state and summon her before it.

But if we adhere to the holdings that the Nevada court had power over her for the purpose of blasting her marriage and opening the way to a successor, I do not see the justice of inventing a compensating confusion in the device of a divisible divorce by which the parties are half-bound and half-free and which permits Rice to have a wife who cannot become his widow and to leave a widow who was no longer his wife. Lillian's standing as the relict of Rice is invulnerable, while her standing as his wife could be blasted by a Nevada decree in an action to which she did not need to even become a party.

This Court is not responsible for all the contradictions and conflicts resulting from our federal system or from our crazy quilt of divorce laws, but we are certainly compounding those difficulties by repudiating the usual requirements of procedural due process in divorce cases and compensating for it by repudiating the Full Faith and Credit Clause. My dissenting views in the *Williams* and *Estin* cases would lead me to affirm the judgment below, because I believe this divorce was always and in all places invalid on due process grounds for want of jurisdiction of the defendant. However, if it was valid on that ground and nothing but a review of the evidence of domicile by the second state court is involved, we should not grant writs in this class of cases; but if I am to review the evidence here, I think the Nevada court's finding of jurisdiction was based on substantial evidence of domicile, not overcome by any new evidence before the Connecticut court, and the Nevada judgment should be given full faith and credit as the Congress has commanded.

FOUNTAIN *v.* FILSON ET UX.

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

No. 542. Decided April 18, 1949.

Respondents sued in the District of Columbia for a declaration of a resulting trust in certain New Jersey realty and for "other relief." The District Court granted petitioner's motion for a summary judgment, on the ground that New Jersey law would not permit the imposition of a resulting trust in the circumstances disclosed in the complaint and accompanying documents. The Court of Appeals sustained this action but remanded the cause to the District Court with directions to enter a personal money judgment for respondents. *Held:* The Court of Appeals erred in directing entry of a personal money judgment and in thus depriving petitioner of an opportunity to dispute the facts material to that claim. Pp. 681–683.

84 U. S. App. D. C. —, 171 F. 2d 999, reversed.

On appeal from a summary judgment of a district court denying a declaration of a resulting trust in realty, the Court of Appeals sustained this action but remanded the case to the District Court with directions to enter a personal money judgment. 84 U. S. App. D. C. —, 171 F. 2d 999. On petition for certiorari, this Court grants certiorari, *reverses* the decision of the Court of Appeals, and remands the cause to the District Court for further proceedings, p. 683.

Charles A. Horsky for petitioner.

Camden R. McAtee for respondents.

PER CURIAM.

Mr. and Mrs. Filson brought this suit in the District Court for the District of Columbia, claiming a $6,000 interest in certain New Jersey realty. The complaint alleged that Mr. and Mrs. Fountain, the defendants, acquired title to this realty subject to a resulting trust

in favor of the Filsons in that amount. The Fountains answered. They denied the existence of a resulting trust and also denied the existence of any obligation to the Filsons. The documents covering the transfer of the realty and certain depositions of the parties were filed. Mrs. Fountain, her husband having died, then moved for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. The sole basis of the motion was the claim that New Jersey law would not permit the imposition of a resulting trust under the circumstances disclosed in the complaint and the accompanying documents. The motion was granted and judgment for Mrs. Fountain was entered.

On appeal the Court of Appeals for the District of Columbia came to three conclusions. First, it agreed that under New Jersey law no resulting trust could arise. Second, it concluded that the summary judgment in Mrs. Fountain's favor was nevertheless erroneous, because the complaint contained a general prayer for "other relief" and alleged facts on the basis of which a personal judgment for $6,000 could have been recovered even in the absence of a resulting trust in the realty. Finally, the Court of Appeals proceeded to examine the depositions which had been taken in advance of trial. The court concluded that they showed the existence of a personal obligation and the case was, therefore, remanded to the District Court with instructions to enter a personal judgment in favor of the Filsons for $6,000. 84 U. S. App. D. C. —, 171 F. 2d 999. Mrs. Fountain's timely motion for a modification of this order in order to permit a trial as to the existence of the personal obligation was denied.

Mrs. Fountain's petition for certiorari, which attacks only the third portion of the Court of Appeals' ruling above stated, is granted and the judgment of the Court of Appeals is reversed. We need not pass on the propriety of an order for summary judgment by a district

court in favor of one party after the opposite party has moved for summary judgment in its favor, where it appears that there is no dispute as to any fact material to the issue being litigated. For here the order was made on appeal on a new issue as to which the opposite party had no opportunity to present a defense before the trial court. In *Globe Liquor Co.* v. *San Roman,* 332 U. S. 571 (1948), and *Cone* v. *West Virginia Paper Co.,* 330 U. S. 212 (1947), we held that judgment notwithstanding the verdict could not be given in the Court of Appeals in favor of a party who had lost in the trial court and who had not there moved for such relief. One of the reasons for so holding was that otherwise the party who had won in the trial court would be deprived of any opportunity to remedy the defect which the appellate court discovered in his case. He would have had such an opportunity if a proper motion had been made by his opponent in the trial court. The same principle interdicts, *a fortiori,* the appellate court order for summary judgment here. Summary judgment may be given, under Rule 56, only if there is no dispute as to any material fact. There was no occasion in the trial court for Mrs. Fountain to dispute the facts material to a claim that a personal obligation existed, since the only claim considered by that court on her motion for summary judgment was the claim that there was a resulting trust. When the Court of Appeals concluded that the trial court should have considered a claim for personal judgment it was error for it to deprive Mrs. Fountain of an opportunity to dispute the facts material to that claim by ordering summary judgment against her. The judgment of the Court of Appeals is, therefore, reversed and the cause remanded to the District Court for further proceedings in accordance with the opinion of the Court of Appeals as here modified.

Reversed.

WADE *v.* HUNTER, WARDEN.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 427. Argued March 7, 1949.—Decided April 25, 1949.

In petitioner's trial by a general court-martial of a Division of the Third Army, then advancing rapidly in Germany, the court heard evidence and arguments of counsel, closed to consider the case, reopened the same day, and continued the case in order to hear civilian witnesses not then available. Subsequently, the Commanding General of the Third Army transferred the case to the Fifteenth Army for a new trial, on the ground that the tactical situation and the distance to the residence of such witnesses made it impracticable for the Third Army to conduct the court-martial. The Fifteenth Army convened a court-martial, which overruled petitioner's plea of former jeopardy and tried and convicted him. *Held:* In the circumstances of this case, the double-jeopardy provision of the Fifth Amendment did not bar his trial before the second court-martial. Pp. 685–692.

1. The double-jeopardy provision of the Fifth Amendment does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. P. 688.

2. A trial may be discontinued when particular circumstances manifest a necessity for so doing and when failure to discontinue would defeat the ends of justice. *United States* v. *Perez,* 9 Wheat. 579. Pp. 689–690.

3. When this may be done without barring another trial depends upon all the circumstances of the particular case and not upon the mechanical application of an abstract formula. P. 691.

4. In this case, the record was sufficient to show that the tactical situation brought about by a rapidly advancing army resulted in withdrawal of the charges from the first court-martial; and, in the absence of charges of bad faith on the part of the Commanding General, courts should not attempt to review his on-the-spot decision that the tactical situation required transfer of the case. Pp. 691–692.

169 F. 2d 973, affirmed.

In a habeas corpus proceeding, a federal district court ordered petitioner's release on the ground that his conviction by court-martial had violated the double-jeopardy provision of the Fifth Amendment. 72 F. Supp. 755. The Court of Appeals reversed. 169 F. 2d 973. This Court granted certiorari. 335 U. S. 907. *Affirmed,* p. 692.

R. T. Brewster and *N. E. Snyder* argued the cause for petitioner. With them on the brief was *Harry W. Colmery.*

Oscar H. Davis argued the cause for respondent. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Campbell* and *Robert S. Erdahl.*

Mr. Justice Black delivered the opinion of the Court.

The Fifth Amendment to the Constitution provides that a person shall not "be twice put in jeopardy of life or limb" for the same offense. The petitioner, now in prison under a court-martial conviction for a serious offense, contends he is entitled to his freedom because another court-martial had previously put him in jeopardy for the same offense. The first court-martial was dissolved by the convening authority before the court reached a decision. The Government contends that the Fifth Amendment's double-jeopardy provision, if applicable to military courts, did not bar the second court-martial conviction here because, as the Government views the record, dissolution of the first court-martial was dictated by a pressing military tactical situation. The circumstances from which these contentions arise are as follows.

March 13, 1945, American troops of the 76th Infantry Division entered Krov, Germany. The next afternoon two German women were raped by two men in American uniforms. Several days later petitioner and another

American soldier were arrested upon charges that they committed these offenses. Two weeks later, March 27, the troops had advanced about 22 miles farther into Germany to a place called Pfalzfeld. On that date at Pfalzfeld petitioner and the other soldier were put on trial before a general court-martial convened by order of the Commanding General of the 76th Infantry Division to which Division the two soldiers were attached.[1] After hearing evidence and arguments of counsel, the court-martial closed to consider the case. Later that day the court-martial reopened and announced that the court would be continued until a later date to be fixed by the judge advocate. The reason for the continuance was the desire of the court-martial to hear other witnesses not then available before deciding the guilt or innocence of the accused.[2]

A week later the Commanding General of the 76th Division withdrew the charges from the court-martial directing it to take no further proceedings. The General then transmitted the charges to the Commanding General of the Third Army with recommendations for trial by a new court-martial. The reason for transferring the charges as explained in a communication to the Commanding General of the Third Army was:

> "The case was previously referred for trial by general court-martial and trial was commenced. Two witnesses, the mother and father of the victim of

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[1] The charges were under the 92d Article of War, 10 U. S. C. § 1564.

[2] "Law Member: The Court desires that further witnesses be called into the case, and to allow time to secure these witnesses, this case will be continued. We would like to have as witnesses brought before the Court, the parents of this person making the accusation, Rosa Glowsky, and also the sister-in-law that was in the room who could further assist in the identification or identity of the accused. The Court will be continued until a later date set by the T.[rial] J.[udge] A.[dvocate]."

> the alleged rape, were unable to be present due to sickness, and the Court continued the case so that their testimony could be obtained. Due to the tactical situation the distance to the residence of such witnesses has become so great that the case cannot be completed within a reasonable time."

The Commanding General of the Third Army concluded that the "tactical situation" of his command and its "considerable distance" from Krov made it impracticable for the Third Army to conduct the court-martial. Accordingly, he in turn transmitted the charges to the Fifteenth Army stating that this action was necessary to carry out the policy of the American Army in Europe to accelerate prompt trials "in the immediate vicinity of the alleged offenses." Pursuant to this transmittal, the Fifteenth Army Commanding General convened a court-martial at a point about forty miles from Krov. Petitioner, represented by counsel, filed a plea in bar alleging that he had been put in jeopardy by the first court-martial proceedings and could not be tried again. His plea was overruled, the case was tried, and a conviction followed. He was sentenced to a dishonorable discharge, forfeiture of all pay and allowances, and life imprisonment, which imprisonment was later reduced to twenty years.[3]

After exhausting his right to military review, petitioner brought this habeas corpus proceeding in a federal district court. That court ordered his release, holding that his plea of former jeopardy should have been sustained. 72 F. Supp. 755. The Court of Appeals reversed, one judge dissenting. 169 F. 2d 973. We hold

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[3] The other soldier was acquitted by the court-martial. The acting Army judge advocate in reviewing petitioner's conviction said: "Four witnesses, all German, positively identified the accused Wade. The same witnesses failed to identify" the other soldier.

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that under the circumstances shown, the Fifth Amendment's double-jeopardy provision did not bar petitioner's trial before the second court-martial.[4]

The interpretation and application of the Fifth Amendment's double-jeopardy provision have been considered chiefly in civil rather than military court proceedings. Past cases have decided that a defendant, put to trial before a jury, may be subjected to the kind of "jeopardy" that bars a second trial for the same offense even though his trial is discontinued without a verdict. See *Kepner* v. *United States,* 195 U. S. 100, 128; *cf. Palko* v. *Connecticut,* 302 U. S. 319, 322–323. The same may be true where a judge trying a case without a jury fails for some reason to enter a judgment. *McCarthy* v. *Zerbst,* 85 F. 2d 640, 642. The double-jeopardy provision of the Fifth Amendment, however, does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the

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[4] Our holding that under the circumstances here the Fifth Amendment did not bar trial by the second court-martial makes it unnecessary to consider the following questions discussed in the Government's brief: (1) To what extent a court-martial's overruling of a plea of former jeopardy is subject to collateral attack in habeas corpus proceedings. See *Carter* v. *McClaughry,* 183 U. S. 365, 390; and *cf. Grafton* v. *United States,* 206 U. S. 333, 352–353; *Sunal* v. *Large,* 332 U. S. 174, and cases collected in n. 8, p. 179. (2) The validity of the Fortieth Article of War, 41 Stat. 795, 10 U. S. C. § 1511. That article provides in part as follows:

"No person shall, without his consent, be tried a second time for the same offense; but no proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial in the sense of this article until the reviewing and, if there be one, the confirming authority shall have taken final action upon the case."

type of oppressive practices at which the double-jeopardy prohibition is aimed. There may be unforeseeable circumstances that arise during a trial making its completion impossible, such as the failure of a jury to agree on a verdict. In such event the purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again. And there have been instances where a trial judge has discovered facts during a trial which indicated that one or more members of a jury might be biased against the Government or the defendant. It is settled that the duty of the judge in this event is to discharge the jury and direct a retrial.[5] What has been said is enough to show that a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments.

When justice requires that a particular trial be discontinued is a question that should be decided by persons conversant with factors relevant to the determination. The guiding rule of federal courts for determining when trials should be discontinued was outlined by this Court in *United States* v. *Perez,* 9 Wheat. 579. In that case the trial judge without consent of the defendant or the Government discharged the jury because its members were unable to agree. The defendant claimed that he could not be tried again and prayed for his discharge as a matter of right. In answering the claim this Court said at p. 580:

> ". . . We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances

[5] *Simmons* v. *United States,* 142 U. S. 148, 154; *Thompson* v. *United States,* 155 U. S. 271, 273–274.

> into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office. . . ."

The rule announced in the *Perez* case has been the basis for all later decisions of this Court on double jeopardy.[6] It attempts to lay down no rigid formula. Under the rule a trial can be discontinued when particular circumstances manifest a necessity for so doing, and when failure to discontinue would defeat the ends of justice. We see no reason why the same broad test should not be applied in deciding whether court-martial action runs counter to the Fifth Amendment's provision against double jeopardy. Measured by the *Perez* rule to which we adhere, petitioner's second court-martial trial was not the kind of double jeopardy within the intent of the Fifth Amendment.

There is no claim here that the court-martial went beyond its powers in temporarily continuing the trial to

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[6] See, *e. g., Simmons* v. *United States,* 142 U. S. 148; *Logan* v. *United States,* 144 U. S. 263, 297–298; *Keerl* v. *Montana,* 213 U. S. 135, 137; *Lovato* v. *New Mexico,* 242 U. S. 199.

obtain the benefit of other witnesses.[7] But the District Court viewed the record as showing that the only purpose of dissolving the court-martial was to get more witnesses. This purpose, the District Court held, was not the kind of "imperious" or "urgent necessity" that came within the recognized exception to the double-jeopardy provision. See *Cornero* v. *United States,* 48 F. 2d 69. We are urged to apply the *Cornero* interpretation of the "urgent necessity" rule here. We are asked to adopt the *Cornero* rule under which petitioner contends the absence of witnesses can never justify discontinuance of a trial. Such a rigid formula is inconsistent with the guiding principles of the *Perez* decision to which we adhere. Those principles command courts in considering whether a trial should be terminated without judgment to take "all circumstances into account" and thereby forbid the mechanical application of an abstract formula. The value of the *Perez* principles thus lies in their capacity for informed application under widely different circumstances without injury to defendants or to the public interest.

Furthermore, this record is sufficient to show that the tactical situation brought about by a rapidly advancing army was responsible for withdrawal of the charges from the first court-martial. This appears in the first order of transmittal of the charges. That order was made by the Commanding General of the 76th Division who was

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[7] The Manual for Courts-Martial, par. 75*a* (1928), recommends that where the ". . . evidence appears to be insufficient for a proper determination of any issue or matter before it, the court may and ordinarily should, take appropriate action with a view to obtaining such available additional evidence as is necessary or advisable for such determination. The court may, for instance, require the trial judge advocate to recall a witness, to summon new witnesses, or to make investigation or inquiry along certain lines with a view to discovering and producing additional evidence."

responsible for convening the court-martial and who was also responsible for the most effective military employment of that Division in carrying out the plan for the invasion of Germany. There is no intimation in the record that the tactical situation did not require the transfer order. The court-martial was composed of officers of the invading Army Division. Momentous issues hung on the invasion and we cannot assume that these court-martial officers were not needed to perform their military functions. In the *Perez* case we said that the sound discretion of a presiding judge should be accepted as to the necessity of discontinuing a trial. This case presents extraordinary reasons why the judgment of the Commanding General should be accepted by the courts. At least in the absence of charges of bad faith on the part of the Commanding General, courts should not attempt to review his on-the-spot decision that the tactical situation required transfer of the charges.

Affirmed.

MR. JUSTICE MURPHY, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE RUTLEDGE agree, dissenting.

I agree with the court below that in the military courts, as in the civil, jeopardy within the meaning of the Fifth Amendment attaches when the court begins the hearing of evidence. I agree also that a valid charge was pending before the first court-martial with which we are now concerned, and that the court had jurisdiction of the subject-matter and of the person of the petitioner.

In the first court-martial evidence was introduced; in fact, both sides had completed the presentation of their cases and had submitted oral argument, and the court had closed to consider its decision. The court was later opened on its own motion, for the purpose of hearing the testimony of three named witnesses, who were expected to shed light on the question of identification.

The Commanding General of the unit comprising petitioner and the court-martial that was trying him withdrew the charges and dissolved the court-martial, and transmitted the papers to the Commanding General of the Third Army, "with a recommendation of trial by general court-martial." They were subsequently transferred to the Commanding General of the Fifteenth Army, who referred the case for trial by general court-martial. Petitioner was tried and convicted, after the court-martial had overruled a plea of former jeopardy based on the prior proceeding. The Commanding General, Fifteenth Army, on the recommendation of his Staff Judge Advocate, approved the finding of guilty and reduced the period of confinement from life to twenty years. The case was assigned for review to Board of Review No. 4, consisting of three Judge Advocates in the Branch Office of the Judge Advocate General with the European Theater. This Board, sitting in Paris, close to the scene of military operations, filed a unanimous opinion to the effect that the plea in bar should have been sustained [1] and that consequently the record of trial was legally insufficient to support the findings and sentence. The Assistant Judge Advocate General filed a dissenting opinion, and the sentence was confirmed by the Commanding General, European Theater. In the *habeas corpus* proceedings in

[1] The opinion of the Board of Review reads in part as follows: "We see nothing which renders the absence of witnesses, as shown by the record of trial in this case, an emergent situation in exception to the rule in the Federal courts. Their witnesses may lie beyond the reach of process, if process issues witnesses may not respond, oral promises to appear may not be kept, and they may become ill during trial; but such difficulties in proof are not grounds for a termination of trial and a second prosecution. Imperious necessity means a sudden and overwhelming emergency, uncontrollable and unforeseeable, infecting the judicial process and rendering a fair and impartial trial impossible. It does not mean expediency." Transcript of Record, p. 75.

the United States, the District Court agreed with the Board of Review that the plea of double jeopardy should have been sustained. The Court of Appeals reversed, one judge dissenting.

There is no doubt that Wade was placed in jeopardy by his first trial. This Court now holds that the decision of his Commanding Officer, assessing the tactical military situation, is sufficient to deprive him of his right under the Constitution to be free from being twice subjected to trial for the same offense. With this reading of the Constitution I cannot agree. The harassment to the defendant from being repeatedly tried is not less because the army is advancing. The guarantee of the Constitution against double jeopardy is not to be eroded away by a tide of plausible-appearing exceptions. The command of the Fifth Amendment does not allow temporizing with the basic rights it declares. Adaptations of military justice to the exigencies of tactical situations is the prerogative of the commander in the field, but the price of such expediency is compliance with the Constitution. I would reverse the judgment below.

HUMPHREY, WARDEN, *v.* SMITH.

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

No. 457. Argued March 30, 1949.—Decided April 25, 1949.

1. In habeas corpus proceedings to review court-martial judgments, courts cannot pass on the guilt or innocence of persons convicted by courts-martial. P. 696.
2. Failure to conduct a pre-trial investigation in the manner prescribed by the 70th Article of War does not deprive a general court-martial of jurisdiction nor subject its judgment to invalidation in a habeas corpus proceeding. Pp. 696–701.

170 F. 2d 61, reversed.

In a habeas corpus proceeding challenging the validity of a conviction by a court-martial, a federal district court denied relief. 72 F. Supp. 935. The Court of Appeals reversed. 170 F. 2d 61. This Court granted certiorari. 336 U. S. 908. *Reversed,* p. 701.

Robert W. Ginnane argued the cause for petitioner. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl* and *Philip R. Monahan.*

Daniel F. Mathews argued the cause and filed a brief for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

The respondent, Bernard W. Smith, an American soldier, was convicted by an Army court-martial for rape of one woman and assault with intent to rape another in violation of the 92d and 93d Articles of War. 10 U. S. C. §§ 1564 and 1565. His punishment was dishonorable discharge, forfeiture of all pay and allowances,

and imprisonment for life. Army reviewing authorities approved the conviction and sentence, but the President reduced the punishment to sixteen years' imprisonment. This habeas corpus proceeding was brought in a District Court challenging the validity of the conviction. The District Court denied relief. 72 F. Supp. 935. The Court of Appeals reversed, ordering respondent's discharge. 170 F. 2d 61. We granted certiorari because the petition raises questions concerning important phases of court-martial statutory powers and the scope of judicial review of court-martial convictions.

We may at once dispose of the contention that the respondent should not have been convicted on the evidence offered. That evidence was in sharp dispute. But our authority in habeas corpus proceedings to review court-martial judgments does not permit us to pass on the guilt or innocence of persons convicted by courts-martial.[1]

It is contended that the court-martial was without jurisdiction to try respondent. If so the court-martial exceeded its lawful authority and its judgment can be invalidated despite the limited powers of a court in habeas corpus proceedings.[2] The soundness of this contention depends upon an interpretation of the 70th Article of War, the pertinent part of which is set out below.[3] It

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[1] *Carter* v. *McClaughry*, 183 U. S. 365, 381; and see *In re Yamashita*, 327 U. S. 1, 8–9, and cases cited.

[2] *United States* v. *Cooke*, 336 U. S. 210; *Collins* v. *McDonald*, 258 U. S. 416, 418; see *In re Yamashita*, 327 U. S. 1, 8–9.

[3] "No charge will be referred to a general court martial for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they

provides the manner in which pre-trial investigations shall be made preliminary to trials of soldiers before general courts-martial. A part of the language is that "No charge will be referred to a general court martial for trial until after a thorough and impartial investigation thereof shall have been made." The contention is that this requirement is jurisdictional in nature; that the kind of pre-trial investigation prescribed is an indispensable prerequisite to exercise of general court-martial jurisdiction; and that absent such prior investigation a judgment of conviction is wholly void.

Here there was an investigation. The claim is that it was neither "thorough" nor "impartial" as the 70th Article requires. The Court of Appeals, one judge dissenting, so held, and its reversal was rested on that finding. There was no finding that there was unfairness in the court-martial trial itself.

We do not think that the pre-trial investigation procedure required by Article 70 can properly be construed as an indispensable prerequisite to exercise of Army general court-martial jurisdiction. The Article does serve important functions in the administration of court-martial procedures and does provide safeguards to an accused. Its language is clearly such that a defendant could object to trial in the absence of the required investigation. In that event the court-martial could itself postpone trial pending the investigation. And the military re-

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are available and to present anything he may desire in his own behalf either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides." 41 Stat. 759, 802, as amended 50 Stat. 724; 10 U. S. C. § 1542. See also Act of June 24, 1948, §§ 222, 231, 244, 62 Stat. 604, 633, 639, 642.

viewing authorities could consider the same contention, reversing a court-martial conviction where failure to comply with Article 70 has substantially injured an accused.[4] But we are not persuaded that Congress intended to make otherwise valid court-martial judgments wholly void because pre-trial investigations fall short of the standards prescribed by Article 70. That Congress has not required analogous pre-trial procedure for Navy courts-martial is an indication that the investigatory plan was not intended to be exalted to the jurisdictional level.

Nothing in the legislative history of the Article supports the contention that Congress intended that a conviction after a fair trial should be nullified because of the manner in which an investigation was conducted prior to the filing of charges. Its original purposes were to insure adequate preparation of cases, to guard against hasty, ill-considered charges, to save innocent persons from the stigma of unfounded charges, and to prevent trivial cases from going before general courts-martial.

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[4] Military reviewing authorities do not revise court-martial convictions for failure to follow pre-trial procedure unless it appears to them that such failure has injuriously affected the substantial rights of the accused. CM 229477, *Floyd*, 17 B. R. 149, 153–156 (1943). The Assistant Judge Advocate General testifying before the Committee on Armed Services stated: "If it appeared in the Office of the Judge Advocate General that the man had been deprived of any substantial right, such as the presentation of testimony in his own behalf, or something of that kind, it would be possible for us to say that the error injuriously affected the rights of the accused and that the sentence should therefore be vacated. The case of real injury would be rare. Ordinarily guilt or innocence is and should be determined at the trial and not by what occurred prior to the trial." Hearings before Subcommittee No. 11, Legal, of House Committee on Armed Services on H. R. 2575, 80th Cong., 1st Sess. 2059–2060 (1947).

War Department, *Military Justice During the War,* 63 (1919). All of these purposes relate solely to actions required in advance of formal charges or trial. All the purposes can be fully accomplished without subjecting court-martial convictions to judicial invalidation where pre-trial investigations have not been made.

Shortly after enactment of Article 70 in 1920 the Judge Advocate General of the Army did hold that where there had been no pre-trial investigation, court-martial proceedings were void *ab initio*.[5] But this holding has been expressly repudiated in later holdings of the Judge Advocate.[6] This later interpretation has been that the pre-trial requirements of Article 70 are directory, not mandatory, and in no way affect the jurisdiction of a court-martial. The War Department's interpretation was pointedly called to the attention of Congress in 1947 after which Congress amended Article 70 but left unchanged the language here under consideration.[7]

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[5] CM 161728, *Clark*. See also to the same effect CM 182225, *Keller*; CM 183183, *Claybaugh*.

[6] See *Floyd, supra,* n. 4; CMETO 4570, *Hawkins,* 13 B. R. (ETO) 57, 71–75 (1945); CM 323486, *Ruckman,* 72 B. R. 267, 272–274 (1947).

[7] Act of June 24, 1948, §§ 222, 231, 244, 62 Stat. 604, 633, 639, 642. In congressional committee hearings War Department representatives were subjected to considerable questioning as to whether pre-trial requirements should be made jurisdictional prerequisites. One of many statements supporting the War Department's view was that of Under Secretary of War Royall, who testified:

"However, our bill does not make it a jurisdictional factor, but it does contemplate a thorough investigation. In the States in which I have practiced law, preliminary investigations are never a jurisdictional requirement. I know they are not in the Federal courts . . . . We would be departing radically from accepted judicial practice, generally throughout the United States, if we made that a

We hold that a failure to conduct pre-trial investigations as required by Article 70 does not deprive general courts-martial of jurisdiction so as to empower courts in habeas corpus proceedings to invalidate court-martial judgments. It is contended that this interpretation of Article 70 renders it meaningless, practically making it a dead letter. This contention must rest on the premise that the Army will comply with the 70th Article of War only if courts in habeas corpus proceedings can invalidate any court-martial conviction which does not follow an Article 70 pre-trial procedure. We cannot assume that judicial coercion is essential to compel the Army to obey this Article of War. It was the Army itself that initiated the pre-trial investigation procedure and recommended congressional enactment of Article 70.[8] A reasonable assumption is that the Army will require compliance with the Article 70 investigatory procedure to the end that Army work shall not be unnecessarily impeded and that Army personnel shall not be wronged as the result of unfounded and frivolous court-martial charges and trials.[9]

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jurisdictional requirement. That is really the difference between the Durham bill and this, as I understand."

This statement and others in opposition to raising pre-trial investigations to a jurisdictional level appear at the following pages of the Hearings before Subcommittee No. 11, Legal, of House Committee on Armed Services on H. R. 2575, 80th Cong., 1st Sess. 1924–1925, 2058–2061, 2064–2065, 2146, 2152–2153 (1947).

[8] War Department, *Military Justice During the War,* 63 (1919); H. R. Rep. No. 940, 66th Cong., 2d Sess. 2 (1920).

[9] Secretary Royall in referring to the procedure told the House Committee: "We believe very strongly in it and we will provide for it as strongly as we can, without making it grounds for a technical appeal." Hearings before Subcommittee No. 11, Legal, of House Committee on Armed Services on H. R. 2575, 80th Cong., 1st Sess. 2152 (1947).

This court-martial conviction resulting from a trial fairly conducted cannot be invalidated by a judicial finding that the pre-trial investigation was not carried on in the manner prescribed by the 70th Article of War.[10]

Reversed.

MR. JUSTICE MURPHY, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE RUTLEDGE concur, dissenting.

Pre-trial investigation under the Seventieth Article of War performs a dual function. It saves the Army's time by eliminating frivolous cases; it protects an accused from the ignominy of a general court martial when the charges against him are groundless. These policies, of course, mean more than the protection of the respondent in this case. Their primary service appears when the defendant is clearly innocent. If the Article is ignored, and the court martial finds the defendant innocent, the error can never be corrected—the officers' time has been wasted and the defendant's record is forever besmirched by the words "general court martial." Yet if the prisoner is found guilty, there is still no sanction. For military authorities will not set aside a conviction unless the very accused asking reversal has been prejudiced. And if the trial has been fair, and resulted in conviction, who will say that the defendant has been prejudiced because preliminary investigation was wanting?

Unless a civilian court is able to enforce the requirement, then, it is not a requirement at all, but only a suggestion which should be observed. Today the Court

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[10] District Courts and Courts of Appeal have not been in agreement on the question. *Henry* v. *Hodges,* 76 F. Supp. 968, 970–974; *Anthony* v. *Hunter,* 71 F. Supp. 823, 830–831; *Hicks* v. *Hiatt,* 64 F. Supp. 238, 242; *Waite* v. *Overlade,* 164 F. 2d 722, 723–724; *De War* v. *Hunter,* 170 F. 2d 993, 995–997.

adopts the latter alternative. It holds that the error of noncompliance with A. W. 70 is not jurisdictional. It makes A. W. 70 a virtual dead letter.

I cannot impute so bland a rule to the Congress. And no evidence of such sterility has been brought to our attention. What the Eightieth Congress thought about the problem is irrelevant, of course, for A. W. 70 was the product of the Sixty-Sixth Congress, in 1920, and respondent was tried in 1944, long before the Eightieth Congress convened. Had respondent's trial taken place in 1948, the result might be entirely different. The available evidence indicates clearly that the Sixty-Sixth Congress considered preliminary investigation vital before trial. The language of the Article is that of command—"no charge *will be referred*" without investigation. The report accompanying the 1920 statute, after referring to an investigation of unfairness in administering military justice, and concluding that "the personal element entered too largely into these cases," listed twenty-three changes in the law. The second change mentioned was this: "Speedy but thorough and impartial preliminary investigation will be had in all cases." H. R. Rep. No. 940, 66th Cong., 2d Sess., p. 2 (1920).

In 1924, just four years after A. W. 70 became the law, the Board of Review construed the language directly opposite to the Court's present interpretation. It held that the error was jurisdictional. CM 161728, *Clark*. Two later holdings, both in 1928, confirmed this view. CM 182225, *Keller;* CM 183183, *Claybaugh*. In *Keller*, the investigation took place, but was not "thorough." The Board held that a thorough investigation was "an absolute right given to the accused by statute." And in 1937 Congress reenacted the same language we are construing now, the same language the Board of Review expounded in 1924 and 1928. 50 Stat. 724. It seems extraordinary to say that reversals of the prior rulings

in 1943, CM 229477, *Floyd,* 17 B. R. 149, should govern when Congress has apparently acquiesced in the first, and contemporary, interpretations.

Congressional belief in the importance of preliminary investigation should not now be frustrated by a holding that noncompliance cannot be attacked by *habeas corpus.* I agree with the court below that the preliminary investigation in this case did not meet the proper standard, and would affirm the judgment.

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GRIFFIN *v.* UNITED STATES.

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

No. 417. Argued December 15–16, 1948.—Decided April 25, 1949.

1. Petitioner, claiming self-defense, was convicted in the District of Columbia of murder in the first degree and was sentenced to death. On a motion for a new trial on the ground of newly discovered evidence, he relied on evidence that at the time of the killing the deceased had an open knife in his pocket. The trial court denied the motion on the ground that, since petitioner did not know that the deceased was carrying a knife, the evidence was inadmissible. An appeal was dismissed by the Court of Appeals without opinion. *Held:* The cause is remanded to the Court of Appeals with instructions to decide, in the first instance, what rule of evidence should prevail in the District of Columbia. Pp. 705–718.
2. In the circumstances of this case, it is inappropriate that the ground of the dismissal of the appeal be left to inference. Pp. 707–708.
3. There is no "federal rule" as to the admissibility of evidence of uncommunicated threats in a murder case in which self-defense is claimed; and, even if there were, it would not follow that that rule must also be the rule for the District of Columbia. Pp. 712–713.
4. Inasmuch as Congress may enact substantive rules of criminal law exclusively for the District of Columbia, the Court of Appeals for the District of Columbia should have the opportunity to formulate rules of evidence appropriate for the District, so long as the rules adopted do not offend statutory or constitutional limitations. Pp. 713–717.
5. The formulation of rules of evidence for the District of Columbia is a matter of local law to be determined, in the absence of specific congressional legislation, by the highest appellate court for the District. Pp. 716–717.
6. This Court should not undertake to decide questions of local law without the aid of some expression of the views of judges of the local courts who are familiar with the intricacies and trends of local law and practice; and only in exceptional cases will this Court review a determination of such a question by the Court of Appeals for the District of Columbia. P. 718.

Remanded.

Petitioner's motion for a new trial on the ground of newly discovered evidence was denied by the District Court for the District of Columbia. An appeal was dismissed by the United States Court of Appeals for the District of Columbia Circuit without opinion. This Court granted certiorari. 335 U. S. 866. *Remanded with instructions,* p. 718.

Francis J. Kelly argued the cause for petitioner. With him on the brief were *James R. Reynolds* and *J. Louis O'Connor.*

Charles B. Murray argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl* and *Philip R. Monahan.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This case was brought here under § 1254 (1) of Title 28 of the United States Code to review the dismissal by the Court of Appeals for the District of Columbia of an appeal from the denial of a motion for a new trial on the ground of evidence discovered after the petitioner had been convicted of murder in the first degree. 335 U. S. 866. The decisive issue is the admissibility of that evidence. The question arises not through its exclusion at trial but on a motion for a new trial in order to be able to introduce it as newly discovered.

The petitioner, Baxter Griffin, was convicted of the murder of Lee Hunter. The killing was the outcome of a quarrel. Admitting that he shot Hunter, Griffin claimed that he did so in self-defense. His story was that the deceased and he were playing a card game called blackjack, that Hunter demanded a larger share of the pot than was his right, and that upon his refusal to pay,

Hunter "jumped up and started around the table, with his hand in his pocket, and told me he would kick my teeth out of my head." On cross-examination Griffin added that Hunter threatened to kill him. Accordingly, so his story continued, Griffin shot Hunter as Hunter advanced toward him with his hand in his pocket. This version of the occurrence was contradicted by five Government witnesses. Each testified that petitioner started the argument, and that it had nothing to do with the card game which, according to their account, was over before the fracas began. According to them, this is what happened: Griffin made some remark to Hunter about taking Hunter's wife and baby around to Griffin's house; Hunter replied that he would kick petitioner's teeth down his throat; Griffin thereupon left the house and returned within ten minutes with a gun, and on his return shot Hunter, who had made no move from the spot where he was standing. Griffin admitted that he saw nothing in Hunter's hand at the time he shot Hunter. On the evidence, as summarized, the jury on March 28, 1947, found Griffin guilty of murder in the first degree; on April 18, 1947, he was sentenced to death; on December 8, 1947, the conviction was affirmed, 83 U. S. App. D. C. 20, 164 F. 2d 903; on March 15, 1948, this Court denied certiorari, 333 U. S. 857.

On May 7, 1948, a little more than a month before the day set for execution, Griffin began the present proceedings for a new trial. It was based on affidavits of his then counsel who averred that it had recently come to his knowledge that the attendant at the morgue had found an opened penknife in the trousers' pocket of the deceased and that the prosecutor knew of this at the time of the trial but failed to introduce this circumstance in evidence or make it available to the defense. The affidavits further alleged that there was evidence that playing cards were on the floor immediately after the shooting, a fact which

would, had it been known to the defense, have tended to corroborate Griffin's statement that the card game was in progress at the time of the shooting. An extended hearing was had on the motion for a new trial. The allegation regarding scattered playing cards on the floor at the time of the fatal shooting was adequately met, and this ground for a new trial need not detain us.

As to Griffin's discovery, after his conviction was affirmed, of the undisclosed knife in the pocket of the deceased, the Government conceded that it knew of this circumstance at the time of the trial and despite that knowledge neither introduced the fact in evidence nor felt any duty to make it known to the defense. The Government justified this on the ground that in its view the circumstance of the knife was inadmissible, since knowledge of its presence in the pocket of the deceased had not been communicated to Griffin either by sight or otherwise. The District Judge took this view of the law and denied the motion for a new trial. In an unreported opinion, he stated, "The question whether a person is justified in attacking an assailant in self-defense must be determined by the facts which were presented to the person who pleads self-defense. He [Griffin] did not know, it appears, that the deceased had an open knife in his pocket, and therefore its existence is irrelevant." An appeal having been taken, the Government moved to dismiss the appeal on the ground that "the issues raised by appellant's motion for a new trial were fully explored in the court below and that the disposition made of them by the trial court was manifestly correct." The appeal was dismissed by a unanimous Court of Appeals, presided over by a judge than whom no one is more alert in protecting the rights of the accused.

Unfortunately, the Court of Appeals evidently thought that the ground for dismissing the appeal was too clear to require explication. It dismissed the appeal without

an expression of views regarding the admissibility of the evidence on which the claim for a new trial rests. It may well have done so on the ground that in the District evidence of this nature is inadmissible. That this was the reason for the dismissal is the view of some members of this Court. The opinion of the Court of Appeals on a later appeal from the denial of a petition for *habeas corpus* by Griffin lends support to such an interpretation of the summary dismissal of the appeal now under review. See *Griffin* v. *Clemmer,* 83 U. S. App. D. C. 351, 169 F. 2d 961.[1] But solicitude for life bars reliance on such an inference, especially since the issue on *habeas corpus* is quite different from that on appeal from a denial of a motion for a new trial. It seems to us more appropriate for the Court of Appeals to address itself directly to the issue of admissibility. This is so in order to rule out the inference that the Court of Appeals may, in applying *United States* v. *Johnson,* 327 U. S. 106, have deemed the denial of a motion for a new trial on the basis of newly discovered evidence solely a matter for the trial court's discretion.

Were the Court of Appeals to declare that the controverted evidence was admissible according to the law

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[1] In *Griffin* v. *Clemmer,* 83 U. S. App. D. C. 351, 169 F. 2d 961, the Court of Appeals had before it an appeal from the denial of a petition for a writ of *habeas corpus* alleging that Griffin's detention was illegal because the conviction was procured by unfair conduct on the part of the prosecutor. This was filed by Griffin after the Court of Appeals had dismissed the appeal from the denial of the motion for a new trial but before this Court granted this petition for certiorari. The claim of unfairness was based on the failure to disclose the finding of the penknife on Hunter. In effect this was a claim of lack of jurisdiction in the court, according to the doctrine of *Johnson* v. *Zerbst,* 304 U. S. 458. The Court of Appeals deemed the evidence to be irrelevant to that proceeding. It is too precarious to treat this as a holding on the admissibility of the evidence.

prevailing in the District, it would have to consider further whether it would not be too dogmatic, on the basis of mere speculation, for any court to conclude that the jury would not have attached significance to the evidence favorable to the defendant had the evidence been before it. If the Court of Appeals had decided that the disputed evidence was not admissible in the District of Columbia on a claim of self-defense and on that ground had sustained the denial of the motion for a new trial, there would have been an end of the matter. It is not to be assumed that this Court would have granted a petition for certiorari to review the ruling since the determination would have been a matter of local law as are the rules of evidence prevailing in the State courts.

We are told, however, that a ruling which did not permit the introduction of "uncommunicated threats" would constitute "egregious error" to be corrected by this Court. *Fisher* v. *United States,* 328 U. S. 463, 476. Wigmore is vouched as authority that uncommunicated threats are admissible in "virtually all Courts." But Wigmore immediately follows the words quoted with a series of qualifications and limitations which prove that there are few questions of admissibility in trials for murder that have occasioned a greater contrariety of views. See 1 Wigmore, Evidence § 111 (3d ed., 1940).[2] By way of

[2] It is pertinent to quote at length Wigmore's statements on this subject:

"This evidence [uncommunicated threats] is now conceded to be admissible, by virtually all Courts. But the following discriminations must be noted:

. . . . . .

"(3) There is much opportunity for abuse of this sort of evidence. Not only may it be manufactured; but, even when genuine, it may be employed improperly to help the defendant by way of justification,—in certain communities at least, where the Courts have been compelled repeatedly to make clear the law that a threat to shoot another is no

example, most jurisdictions hold that evidence of uncommunicated threats is inadmissible where there is clear proof that the defendant took the initiative, or where there is no evidence that the deceased was the aggressor other than the proffered uncommunicated threats. Were this the rule in the District, the dismissal of the appeal may well have been rested on it, since there was weighty

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justification for the latter to kill on sight. For these reasons various *limitations* have been attempted:

"(a) The evidence of threat is inadmissible where there is clear evidence that the *defendant was the aggressor*. Most jurisdictions adopt this rule, and none seem to negative it.

"(b) Furthermore, the threat is only admissible (as most Courts provide) where there is some *other evidence of an aggression by the deceased*. This is usually expressed by saying that there must have been some 'demonstration of hostility,' or, more shortly, some 'overt act,' by the deceased. It is difficult to say whether this limitation originated in the "*res gestæ*" notion (*infra*) or in a rule of criminal law that an overt act is a necessary element of the justification of self-defence, or merely in a general policy of preventing the abuse of this evidence. At any rate, it seems a satisfactory limitation, provided the multiplication of quibbles as to 'overt acts' is avoided by leaving the whole matter in the hands of the trial judge; for it prevents the defendant from trying to use the threats as a mere pretext for justifying the killing of one who was making no actual attempt to injure him.

"(c) Another condition, sometimes suggested, but inconsistent with and more stringent than the preceding one, is that the threat should be received only when there is *no other direct evidence* as to who was the aggressor, *i. e.* when there were no eye-witnesses. Perhaps in practice a combination of (b) and (c) would be the best; *i. e.* to admit the evidence when by eye-witnesses there was some other evidence of the deceased's aggression, *or* when there were no eye-witnesses to the affair.

"(4) Another and additional use, independent of the preceding, receives the uncommunicated threat in *'confirmation'* or 'corroboration' of communicated threats. This is usually coupled with one of the preceding limitations as an alternative condition of admission.

"(5) The doctrine of "res gestæ" is sometimes invoked as the ground of receiving the evidence; and the same notion underlies the occa-

proof that the petitioner was the aggressor. Indeed, for all we know the Court of Appeals might have had in mind a rule concerning uncommunicated threats that would admit them and yet guard against the danger of fabrication by placing upon the trial judge the responsibility of excluding such alleged threats against the defendant in the absence of proof satisfactory to him of some hostile manifestation by the deceased relevant to the killing. At least one State has some such rule. *State* v. *Carter,* 197

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sional suggestion that the threats 'characterize' the deceased's conduct. This employment of "res gestæ" as a veil for obscurity of thought is elsewhere examined (post, § 1795); and it is enough here to say that it has no possible application to this kind of evidence, and cannot be made to fit its rules; the sooner such phrases are abandoned, the better for clearness of legal thought.

"(6) In some jurisdictions it is impossible to ascertain the exact rule. Previous precedents are ignored, inconsistent tests laid down in succeeding rulings, decisions in other jurisdictions are cited to the exclusion of local precedents; and the oftener the matter comes up for a ruling, the more it is obscured.

" (7) The prosecution may of course *rebut* the evidence of threats by counter-testimony of the *deceased's peaceful plans.* It would seem also that, whenever the deceased's aggression is in issue, the prosecution could begin with its evidence of peaceful plans. The prosecution may also, on the principle of § 63, *ante,* rebut by evidence of the deceased's peaceful *character.*

"(8) There may be *sundry other cases* in which the threats of a deceased person would be relevant apart from the present doctrines.

" (9) The threats of a *third person* may also be admitted, where it is desired to show that he, and not the accused, was the aggressor.

" (10) In *other issues* in which the *aggression* of the plaintiff or prosecuting witness is material, his threats are admissible on the foregoing principles.

" (11) *Other conduct of the deceased,* not amounting to threats, but indicating a *motive* to attack (on the principle of § 390, *post*) may be admitted, by the logic of the present rule, without showing prior communication to the defendant." 1 Wigmore, Evidence, § 111 (3d ed., 1940).

La. 155, 158, 1 So. 2d 62, 63. This is not to reject as unreasonable a rule, followed by some courts, that would let the evidence in, even where all other witnesses oppose a defendant's version of the killing.

One thing is clear. There is no "federal rule" on this subject. The decision in *Wiggins* v. *Utah,* 93 U. S. 465, does not purport to lay down a general rule, nor does it even formulate the evidentiary problem now in controversy. In that case, in light of the fact that there was no other identification of the aggressor, proof was offered that the deceased had exhibited a pistol a few minutes before the shooting and had said, though out of the hearing of the accused, that "he would kill defendant before he went to bed that night," and this Court naturally held that this evidence should have been admitted. It did so because "it would have tended strongly to show where that first shot came from, and how that pistol, with one chamber emptied, came to be found on the ground." *Wiggins* v. *Utah, supra* at 470.

But even assuming that the "federal rule" is that the evidence described in the motion for a new trial would be admissible, it does not follow that it must also be the rule for the District of Columbia. This Court, in its decisions, and Congress, in its enactment of statutes, have often recognized the appropriateness of one rule for the District and another for other jurisdictions so far as they are subject to federal law. Thus, the "federal rule" in first-degree murder cases is that, unless the jury by unanimous vote agrees that the penalty should be death, the court must fix the sentence at imprisonment for life. 35 Stat. 1151, 1152, 18 U. S. C. § 567, now 18 U. S. C. § 1111 (1948), *Andres* v. *United States,* 333 U. S. 740. But a defendant convicted of first-degree murder in the District cannot look to the jury to soften the penalty; he must be given the death sentence. 31

Stat. 1321, 43 Stat. 799, D. C. Code § 22–2404, *Johnson* v. *United States,* 225 U. S. 405. Furthermore, the Court's decision in *Fisher* v. *United States,* 328 U. S. 463, makes clear that when we refused to reverse the Court of Appeals for the District we were not establishing any "federal rule" in interpreting the murder statutes which apply in places other than the District of Columbia over which Congress has jurisdiction. In fact, this Court has been at pains to point out that "Congress . . . recognized the expediency of separate provisions" pertaining to criminal justice applicable exclusively to the District of Columbia in contradistinction to the Criminal Code governing offenses amenable to federal jurisdiction elsewhere. *Johnson* v. *United States,* 225 U. S. 405, 418.

Many statutes reflect this distinctive position of the District in matters of criminal law. Compare 35 Stat. 1149, 18 U. S. C. § 516 ("federal" adultery statute), now repealed, 18 U. S. C. p. 2415 (1948), with 31 Stat. 1332, D. C. Code § 22–301 (District adultery statute); compare 35 Stat. 1143, 18 U. S. C. §§ 2031, 2032 (1948) ("federal" rape statute) with 31 Stat. 1322, 41 Stat. 567, 43 Stat. 798, D. C. Code § 22–2801 (District rape statute); compare 35 Stat. 1144, 18 U. S. C. § 2111 (1948) ("federal" robbery statute) with 31 Stat. 1322, D. C. Code § 22–2901 (District robbery statute); compare 35 Stat. 1144, 18 U. S. C. § 466 ("federal" larceny statute), now repealed, 18 U. S. C. p. 2415 (1948),[3] with 31 Stat. 1324, D. C. Code § 22–2201 (District larceny statute). In fact, it requires two volumes to contain "all the general and permanent laws relating to or in force in the District of Columbia, on January 3, 1941, except such laws as are of application in the District of Columbia by reason of being laws of the

[3] The repeal of the specific provisions on adultery and larceny does not detract from their illustrative significance.

United States general and permanent in their nature." See Preface to District of Columbia Code (1940 ed.). If Congress can enact substantive rules of criminal law exclusively for the District of Columbia,[4] the Court of Appeals for the District of Columbia ought not to be denied opportunity to formulate rules of evidence appropriate for the District, so long as the rules chosen do not offend statutory or constitutional limitations.

The position of spouses as witnesses strikingly illustrates that the District stands apart from the rule of evidence prevailing generally in the federal courts. The federal courts have held that one spouse cannot testify against the other unless the defendant spouse waives the privilege. *Miles* v. *United States,* 103 U. S. 304; *Bassett* v. *United States,* 137 U. S. 496; cf. *United States* v. *Mitchell,* 137 F. 2d 1006, 1008 (C. A. 2d Cir.). Since this Court in the *Funk* case left open the question whether this rule should be changed, *Funk* v. *United States,* 290

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[4] ". . . There is certainly nothing anomalous in punishing the crime of murder differently in different jurisdictions. It is but the application of legislation to conditions. But if it be anomalous, very little argument can be drawn from it to solve the questions in controversy. The difference existed for a number of years between the District and other places under national jurisdiction, for, as we have seen, the qualified verdict has not existed in the District since the enactment of the District Code, and did not exist when the Criminal Code was enacted. . . .

"Congress certainly in enacting the District Code, recognized the expediency of separate provisions for the District of Columbia. It was said at the bar and not denied that the District Code was not only the work of the lawyers of the District, having in mind the needs of the District, but of its citizens as well, expressed through various organizations and bodies of them. In yielding to the recommendations Congress made no new precedent. It had given local control to the Territories, and it enacted a separate code for Alaska." *Johnson* v. *United States,* 225 U. S. 405, 417–418.

U. S. 371, 373, it presumably is still the "federal rule" for the lower courts. In the District, however, the rule has long been otherwise. *Halback* v. *Hill,* 49 App. D. C. 127, 261 F. 1007; *Buford* v. *Buford,* 81 U. S. App. D. C. 169, 170, 156 F. 2d 567, 568; cf. *Dobbins* v. *United States,* 81 U. S. App. D. C. 218, 157 F. 2d 257; 31 Stat. 1358, D. C. Code § 14–306. Another example is afforded by the fact that the statute just cited also provided that one spouse could testify in favor of the other in cases in the District when the "federal rule" was still to the contrary. Compare *Jin Fuey Moy* v. *United States,* 254 U. S. 189; *Hendrix* v. *United States,* 219 U. S. 79, both overruled in *Funk* v. *United States, supra.*

The problem of the admissibility of the evidence set forth in the motion for a new trial is serious and its wise solution full of difficulty. The problem was apparently not explored below, and at the bar of this Court counsel did not give it the consideration appropriate for determination of a federal issue of general importance. It was not even argued in their briefs. Under such circumstances it is not for us to announce a rule for the District of Columbia. Nothing that has been said concerning the various possible choices is intended as an expression of preference among the competing rules about the admissibility of uncommunicated threats, nor as the slightest restriction upon the freedom of the Court of Appeals to make its own choice. We purposely withhold any expression of opinion on the merits of any of the permissible views on admissibility of this evidence. Certainly nothing in our decisions forecloses the Court of Appeals from selecting any one in the range of choices open to it, each one having some rational basis. That court has heretofore been recognized as the appellate tribunal for determining the local rules of evidence; it also is a court that has active experience with the just

and practical considerations governing trials for murder, plainly outside the preoccupation of this Court.

It is precisely for such reasons that for a decade the Court has declined to review all convictions for first-degree murder in the District of Columbia, with a single exception, and in every one of these cases some local rule of evidence was at least in part involved. The Appendix, *infra,* p. 719, gives a summary of the legal issues involved in the fourteen cases in which we denied a petition for certiorari. This course of disposition manifests uniformity of respect by this Court for District rulings on evidence.[5] Reference to this course of disposition of attempts to secure review here for convictions of murder in the District in no wise disregards our repeated admonition that denial of a petition for certiorari imports nothing as to the merits of a lower court decision. These denials do not remotely imply approval of the various rulings on evidence made in these cases by the Court

[5] To compare this impressive course of disposition with the fact that we have granted little over 5% of petitions *in forma pauperis* on behalf of convicts is to treat statistics as though they were merely figures without meaning. The mass of these *in forma pauperis* petitions, usually drawn by laymen, are pathetically trivial and frivolous endeavors by those incarcerated to procure their freedom after all other hope has faded. To draw inferences from this 5% figure is to treat as fungible denials of certiorari because no federal question is raised, denials because the state remedies were not exhausted, and denials for other unrelated jurisdictional reasons. The fourteen petitions for certiorari for the District of Columbia were of a wholly different nature. They were all cases in which the petitioner was represented by counsel and in which the Court of Appeals for the District of Columbia had considered seriously errors claimed to have occurred in the course of the trial—they were all adjudications on the merits. Our consistent denials under these circumstances are mute evidence, not of approval or disapproval, but of deference to the Court of Appeals for the District of Columbia on rules of evidence prevailing in the District.

of Appeals for the District. What they do establish is that it has become settled practice for this Court to recognize that the formulation of rules of evidence for the District of Columbia is a matter purely of local law to be determined—in the absence of specific Congressional legislation—by the highest appellate court for the District.

Previous to this case, there was, as has been noted, a single exception to this Court's consistent refusal, for the past decade, to bring here for review a conviction for murder in the District.[6] The disposition of the exception powerfully underlines the significance of the necessity for the Court of Appeals to pass initially on this issue. The conviction in that case was affirmed essentially on the principle that the law of evidence and procedure governing criminal trials in the District of Columbia is in the keeping of the Court of Appeals for the District and is not to be exercised by this Court. "The administration of criminal law in matters not affected by constitutional limitations or a general federal law is a matter peculiarly of local concern. . . . Matters relat-

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[6] The situation in England regarding appeals in criminal cases is not without illumination on the importance of abstention by this Court in criminal cases already decided by two courts. Between the establishment of the Court of Criminal Appeal by the Criminal Appeal Act of 1907 and the end of 1947, there have been 585 appeals in murder cases to that Court. In the same period there have been only four appeals from that Court to the House of Lords. Such appeals can only be taken if "the Director of Public Prosecutions or the prosecutor or defendant obtains the certificate of the Attorney General that the decision of the Court of Criminal Appeal involves a point of law of exceptional public importance, and that it is desirable in the public interest that a further appeal should be brought." The Criminal Appeal Act, 1907, 7 Edw. VII, c. 23.

We are indebted for the above figures to the kindness of the Attorney General of England, the Rt. Hon. Sir Hartley Shawcross.

ing to law enforcement in the District are entrusted to the courts of the District. Our policy is not to interfere with the local rules of law which they fashion, save in exceptional situations where egregious error has been committed." Such were the views which determined decision in *Fisher* v. *United States,* 328 U. S. 463, 476. While the *Fisher* case evoked dissent, it was a decision rendered after the Court of Appeals had fully declared its views of the law, and none of the considerations that moved the dissenters in that case is even remotely present in the case now before us.

We must therefore remand the case to the Court of Appeals with instructions to decide, in the first instance, what rule should prevail in the District of Columbia. To do otherwise would constitute an unwarranted departure from a wise rule of practice in our consideration of cases coming here from the Court of Appeals of the District. "There are cogent reasons why this Court should not undertake to decide questions of local law without the aid of some expression of the views of judges of the local courts who are familiar with the intricacies and trends of local law and practice. We do not ordinarily decide such questions without that aid where they may conveniently be decided in the first instance by the court whose special function it is to resolve questions of the local law of the jurisdiction over which it presides. *Huddleston* v. *Dwyer,* 322 U. S. 232, 237, and cases cited. Only in exceptional cases will this Court review a determination of such a question by the Court of Appeals for the District." *Busby* v. *Electric Utilities Employees Union,* 323 U. S. 72, 74–75.

Remanded.

[For dissenting opinion of Mr. Justice Murphy, see *post,* p. 721.]

APPENDIX TO OPINION OF THE COURT.

Summary of Disposition of Petitions for Certiorari to the Court of Appeals for the District of Columbia to Review Death Sentences on Conviction for First-degree Murder since 1938.

Case	Questions raised	Disposition	Reported at—	
			U. S.	F. 2d
1. No. 926, O. T. 1939. *McAffee* v. *U. S.*	1. Insufficiency of evidence. 2. Use of confession. 3. Interpretation of murder statute.	Denied	310/643	111/199
2. No. 260, O. T. 1942. *Mumforde* v. *U. S.*	1. Abandonment of felony. 2. Admission of statements made in absence of counsel. 3. Charge to jury.	Denied	317/656	130/411
3. No. 341, O. T. 1944. *Neely* v. *U. S.*	1. Use of confession. 2. Admission of statements made in absence of counsel.	Denied	323/754	144/519
4. No. 1057, O. T. 1944. *Mergner* v. *U. S.*	1. Use of confession. 2. Instructions as to premeditation.	Denied	325/850	147/572
No. 270, O. T. 1945 (denial of lunacy hearing). *Neely* v. *U. S.*	3. Was there prima facie evidence in support of lunacy petition?	Denied	326/768	150/977
5. No. 122, O. T. 1945. *Fisher* v. *U. S.*	1. Insufficiency of evidence to show premeditation. 2. Refusal of instructions. 3. Interpretation of murder statute (see opinion 328 U. S. 463).	Granted	326/705	149/28
6. No. 363, O. T. 1945. *McFarland* v. *U. S.*	1. Admission into evidence of victim's blood-stained clothes. 2. Instructions on circumstantial evidence. 3. Newly discovered evidence. 4. Blood-detection test.	Denied	326/788	150/593
7. No. 1242, O. T. 1945. *Medley* v. *U. S.*	1. Admission of expert testimony. 2. Instructions to jury. 3. Time to file plea in abatement.	Denied	328/873	155/857
8. No. 1097, O. T. 1946. *Hawkins* v. *U. S.*	1. Evidence of unrelated crimes. 2. Use of confession. 3. Charge to jury.	Denied	331/830	158/652
9. No. 276, Misc., O. T. 1947. *Griffin* v. *U. S.*	1. Cross-examination by trial judge.	Denied	333/857	164/903
10. No. 300, Misc., O. T. 1947. *Wheeler* v. *U. S.*	1. Jury improperly constituted. 2. Restrictive cross-examination. 3. Misconduct of judge.	Denied	333/829	165/225
11. No. 327, Misc., O. T. 1947. *Patton* v. *U. S.*	1. Sufficiency of evidence. 2. Separation of jury.	Denied	333/830	165/225
12. No. 519, O. T. 1947. *Fook* v. *U. S.*	1. Judge's comment on evidence. 2. Instructions to the jury. 3. Prejudicial remarks.	Denied	333/838	164/716
13. No. 553, Misc., O. T. 1947. *Hall* v. *U. S.*	1. Evidence of other crimes. 2. Insufficiency of proof. 3. Use of confession. 4. Improper use of peremptory challenges.	Denied	334/853	168/161
14. No. 554, Misc.,* O. T. 1947. *Gray* v. *U. S.*	1. Evidence of other crimes. 2. Insufficiency of proof. 3. Use of confession. 4. Improper use of peremptory challenges.	Denied	334/853	168/161
15. No. 41, Misc., O. T. 1948 (instant case). *Griffin* v. *U. S.*	1. Admissibility of uncommunicated threats in case of self-defense (now No. 417).	Granted	335/866	----------

*Certiorari denied because application therefor was not made within the time provided by law, 334 U. S. 853.

NOTE.—The Court also denied certiorari in the only other first-degree murder case filed during the last decade. No evidentiary point was raised in the petition for certiorari. See *Copeland* v. *U. S.*, No. 887, O. T. 1945, certiorari denied at 328 U. S. 841.

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MR. JUSTICE MURPHY, dissenting.

Baxter Griffin has been sentenced to die for the murder of Lee Hunter. His justification for the killing was self-defense. He has found that Hunter had an open knife in his pocket when he was shot. He seeks a new trial on the basis of that newly-discovered evidence. The first question is whether that evidence would be admissible at a new trial.

It is clear to me that it is admissible. Uncommunicated threats and designs on the defendant cannot show his motive in killing, but they may demonstrate that a design on the defendant did in fact exist. This is the rule in "virtually all Courts." 1 Wigmore, Evidence (3d ed., 1940), § 111, p. 547. It is certainly the federal rule. *Wiggins* v. *Utah,* 93 U. S. 465; *Trapp* v. *New Mexico,* 225 F. 968. And it is a thoroughly desirable rule. A defendant should be entitled to present the jury with evidence lending credence to his theory of the case. *Griffin's* case is a good example of the policy behind the rule: for the open knife is the only supporting evidence of his self-defense testimony.

There can be little question that the open knife is an element in the proof of a design on the defendant, and is admissible under the rule stated above. But some courts have made exceptions to this rule, three of which might be considered relevant in this case. Wigmore, *supra,* § 111 (3). The exceptions have a central foundation: distrust of the jury's ability to evaluate this kind of evidence. Many rules of exclusion are bottomed on this distrust, of course. But it is clearly misplaced when directed at the jury's capability in weighing the value of uncommunicated threats in a murder trial. The evidence is simple; it is not calculated to inflame; it is far more difficult to fabricate than are communicated threats; the prosecution can easily question its importance; and

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it provides solid support for a defendant's self-defense theory. While in Griffin's case the evidence is stronger for the prosecution than it was in *Wiggins', supra,* that difference is not a distinction. The very plea of self-defense raises doubt on that question. Defendant's testimony, supporting his plea, raises further doubt.

It is clear that this evidence might change the jury's verdict. To make admissibility depend upon mechanical and often illogical variations in the size of the doubt in a judge's mind is an invasion of the jury's function. "It is pertinent here to remark, that both the effect of [the witnesses'] testimony and [their] credibility were to be weighed by the jury." *Wiggins* v. *Utah, supra,* at 469.

The Court makes little attempt to justify the exclusion of this evidence. Instead, it cites *Fisher* v. *United States,* 328 U. S. 463. The *Fisher* case declined to upset an evidence rule that had "long been the law of the District of Columbia": that "mental deficiency which does not show legal irresponsibility" is not "a relevant factor in determining whether an accused is guilty of murder in the first or second degree." The Court stated the general rule that "matters relating to law enforcement in the District are entrusted to the courts of the District" in a case in which a reversal would have been a "radical departure from common law concepts" and thus "more properly a subject for the exercise of legislative power or at least for the discretion of the courts of the District." 328 U. S. at 471, 473, 476.

In *Fisher,* the Court considered the judiciary's case-by-case method ill suited for the sweeping changes which were and are necessary in the law of insanity. It recognized that an indirect attack on the problem, by admitting evidence of one's past life as relevant in premeditation, might lead to the trial of one's whole life rather than of the specific offense charged.

Despite the radical nature of the change, three members of this Court thought that the judiciary should make an attempt to correct the injustice of the common-law rules. Those arguments were rejected. But they were rejected only upon the limited basis to which I have referred.

Today the Court extends the *Fisher* rule. It calls *Fisher* a holding that *no* District of Columbia rules of evidence are reviewable in this Court. The *Fisher* case is no authority for such a proposition. There is no warrant for it in statute. And our denial of thirteen petitions for certiorari in death cases in the District in the last ten years cannot establish such a proposition. In the last ten complete Terms of Court, only 5.1% of all petitions for certiorari *in forma pauperis* have been granted. And the percentage of petitions for certiorari, other than *in forma pauperis,* granted in the same period has fluctuated between 14.9 and 22.7.[1] When we deny nineteen out of twenty petitions *in forma pauperis,* and four out of five of the other petitions, the denial of petitions in thirteen capital cases in ten years reflects no greater policy in those cases than it does in any other class of cases. This is particularly true when the sample—fifteen cases—is so small compared to the number of cases we are asked to review, and when the sample considers only murder cases. "Nothing is so fallacious as facts, except figures." For figures which do not reveal the peculiar facts of each case cannot reflect a policy of any kind.

Self-limitation of our appellate powers may be a worthy thing, but it is not attractive to me when the behest of Congress is otherwise. Congress has given this Court

[1] Annual Report of the Director of the Administrative Office of the United States Courts 1948, Table A 1.

the ultimate power to review District of Columbia trials. No matter how the decision is phrased, the Court's power in the premises is such that it is responsible for the evidence rule it asks the Court of Appeals to expound. There is no "radical departure from common law" rules in *Griffin's* case, as there was in *Fisher's*. We should declare the evidence admissible.

If the evidence is admissible, a motion for a new trial should be granted. A contrary determination would be an abuse of discretion,[2] for there is manifestly a reasonable possibility [3] that the jury would lessen the verdict of first-degree murder.

THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS, and MR. JUSTICE RUTLEDGE join in this opinion.

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[2] See *United States* v. *Johnson*, 327 U. S. 106.

[3] The Government concedes that the "reasonable possibility" standard is proper, at least in a capital case. Compare *Wagner* v. *United States*, 118 F. 2d 801; *Evans* v. *United States*, 122 F. 2d 461; *Weiss* v. *United States*, 122 F. 2d 675; *Berry* v. *Georgia*, 10 Ga. 511.

CALIFORNIA *v.* ZOOK ET AL.

CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF LOS ANGELES COUNTY, CALIFORNIA.

No. 355. Argued February 8, 1949.—Decided April 25, 1949.

1. A California statute prohibits the sale or arrangement of any transportation over the public highways of the State if the transporting carrier has no permit from the Interstate Commerce Commission. The Federal Motor Carrier Act has substantially the same provision respecting carriers in interstate commerce. Respondents operate a travel bureau in Los Angeles, and receive commissions for arranging "share-expense" passenger transportation in private automobiles. State lines are crossed in many of the trips. Respondents were convicted of violating the state statute. *Held:* The state statute, as so applied, is not invalid under the Commerce Clause of the Federal Constitution. Pp. 726–738.
2. The fact that a federal law and a state law affecting interstate commerce are identical does not automatically invalidate the state law; the question to be determined, by a judgment upon the particular case, is whether the state law conflicts with national policy and whether Congress intended to make its jurisdiction exclusive. Pp. 728–731.
3. Normally, congressional purpose to displace local laws must be clearly manifested; and, if the claim is conflict in terms, it must clearly appear that the federal provisions are inconsistent with those of the state. P. 733.
4. The tradition of "usual police powers" is of aid in determining congressional intent as to excluding state action on interstate commerce, at least when Congress has legislated; and states clearly have an interest in regulating the use of their own highways. Pp. 734–735.
5. In this case, there is no conflict in terms between the federal and California statutes, and no possibility of such conflict, since the state statute makes federal law the law of the state in this matter. P. 735.
6. There is no indication in this case that Congress intended to substitute a uniform federal law for diverse state laws, for there was little state legislation on the subject when Congress acted. Pp. 735–736.

7. The state statute is not rendered invalid by the fact that it imposes heavier penalties than the federal act nor by the possibility of double punishment. Pp. 731–733, 735–738.
8. Difficulties confronting state regulation of other phases of interstate commerce can not justify exclusion of the state regulation here involved. P. 736.
9. The validity of the California statute here involved, which does not conflict with Interstate Commerce Commission policy, is not affected by an earlier state statute which did conflict with that policy. P. 737.
10. So far as casual, occasional, or reciprocal transportation of passengers for hire is concerned, the State may punish as it has in the present case for the safety and welfare of its inhabitants; the Federal Government may punish for the safety and welfare of interstate commerce. P. 738.

87 Cal. App. 2d Supp. 921, 197 P. 2d 851, reversed.

Respondents were convicted of violating a California penal statute. The conviction was reversed, and the complaint was ordered dismissed, by the highest court of the State in which a decision could be had. 87 Cal. App. 2d Supp. 921, 197 P. 2d 851. This Court granted certiorari. 335 U. S. 883. *Reversed,* p. 738.

John L. Bland argued the cause for petitioner. With him on the brief was *Ray L. Chesebro.*

DeWitt Morgan Manning argued the cause for respondents. *Frank W. Woodhead* was on the brief.

Mr. Justice Murphy delivered the opinion of the Court.

A California statute prohibits the sale or arrangement of any transportation over the public highways of the State if the transporting carrier has no permit from the Interstate Commerce Commission.[1] The federal Motor

[1] Calif. Stats. 1947, c. 1215, §§ 2, 4, pp. 2724, 2725, Deering's Calif. Penal Code (1947 Supp.), §§ 654.1, 654.3. The statute makes it criminal to sell transportation in a carrier which has failed to secure

Carrier Act has substantially the same provision.[2] The question is whether the state act as applied in this case is invalid in view of the federal act.

Respondents operate a travel bureau in Los Angeles, and receive commissions for arranging "share-expense" passenger transportation in automobiles. Owners of private cars desiring passengers for a trip register with respondents' agency, as do prospective passengers. State lines are crossed in many of the trips. Until 1942 the federal act specifically exempted such "casual, occasional, or reciprocal" transportation.[3] But in that year the Interstate Commerce Commission removed the exemption,[4] as the Motor Carrier Act empowered it to do.[5] Both the California and federal statutes now require respondents to sell transportation only in carriers having permits from the I. C. C.

Respondents were prosecuted under the state act. They admitted their unlawful activity, but demurred to the criminal complaint on the sole ground that the state statute entered an exclusive congressional domain. The trial court disagreed, and entered a judgment of con-

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a permit from either the California Public Utilities Commission or the Interstate Commerce Commission of the United States. Our only concern is with the correspondence of state and federal legislation.

[2] 49 U. S. C. §§ 301, 303 (b) (see note 5, *infra*), 49 Stat. 543 *et seq.*, 54 Stat. 919, 921. The act is limited to carriers operating in interstate commerce. 49 U. S. C. § 302 (b).

[3] 49 U. S. C. § 303 (b) (9).

[4] When the transportation is arranged "by a third-party intermediary who engages in making such transactions for compensation or as a regular occupation or business." *Ex parte No. MC–35,* 33 M. C. C. 69, 81.

[5] The I. C. C. order was upheld by the District Court for the Northern District of Illinois in *Drake* v. *United States,* November 18, 1942 (see *Levin* v. *United States,* 3 Federal Carriers Cases (CCH) 2297). We affirmed. *Levin* v. *United States,* 319 U. S. 728.

viction, but the appellate court[6] upheld respondents' contention, and ordered the complaint dismissed. 87 Cal. App. 2d Supp. 921, 197 P. 2d 851. The case is here on certiorari, 335 U. S. 883.

Certain first principles are no longer in doubt. Whether as inference from congressional silence, or as a negative implication from the grant of power itself, when Congress has not specifically acted we have accepted the *Cooley* case's broad delineation of the areas of state and national power over interstate commerce. *Cooley* v. *Port Wardens,* 12 How. 299; *Southern Pacific Co.* v. *Arizona,* 325 U. S. 761, 768. See Ribble, *State and National Power Over Commerce,* ch. 10. Absent congressional action, the familiar test is that of uniformity versus locality: if a case falls within an area in commerce thought to demand a uniform national rule, state action is struck down. If the activity is one of predominantly local interest, state action is sustained. More accurately, the question is whether the state interest is outweighed by a national interest in the unhampered operation of interstate commerce.

There is no longer any question that Congress can redefine the areas of local and national predominance, *Prudential Insurance Co.* v. *Benjamin,* 328 U. S. 408; *Southern Pacific Co.* v. *Arizona, supra,* at 769, despite theoretical inconsistency with the rationale of the Commerce Clause as a limitation in its own right. The words of the Clause—a grant of power—admit of no other result. When Congress enters the field by legislation, we try to discover to what extent it intended to exercise its power of redefinition; here we are closer to an intent that can be demonstrated with assurance, although we may em-

[6] The Appellate Department of the Superior Court of Los Angeles County, State of California. There is no further review in the state courts. Art. VI, §§ 4, 4b, Calif. Const.; *People* v. *Reed,* 13 Cal. App. 2d 39, 56 P. 2d 240.

ploy presumptions grounded in experience in doubtful cases.

But whether Congress has or has not expressed itself, the fundamental inquiry, broadly stated, is the same: does the state action conflict with national policy? The *Cooley* rule and its later application, *Southern Pacific Co.* v. *Arizona, supra,* the question of congressional "occupation of the field," and the search for conflict in the very terms of state and federal statutes are but three separate particularizations of this initial principle.

We restate the familiar because respondents would have us pronounce an additional rule: that when Congress has made specified activity unlawful, "coincidence is as ineffective as opposition," and state laws "aiding" enforcement are invalid. Respondents seem to argue that this is as fundamental as the rule of conflict with national authority, and that it rests upon wholly independent premises.

But respondents seize upon only one part of the familiar phrase in *Charleston & W. C. R. Co.* v. *Varnville Furniture Co.,* 237 U. S. 597, 604. We said that when "Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition . . . ." See also, *Pennsylvania R. Co.* v. *Public Service Comm'n,* 250 U. S. 566, 569; *Missouri P. R. Co.* v. *Porter,* 273 U. S. 341, 346. Respondents' argument assumes the stated premise—that Congress has "taken the particular subject-matter in hand," to the exclusion of state laws. The Court could not have intended to enunciate a mechanical rule, to be applied whatever the other circumstances indicating congressional intent. Neither the language nor the facts of the cases cited support an approach in such marked contrast with this Court's consistent decisional bases. The *Varnville* case struck down a South Carolina statute which had the effect of holding a connecting carrier liable for goods damaged in inter-

state commerce, when Congress had determined that the initial carrier should bear primary responsibility; the *Pennsylvania Railroad* case held invalid a state measure requiring a specified type of rear platform different from the detailed specifications of the Interstate Commerce Commission; and in the *Porter* case, the Court thought Congress intended to leave the terms of a uniform bill of lading to the I. C. C., and that state laws on the subject were meant to be ineffective. See *Cloverleaf Butter Co.* v. *Patterson,* 315 U. S. 148, 157–159.

The "coincidence" rationale is only an application of the first principle of conflict with national policy. The phrase itself simply states that familiar rule. If state laws on commerce are identical with those of Congress, the Court may find congressional motive to exclude the states: Congress has provided certain limited penalties, "and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go," *Varnville, supra,* at 604—that is, if Congress has "occupied the field." But the fact of identity does not mean the automatic invalidity of state measures. Coincidence is only one factor in a complicated pattern of facts guiding us to congressional intent.[7] As the Court

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[7] Compare *Missouri, K. & T. R. Co.* v. *Harris,* 234 U. S. 412, with *Northern P. R. Co.* v. *Washington,* 222 U. S. 370; *People* v. *Compagnie Générale Transatlantique,* 107 U. S. 59, 63; *Oregon-Washington R. & Nav. Co.* v. *Washington,* 270 U. S. 87; and *Cloverleaf Butter Co.* v. *Patterson,* 315 U. S. 148. In these cases we made our decision concerning congressional intent by considering all the factors we considered relevant. We did not resort to a mechanical rule.

The text also seems to supply the underlying rationale for the two cases cited in *Varnville,* at 604, to support the familiar quotation on "coincidence." *Southern R. Co.* v. *Railroad Comm'n,* 236 U. S. 439, and *Chicago, R. I. & P. R. Co.* v. *Hardwick Farmers Elevator Co.,* 226 U. S. 426. And see *Jerome* v. *United States,* 318 U. S. 101, 105.

stated in the *Pennsylvania Railroad* case, at 569, the "question whether Congress and its commissions acting under it have so far exercised the exclusive jurisdiction that belongs to it as to exclude the State, must be answered by a judgment upon the particular case." Statements concerning the "exclusive jurisdiction" of Congress beg the only controversial question: whether Congress intended to make its jurisdiction exclusive.

This has long been settled. *Fox* v. *Ohio,* 5 How. 410, announced uncertainly what *United States* v. *Marigold,* 9 How. 560, later made clear: that "the same act might, as to its character and tendencies, and the consequences it involved, constitute an offence against both the State and Federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each." 9 How. at 569.[8] See *Ex parte Siebold,* 100 U. S. 371, 390; *United States* v. *Lanza,* 260 U. S. 377, 384. And see *Union Brokerage Co.* v. *Jensen,* 322 U. S. 202, 208.

Asbell v. *Kansas,* 209 U. S. 251, is a further illustration. A Kansas statute provided criminal penalties for the importation of cattle from any point south of the State, except for immediate slaughter, without approval of the proper state officials or the Bureau of Animal Industry of the United States. The congressional Act, 32 Stat. 791, 792, allowed cattle to be transported into a state if inspected and passed by an inspector of the United States Bureau of Animal Industry. Violation of the federal act brought criminal sanctions. Yet we affirmed a conviction under the state law. We said that "if the state law conflicts with it [federal law] the state law must yield. But the law of Kansas now before us recognizes the supremacy of the national law and conforms to it."

[8] The *Fox* and *Marigold* cases were concerned with congressional power over forgeries, but for the purposes of this case the principle is the same.

209 U. S. at 258. And see the similar problem and similar answer by Brandeis, J., for the Court in *Dickson* v. *Uhlmann Grain Co.*, 288 U. S. 188.

To limit our inquiry to respondents' single standard would restrict us to unreality. For Congress is often explicit when it wishes state laws to conclude federal prosecution, to avoid the double punishment possible in a federal system. See, for example, 18 U. S. C. § 659, defining the crime of stealing from an interstate carrier; 18 U. S. C. § 660, misapplication of funds by an officer or employee of a carrier engaged in commerce. And when state enforcement mechanisms so helpful to federal officials are to be excluded, Congress may say so, as in the Labor Management Relations Act, 1947, 29 U. S. C. (Supp. I), § 160 (a). That Congress has specifically saved state laws in some instances, see, *e. g.*, the Securities Act of 1933, 15 U. S. C. § 77r, indicates no general policy save clarity.

Respondents' automatic "coincidence means invalidity" theory, applied in an area as imbued with the state's interest as is this one, see *infra*, would lead us to the conclusion that a state may not make a dealer in perishable agricultural commodities respect its laws on the fraudulent nonpayment of an obligation, if that fraud occurred after an interstate shipment, 7 U. S. C. § 499b (4), for Congress has not expressly saved such prosecutions. We would hold, too, that extortion or robbery from interstate commerce under 18 U. S. C. § 1951 or 18 U. S. C. § 2117 is immune from state action; that the wrecking of a bridge over an interstate railroad is an "exclusively federal" offense, 18 U. S. C. § 1992; that the transmittal of a ransom note in interstate commerce cannot be punished by local authorities, 18 U. S. C. § 875. And see 18 U. S. C. §§ 331, 472, 479. In short, we would be setting aside great numbers of state statutes to satisfy a congressional purpose which would be only the product of this Court's

imagination. We cannot agree that each of the problems under the statutes cited may not be resolved by examination of the whole case.

The question is whether Congress intended to override state laws identical with its own when it, through the Interstate Commerce Commission, regulated share-expense passenger automobile transportation, or whether it intended to let state laws stand. While the statute says nothing expressly on this point and we are aided by no legislative history directly in point,[9] we know that normally congressional purpose to displace local laws must be clearly manifested. *H. P. Welch Co.* v. *New Hampshire,* 306 U. S. 79, and cases cited; *Maurer* v. *Hamilton,* 309 U. S. 598, 614; *Kelly* v. *Washington,* 302 U. S. 1, 11, 14; *Mintz* v. *Baldwin,* 289 U. S. 346. Or if the claim is conflict in terms, it "must be clear that the federal provisions are inconsistent with those of the state to justify the thwarting of state regulation." *Cloverleaf Butter Co.* v. *Patterson, supra,* at 156. See also *Hines* v. *Davidowitz,* 312 U. S. 52, at 67.

General propositions derived from the whole sweep of the Commerce Clause are often helpful, and we think those just stated are persuasive indications of congressional intent in the case now before us. But the

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[9] As might be expected: there was an exemption of casual operations when the statute was passed. See note 5, *supra,* and text. Discussion in debate and hearings is largely descriptive. See, *e. g.,* Hearings before Subcommittee of House Committee on Interstate and Foreign Commerce on H. R. 5262 and H. R. 6016, 74th Cong., 1st Sess., pp. 47, 97, 183, 188–191, 208, 262; Hearings before Senate Committee on Interstate Commerce on S. 1629, S. 1632, and S. 1635, 74th Cong., 1st Sess., pp. 69, 70, 87, 97, 119, 186–188, 215, 390. The Committee reports are not helpful.

There is, however, an expression of deference to state action on intrastate commerce, 49 U. S. C. § 302 (b), as strengthened on the floor of the Senate, 79 Cong. Rec. 5735–5737. See 79 Cong. Rec. 12197; 49 U. S. C. § 305 (a).

quite separate Commerce Clause degree questions can be resolved only by careful scrutiny of the particular activity regulated. The Interstate Commerce Commission found these dangers present in the business of share-expense passenger transportation: abandonment of passengers before reaching the promised destination; personal injuries sustained by passengers because of irresponsible drivers, with attendant delay and expense; delays caused by arrest and detention of drivers for violations of traffic laws; crowded conditions in automobiles by reason of an excessive number of passengers and their baggage; and "annoyance, anxiety, or fright caused by reckless and improper driving by the automobile operators, by the bad mechanical condition of the vehicles used, by the fatigue of drivers operating the automobiles for long periods without adequate rest, or by the improper conduct of the drivers or other passengers." Evidence of these evils led the I. C. C. to remove the exemption which had covered these respondents. *Ex parte No. MC–35,* 33 M. C. C. 69, 73, 74. See also Report of Federal Coordinator of Transportation on the Regulation of Transportation Agencies other than Railroads and on Proposed Changes in Railroad Regulation (Washington, 1934), Sen. Doc. 152, 73d Cong., 2d Sess., p. 226, mentioning the financial irresponsibility of these carriers. And see *California* v. *Thompson,* 313 U. S. 109.

Of course we no longer limit the states to their "traditional" police powers in considering a statute's validity under the Fourteenth Amendment. See *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.,* 335 U. S. 525. But the tradition of "usual police powers" is still of aid in determining congressional intent to exclude state action on interstate commerce, at least when Congress has legislated. Many of the evils discussed by the I. C. C., above, are of the oldest within the ambit of the police power: protection against fraud and physical harm to a

state's residents. And consistent with the many cases giving the state's interest in its own highways more weight than the national interest against "burdening" commerce,[10] we have held that the highway regulation involved in this case is allowable state action before Congress acted. *California* v. *Thompson, supra.* Removal of the Motor Carrier Act's exemption since the *Thompson* case does not change our conclusion.

The case would be different if there were conflict in the provisions of the federal and California statutes. But there is no conflict in terms, and no possibility of such conflict, for the state statute makes federal law its own in this particular. The case might also be different were there variegated state laws on this subject in 1941, when the I. C. C. removed the federal exemption. We might then infer congressional purpose to displace local laws and establish a uniform rule beyond which states may not go. See *Southern R. Co.* v. *Railroad Commission,* 236 U. S. 439. Whatever the result in that class of cases, it would be startling to discover congressional intention to "displace" state laws when there were no state laws to displace when Congress acted. And that is nearly the situation in the present case. When the I. C. C. removed the federal exemption, it mentioned twelve cities, other than Los Angeles and San Francisco, in which the problem was particularly acute.[11] Of these twelve

[10] E. g., *South Carolina State Highway Dept.* v. *Barnwell Bros.,* 303 U. S. 177; *Clark* v. *Poor,* 274 U. S. 554, 557; *Maurer* v. *Hamilton,* 309 U. S. 598, 614; *Hendrick* v. *Maryland,* 235 U. S. 610; *H. P. Welch Co.* v. *New Hampshire,* 306 U. S. 79; *Kelly* v. *Washington,* 302 U. S. 1, 10. See the distinction of *Buck* v. *Kuykendall,* 267 U. S. 307, and *Bush & Sons* v. *Maloy,* 267 U. S. 317, in *Bradley* v. *Public Utilities Commission,* 289 U. S. 92 at 95. See Kauper, *State Regulation of Interstate Motor Carriers,* 31 Mich. L. Rev. 920, 1097.

[11] "The travel-bureau business is quite extensive in many cities, particularly those in the western and southwestern States, notably at Kansas City, Mo., Wichita, Kans., Oklahoma City and Tulsa,

cities, only two were located in states which attempted regulation of the kind of transportation we are now considering.[12] Such striking absence of state law in states where the problem was recognized as serious by the I. C. C. clearly demonstrates a purpose to provide rather than displace local rules—to fill a void rather than nationalize a single rule. And we see nothing to show that a more serious problem in the State of California might not properly beget a more serious penalty, if the California legislature deemed it wise. I. C. C. recognition that the problem is more acute in some states than in others may well indicate acceptance of that proposition.

It is said that I. C. C. recognition of the difficulties facing state regulation of interstate commerce, 33 M. C. C. at 76, because of cases such as *Buck* v. *Kuykendall, supra,* is of importance here. But this case concerns only the state's mechanisms for enforcing a statute identical with that of the federal government, though rooted in different policy considerations. We cannot predicate exclusion upon the simple recognition of Constitutional difficulties not present in the cause before us. Since the

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Okla., Dallas, Forth Worth, San Antonio, Houston, and El Paso, Tex., Los Angeles and San Francisco, Calif., Portland, Oreg., Seattle, Wash., and Denver, Colo. The record establishes that such operations exist at other cities, including Chicago, Ill., and New York, N. Y. At one time, there were approximately 50 bureaus in operation in Los Angeles alone. . . ." 33 M. C. C. at 71–72.

[12] Letters from motor carrier commissions in western and southwestern States show that in 1941 there was no regulation, or attempt at regulation, covering Kansas City, Oklahoma City, Tulsa, Dallas, Fort Worth, San Antonio, Houston, El Paso, Portland, or Seattle. Only in Wichita and Denver was regulation attempted, and its extent in Wichita is not at all clear.

In 1941 there was likewise no regulation or attempt at regulation of any kind in Arizona, Montana, New Mexico, or Utah, although Wyoming attempted some measure of control. Idaho's only requirement was a registration fee.

I. C. C. order was issued after *California* v. *Thompson,* one would expect the federal agency to be specific if it intended to supersede state laws. And we do not see how a previous California statute conflicting with I. C. C. policy, cf. 1933 Cal. Stat., c. 390, § 1, p. 1012, and *Frank Broker Application,* 8 M. C. C. 15, can have anything to do with the only California statute we are considering—a measure which does not conflict with I. C. C. policy. It is difficult to believe that the I. C. C. intended to deprive itself of effective aid from local officers experienced in the kind of enforcement necessary to combat this evil—aid of particular importance in view of the I. C. C.'s small staff. See 61st Annual Report of the I. C. C. (1947), p. 122; 62d Annual Report of the I. C. C. (1948), p. 109.[13]

This is not a hypothetical case on "normal Congressional intent." It is California's attempt to deal with a real danger to its residents. We know that coincidence, with its consequent possibility of double punishment, is an important factor to be considered. In many cases it may be a persuasive indication of congressional intent. But we must look at the whole case. In this case the factors indicating exclusion of state laws are of no consequence in the light of the small number of local regulations and the state's normal power to enforce safety and good-faith requirements for the use of its own highways.

[13] Respondents ignore practical differences when they rely upon the *Southern R. Co.* case, *supra,* which invalidated state regulation of grab-irons on railroad cars moving in interstate commerce. The individual state's interest in the manner its residents use its own highways can hardly be compared with the time-honored I. C. C. control over the nation's traditional avenues of interstate transportation, the railroads. A case closer to the one before us is *Asbell* v. *Kansas, supra.* To recognize that the question is one of degree does not resolve the sharp differences in extreme revealed by the *Southern R. Co.* case and the one now before us.

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"The state and federal regulations here applicable have their separate spheres of operation." *Union Brokerage Co.* v. *Jensen, supra,* 322 U. S. at 208.[14] So far as casual, occasional, or reciprocal transportation of passengers for hire is concerned, the State may punish as it has in the present case for the safety and welfare of its inhabitants; the nation may punish for the safety and welfare of interstate commerce. There is no conflict.

Reversed.

MR. JUSTICE FRANKFURTER, dissenting.

My brother BURTON has set forth in convincing detail how the regulation of "travel bureaus" for arranging transportation of passengers by motor carriers engaged in interstate commerce was taken over by federal authority, after experience had disclosed the inadequacy of State regulation. What I have to say only serves to emphasize my agreement with his conclusion.

In *California* v. *Thompson,* 313 U. S. 109, this Court recognized that positive intervention of Congress was required to displace the reserve power of the State to promote safety and honesty in the business of arranging for motor carrier transportation even beyond State lines. As to such business the power of Congress to regulate commerce "among the several States" was an excluding, not an exclusive, power—State action was not barred by the Commerce Clause but only by appropriate congressional action. State action is displaced only to the extent that Congress chooses to displace it. One would suppose that, when Congress has proscribed defined conduct and attached specific consequences to violations of such out-

[14] "The Federal Government has dealt with the manner in which the customhouse brokerage is carried on. Minnesota, however, is legitimately concerned with safeguarding the interests of its own people . . . ." *Id.*

lawry, the States were no longer free to impose additional or different consequences by making the same misconduct also a State offense. And that is this case.

For the first time in the hundred and twenty-five years since the problem of determining when State regulation has been displaced by federal enactment came before this Court, *Gibbons* v. *Ogden,* 9 Wheat. 1, the Court today decides that the States can impose an additional punishment for a federal offense unless Congress in so many words forbids the States to do it. When Congress deals with a specific evil in a specific way, subject to specified sanctions, it is not reasonable to require Congress to add, "and hereafter the States may not also punish for this very offense," to preclude the States from outlawing the same specific evil under different sanctions.[1] To do so would impute to Congress the purpose of imposing upon a nationwide rule the crazy-quilt of diversity—actual or potential—in State legislation, when the federal policy was adopted by Congress precisely because it concluded that the manner in which the States, under their permissive power, dealt with the evil was unsatisfactory.

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[1] The variety of sanctions now enforceable is reflected in the following statutes:

United States: fine of not more than $100 for the first offense and not more than $500 for any subsequent offense. 49 Stat. 564, 49 U. S. C. § 322 (a).

California: fine of not over $250 or imprisonment for not over 90 days or both, and on the second conviction, imprisonment for not less than 30 days or more than 180 days. For subsequent convictions, imprisonment for not less than 90 days and not more than one year. Cal. Pen. Code § 654.3 (Deering, 1947 Supp.).

Washington: fine of not over $250 or not over 90 days in jail; apparently additional offenses do not increase the punishment. Wash. Rev. Stat. Ann. § 2266 (1940), §§ 6397–19, 6397–20 (1941 Supp.).

Wyoming: fine of not less than $25, nor more than $100, or imprisonment for not more than six months or both. Wyoming Comp. Stat. Ann. §§ 60–1309, 60–1362 (1945). The applicability of these sections to a situation of the present type is not free from doubt.

Such an inference is a strained and strange way of interpreting the mind of Congress. It also disregards an important aspect of civil liberties, namely, avoidance of double punishment for the same act even though such double punishment may be constitutionally permissible. See *Jerome* v. *United States,* 318 U. S. 101, 105.

Of course the same physical act may offend a State policy and another policy of the United States. Assaulting a United States marshal would offend a State's policy against street brawls, but it may also be an obstruction to the administration of federal law. Scores of such instances, inevitable in a federal government, will readily suggest themselves. That was the kind of a situation presented by *United States* v. *Marigold,* 9 How. 560. Passing counterfeit currency may, in one aspect, be "a *private cheat* practised by one citizen of Ohio upon another," and therefore invoke a State's concern in "protecting her citizens against frauds," 9 How. 568, 569, but the same passing becomes of vital concern to the Federal Government because it tends to debase the currency. Such a situation is quite different from this case. It merits repetition to say that we are now reversing a State court for holding that the very same conduct for the disobedience of which federal regulation imposes a maximum fine of one hundred dollars for the first offense cannot be prosecuted in a State court under a State law imposing a larger fine and, perchance, a prison sentence.

The talk about "conflict" as a basis for displacing State by federal enactment is relevant only in situations where Congress has chosen to "circumscribe its regulation and occupy only a limited field," while State regulation is "outside that limited field," and yet an inference of negation of State action is sought to be drawn. See *Kelly* v. *Washington,* 302 U. S. 1, 10. Even in such circumstances this Court has drawn inferences of implied exclusion of

State action although in no sense of the word would there have been physical clash between State and federal regulation so as to preclude concurrence of vitality for both regulations. See, *e. g., Cloverleaf Butter Co.* v. *Patterson,* 315 U. S. 148; *Hill* v. *Florida,* 325 U. S. 538. In this case we have the very conduct theretofore left to State regulation taken over by federal regulation, and yet the Court superimposes upon the displacing federal regulation the State regulation which was consciously displaced. That a Court which only on April 4, 1949, decided *H. P. Hood & Sons* v. *Du Mond,* 336 U. S. 525, as it did, should now decide this case as it does, presents indeed a problem for reconciliation.

MR. JUSTICE BURTON, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE JACKSON join, dissenting.

The question presented is whether § 654.1 of the Penal Code of California[1] is invalid as applied in this case to interstate commerce by the Municipal Court of Los Angeles. The respondents, Zook and Craig, were convicted of making a sale, in 1948, in California, of interstate motor transportation to Texas, on an individual fare basis, over the public highways of California, under conditions whereby the transportation was to be supplied by a carrier having no certificate of convenience and necessity or other permit from the Public Utilities Commission of California, or from the Interstate Commerce Commission of the United States. Such a sale was adjudged contrary to the terms of § 654.1 but the Appellate Department of the Superior Court of California held that that Section was invalid as thus applied to interstate commerce in the face of the Interstate Commerce Act of the United States and of orders issued under the au-

[1] See Appendix A, *infra,* p. 776.

thority of that Act making precisely such a sale a federal offense. We agree with the court below that California could not, without the consent of Congress, lawfully thus share the exclusive jurisdiction being exercised by Congress to regulate commerce among the states and we find here no such consent. On the other hand, we do find here, under all the circumstances, that Congress has exercised its power of regulation of this precise form of interstate commerce to the exclusion of the states and in conflict with the regulation attempted here by the State of California.

From 1933 until 1947 the California legislation on this subject expressly distinguished between intrastate and interstate transportation. It provided that the state legislation was to be applicable to interstate motor carriers only "until such time as Congress of the United States shall act, . . ." [2] or in "the absence of action on the part of Congress or the Interstate Commerce Commission . . . ." [3] California thus recognized not only the possibility but the propriety of federal regulation of this form of commerce to the extent of its interstate operations. In 1935 [4] and in 1940 [5] Congress, on its part, expressly recognized a federal responsibility for such regulation. It assumed jurisdiction over the qualifications and maximum hours of service of employees and over safety of operations and standards of equipment. As to other regulations, Congress temporarily and conditionally exempted this kind of transportation from the Interstate

[2] 1933 Cal. Stat., c. 390, § 1, p. 1012.

[3] 1941 Cal. Stat., c. 539, § 2, p. 1863.

[4] § 203 (b), 49 Stat. 545–546, of the Motor Carrier Act, 1935, which became Part II, Interstate Commerce Act, 49 Stat. 543, 54 Stat. 919.

[5] § 203 (b) (9) of Part II, Interstate Commerce Act, 54 Stat. 921, 49 U. S. C. § 303 (b) (9). For text, see Appendix B (2), *infra*, p. 783.

Commerce Act. In doing so, however, it authorized the Interstate Commerce Commission to determine from time to time to what extent, if any, the exemption should be removed. In 1942, after a thorough study, that Commission largely removed the exemption.[6] Thus, by express authority of Congress, the regulation of the interstate operations of this type of transportation was vested in the Interstate Commerce Commission after a determination by that Commission that such an application of federal law was necessary to carry out the policy of Congress.

Section 654.1, which was added to the Penal Code of California in 1947, contained no provision distinguishing between intrastate and interstate commerce in this field. It mentioned only "transportation . . . over the public highways of the State of California . . . ." The state court below nevertheless interpreted the Section as seeking to include interstate as well as intrastate transportation and then held that it was invalid insofar as it applied to interstate transportation.[7] We accept the state court's

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[6] *Ex parte No. MC–35,* 33 M. C. C. 69, 49 C. F. R., Cum. Supp. § 210.1.

[7] "The point made on appeal is that the acts charged and proved against defendants were done in interstate commerce and that for that reason and because of certain federal legislation, the state law cannot be applied to those acts. We find this contention well founded. . . .

. . . . . .

"Respondent [The People of the State of California] concedes and even demonstrates that under the circumstances of this case the federal law and section 654.1, Penal Code, forbid and punish the same acts, but *contends* that this is permissible and does not *invalidate the state law, even as applicable to acts in interstate commerce.* If we look to the rule in California for determining whether a city ordinance is in conflict with a state law and for that reason void, the city being limited by our Constitution to such police regulations 'as do not conflict with general laws,' we find it established that

interpretation and the question before us is only the validity of the statute as applied to interstate transportation.[8] If it were not for the interpretation given to the California statute by the court below, the issue might be disposed of by limiting that statute, like its predecessor, to intrastate transportation.

'there is a conflict where the ordinance and the general law punish precisely the same acts.' . . . Respondent contends that this is not the rule applicable as between state and federal legislation, but on review of the authorities *we conclude that the rule in interstate commerce matters has substantially the same effect as that above stated.* Of such a case, the United States Supreme Court said long ago: 'This legislation [enacted by Congress] covers the same ground as the New York Statute, and they cannot co-exist.' (*New York* v. *Compagnie Generale Transatlantique* (1883), 107 U. S. 59, 63 [2 S. Ct. 87, 27 L. Ed. 383, 385].) . . .

. . . . . .

"We conclude, therefore, that section 654.1, Penal Code, cannot be *validly* applied to transportation in interstate commerce, and since the complaint herein expressly limits itself to such transportation, it states no offense punishable under the section and the demurrer should have been sustained." (Emphasis added.) *People* v. *Zook,* 87 Cal. App. 2d Supp. 921, 922, 925, 197 P. 2d 851, 852, 854.

[8] *People* v. *Zook, supra.* The material statutory provisions include: The Penal Code of California, §§ 654.1–654.3, added by 1947 Cal. Stat. c. 1215, pp. 2723–2725. For text, see Appendix A, *infra,* p. 776. National Transportation Policy, inserted before Part I of the Interstate Commerce Act, 54 Stat. 899, 49 U. S. C., note preceding § 1. For text, see Appendix B (1), *infra,* p. 778. Part II, Interstate Commerce Act, §§ 202 (a), jurisdiction in Interstate Commerce Commission; 202 (b), powers of states; 203 (b) (9), partial and conditional exemption of casual and occasional transportation; 211 (a), licenses, certificates, permits; 222 (a), penalties; 49 Stat. 543, *et seq.,* as amended by 52 Stat. 1029, 1237, 54 Stat. 920, *et seq.;* 49 U. S. C. §§ 302 (a) and (b), 303 (b) (9), 311 (a), 322 (a). For text, see Appendix B (2), *infra,* p. 781. 49 C. F. R. Cum. Supp. § 210.1, as to removal of exemption as provided in § 203 (b) (9) of Part II, Interstate Commerce Act. For text, see note 23, *infra,* p. 770.

The complaint is printed in the margin.[9] Its sufficiency is the precise issue presented to us on the demurrer which the court below has ordered sustained. In that court, the respondents successfully asserted the invalidity of the state statute in the face of the Interstate Commerce Act applicable to the same offense. The petitioner concedes that the two laws sought to forbid and punish the same acts, but contends that this was a permissible duplication.

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[9] "COMPLAINT—Filed January 8, 1948

"Personally appeared before me, this 8th day of January, 1948, E. W. Hively of Los Angeles City, who, first being duly sworn, complains and says: That on or about the 7th day of January, 1948, at and in Los Angeles City, in the County of Los Angeles, State of California, a misdemeanor, to-wit: Violation of Section 654.1 of the Penal Code of the State of California was committed by Berl B. Zook and Wilmer K. Craig (whose true name to affiant is unknown), who at the time and place last aforesaid, did wilfully and unlawfully, at 925 West 7th Street, in the City of Los Angeles, sell, and offer to sell, negotiated, provided and arranged for, and advertised and held themselves out as persons who sell and offer to sell and negotiate, provide and arrange for the transportation of persons on an individual fare basis over the public highways of the State of California by a carrier other than a carrier having a valid and existing certificate of convenience and necessity or other valid and existing permit from the Public Utilities Commission of the State of California or from the Interstate Commerce Commission of the United States authorizing such holder of a certificate or other permit to provide such transportation of passengers in that the said Berl B. Zook and Wilmer K. Craig, held themselves out as persons willing to sell and negotiate for the above described transportation and sold to James A. Moss and Dorothy Mae Elbag, transportation from Los Angeles to Fort Worth, Texas, over a carrier which was not licensed in any manner by the State of California or the Interstate Commerce Commission to carry passengers for compensation or hire and negotiated for the sale of such transportation and arranged for such transportation.

"All of which is contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the People

Agreeing that the two statutes forbid the same acts, our first duty is to see how far this identity of legislative effect extends. Our remaining duty then is to determine whether the state law is valid in the face of the federal law on the same subject.

The substantial identity between the statutes ends with their definitions of the offense. Only the Federal Act requires a broker's license and the general exemptions from the respective Acts are in great conflict.[10] The penalties are substantially different.[11] For example,

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of the State of California. Said Complainant therefore prays that a warrant may be issued for the arrest of said Defendant .... (whose true name .... to affiant is unknown) and that .... he .... may be dealt with according to law.

"Subscribed and sworn to before me this 8th day of January, 1948, E. W. Hively.

"Urban F. Emma, Clerk of the Municipal Court of Los Angeles City, in said County and State. By G. Lander (Seal.) Deputy Clerk.

"[File endorsement omitted]

"Issued by Ray L. Chesebro, City Attorney
"By Boyd A. Taylor, Deputy City Attorney."

The respondents demurred to this complaint. The demurrer was overruled by the Municipal Court of the City of Los Angeles, California. The respondents, upon a stipulated statement of facts, were convicted and sentenced by that court. Their motion in arrest of judgment was denied. The Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, reversed the judgment and remanded the cause to the Municipal Court with directions to sustain the demurrer. The appeal from the order in arrest of judgment was dismissed.

[10] Cf. § 654.2 of the Penal Code of California with § 203 (b) of the Interstate Commerce Act; see § 211 (a) as to broker's license and, generally, Appendices A and B, *infra*, pp. 776, 778. For a detailed juxtaposition of the conflict, see Appendix C, *infra*, p. 784.

[11] Under § 654.3 of the Penal Code of California, assuming this to be the respondents' first offense, each respondent was subject to a maximum fine of $250 or imprisonment for not over 30 days,

in the instant case each respondent was fined $150 more under the state law than would have been possible under the federal law for what apparently was a first offense under each Act. Under the state law the court also had an option to impose a jail sentence, whereas no such option would have been available to it under the federal law. The federal law also provided for a fine up to $500 for each offense after the first. Under the state law, convictions after the first were punishable solely by imprisonment. Accordingly, while the offense here charged was one which violated both the state and federal statutes, there was a substantial conflict between the sanctions available for the enforcement of those statutes. This conflict is by no means conclusive of this case but it is entitled to consideration as indicating the absence, rather than the presence, of an implied consent by the United States to the intrusion of the state law into the exclusive jurisdiction made available to the United States by the Federal Constitution. Prosecution and punishment under both the state and federal statutes would, in this instance, often result in greater punishment than the maximum permitted by the federal law. We cannot readily assume congressional consent to state legislation

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or both. In the instant case the court fined each respondent $250 and required that, in default of the payment of the respective fines before 5 p. m. on the date of judgment, they were to be imprisoned in the city jail in the proportion of one day's imprisonment for each $2 of the fines until paid, not exceeding 125 days. For a second conviction the punishment prescribed is limited to imprisonment for not less than 30 days and not more than 180 days. Upon a third or subsequent conviction the punishment is limited to imprisonment for not less than 90 days and not more than one year, without eligibility for probation. Violations of the corresponding § 211 (a) of the Interstate Commerce Act are punishable, under § 222 (a), by a fine of not more than $100 for the first offense and not more than $500 for any subsequent offense. Each day of violation constitutes a separate offense.

that makes an expressly stated congressional "maximum" penalty no longer a maximum penalty.

The issue requires answers to two questions: I. Did the California Code invade the exclusive jurisdiction which Congress was exercising through its Interstate Commerce Act? II. If so, was the conviction under the California Code invalid on the ground that Congress had taken exclusive jurisdiction over that offense and had not consented to share its jurisdiction with California as here proposed? For the reasons to be stated, we believe the answer to each of those questions should be yes.

I.

The California Code invaded the exclusive jurisdiction which Congress was exercising through its Interstate Commerce Act.

The petitioner's concession that the respondents' acts simultaneously violated the terms of both statutes sharply distinguishes the issue here from those often presented in this general field of controversy. (1) We do not have here the much litigated issue as to the validity of state statutes prohibiting or otherwise regulating acts committed in the course of interstate commerce but in a field of that commerce where Congress has taken no action. In the instant case, Congress has taken jurisdiction by statute not only in this general field but over the precise type of interstate motor carrier transportation of passengers that is the subject of the state legislation and of the complaint in this case. (2) Similarly, we do not have here a case where a state has applied its prohibitory or otherwise regulatory measures to some intrastate transaction taking place before or after, and separable from, the transactions in interstate commerce over which the Federal Government has taken jurisdiction. (3) We

do not have here an attempt by a state to supplement federal control over some activity related to but not specifically covered by the federal legislation. (4) Also, we do not have here a case where Congress has expressly consented to share with the states the plenary and supreme authority of Congress to take jurisdiction over the regulation of the interstate commerce in question. (5) On the other hand, we do have here the significant situation of a state attempting, by a new state law, to reach and punish, additionally, a transaction in interstate commerce in the face of the active exercise of substantially conflicting federal jurisdiction over the same transaction and in the absence of express congressional consent to such attempted duplication of jurisdiction. This is in contrast to an attempt by a state to help enforce, as such, an already existing federal statute covering the offense.

We start not merely with the inherent right of a state to exercise its police power over acts within its jurisdiction. We start also with the constitutional provisions by which the supreme legislative power of the respective states has been delegated to Congress to regulate interstate commerce.[12]

Once Congress has lawfully exercised its legislative supremacy in one of its allotted fields and has not accompanied that exercise with an indication of its consent to share it with the states, the burden of overcoming the supremacy of the federal law in that field is upon any state seeking to do so.

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[12] "The Congress shall have Power . . . To regulate Commerce . . . among the several States, ..." (U. S. Const. Art. I, § 8.)

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (*Id.* Art. VI.)

An early statement of the general principle involved was made by Mr. Justice Story in *Prigg* v. *Pennsylvania,* 16 Pet. 539, 617–618.[13] That statement was approved and enlarged upon by Mr. Justice J. R. Lamar in *Southern R. Co.* v. *Railroad Comm'n of Indiana,* 236 U. S. 439, in a case arising under the Interstate Commerce Act in which, on reasoning applicable in the instant case, an Indiana statute was held invalid because it required handholds on the sides or ends of railroad cars operating in interstate commerce in Indiana in substantial duplication of the Federal Safety Appliance Act requiring handholds on both the sides and ends of such cars. There Mr. Justice Lamar said:

> "But the principle that the offender may, for one act, be prosecuted in two jurisdictions has no application where one of the governments has exclusive

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[13] ". . . it would seem, upon just principles of construction, that the legislation of Congress, if constitutional, must supersede all state legislation upon the same subject; and by necessary implication prohibit it. For if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the state legislatures have a right to interfere; and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject-matter. Its silence as to what it does not do, is as expressive of what its intention is as the direct provisions made by it. This doctrine was fully recognised by this Court, in the case of Houston *v.* Moore, 5 Wheat. Rep. 1, 21, 22; where it was expressly held, that where Congress have exercised a power over a particular subject given them by the Constitution, it is not competent for state legislation to add to the provisions of Congress upon that subject; for that the will of Congress upon the whole subject is as clearly established by what it had not declared, as by what it has expressed." *Id.* at pp. 617–618.

jurisdiction of the subject-matter and therefore the exclusive power to punish. Such is the case here where Congress, in the exercise of its power to regulate interstate commerce, has legislated as to the appliances with which certain instrumentalities of that commerce must be furnished in order to secure the safety of employés. Until Congress entered that field the States could legislate as to equipment in such manner as to incidentally affect without burdening interstate commerce. But Congress could pass the Safety Appliance Act only because of the fact that the equipment of cars moving on interstate roads was a regulation of interstate commerce. Under the Constitution the nature of that power is such that when exercised it is exclusive, and *ipso facto,* supersedes existing state legislation on the same subject. Congress of course could have 'circumscribed its regulations' so as to occupy a limited field. *Savage* v. *Jones,* 225 U. S. 501, 533. *Atlantic Line* v. *Georgia,* 234 U. S. 280, 293. But so far as it did legislate, the exclusive effect of the Safety Appliance Act did not relate merely to details of the statute and the penalties it imposed, but extended to the whole subject of equipping cars with appliances intended for the protection of employés. *The States thereafter could not legislate so as to require greater or less or different equipment; nor could they punish by imposing greater or less or different penalties.* . . .

. . . . . .

"The test, however, is not whether the state legislation is in conflict with the details of the Federal law or supplements it, but whether the State had any jurisdiction of a subject over which Congress had exerted its exclusive control." (Emphasis added.) *Id.* at pp. 446, 448.

Mr. Justice Holmes said in *Charleston & W. Car. R. Co.* v. *Varnville Co.,* 237 U. S. 597, 604:

> "When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go."

Mr. Justice Butler reemphasized this in sweeping terms in *Missouri Pac. R. Co.* v. *Porter,* 273 U. S. 341, 346, by concluding the opinion of the Court as follows:

> "Its [Congress'] power to regulate such [interstate] commerce and all its instrumentalities is supreme; and, as that power has been exerted, state laws have no application. *They cannot be applied in coincidence with, as complementary to or as in opposition to, federal enactments which disclose the intention of Congress to enter a field of regulation that is within its jurisdiction."* (Emphasis added.)

See also, *Erie R. Co.* v. *New York,* 233 U. S. 671, 683; *Second Employers' Liability Cases,* 223 U. S. 1, 55.

Related to this exclusive jurisdiction of Congress, established by Article VI of the Constitution, is the general policy against subjecting anyone to punishment more than once for the commission of a single act. Unless care is taken to prevent this, such double punishment may result from the overlapping of the federal and state jurisdictions. However, its unfairness to the individual, as well as its cumbersomeness for enforcement purposes, suggests that it should not be read into legislation in the absence of clear language demonstrating a purpose to permit it. In a case which related to the interpretation of a federal statute that might duplicate or build upon a state law, this Court said:

> " . . . it should be noted that the double jeopardy provision of the Fifth Amendment does not stand as a bar to federal prosecution though a state convic-

> tion based on the same acts has already been obtained. . . . That consideration gives additional weight to the view that where Congress is creating offenses which duplicate or build upon state law, courts should be reluctant to expand the defined offenses beyond the clear requirements of the terms of the statute." *Jerome* v. *United States,* 318 U. S. 101, 105.

So here we should be reluctant to read into a federal statute congressional consent to state legislation which authorized prosecution and punishment by the State in addition to federal prosecution and punishment.

Where there is legislative intent to share the exclusiveness of the congressional jurisdiction, appropriate language can make that intent clear. An outstanding example of such authorization is in the Eighteenth Amendment, now repealed. It was there provided that "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation." (U. S. Const.) More recently, clear language was used by Congress to insure the validity of state cooperation in the "Migratory Bird Conservation Act," approved February 18, 1929:

> "SEC. 17. That when any State shall, by suitable legislation, make provision adequately to enforce the provisions of this Act and all regulations promulgated thereunder, the Secretary of Agriculture may so certify, and then and thereafter said State may cooperate with the Secretary of Agriculture in the enforcement of this Act and the regulations thereunder." 45 Stat. 1225, 16 U. S. C. § 715p.

Still closer to the present situation is the language used by the Congress that passed the Motor Carrier Act, 1935. In "The Whaling Treaty Act" it said:

> "SEC. 12. That nothing in this Act shall be construed to prevent the several States and Territories

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> from making or enforcing laws or regulations not inconsistent with the provisions of said Convention [for the regulation of whaling] or of this Act, or from making or enforcing laws or regulations which shall give further protection to whales . . . ." 49 Stat. 1248, 16 U. S. C. § 912.[14]

The Motor Carrier Act, 1935, did not overlook the subject of exclusive state and federal jurisdiction over the respective fields of intrastate and interstate commerce touched by the Act. It did not, however, approve joint and conflicting control by both at the same time. *It expressly vested in the Interstate Commerce Commission*

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[14] The constitutional principle of the supremacy of federal jurisdiction here discussed puts a limitation upon the legislative jurisdiction of the states in the absence of congressional consent. It does not restrict cooperation of the states in the enforcement of federal statutes. Such cooperation, for example, is an appropriate accompaniment of the National Transportation Policy under the Interstate Commerce Act. This cooperation does not, however, require the creation of separate state offenses paralleling or nearly paralleling the federal offenses. It calls, rather, for cooperation in enforcing the existing federal offenses.

The petitioner, in aid of its argument, has pointed to the declaration of policy as originally stated in the Motor Carrier Act, 1935. There is no aid for the petitioner there. That declaration contained the general phrase, "It is hereby declared to be the policy of Congress to . . . cooperate with the several States and the duly authorized officials thereof and with any organization of motor carriers in the administration and enforcement of this part." 49 Stat. 543. For full text, see Appendix B (1), *infra*, p. 778. When this declaration was repealed in 1940 and largely incorporated in a statement of the "National Transportation Policy," preceding Part I of the Interstate Commerce Act, Congress added language emphasizing the federal rather than the state features of the policy. The material clauses then read:

"It is hereby declared to be the national transportation policy of the Congress . . . to cooperate with the several States and the duly authorized officials thereof; . . . all to the end of developing, coordinating, and preserving a national transportation system by

the regulation of the transportation of passengers by motor carriers engaged in interstate commerce. With equal clarity it expressly provided that Part II of the Interstate Commerce Act *should not affect the powers of taxation of the several states.* It thus dealt with and preserved to the states their full powers to tax without added restriction because of the Motor Carrier Act's relation to interstate commerce. The state powers of taxation were thus distinguished from those of regulation because the power of regulation of interstate commerce was vested expressly in the Interstate Commerce Commission. Also, in relation to the regulation of intrastate commerce, Congress provided that nothing in Part II of the Interstate Commerce Act "shall be construed . . . to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the *exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof.*" (Emphasis added.) § 202 (c), 49 Stat. 543, later designated § 202 (b), 54 Stat. 920, 49 U. S. C. § 302 (b). For full text of original § 202 (b) and (c), later designated § 202 (a) and (b), see Appendix B (2), *infra,* p. 781.

Congress thus dealt directly with the problem of state and federal regulation of motor carrier transportation, either interstate or intrastate in character. Congress indicated no consent to share with others its exclusive jurisdiction over the regulation of interstate commerce. If

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water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. . . ." 54 Stat. 899. For full text and comment, see Appendix B (1), *infra,* p. 778.

It was because the Commission, in 1942, found it necessary in order to carry out this National Transportation Policy that it withdrew the exemption in § 203 (b) (9) which is now before us and which theretofore, to a large extent, had kept interstate travel bureaus and interstate share-the-expense operators exempt from the Interstate Commerce Act.

it had intended to do so, that would have been the place to express such an intent. The language used reflected not merely an absence of congressional consent to the sharing of its jurisdiction over any form of interstate commerce. On the contrary, especially when read with § 203 (b) (9), it evidenced a conscious congressional dissent from any such sharing of its jurisdiction over this form of interstate commerce described in this legislation. Section 203 (b) (9) stated a positive insistence upon federal jurisdiction in the precise field which concerns us here. It provided that the federal jurisdiction become effective whenever and to the extent that the Interstate Commerce Commission found the necessity for it. In this narrow field, Congress thus expressly left temporarily on trial the substantially exclusive state regulation of interstate commerce which was already in effect. This express temporary conditional exemption created a special situation in which the consent of Congress to state regulation was to be continued or cut off by the Interstate Commerce Commission. It did not suggest any sharing or duplication of control by the Commission and the state. This temporary survival of state control was expressly and unequivocally terminated by the order of the Interstate Commerce Commission in 1942. That order called for a positive discontinuance of state control, coupled with a positive vesting of jurisdiction in the Interstate Commerce Commission over this particular type of interstate commerce. The procedure thus taken to substitute federal for state regulation of interstate commerce was the very opposite of a procedure permissive of joint or duplicating federal and state control. It is difficult to conceive of a more deliberate and obvious substitution of one for the other. The area available for such substitution of federal for state control was clearly defined and set aside in § 203 (b) (9) and then put into effect by

order of the Interstate Commerce Commission. *Ex parte No. 35,* 33 M. C. C. 69, 49 C. F. R. Cum. Supp. § 210.1. For an example of a substitution of exclusive federal regulation for exclusive state regulation of certain interstate commerce activities in the warehousing field, see *Rice* v. *Santa Fe Elevator Corp.,* 331 U. S. 218.

This brings us to the final question of statutory interpretation. Did Congress impliedly consent to this attempted sharing of its established jurisdiction within the narrow limits of § 203 (b) (9)?

II.

The conviction under the California Code was invalid because Congress had taken exclusive jurisdiction over that offense and had not consented to share its jurisdiction with California.

It is a contradiction in terms to say that a state, without the consent of Congress, may duplicate or share in the exclusive jurisdiction of Congress. If the jurisdiction of Congress has become exclusive, the state's jurisdiction must, by hypothesis, be derived thereafter from Congress or cease to exist. In this case there was *no express consent* by Congress to share with the states the federally protected exclusive jurisdiction over this type of transaction in interstate commerce. The question remains, however, whether, under all the circumstances, Congress shall be held to have impliedly consented to share its exclusive jurisdiction with California. The text of the legislation and the course of events, which led the Federal Government to take jurisdiction, not only disclose an absence of any basis for a claim that Congress impliedly consented to the California legislation but present overwhelming evidence of a deliberate, careful and unconditional assumption by Congress of federal juris-

diction, *consciously exclusive* of the inadequate state regulation theretofore found to exist. See the reference, *supra,* to original § 202 (b) and (c) of the Act dealing with the jurisdiction of the Interstate Commerce Commission and of the states. For full text, see § 202 (a) and (b) in Appendix B (2), *infra,* p. 781. In addition, we shall now consider in detail the action taken under the informed guidance of the Interstate Commerce Commission in accordance with the express terms of § 203 (b).

The precise fundamental issue is not the identity, similarity, diversity, or even repugnance, of the two statutes. The fundamental issue is that of the presence or absence of congressional consent to the sharing of its exclusive jurisdiction. The degree of immediate or potential conflict between the statutes has a material relation to the issue of congressional consent. Clear conflict between the statutes would be practically conclusive against the state. The less the conflict, the less obvious is the basis for the objection of Congress to sharing its jurisdiction with the state. However, even a complete absence of conflict, resulting in a mere duplication of offenses, would not remove all basis for objection and would not necessarily establish the required congressional consent. For example, the inherent objectionability of the double punishment of an offender for a single act always argues against its implied authorization. Similarly, the difficulties inherent in diverse legislative and enforcement policies always argue against the introduction of new state offenses, as distinguished from state cooperation in prosecuting existing federal offenses. Here there was substantial potential conflict between the prescribed state penalties and the federal penalties, although the prohibited acts were the same. Likewise, there was a substantial difference between the two statutes in the exceptions to their application and in such related provisions

as those for the licensing of the travel bureaus as distinguished from the carriers. Furthermore, § 203 (b) expressly left it to the Interstate Commerce Commission to determine the extent, if any, to which the federal jurisdiction should be applied.

In the instant case the most impressive material, emphasizing the unwillingness of Congress to share its exclusive control with a control through state legislation, is found in the legislative, administrative and judicial proceedings which led to the taking of complete jurisdiction by Congress. When federal jurisdiction was thus taken, in 1942, it was clear to Congress that there existed highly unsatisfactory state regulation of the interstate transactions in question. There is no evidence of a subsequent change in the attitude of Congress. The course of events tells the story. It suggests no consent by Congress to a duplication of federal and state control. On the other hand, it demonstrates the existence of ample reasons for taking and retaining exclusive federal jurisdiction over this kind of interstate transportation. It is an example of the effective integration of our federal and state jurisdictions when each is given exclusive control over designated activities, rather than simultaneous, dual and conflicting control over the same activities.

1. *June 5, 1931.*—A California statute was approved defining motor carrier transportation agents (comparable to travel bureaus arranging share-the-expense trips), and providing for the State's regulation, supervision and licensing of such agents. This Act referred expressly to transportation between points within California and to transportation to the border of that State when one of the points to be reached was outside the State. It expressly permitted these state-licensed transportation agencies to arrange for motor transportation by a motor carrier *not* holding a valid certificate of public conven-

ience and necessity issued by the Railroad Commission of California. In substance, the Act thus recognized and licensed travel bureaus arranging for share-the-expense interstate, as well as intrastate, motor trips by unlicensed carriers. 1931 Cal. Stat., c. 638, § 1, p. 1362, *et seq.*

2. *May 15, 1933.*—Another California statute repealed the Act of June 5, 1931. The new statute declared it to be the policy of California to regulate and control motor carrier transportation agents acting as "intermediaries between the public and those motor carriers of passengers operating, as common carriers or otherwise, over the public highways of the State, for compensation, that are not required by law to obtain, or that have not obtained, a certificate from the Railroad Commission of the State of California . . . ." 1933 Cal. Stat., c. 390, § 1, p. 1012. This statute, like that of 1931, recognized and prescribed licenses for the travel bureaus dealing in share-the-expense interstate, as well as intrastate, motor trips by unlicensed carriers. This statute and this declaration remained in effect until 1947. It was during this same time that the Interstate Commerce Commission, after investigation, declared that it found that such operations, at least as applied to interstate commerce, *were contrary to public policy.* The Commission's extended investigation resulted, in 1942, in the deliberate application of the Interstate Commerce Act to these interstate operations under express authority of Congress. The federal law thereupon expressly prohibited such transportation by unlicensed carriers, in interstate commerce, and also prohibited travel bureaus or brokers from selling or arranging such unlicensed trips in interstate commerce. The conflict in policy thus became clear, at least by 1942.

The relation of the 1933 California Act to interstate commerce and its conflict with the federal policy stated by the Interstate Commerce Commission is emphasized

by the foregoing declaration of state policy which remained in the State Act from 1933 until 1941: *"until such time as Congress of the United States shall act,* the public welfare requires such regulation and control of such intermediaries between the public and interstate motor carriers as well as between the public and intrastate motor carriers." (Emphasis added.) *Id.* at p. 1012.

The California Act also included, until 1941, the following: "The provision of this act shall apply regardless of whether such transportation so sold, or offered to be sold, is interstate or intrastate." *Id.* at p. 1013. In general, the Act amplified the plan of the 1931 Act. It required the bonding and licensing of motor carrier transportation agents (or travel bureaus) arranging for unlicensed interstate, as well as intrastate, motor carrier transportation. Both State Acts contained a section providing explicitly for the separability of any section, subsection, sentence, clause or phrase which might be held unconstitutional.

3. *August 9, 1935.*—Following an extended survey of the rapidly increasing volume of interstate motor transportation, the Motor Carrier Act, 1935, was enacted by Congress as Part II of the Interstate Commerce Act. For the purposes of this case, the most important feature of this Act was its provision for the partial and conditional exemption from its operation of the kind of motor carrier transportation here involved. Section 203 (b) (9) excluded from its operation, except for safety purposes, "the casual, occasional, or reciprocal transportation of passengers or property in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business." 49 Stat. 546. This exclusion of casual and occasional motor carriers was only a conditional exemption, expressive of federal concern over the apparent inadequacy of the state control over casual and occasional

transportation involving interstate trips. The condition applied to the exclusion was—

> "(b) Nothing in this part [Part II of the Interstate Commerce Act], . . . shall be construed to include . . . [clauses (1) to (7) incl.]; nor, *unless and to the extent that the [Interstate Commerce] Commission shall from time to time find that such application is necessary to carry out the policy of Congress enunciated in section 202,*[15] *shall the provisions of this part,* except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment *apply to:* (8) . . . or (9) . . . [casual, occasional or reciprocal transportation as quoted above]." (Emphasis added.) 49 Stat. 545–546.

The close relation between the Commission, the policy of Congress enunciated in the Act and the federal control over the casual and occasional motor carrier transportation of passengers has been emphasized thus from the inception of the Motor Carrier Act, 1935, to the present.

This provision conditionally exempted from federal control not only the casual and occasional transportation service itself but, by rendering such transportation not "subject to" Part II of the Interstate Commerce Act, it also conditionally exempted, from the federal brokerage license requirements, the travel bureaus which sold or arranged for such casual and occasional unlicensed and unregulated interstate transportation.[16]

4. *June 14, 1938.—Frank Broker Application,* 8 M. C. C. 15. Division 5 of the Interstate Commerce Commission made an important ruling on this application. February 11, 1936, the applicant, doing business as

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[15] See Appendix B (1), *infra,* p. 779.

[16] § 211 (a), 49 Stat. 547, 49 U. S. C. § 311 (a). For text, see Appendix B (2), *infra,* p. 783.

Frank's Travel Bureau, of Dallas, Texas, filed an application under § 211 of the Motor Carrier Act, 1935, for a broker's license for the purpose of arranging motor transportation of persons in interstate commerce. For five years the applicant had operated a "travel bureau" in Dallas, Texas. The nature of his business was to bring together persons desiring to travel from Dallas to any point as far west as Los Angeles, California, or as far east as New York, New York. The applicant also sold tickets, on a commission, for certain competing licensed motor carriers. The Commission held that it was necessary for the applicant to obtain a broker's license under the Federal Act in order to continue to sell tickets for the licensed carriers. The rest of the applicant's interstate business, however, was that of a typical travel bureau, arranging for transportation by unlicensed carriers. The Commission's opinion discussed this activity at length and reached a conclusion that throws light on the future policy of the Commission and on the future course of the federal and state legislation. It demonstrates that the Commission, when taking its stand against this type of interstate transportation, did so, at least in California, in the face of a contrary state policy which then favored the continuance, rather than the prohibition, of such operations. The Commission finally issued the broker's license *but only upon the express condition that the applicant would discontinue his travel bureau operations in arranging for the above-described unlicensed interstate transportation which the Commission found to be not in the public interest.* It said (pp. 19–20):

> "*The record convinces us that applicant's method of doing that portion of his business, namely the bringing together of prospective passengers and private individuals, not motor carriers, in order that they may enter into an arrangement whereby the passenger for compensation is transported in inter-*

state or foreign commerce by the private individual, is not in the public interest. Applicant's limited knowledge of the passenger and owner-driver, and his inability to secure authoritative information with respect to each, of necessity makes it impossible for him to safeguard the rights of either. As a result of this practice an unscrupulous passenger or owner-driver is given an opportunity to defraud honest citizens. Under section 204 (a) (4) of the act, we are authorized, among other things, to establish reasonable requirements with respect to the practices of a broker. We are of the opinion that *it is reasonable to require applicant to discontinue his practice of securing private individuals not engaged in business as carriers, to transport passengers for compensation in interstate or foreign commerce, and the license granted herein will be subject to this condition and limitation.*

"We find that applicant is fit, willing, and able to perform the brokerage service proposed and to conform to the provisions of the act and our requirements, rules, and regulations thereunder; that the proposed service, *subject to the condition and limitation stated in the next preceding paragraph, is consistent with the public interest and the policy declared in section 202 (a)*[17] *of the act;* and that a brokerage license should be issued to him." (Emphasis added.)

5. *February 6, 1939.—Michaux Broker Application,* 11 M. C. C. 317. Division 5 of the Interstate Commerce Commission denied this application, filed in June, 1936, for a broker's license under the Federal Act. The applicant sought to carry on an interstate travel bureau operation in Chicago. The Commission found that, if the

[17] See Appendix B (1), *infra,* p. 779.

operation were strictly limited to arrangements for interstate transportation by casual or occasional carriers, "the transportation would not be subject to the act." (*Id.* at p. 318.) The applicant, accordingly, would not require a broker's license for that activity. The Commission, however, said (p. 318): "The extent of applicant's past operations gives rise to doubt that such a volume of business could be achieved without the employment of some persons regularly engaged in transportation of passengers by motor vehicle as an occupation." He disclaimed intention to engage in such operations in the future. The Commission thereupon denied his request for a broker's license for those operations because no such license was required for them. The Commission warned him of the penalties for unlawful operations and denied his application on the ground that he had "not shown that his operation as broker will be consistent with the public interest or with the policy declared in section 202 (a)[18] of the act, ..." (P. 318.) His operations as thus described and condemned were of a type comparable to those *previously condemned by the Commission in its decision on the Frank Broker Application, supra, but approved in California's statutory declaration of a contrary policy then in effect.*

6. *May 1, 1940, and May 17, 1940.*[19]—The Interstate Commerce Commission entered upon its important investigations known, respectively, as *Ex parte No. MC–35,* 33 M. C. C. 69, and *Ex parte No. 36,* 32 M. C. C. 267. The first was made—

> "into the practices with respect to the casual, occasional, or reciprocal transportation of passengers in interstate or foreign commerce for compensation, for the purpose of determining whether the exemption

[18] See Appendix B (1), *infra,* p. 779.

[19] Orders directing investigations, 5 Fed. Reg. 1830, 1845.

> of such transportation as provided in section 203 (b) (9) of the Interstate Commerce Act should be removed to the extent of making applicable all provisions of part II of the act to such transportation . . . [when sold under travel bureau practices]." *Ex parte No. MC–35,* 33 M. C. C. 69, 70.

The second was an investigation into the subject of rules and regulations to govern brokers of passenger transportation subject to Part II of the Interstate Commerce Act. The first investigation later disclosed, among other things, that the—

> "Board of Public Utilities and Transportation of the city of Los Angeles during the latter part of 1939 and the early part of 1940 received an average of 8 complaints daily involving travel bureaus. At other cities, abandoned passengers, who were usually found to be without funds, were assisted by private or public charity. In general, the testimony of the witnesses for such organizations as better-business bureaus, and travelers' aid societies, based upon a knowledge acquired in the performance of their duties, corroborates that of passengers who testified with regard to the difficulties they encountered while traveling by means of transportation arranged through travel bureaus.
>
> "The law-enforcement officials and representatives of eleemosynary and quasipublic organizations who testified favor the removal of the exemption in section 203 (b) (9) of the casual, occasional, and reciprocal transportation of passengers for compensation, when such transportation is arranged through travel bureaus, and believe that regulation by this Commission of such transportation is necessary. Their opinions are based principally on the grounds that this type of transportation as now conducted is the cause of inconvenience and hardship to the trav-

eling public using such transportation, for which adequate redress cannot be obtained, that numerous violations of State and local laws and regulations occur in connection therewith, *that State and local officials are unable properly to regulate such operations because of the fact that a large proportion of the transportation is interstate,* and that, because of the present practices in connection with such transportation, an unreasonable burden is placed upon private and public charities in caring for passengers abandoned or injured while traveling by this means of transportation." (Emphasis added.) *Id.* at pp. 75–76.

7. *September 18, 1940.*—Amendments were enacted to Part II, Interstate Commerce Act. Although the final report in *Ex parte No. MC–35* was not made until 1942, some of the conditions referred to above were reflected in an amendment made to § 203 (b) (9) in 1940.[20] Congress still left the casual transportation operations generally unlicensed and unregulated by the Commission. Yet, through this 1940 Amendment, Congress did expressly provide that, at least when the sales or arrangements for the casual or occasional interstate transportation were made by a licensed broker, then those sales and arrangements were to be considered "subject to" the

[20] Clause (9) of § 203 (b) was amended to read as follows, the new language being italicized:

"(9) the casual, occasional, or reciprocal transportation of passengers or property by motor vehicle in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business, *unless, in the case of transportation of passengers, such transportation is sold or offered for sale, or provided or procured or furnished or arranged for, by a broker, or by any other person who sells or offers for sale transportation furnished by a person lawfully engaged in the transportation of passengers by motor vehicle under a certificate or permit issued under this part or under a pending application for such a certificate or permit.*" (Emphasis added.) 54 Stat. 921, 49 U. S. C. § 303 (b) (9).

Act. The effect of this was to prohibit brokers licensed under the Interstate Commerce Commission from also conducting an unlicensed travel bureau business. This was, therefore, an express congressional recognition of the policy announced by the Commission in the *Frank Broker Application, supra.*

In substance this amounted to a congressional assumption of jurisdiction, in 1940, in conflict with a part of the existing California policy which approved and attempted to regulate these transactions not only in intrastate but also in interstate transactions. This action of Congress, conforming to the Commission's declaration of policy in the *Broker Application* cases, substituted this federal prohibition in place of state regulation of these interstate activities. This attitude was strongly reenforced in 1942 and there has been no contrary federal action at any time. See also, *Copes Broker Application,* 27 M. C. C. 153, 155–156, 169–172, decided by the full Commission, December 20, 1940.

8. *April 28, 1941.—California* v. *Thompson,* 313 U. S. 109. This case overruled *Di Santo* v. *Pennsylvania,* 273 U. S. 34. It held that the 1933 California Act, at least prior to 1940, was valid, but the Court made it clear that it did so because *Congress had not then taken jurisdiction* over travel bureau or brokerage operations in selling or arranging for casual or occasional interstate motor carrier transportation of passengers. The opinion of the Court is full of reservations as to what might be the contrary effect of the taking of federal jurisdiction over these transactions. For example, the Court said:

> "Congress has not undertaken to regulate the acts for which respondent was convicted or the interstate transportation to which they related. . . . Hence we are concerned here only with the constitutional authority of the state to regulate those who, within the state, aid or participate in a form of interstate

commerce over which Congress has not undertaken to exercise its regulatory power." *Id.* at p. 112, and see pp. 114 and 115.

9. *June 2, 1941.*—The 1933 California Act, which had been slightly revised in 1935, was substantially amended. The Amendment struck out the express application of the Act to interstate as well as intrastate transportation. While the Act evidently still applied, through its general language, to both types of transportation, the omission reflected the State's anticipation of the coming federal control over the interstate transactions. This anticipation was expressly stated in an amendment to § 2 limiting the State's regulation of these interstate transactions to a period in "the absence of action on the part of Congress or the Interstate Commerce Commission regulating or requiring licenses of motor carrier transportation agents acting as such for motor carriers carrying passengers in interstate commerce . . . ." [21] This demonstrated California's recognition of the lack of the necessity for, or even the lack of propriety in its attempting to exercise, state control in the face of federal control. This provision was later held by the Superior Court of

[21] "SEC. 2. Section 2 of the act cited in the title hereof is hereby amended to read as follows:

. . . . . .

"In the absence of action on the part of Congress or the Interstate Commerce Commission regulating or requiring licenses of motor carrier transportation agents acting as such for motor carriers carrying passengers in interstate commerce (in this paragraph referred to as 'interstate motor carrier transportation agents') this act shall apply to and regulate such interstate motor carrier transportation agents to the same extent and in the same manner that it regulates or requires the licensing of motor carrier transportation agents acting as such for motor carriers carrying passengers in intrastate commerce (in this paragraph referred to as 'intrastate motor carrier transportation agents')." 1941 Cal. Stat., c. 539, pp. 1862, 1863, amending 1933 Cal. Stat., c. 390, which was the Act cited in the title of this 1941 Act.

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California to cut off completely and voluntarily the state control after the anticipated federal action was taken in 1942. *People* v. *Van Horn,* 76 Cal. App. 2d 753, 174 P. 2d 12.

10. *March 21, 1942.*—This is the most significant date in these proceedings. It marked the issuance of the order of the Interstate Commerce Commission, effective May 15, 1942, in *Ex parte No. MC–35,* 33 M. C. C. 69, 49 C. F. R. Cum. Supp. § 210.1.[22] That order expressly removed the above-mentioned exemption which theretofore had excluded from regulation, under Part II of the Interstate Commerce Act, the casual, occasional and reciprocal transportation of passengers by motor vehicle in interstate commerce for compensation as provided in § 203 (b) (9). This order removed that exemption "to the extent necessary to make applicable all provisions of Part II of the act to such transportation when sold . . . or arranged for, by any person who sells, . . . or arranges for such transportation for compensation or as a regular occupation or business." [23] It thus expressly

[22] It was preceded, on February 3, 1942, by the report and order in *Ex parte No. MC–36,* 32 M. C. C. 267, effective April 1, 1942, 49 C. F. R. Cum. Supp. § 200.300. That order prescribed the kind of information that must be recorded, under federal control, by every passenger broker licensed under § 211 of Part II of the Interstate Commerce Act.

[23] "ORDER

"At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 21st day of March, A. D. 1942.

"EX PARTE NO. MC–35

"EXEMPTION OF CASUAL, OCCASIONAL, OR RECIPROCAL TRANSPORTATION OF PASSENGERS BY MOTOR VEHICLE

"*It appearing,* That by order of May 1, 1940, the Commission, division 5, entered into an investigation into practices with respect to the casual, occasional, or reciprocal transportation of passengers

brought under federal control the interstate passenger transportation arranged for through travel bureaus and it also brought those travel bureaus themselves under federal control. It required a license or permit to be secured for the trip and a broker's license to be secured by the bureau. §§ 203 (b) (9) and 211 (a), 49 Stat. 546,

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in interstate or foreign commerce for compensation for the purpose of determining whether the exemption of such transportation as provided in section 203 (b) (9) of the act should be removed to the extent necessary to make applicable all provisions of the act to such transportation when it is sold, or offered for sale, or provided, or procured, or furnished, or arranged for by any person who holds himself or itself out as one who sells, or offers for sale transportation wholly or partially subject to the act, or who negotiates for, or holds himself out by solicitation, advertisement, or otherwise, as one who sells, provides, furnishes, contracts, or arranges for, such transportation;

"*And it further appearing,* That a full investigation of the matters and things involved has been made and that the division, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

"*It is ordered,* That the Code of Federal Regulations be, and it is hereby, amended by adding the following:

"Title 49—Transportation and Railroads

"Chapter 1—Interstate Commerce Commission

"Subchapter B—Carriers by Motor Vehicle

"Part 210—Exemptions

"Sec. 210. 1 *Casual, occasional, or reciprocal transportation of passengers for compensation when such transportation is sold or arranged by anyone for compensation.* The partial exemption from regulation under the provisions of Part II of the Interstate Commerce Act of the casual, occasional, and reciprocal transportation of passengers by motor vehicle in interstate or foreign commerce for compensation as provided in section 203 (b) (9) of the act be, and it is hereby, removed to the extent necessary to make applicable all provisions of Part II of the act to such transportation when sold or offered for sale, or provided or procured or furnished or arranged for, by any person who sells, offers for sale, provides, furnishes, contracts, or arranges for such transportation for com-

554, 54 Stat. 921, 49 U. S. C. §§ 303 (b) (9) and 311 (a). The federal control was coextensive with the problem and carefully adjusted to it. There was no need, desire or willingness expressed to accept duplicate parallel state control of these interstate operations. On the other hand, it was expressly stated that it was the inability of the state and local officials properly to regulate such interstate operations that convinced the Commission of the necessity of federal control. *Ex parte No. MC–35, supra,* p. 76.

The intent of Congress and of its specially qualified Interstate Commerce Commission to take complete control of these interstate operations and to supersede the existing state regulation had been indicated in the amendment to § 203 (b) (9), made September 18, 1940. It was demonstrated beyond question in the Commission's report in *Ex parte No. MC–35, supra.* That report summarized two years of nationwide investigations. It dealt with the travel bureau problem especially upon an interstate basis. It made specific reference to interstate operations between California and Texas. Typical excerpts from the report have been quoted *supra,* pp. 765–767.

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pensation or as a regular occupation or business. (Sec. 203 (b) (9), 49 Stat. 546, 54 Stat. 919, 921; 49 U. S. C. 303 (b) (9)).

"*It is further ordered,* That this order shall become effective May 15, 1942.

"*And it is further ordered,* That notice of this order be given to the general public affected thereby by publishing it in the Federal Register and by depositing copies thereof in the office of the Secretary of the Commission in Washington, D. C.

"By the Commission, division 5.

[Signed] "W. P. Bartel
"Secretary."

We are indebted to the Interstate Commerce Commission for the full text of the above order. The amendment to the Code of Federal Regulations made by this order appears in 49 C. F. R. Cum. Supp. § 210.1.

Bearing further upon the unsuitability of state and local control over the interstate features of this kind of transportation and upon the need for a more uniform and complete federal control, the report said:

> "There can be little doubt that the removal of the exemption may in some instances work a hardship upon casual, occasional, or reciprocal transporters of passengers and upon persons traveling as passengers by that means of transportation, as well as upon travel bureaus. On the other hand, substantial benefits to the general public would result from the proper regulation of such transportation. If it were properly regulated, passengers using such transportation would not encounter many of the difficulties arising at present. In their testimony, briefs, and exceptions, several travel bureaus admit that reasonable rules and regulations governing the operations of travel bureaus in their appropriate and legitimate field are desirable and necessary. Casual, occasional, and reciprocal transportation of passengers cannot be regulated unless the exemption in section 203 (b) (9) is at least partially removed. The act does not give us power, without the removal of the exemption referred to, to prescribe reasonable rules and regulations governing, or to regulate in any other manner the operations of, travel bureaus. Proper regulation of travel bureaus engaged in legitimate operations can be accomplished only by amendment of the act." *Id.* at p. 80. See also, pp. 76–81.

The validity and binding effect of this order was upheld by the United States District Court for the Northern District of Illinois, November 18, 1942. See Findings of Fact and Conclusions of Law, in *Levin* v. *United States, sub nom., T. A. Drake et al.* v. *United States et al.*, 3 Fed. Car. Cas. (CCH) ¶ 80,100, judgment affirmed, *per curiam,* 319 U. S. 728.

11. *November 8, 1946.—People* v. *Van Horn,* 76 Cal. App. 2d 753, 174 P. 2d 12. There could be no doubt that the Federal Government had thus taken jurisdiction over the regulation of travel bureaus engaged in selling or arranging motor transportation in interstate commerce or that the federal statute prohibited such transportation without a federal license or permit. The effect of this action as relating to California was tested in 1945. The operator of a travel bureau arranging for casual interstate motor transportation between San Diego and points outside of California was charged with violation of the 1933 California Act, as amended by the Act of 1941. The Appellate Department of the Superior Court of that State, in *People* v. *Van Horn, supra,* thereupon held that the California statute no longer applied to such interstate commerce because, under its 1941 Amendment, that Act was made to apply only in "the absence of action on the part of Congress or the Interstate Commerce Commission regulating or requiring licenses of motor carrier transportation agents acting as such for motor carriers carrying passengers in interstate commerce . . . ." 1941 Cal. Stat., c. 539, § 2, p. 1863. The court recognized that, since 1942, that condition had been met. Accordingly, although California formerly had regulated these transactions, it was held that it had voluntarily abandoned such regulation in favor of the Federal Government.[24]

12. *July 8, 1947.*—The present California statute was approved. It repealed the Act of 1933, as amended in 1935 and 1941. While the application of the new Act to interstate transactions is not express, it was interpreted

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[24] See also, *People* v. *Edmondson,* decided March 15, 1946, by the Appellate Department of the Superior Court, County of Los Angeles, California. The opinion of that court is not officially reported but appears in 1946 L. A. Crim. App. 2160. Cert. denied, October 14, 1946, 329 U. S. 716.

by the court below as being thus applicable.[25] It may indicate, therefore, a change in the legislative policy of California toward intrastate operations and an attempted change toward interstate operations but there is no evidence of a change in the policy of Congress.

Jurisdiction over these interstate transactions was assumed by Congress after thorough investigation of the need for such action. That legislation enacted was supreme and therefore exclusive. This does not mean that it might not have been shared with the states if Congress had so provided. We believe, however, that it does mean that, in order for the federal jurisdiction to have been so shared, there must have been some express or implied consent by Congress to do so. The position of Congress was perfectly clear in 1942. There has been no evidence of a change in it.

In Appendix C, *infra,* p. 784, there are placed in convenient juxtaposition the principal circumstances in this case which demonstrate conflicts between the California and federal legislation and policies, classified as follows:

(1) Conflicts inherent in the statutory texts.

(2) Emphasis expressly placed upon the mutual exclusiveness of the state and federal regulations.

(3) Conflicts between state and federal policies which led to the taking of federal jurisdiction over travel bureaus and share-the-expense motor transportation engaged in casual interstate operations.

In the absence of contraverting evidence, the above list of circumstances presents a convincing argument against the conclusion that Congress, in this instance, either expressly or impliedly consented to share with California the regulation of casual, occasional or reciprocal transportation of passengers by motor vehicle in interstate commerce.

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[25] See note 7, *supra,* p. 730.

While it may be uncertain where the line of exclusive federal jurisdiction impinges upon that of the states in the absence of the exercise of federal jurisdiction by Congress, there is no doubt that, when Congress has asserted its exclusive jurisdiction, it is for Congress to indicate the extent, if any, to which a state may then share it. To whatever extent that this is not so, federal law will have lost its constitutional supremacy over state law.

For these reasons we believe that the judgment should be affirmed.

APPENDIX A.

The California Act of 1947.

"An act to repeal 'An act to define motor carrier transportation agent; to provide for the regulation, supervision and licensing thereof, and to provide for the enforcement of said act and penalties for the violation thereof; and repealing an act entitled "An act to define motor carrier transportation agent; to provide for the regulation, supervision and licensing thereof, and to provide for the enforcement of said act and penalties for the violation thereof," approved June 5, 1931, and all acts or parts of acts inconsistent with the provisions of this act,' approved May 15, 1933, and to add Sections 654.1, 654.2, and 654.3 to the Penal Code, relating to transportation of persons.

"[Approved by Governor July 8, 1947. Filed with Secretary of State July 8, 1947.]

"The people of the State of California do enact as follows:

"SECTION 1. The act cited in the title hereof is repealed.

"SEC. 2. Section 654.1 is added to the Penal Code, to read:

"654.1. It shall be unlawful for any person, acting individually or as an officer or employee of a corporation, or as a member of a copartnership or as a commis-

sion agent or employee of another person, firm or corporation, to sell or offer for sale or, to negotiate, provide or arrange for, or to advertise or hold himself out as one who sells or offers for sale or negotiates, provides or arranges for transportation of a person or persons on an individual fare basis over the public highways of the State of California unless such transportation is to be furnished or provided solely by, and such sale is authorized by, a carrier having a valid and existing certificate of convenience and necessity, or other valid and existing permit from the Public Utilities Commission of the State of California, or from the Interstate Commerce Commission of the United States, authorizing the holder of such certificate or permit to provide such transportation.

"SEC. 3. Section 654.2 is added to the Penal Code, to read:

"654.2. The provisions of Section 654.1 of the Penal Code shall not apply to the selling, furnishing or providing of transportation of any person or persons

"(1) When no compensation is paid or to be paid, either directly or indirectly, for such transportation;

"(2) To the furnishing or providing of transportation to or from work, of employees engaged in farm work on any farm of the State of California;

"(3) To the furnishing or providing of transportation to and from work of employees of any nonprofit cooperative association, organized pursuant to any law of the State of California;

"(4) To the transportation of persons wholly or substantially within the limits of a single municipality or of contiguous municipalities;

"(5) To transportation of persons over a route wholly or partly within a national park or state park where such transportation is sold in conjunction with or as part of a rail trip or trip over a regularly operated motor bus transportation system or line;

"(6) To the transportation of passengers by a person who is driving his own vehicle and the transportation of persons other than himself and members of his family when transporting such persons to or from their place of employment and when the owner of such vehicle is driving to or from his place of employment; provided that arrangements for any such transportation provided under the provisions of this subsection shall be made directly between the owner of such vehicle and the person who uses or intends to use such transportation.

"SEC. 4. Section 654.3 is added to the Penal Code, to read:

"654.3. Violation of Section 654.1 shall be a misdemeanor, and upon first conviction the punishment shall be a fine of not over two hundred fifty dollars ($250), or imprisonment in jail for not over 90 days, or both such fine and imprisonment. Upon second conviction the punishment shall be imprisonment in jail for not less than 30 days and not more than 180 days. Upon a third or subsequent conviction the punishment shall be confinement in jail for not less than 90 days and not more than one year, and a person suffering three or more convictions shall not be eligible to probation, the provisions of any law to the contrary notwithstanding." 1947 Cal. Stat., c. 1215, pp. 2723–2725.

APPENDIX B.

(1) *National Transportation Policy.*

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster

sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." Inserted before Part I of the Interstate Commerce Act, 54 Stat. 899, 49 U. S. C., note preceding § 1.

The foregoing "National Transportation Policy" has, for many purposes, superseded the declaration of the policy of Congress enunciated in the original § 202 of the Motor Carrier Act, 1935, to which a cross reference was made expressly in § 203 (b), 49 Stat. 545. This cross reference prescribed that, in order to make Part II of the Interstate Commerce Act applicable to the kind of interstate transportation described in § 203 (b) (9), the Commission must "find that such application is necessary to carry out the policy of Congress enunciated in section 202, ..." The policy of Congress thus referred to as being enunciated in § 202 was contained in the original form of § 202 (a), 49 Stat. 543. It read as follows:

"SEC. 202. (a) It is hereby declared to be the policy of Congress to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the pub-

lic interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers; develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense; and cooperate with the several States and the duly authorized officials thereof and with any organization of motor carriers in the administration and enforcement of this part."

The foregoing original § 202 (a) was repealed, September 18, 1940, 54 Stat. 920. At the same time the designation of the original § 202 (b) and (c) were changed respectively to § 202 (a) and (b). (Both of these subsections are material and they are printed in Appendix B (2), *infra.*)

Accordingly, § 202 of Part II of the Interstate Commerce Act ceased to contain any statement of the general "policy of Congress" corresponding to that contained in the original form of § 202 (a). On the other hand, the very same Act which thus removed this declaration of policy from Part II of the Interstate Commerce Act inserted "before Part I" of that Act a new paragraph entitled "National Transportation Policy." This is the paragraph quoted above from 54 Stat. 899. In the codification of Title 49, a reference to this new paragraph was substituted for the original reference to § 202. The codified clause thus required the Commission to "find that such application is necessary to carry out the national transportation policy declared in the Interstate Commerce Act, . . ." 49 U. S. C. § 303 (b), instead of "the policy of Congress enunciated in section 202, ..." We have adopted that interpretation in this opinion.

(2) *Material Provisions of Part II of the Interstate Commerce Act.*

"SEC. 202. (a) The provisions of this part apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation, and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor, is hereby vested in the Interstate Commerce Commission.

"(b) Nothing in this part shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof." 49 Stat. 543, as amended, 54 Stat. 920, 49 U. S. C. § 302 (a) and (b).

"SEC. 203. . . .

"(b) Nothing in this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include (1) motor vehicles employed solely in transporting school children and teachers to or from school; or (2) taxicabs, or other motor vehicles performing a bona fide taxicab service, having a capacity of not more than six passengers and not operated on a regular route or between fixed termini; or (3) motor vehicles owned or operated by or on behalf of hotels and used exclusively for the transportation of hotel patrons between hotels and local railroad or other common carrier stations; or (4) motor vehicles operated, under authorization, regulation, and control of the Secretary of the Interior, principally for the purpose of transporting persons in and about the national parks and

national monuments; or (4a) motor vehicles controlled and operated by any farmer when used in the transportation of his agricultural commodities and products thereof, or in the transportation of supplies to his farm; or (5) motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act, approved June 15, 1929, as amended, or by a federation of such cooperative associations, if such federation possesses no greater powers or purposes than cooperative associations so defined; or (6) motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish), or agricultural commodities (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property, or passengers, for compensation; or (7) motor vehicles used exclusively in the distribution of newspapers; or (7a) the transportation of persons or property by motor vehicle when incidental to transportation by aircraft; nor, unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the policy of Congress enunciated in section 202,[26] shall the provisions of this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment apply to: (8) 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, except when such transportation is under a common control, management, or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities, or zone, and provided that the motor carrier engaged in such transportation of passengers over regular or irregular route

[26] See Appendix B (1), *supra*.

or routes in interstate commerce is also lawfully engaged in the intrastate transportation of passengers over the entire length of such interstate route or routes in accordance with the laws of each State having jurisdiction; or (9) the casual, occasional, or reciprocal transportation of passengers or property by motor vehicle in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business, unless, in the case of transportation of passengers, such transportation is sold or offered for sale, or provided or procured or furnished or arranged for, by a broker, or by any other person who sells or offers for sale transportation furnished by a person lawfully engaged in the transportation of passengers by motor vehicle under a certificate or permit issued under this part or under a pending application for such a certificate or permit." 49 Stat. 545–546, as amended by 52 Stat. 1029, 1237, 54 Stat. 921, 49 U. S. C. § 303 (b).

"SEC. 211. (a) No person shall for compensation sell or offer for sale transportation subject to this part or shall make any contract, agreement, or arrangement to provide, procure, furnish, or arrange for such transportation or shall hold himself or itself out by advertisement, solicitation, or otherwise as one who sells, provides, procures, contracts, or arranges for such transportation, unless such person holds a broker's license issued by the Commission to engage in such transactions: *Provided, however,* That no such person shall engage in transportation subject to this part unless he holds a certificate or permit as provided in this part. In the execution of any contract, agreement, or arrangement to sell, provide, procure, furnish, or arrange for such transportation, it shall be unlawful for such person to employ any carrier by motor vehicle who or which is not the lawful holder of an effective certificate or permit issued as provided in this part: *And provided further,* That the provisions of this paragraph shall not apply to any carrier holding a certificate

or a permit under the provisions of this part or to any bona fide employee or agent of such motor carrier, so far as concerns transportation to be furnished wholly by such carrier or jointly with other motor carriers holding like certificates or permits, or with a common carrier by railroad, express, or water." 49 Stat. 554, 49 U. S. C. § 311 (a).

"SEC. 222. (a) Any person knowingly and willfully violating any provision of this part, or any rule, regulation, requirement, or order thereunder, or any term or condition of any certificate, permit, or license, for which a penalty is not otherwise herein provided, shall, upon conviction thereof, be fined not more than $100 for the first offense and not more than $500 for any subsequent offense. Each day of such violation shall constitute a separate offense." 49 Stat. 564, 49 U. S. C. § 322 (a).

APPENDIX C.

Summary of conflicts between California and federal legislation and policies.

(1) *Conflicts inherent in the statutory texts.*

CALIFORNIA STATUTE. (See Appendix A, *supra*.)	FEDERAL STATUTE. (See Appendix B (2), *supra*.)
(*a*) *Persons Affected and Activities Prohibited.*	
654.1. It shall be unlawful for any *person, acting individually or as an officer or employee* of a corporation, or as a member of a copartnership or as a commission agent or employee of another person, firm or corporation, to sell or offer for sale or, to negotiate, provide or arrange for, or to advertise or hold himself out	SEC. 203. (a) As used in this part— (1) The term *"person"* means any *individual, firm, copartnership, corporation, company,* association, or joint-stock association; and includes any trustee, receiver, assignee, or personal representative thereof. 49 Stat. 544, 49 U. S. C. § 303 (a) (1). SEC. 211. (a) *No person shall for compensation sell* or offer for

as one who sells or offers for sale or negotiates, provides or arranges for transportation of a person or persons *on an individual fare basis* over the public highways of the State of California *unless* such transportation is to be furnished or provided solely by, and such sale is authorized by, a carrier having a valid and existing certificate of convenience and necessity, or other valid and existing *permit from the Public Utilities Commission of the State of California, or from the Interstate Commerce Commission* of the United States, authorizing the holder of such certificate or permit to provide such transportation.

(In addition to the textual variations between the state and federal prohibitions, this measure differs from the federal measure because this merely prohibits *travel bureau operations as such* unless the carrier has a state or federal license or permit *and it does not require that the broker selling or arranging for the transportation must be a licensed broker.*)

sale transportation subject to this part or shall make any contract, agreement, or arrangement to provide, procure, furnish, or arrange for such transportation or shall hold himself or itself out by advertisement, solicitation, or otherwise as one who sells, provides, procures, contracts, or arranges for such transportation, *unless such person holds a broker's license issued by the Commission* to engage in such transactions: *Provided however,* That *no such person shall engage in transportation subject to this part unless he holds a certificate or permit as provided in this part.* In the execution of any contract, agreement, or arrangement to sell, provide, procure, furnish, or arrange for such transportation, it shall be unlawful for such person to employ any carrier by motor vehicle who or which is not the lawful holder of an effective certificate or permit issued as provided in this part: . . . .

(In addition to the textual variations between the state and federal prohibitions, this differs from the state measure because this measure not only prohibits *interstate travel bureau operations as such* unless the carrier holds a federal license or permit, *but it also requires that the broker selling or arranging for the transportation must hold a federal broker's license.*)

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(*b*) *Exemptions.*

654.2. The provisions of Section 654.1 of the Penal Code *shall not apply* to the selling, furnishing or providing of transportation of any person or persons

(1) *When no compensation is paid* or to be paid, either directly or indirectly, for such transportation;

(2) To the furnishing or providing of transportation to or from work, of *employees engaged in farm work on any farm of the State of California;*

(3) To the furnishing or providing of transportation to and from work of *employees of any nonprofit cooperative association, organized pursuant to any law of the State of California;*

(4) To the transportation of persons wholly or substantially *within the limits of a single municipality or of contiguous municipalities;*

(5) To transportation of persons over a route *wholly or partly within a national park or state park where such transportation is sold in conjunction with or as part of a rail trip or trip over a regularly operated motor bus transportation system or line;*

(6) To the transportation of passengers by a person who is driving his own vehicle and the transportation of persons other than himself and members of his family when transporting such persons to or from their place

SEC. 211. (a) . . . *And provided further,* That the provisions of this paragraph *shall not apply to any carrier holding a certificate or a permit under the provisions of this part* or to any bona fide employee or agent of such motor carrier, so far as concerns transportation to be furnished wholly by such carrier or jointly with other motor carriers holding like certificates or permits, or with a common carrier by railroad, express, or water.

SEC. 203. . . .

(b) *Nothing in this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include* (1) motor vehicles employed solely in transporting *school children and teachers* to or from school; or (2) *taxicabs,* or other motor vehicles performing a bona fide taxicab service, having a capacity of not more than six passengers and not operated on a regular route or between fixed termini; or (3) motor vehicles owned or operated *by or on behalf of hotels* and used exclusively for the transportation of hotel patrons between hotels and local railroad or other common carrier stations; or (4) *motor vehicles operated, under authorization, regulation, and control of the Secretary of the Interior, principally for the purpose of transporting persons*

of employment and when the *owner of such vehicle is driving to or from his place of employment; provided* that arrangements for any such transportation provided under the provisions of this subsection shall be made directly between the owner of such vehicle and the person who uses or intends to use such transportation.

in and about the national parks and national monuments; or (4a) motor vehicles controlled and operated *by any farmer when used in the transportation of his agricultural commodities and products thereof,* or in the transportation of supplies to his farm; or (5) motor vehicles controlled and operated *by a cooperative association as defined in the Agricultural Marketing Act,* approved June 15, 1929, as amended, or by a federation of such cooperative associations, if such federation possesses no greater powers or purposes than cooperative associations so defined; or (6) motor vehicles used in *carrying property consisting of ordinary livestock, fish (including shell fish), or agricultural commodities* (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property, or passengers, for compensation; or (7) motor vehicles used exclusively in *the distribution of newspapers;* or (7a) the transportation of persons or property by motor vehicle *when incidental to transportation by aircraft; nor, unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the policy of Congress enunciated in section 202,* shall the provisions of this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employ-

ees and safety of operation or standards of equipment apply to: (8) 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, except* when such transportation is under a common control, management, or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities, or zone, and provided that the motor carrier engaged in such transportation of passengers over regular or irregular route or routes in interstate commerce is also lawfully engaged in the intrastate transportation of passengers over the entire length of such interstate route or routes in accordance with the laws of each State having jurisdiction; or (9) *the casual, occasional, or reciprocal transportation of passengers or property by motor vehicle in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business, unless,* in the case of transportation of passengers, such transportation is sold or offered for sale, or provided or procured or furnished or arranged for, *by a broker,* or by any other person who sells or offers for sale transportation furnished by a person

lawfully engaged in the transportation of passengers by motor vehicle under a certificate or permit issued under this part or under a pending application for such a certificate or permit.

(*c*) *Penalties.*

654.3. Violation of Section 654.1 shall be a misdemeanor, and upon *first conviction* the punishment shall be a fine of not over two hundred fifty dollars ($250), or imprisonment in jail for not over 90 days, or both such fine and imprisonment. Upon *second conviction* the punishment shall be imprisonment in jail for not less than 30 days and not more than 180 days. Upon a *third or subsequent conviction* the punishment shall be confinement in jail for not less than 90 days and not more than one year, and a person suffering three or more convictions shall not be eligible to probation, the provisions of any law to the contrary notwithstanding.

SEC. 222. (a) Any person knowingly and willfully violating any provision of this part, or any rule, regulation, requirement, or order thereunder, or any term or condition of any certificate, permit, or license, for which a penalty is not otherwise herein provided, shall, upon conviction thereof, be fined not more than $100 for the *first offense* and not more than $500 for *any subsequent offense*. Each day of such violation shall constitute a separate offense.

(2) *Emphasis expressly placed upon the mutual exclusiveness of the state and federal regulations assigning intrastate regulation to the states, and interstate regulation to the Interstate Commerce Commission upon its finding it necessary.*

1933 California Act.

The state policy of regulation of motor carrier transportation

Federal Act—Motor Carrier Act, 1935, Part II, Interstate Commerce Act.

"The provisions of this part apply to the transportation of

agents and unlicensed share-the-expense motor carriers was to apply to *interstate, as well as intrastate, transportation "until such time as Congress of the United States shall act, ..."* P. 760, *supra.*

1941 California Amendments.

The state regulation of the *interstate transportation was limited to a period in "the absence of action on the part of Congress or the Interstate Commerce Commission* regulating or requiring licenses of motor carrier passengers or property by motor carriers engaged in *interstate* or foreign commerce . . . *and the regulation of such transportation, . . . is hereby vested in the Interstate Commerce Commission."* § 202 (a), Appendix B (2), *supra.*

"Nothing in this part shall be construed . . . to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof." § 202 (b), Appendix B (2), *supra.*

Nothing in this part was to include the casual, occasional, or reciprocal transportation of passengers by motor vehicle in *interstate commerce* for compensation by any person not engaged in such transportation as a regular occupation or business *"unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the policy of Congress enunciated in section 202, ..."* § 203 (b), Appendix B (2), *supra.*

Federal Act—1940 Amendment to Part II of the Interstate Commerce Act.

This *partly removed the exemption of the Federal Act from the casual, occasional,* or reciprocal transporters of persons or property in *interstate commerce.* The removal applied to cases, for example, where the transporta-

transportation agents acting as such for motor carriers carrying passengers in interstate commerce . . . ." P. 769, *supra.*

1947 California Act.

This repealed the 1933 Act, as amended in 1941, and mentioned only "transportation . . . over the public highways of the State of California . . . ." Appendix A, *supra.* This could be interpreted as limited to intrastate transportation but *it was interpreted, by the court below, as an invalid attempt to invade the federal jurisdiction over interstate commerce.* Note 7, *supra.*

tion was sold or arranged for by a broker. Note 20, *supra.*

Federal Order—1942 Order of the Interstate Commerce Commission.

This *further removed the exemption from the casual, occasional,* or reciprocal transporters of persons or property in *interstate commerce.* This federal order brought these interstate operations under the Federal Act and under the regulations of the Commission. By virtue of the self-terminating provisions of the California Act, *this order cut off the state regulation of these interstate operations.* Note 23, *supra.*

(3) *Conflicts between state and federal policies which led to the taking of federal jurisdiction over travel bureaus and share-the-expense motor transportation engaged in casual interstate operations.*

The 1931 California Act recognized and *licensed travel bureaus arranging share-the-expense interstate,* as well as intrastate, *motor trips by unlicensed carriers.* Pp. 759–760, *supra.*

The 1933 California Act continued this policy as to interstate as well as intrastate transportation. It stated, however, that such application to *interstate transportation would continue only until such time as the Congress of the United States took action.* Pp. 760–761, *supra.*

In 1935 and 1940, Part II of the Interstate Commerce Act *gave warning that federal control would be taken when the Interstate Commerce Commission found it necessary in order to carry out the policy of Congress.* Pp. 761–762, 767–768, *supra.*

The 1941 California Amendments *emphasized the limitation upon state regulation of interstate transportation.* Pp. 769–770, *supra.*

In 1940, the Interstate Commerce Commission began its expressly authorized *investigations* into the operations of travel bureaus and share-the-expense interstate motor transportation. Pp. 765–767, *supra.* In 1942, these resulted in the *Commission's conclusion that such operations, as applied to interstate commerce, were contrary to public policy.* It declined to issue a license even to a regular transportation broker unless he agreed to refrain from such operations. It expressly found that state and local officials were unable to regulate such operations because a large proportion of the transportation was interstate.

In 1942, *the anticipated federal action automatically cut off the California regulation of these interstate operations.* Pp. 770–774, *supra.*

In 1942, the Interstate Commerce Commission order *largely removed the statutory exemption of these travel bureaus and operations from the Interstate Commerce Act and federal control has been continuously exercised over them since that date.* Pp. 770–773, *supra.*

UNITED STATES *v.* WALLACE & TIERNAN CO. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND.

No. 416. Argued March 29, 1949.—Decided May 2, 1949.

In a grand jury proceeding which resulted in the indictment of appellees for violations of the Sherman Act, they were required to produce certain documents pursuant to a subpoena obtained and served in a proper manner, and the District Court ruled that it was not so broad and sweeping as to constitute an unreasonable search and seizure. Later the indictment was dismissed and the subpoenaed documents and photostatic copies thereof were ordered returned to appellees, solely because women were excluded from the grand jury. In a civil proceeding charging appellees with violations of the Sherman Act, the District Court denied a motion and quashed a subpoena to require production of the same documents, solely because of the actions taken in the criminal proceeding. In a trial in the civil proceeding, the Government introduced such evidence as it had, indicated that this was insufficient because of the exclusion of the subpoenaed documents, but requested the court to enter judgment for the Government. The trial court dismissed the suit without prejudice. *Held:*

1. Dismissal of the indictment because no women were on the grand jury was no sufficient reason for holding that the Government was barred from making use of the subpoenaed documents in a future valid proceeding. *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, distinguished. Pp. 795–800.

2. Failure of the Government to appeal from the orders in the criminal proceeding dismissing the indictment and requiring the return of the documents and photostatic copies thereof did not bar the Government by the doctrine of *res judicata* from having the documents produced in the civil proceeding. Pp. 800–801.

3. Another order of the District Court "precluding and restraining the United States from using in any way or for any purpose any knowledge, information or evidence obtained from or contained in" any of the subpoenaed documents was intended to apply only to the criminal proceeding and did not bar their use in the civil proceeding. Pp. 801–803.

4. That the dismissal of the civil proceeding was without prejudice to filing another suit did not make the cause unappealable, for denial of relief and dismissal of the case ended this suit so far as the District Court was concerned. Pp. 794–795, n. 1.

Reversed.

In a civil proceeding charging violations of the Sherman Act, the District Court declined to require the production of certain books and documents previously produced before a grand jury in a criminal proceeding and ordered returned because the grand jury was improperly constituted. It dismissed the civil proceeding without prejudice. On appeal to this Court, *reversed,* p. 803.

Arnold Raum argued the cause for the United States. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Bergson* and *Beatrice Rosenberg.*

Charles H. Tuttle argued the cause for appellees. With him on the brief were *William H. Edwards, Edward T. Hogan, Laurence J. Hogan* and *S. Everett Wilkins, Jr.*

Mr. Justice Black delivered the opinion of the Court.

The basic question here is whether the Fourth Amendment's prohibition of unreasonable searches and seizures bars the United States from utilizing certain documentary evidence in this civil antitrust proceeding instituted in the United States District Court of Rhode Island. Subsidiary procedural questions involve the doctrine of *res judicata.*[1] We proceed at once to consideration of the important basic question since for reasons later given we reject the subsidiary *res judicata* contentions.

[1] Appellees have moved to dismiss this appeal taken by the United States under § 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. § 29, as amended, Act of June 25, 1948, § 17, 62 Stat. 869, 989. The decision appealed from was as follows: "The Government's 'request' for judgment and relief prayed for in

First. Whether the Government has a right to utilize the documentary evidence in this civil proceeding can be best understood by an immediate reference to this Court's holding in *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385. Appellees here contend that the *Silverthorne* holding is a complete and permanent bar to the Government's introduction of the documents as evidence, to the use of the documents to obtain other evidence, or for any other purpose.

The facts in the *Silverthorne* case as found by this Court were these: The Silverthornes having been indicted were arrested at their homes early in the morning and detained in custody for some hours. While so detained Government officers "without a shadow of authority" went to the office of their company and made a clean sweep of all the books, papers and documents found there. "All the employees were taken or directed to go to the office of the District Attorney of the United States to which also the books, &c., were taken at once." The District Court ordered all books, etc., returned on a finding that the search and seizure violated the constitutional rights of the parties. Photographs and copies of the papers having been made, a new indictment was

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the complaint is denied and judgment may be entered dismissing the action without prejudice. It is so ordered."

This judgment followed the court's action in denying the Government's motions for production of documents essential to prove the Government's case. The record fails to sustain appellees' contention that the Government invited the court to enter this order denying relief and dismissing the action. That the dismissal was without prejudice to filing another suit does not make the cause unappealable, for denial of relief and dismissal of the case ended this suit so far as the District Court was concerned. *Wecker* v. *National Enameling Co.,* 204 U. S. 176, 181–182. See also *United States* v. *National City Lines,* 334 U. S. 573, 577, and *Bowles* v. *Beatrice Creamery Co.,* 146 F. 2d 774. The motion to dismiss the appeal is overruled.

returned based upon the knowledge thus obtained. Subpoenas were then issued calling for production of the original papers. Upon refusal to produce, one of the Silverthornes was imprisoned for contempt.

This Court viewed the whole performance of the unlawful search and seizure of the Silverthorne books and papers as an "outrage," planned or at least ratified by the Government. Under these circumstances it was held that the Government was neither entitled to use the original documents nor any knowledge obtained from the originals, the photostats, or the copies. The rule announced was that evidence or knowledge "gained by the Government's own wrong" is not merely forbidden to be "used before the Court but that it shall not be used at all." Other cases in this Court have applied the same rule.[2] It is an extraordinary sanction, judicially imposed, to limit searches and seizures to those conducted in strict compliance with the commands of the Fourth Amendment.

In the case before us, however, United States officers did not go to the appellees' offices and seize their documents. Officers served a court subpoena on appellees calling on them to produce certain designated documents for use in a grand jury investigation. Appellees challenged the subpoena on the ground that it was so broad and sweeping as to constitute an unreasonable search and seizure under the Fourth Amendment. The District Court at all times has rejected this contention, and appellees do not urge it here. Thus it cannot be thought that the form of the subpoena or the method of its en-

[2] *Weeks* v. *United States,* 232 U. S. 383; *Johnson* v. *United States,* 333 U. S. 10; *Go-Bart Co.* v. *United States,* 282 U. S. 344; *Byars* v. *United States,* 273 U. S. 28; *Gouled* v. *United States,* 255 U. S. 298; *United States* v. *Lefkowitz,* 285 U. S. 452; *Trupiano* v. *United States,* 334 U. S. 699; and *cf. Harris* v. *United States,* 331 U. S. 145; *Zap* v. *United States,* 328 U. S. 624; *Davis* v. *United States,* 328 U. S. 582.

forcement constitutes even a "constructive" search or seizure barred as "unreasonable" by the Fourth Amendment. *Oklahoma Press Co.* v. *Walling,* 327 U. S. 186, 202–208. And up to this point nothing that happened in this case is even remotely analogous to the situation that evoked this Court's condemnation in the *Silverthorne* case. But the District Court found and appellees here urge that subsequent developments in this case call for application of the *Silverthorne* rule. Those developments were as follows:

The grand jury before which the documents were produced returned an indictment against appellees and others charging violations of §§ 1 and 2 of the Sherman Act.[3] Shortly after we decided *Ballard* v. *United States,* 329 U. S. 187, the District Court on motion of appellees dismissed the indictment on the ground that the court practice of intentionally and systematically excluding women from the grand jury panel rendered the grand jury an illegally constituted body. On the same day the court granted appellees' motion for return of the previously impounded documents. Later the court ordered the Government to return a number of photostats that had been made of the original documents. In an opinion discussing return of the photostats the District Court reaffirmed its belief that the "subpoenas did not violate the Fourth Amendment and the Government was entitled to have the documents produced for presentation to a legal grand jury." The court held, however, that "when the grand jury turned out to be illegally constituted and the indictment was dismissed . . . the subpoenas amounted to unreasonable searches and seizures in violation of the Fourth Amendment . . . ."

In order to implement a congressional policy to have the grand jury a "truly representative" cross section of

[3] 26 Stat. 209, as amended 50 Stat. 693, 15 U. S. C. §§ 1, 2.

the community, we held in the *Ballard* case, *supra,* that exclusion of women from the grand jury required dismissal of an indictment. The effect of the District Court's holding here was to add to the *Ballard* requirement for dismissal of the indictment a further extraordinary sanction devised by this Court to prevent violations of the Fourth Amendment. For here there was no official culpability in issuance or service of the *subpoena duces tecum.* The sole ultimate reason for the District Court's application of the *Silverthorne* rule was that no women were on the grand jury, a circumstance that bears only a remote if not wholly theoretical relationship to search and seizure. We cannot agree that the *Silverthorne* rule requires such a result.

Aside from the limited extent to which the Fourth Amendment applies to the subpoena process, see *Oklahoma Press Co.* v. *Walling,* 327 U. S. 186, there are other reasons why the *Silverthorne* exclusionary rule should not be extended to the situation in this case. That rule stems from the Fourth Amendment. This Court has said that the Fourth Amendment command rests "upon the desirability of having magistrates rather than police officers determine when searches and seizures are permissible and what limitations should be placed upon such activities." *Trupiano* v. *United States,* 334 U. S. 699, 705; see also *McDonald* v. *United States,* 335 U. S. 451, 455–456. The *Silverthorne* search and seizure was made without any authority from a magistrate. And the seizure was so sweeping in nature that it probably could not have been authorized by a search warrant. *Weeks* v. *United States,* 232 U. S. 383, 393–394. The *Silverthorne* exclusionary rule as explained in that case and others is designed to safeguard the privacy of people, and to prevent seizure of their papers and property except in compliance with valid judicial process. As tersely stated in the *Silverthorne* case the rule's purpose is to

prevent the Fourth Amendment from being reduced to "a form of words."

Only by engaging in the most exaggerated apprehensions can the action of the prosecuting officers in this case be considered a threat to the Fourth Amendment. They went to the court for their subpoena. The court approved it. There is no claim that the subpoena was obtained or served in an improper manner or that any Government officer committed a wrong in the way the documents were handled or returned. At least many of the documents were highly relevant to the serious monopoly offenses charged against appellees. That there were no women on the grand jury did not contribute to any invasion of appellees' privacy. Dismissal of the indictment could not transform what had been proper official conduct into the type of conduct condemned in the *Silverthorne* and other cases.

It is true that a metaphysical argument can be made to support a strained analogy between the situation here and that in the *Silverthorne* and other cases. That argument is that the "illegal" grand jury was only a "so-called" grand jury, and that the considered judicial command for production of papers before it must be treated as though the court had ordered production of papers before a group of appellees' competitors. This argument has a superficial plausibility on the word level, but if our attention is directed to substance rather than symbols the speciousness of the argument is exposed.

Whatever injury appellees may have suffered resulted from the absence of women on the grand jury and that injury has been remedied by freeing appellees from prosecution under the indictment. Furthermore the search and seizure here, if such it can be called in any true sense, was not the kind that has prompted this Court to hold that the Government has by wrongful conduct of its officers forfeited all opportunity to make use of

evidence unlawfully seized. We decline to extend the *Silverthorne* rule to such an extent. The Fourth Amendment, important as it is in our society, does not call for imposition of judicial sanctions where enforcing officers have followed the law with such punctilious regard as they have here. We hold that dismissal of the grand jury because no women were on it is no sufficient reason for holding that the Government is barred from making use of the summoned documents.

Second. At the same time the District Court ordered the indictment dismissed it also ordered that the documents be returned to the defendants. The Government did not appeal from the order dismissing the indictment. See *United States* v. *Hark,* 320 U. S. 531, 535–36. It is contended that by its failure to appeal, the Government is barred by the doctrine of *res judicata* from challenging the dismissal and return orders.

Assuming that the Government by failure to appeal is barred from challenging the court's holding that the grand jury was illegally constituted and that the documents were properly ordered returned, it by no means follows that these orders permanently barred the Government from any future use of the documents as evidence. For the Government forfeited no rights to use the documents in a future valid proceeding by failing to appeal from the dismissal of the indictment—a dismissal it believed to be supported by our holding in the *Ballard* case. And dismissal of the pending indictment after holding the grand jury illegal created a situation where appellees were entitled to return of their papers as a matter of course. Consequently an appeal from the return order alone, even if such an appeal could have been taken, would have availed the Government nothing. For the foregoing reasons we hold that orders dismissing the indictment and requiring return of the documents did not affect the

Government's right to have the documents produced in these civil proceedings.

For the same reasons we hold that the Government's right to demand production in this civil case was not affected by the District Court's later order requiring return of photostatic copies of the documents. Return of the photostats, like return of the originals, necessarily followed from the dismissal of the indictment. This was recognized by the District Court when in directing return of the photostats the court said, "Since these motions stem from Indictment No. 6055, the Clerk is ordered to make the motions, the hearings thereon, and this opinion part of the record of said indictment."

Third. For their claim of *res judicata* appellees also rely on a third order of the District Court "precluding and restraining the United States from using in any way or for any purpose any knowledge, information or evidence obtained from or contained in any of the aforesaid illegally seized papers and documents." This order was entered prior to the court's action in this civil proceeding in which it quashed the *subpoena duces tecum* and refused to order production of the documents. Appellees contend that this order was a "decree of judicial outlawry" against any future Government use of the papers or knowledge acquired from them; that the Government could have but did not appeal from the order; that for this reason the "decree of judicial outlawry" had become final and binding upon the Government at the time it asked for production in this proceeding. The Government denies that the order had or was intended to have the broad proscriptive effect urged by respondents. In addition, the Government contends that the order was interlocutory and therefore not appealable. On this latter premise the Government relies on "familiar law that only a final judgment is *res judicata* as between the parties." *Merriam Co.* v. *Saalfield,* 241 U. S. 22, 28.

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To some extent both phases of the contention—scope of the order and its appealability—depend upon whether the proceeding was handled by the court as an independent plenary proceeding or one to suppress evidence at a forthcoming trial. For a judgment in an independent plenary proceeding for return of property and its suppression as evidence is final and appealable and the scope of relief in such a case may extend far beyond its effect on a pending trial; but a decision on a motion to return or suppress evidence in a pending trial may be no more than a procedural step in a particular case and in such event the effect of the decision would not extend beyond that case. Whether a motion is to be treated as independent and plenary or as merely a procedural step in a pending trial must be determined by particular circumstances. See *Cogen* v. *United States,* 278 U. S. 221. The circumstances here we think show that the order now considered was not one of permanent general "outlawry" against all use of the documents involved, but an order to prevent their use in a particular criminal proceeding then pending.

After the court had dismissed the indictment because no women were on the jury, the Government filed in the same District Court an information charging the same offense. The defendants filed a motion in the information proceeding (1) to dismiss the information; (2) in the alternative to dismiss and expunge those facts of the information based on knowledge obtained from the papers and documents; (3) to preclude and restrain the United States from using in any way or for any purpose knowledge or evidence obtained from or contained in the documents. The court denied (1) and (2) but granted (3). The motion, court opinion, and court order bore the title and number (6070) of the criminal information proceeding. During the argument colloquies took place between court and counsel which emphasized that the motion related to "Criminal 6070."

The motion was argued at length before the district judge. Government counsel took the position that the court's order on the motion would not be appealable. See *Cobbledick* v. *United States,* 309 U. S. 323; *United States* v. *Rosenwasser,* 145 F. 2d 1015. He therefore asked the court to be careful about the form of the order, expressing apprehensions that counsel for appellees would later argue that the order entered in the criminal proceeding was broad enough to bar use of the documents in the civil proceedings. Government counsel indicated his plans subsequently to present the issue of the Government's right to use the documents in this civil proceeding, taking the position that an appeal would then lie. He therefore asked the court to await entry of any order until his plans could be carried out. Appellees' counsel told the court that "The plans which Mr. Kelleher has concern Civil 6055. This is Criminal 6070." And the court told Government counsel that the preclusion order would preclude use of the documents "only in this [criminal] action." The court further said to Government counsel that if the court made a wrong order "Then you can go ahead as you contend or plan to go ahead in your civil action." Finally, just before conclusion of the hearing on the order, the court told Government counsel, "I don't see how this is going to prejudice you in some other case, and this Court is only concerned with 6070 [criminal information charge] at this time, as I understand it."

We hold that the proceedings leading up to the preclusion order must be deemed a part of the criminal proceedings, see *Cogen* v. *United States,* 278 U. S. 221, 227; that the order did not preclude use of the documents except in these proceedings; and that this order does not stand as a bar to consideration of the availability of the documents for use as evidence in this civil case.

Other contentions of appellees have been considered and found to be without merit.

Reversed.

UNITED STATES *v.* URBUTEIT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 640. Decided May 2, 1949.

In reversing the decision below in this condemnation proceeding under the Federal Food, Drug, and Cosmetic Act and remanding the case to the Court of Appeals, 335 U. S. 355, this Court decided that the separate shipment of certain machines and certain leaflets relative to their alleged diagnostic and curative value was immaterial because the movement of the machines and leaflets constituted a single interrelated activity; but it left for consideration by the Court of Appeals the question whether the evidence as to the falsity of the advertising as to the diagnostic capabilities of the machines was adequate to sustain their condemnation even though error in exclusion of other evidence were conceded. *Held:* The United States was entitled to a hearing on the latter question; and the Court of Appeals failed to follow the mandate of this Court when it remanded the case to the District Court for determination of a question as to which of the shipments might be considered a single interrelated activity. Pp. 804–806.
172 F. 2d 386, reversed.

After the decision of this Court, reversing the decision below and remanding this case to the Court of Appeals, 335 U. S. 355, the latter court remanded it to the District Court for further proceedings. 172 F. 2d 386. *Certiorari granted and judgment reversed,* p. 806.

Solicitor General Perlman for the United States.

H. O. Pemberton for respondent.

PER CURIAM.

The question presented by this petition is whether the Court of Appeals followed our mandate on remand of the cause in 335 U. S. 355.

The case when it was here earlier this Term appeared in the following posture:

A condemnation proceeding was instituted by the United States under the Federal Food, Drug, and Cosmetic Act (52 Stat. 1040, 1044, 21 U. S. C. § 334). Sixteen machines with alleged diagnostic and curative capabilities had been shipped in interstate commerce. Leaflets describing the uses of the machine had been shipped at a separate time. The Court of Appeals had held that the separate shipments of the machines and leaflets precluded a conclusion that the leaflets had accompanied the device in interstate commerce, and therefore the transaction was outside the reach of the Act. We reversed the Court of Appeals and held that the separate shipment of the machines and leaflets constituted a single interrelated activity.

On remand the Court of Appeals concluded that because there were several shipments of machines and a single shipment of advertising matter, it was not clear which shipments might be considered a single interrelated activity. Therefore, it remanded the case to the District Court for a determination of this fact. 172 F. 2d 386.

When the case was here before, we decided that the fact of separate shipments of machines and leaflets was immaterial. The controlling factors were whether the leaflets were designed for use with the machine and whether they were so used. Since the function of the leaflets and the purpose of their shipment were established, nothing more was needed to show that the movements of the machines and leaflets constituted a single interrelated activity. Moreover, the case is not complicated by shipments of machines and leaflets to different persons. One Kelsch was the recipient of both.

On remand the Court of Appeals adhered to its former ruling that the District Court erroneously excluded evi-

dence as to the therapeutic or curative value of the machines. When the case was here before we did not disturb that ruling. But we did leave to the Court of Appeals for consideration a further question—whether the evidence as respects the falsity of the representations regarding the diagnostic capabilities of the machines was adequate to sustain the condemnation even though error in exclusion of the other evidence were conceded. The United States is entitled to a hearing on that question.

The petition for certiorari is granted and the judgment is

Reversed.

UNITED STATES EX REL. JOHNSON *v.* SHAUGHNESSY, ACTING DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION.

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

No. 506. Argued April 19–20, 1949.—Decided May 9, 1949.

1. A board of special inquiry appointed pursuant to § 17 of the Immigration Act of 1917 as amended, 8 U. S. C. § 153, is bound to accept as final a certificate that an alien is a mental defective of a class excluded from admission to the United States by § 3, 8 U. S. C. § 136 (d), where such certificate has been issued by a medical appeal board after a fair hearing in conformity with § 16, 8 U. S. C. § 152, and regulations of the Public Health Service prescribed pursuant thereto. P. 809.
2. A report of a medical appeal board appointed pursuant to § 16 of the Immigration Act of 1917 as amended, 8 U. S. C. § 152, to review a finding of two medical officers that an alien seeking admission to the United States is mentally defective, does not comply with the applicable law and regulations where it fails to show that the appeal board based its findings and conclusion "on its medical examination of the alien" and merely shows that it considered the appeal and, after "taking into consideration" the certificate of the medical officers who made the original examination and the testimony of an alienist employed by the alien, con-

curred in the report of the medical officers who made the first examination. Pp. 809–812.

(a) The appeal board could not rest its finding that the alien was a mental defective on the certificate of the original examining officers, since the Act and regulations prescribe an independent review and re-examination. P. 812.

(b) The statement of the appeal board that it had "considered the appeal" can not be treated as a certification that the alien had been given an independent medical examination. P. 6.

3. Assuming, without deciding, that defects in the appeal board's report could be cured by additional data in the record, the data in the record in this case is not sufficient to cure the defect. Pp. 812–815.

170 F. 2d 1009, reversed.

In a habeas corpus proceeding challenging the validity of the detention of an alien under an exclusion order issued by a board of special inquiry under the Immigration Act of 1917 as amended, the District Court discharged the writ and ordered the alien remanded to the immigration authorities. 82 F. Supp. 36. The Court of Appeals affirmed. 170 F. 2d 1009. This Court granted certiorari. 336 U. S. 924. *Reversed and remanded,* p. 815.

Gunther Jacobson argued the cause and filed a brief for petitioner.

Patricia H. Collins argued the cause for respondent. With her on the brief were *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl* and *Philip R. Monahan.*

Jack Wasserman, Gaspare Cusumano and *Thomas M. Cooley, II,* filed a brief for the Association of Immigration and Nationality Lawyers, as *amicus curiae,* urging reversal.

Mr. Justice Black delivered the opinion of the Court.

The American Foreign Service at Stockholm issued to petitioner an immigration visa to come to the United

States as a Swedish quota immigrant. On the ground that she was a mental defective, authorities of the Immigration and Naturalization Service declined to admit her into this country and ordered her detention at Ellis Island pending deportation to Sweden. She filed this habeas corpus proceeding contending that she was not a mental defective and challenging in several respects the legality of the exclusion order. The District Court discharged the writ and ordered petitioner remanded to the immigration authorities. 82 F. Supp. 36. The Court of Appeals affirmed, one judge dissenting. 170 F. 2d 1009. Certiorari was granted because important questions were raised concerning administration of the immigration laws.

Section 3 of the Immigration Act of 1917 excludes from admission into this country certain classes of aliens deemed undesirable. Among those excluded are persons "who are found to be and are certified by the examining surgeon as being mentally . . . defective . . . ." 39 Stat. 874, 875, 8 U. S. C. § 136 (d). Section 16 of the Act [1] provides that mental examinations of arriving aliens shall be made by not less than two United States Public Health Service medical officers especially trained in the diagnosis of insanity and mental defects. The same section authorizes an appeal to a special board of medical officers of the Public Health Service for any alien who is certified by the two medical officers as a mental defective. Finally § 17 of the Act as amended, 8 U. S. C. § 153, provides that boards of special inquiry shall be appointed by the Immigration and Naturalization Service, subject to approval of the Attorney General. These boards of special inquiry are granted "authority to determine whether an alien who has been duly held shall be allowed to land or shall be deported." It was a board of special inquiry of this kind that ordered petitioner excluded from the United States.

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[1] 39 Stat. 885, as amended, 8 U. S. C. § 152.

First. Two medical officers of the Public Health Service signed a certificate that petitioner was a mental defective. On appeal a board of three Public Health medical officers affirmed the finding of this certificate. Later when her case was under consideration by a board of special inquiry of the Immigration and Naturalization Service, petitioner asked for time to produce additional evidence to show that she was not a mental defective. The board refused to hear such evidence holding that it was bound by § 17 of the Immigration Act to accept as final the medical certification that she was a mental defective. Petitioner contends that this holding was error which invalidates the exclusion order. We hold that the Court of Appeals correctly rejected this contention.

Section 17 provides, with an exception not here relevant, that "the decision of a board of special inquiry shall be based upon the certificate of the examining medical officer and . . . shall be final as to the rejection of aliens affected with . . . any mental . . . disability which would bring such aliens within any of the classes excluded from admission to the United States under section three of this Act." We agree with the following statement of the Court of Appeals. "A certificate by the medical board if its action conformed to the statute and regulations and its decision was made after a fair hearing was plainly intended to be conclusive." 170 F. 2d 1009, 1012. This conclusion is particularly compelling in the light of the legislative history referred to in that court's opinion. We therefore turn to the medical certificates to consider the contention that they were not issued as the result of the kind of examinations required by the statute and regulations, and that the certificates themselves failed to conform to those requirements.

Second. Petitioner attacks the validity of both the initial medical certificate and that of the appellate medical board, contending that they provide an inadequate basis for excluding her from the United States. The

importance of these medical certificates is underscored by our holding that Congress has made the findings and conclusions in the certificates final on the question of whether an alien is so mentally defective that admission into the country must be denied. Congress has taken note of the crucial importance of this medical determination by prescribing certain minimum procedural requirements that the Public Health Service must follow, such as special qualifications of examining doctors, the minimum number of doctors that must examine the applying alien, and the right of an alien to have an initial adverse certificate reviewed by a special board of doctors. In order that further safeguards might be provided, Congress authorized the Surgeon General of the Public Health Service to prescribe additional regulations governing the procedure to be observed in the exercise of that Service's exclusive authority over medical questions.

Pursuant to this statutory authority the Surgeon General issued regulations which detail the manner in which medical examinations shall be held and the type of certificates by which examining doctors and boards shall report their findings and conclusions. As shown by the dissenting opinion below, serious challenges have been made to the sufficiency of the certificate of the medical appeal board as well as to the initial medical certificate in which two doctors certified petitioner to be a mental defective.[2] The shortcomings of the initial certificate, however, probably could have been rendered harmless

[2] During the hearings before the Board of Special Inquiry counsel for petitioner stated to this board "that from an examination of the record it appears that the only positive finding of mental defectiveness appears in the record of the ship's surgeon . . . ." Counsel insisted that petitioner was suffering from no "mental disturbance whatsoever." In her behalf he asked for an opportunity to produce further medical testimony. In response to this request the board's chairman asked counsel whether petitioner would be able to bear the expenses of her continued detention should the board grant her

by a proper examination and certificate by the medical board of appellate review. Since our conclusion is that the appellate review failed to meet the requisite standards prescribed by statute and regulations, we need not consider the challenges directed against the original certificate standing alone.

Regulations of the Public Health Service provide the way in which medical appeal boards shall be convened and detail a procedure for the boards to follow. The regulations impose a duty on such boards "to re-examine an alien"; they further provide that "re-examination shall include . . . a medical examination by the board"; that the "findings and conclusions of the board shall be based on its medical examination of the alien"; and that "The board shall report its findings and conclusions to the Immigration Service . . . ." [3] The report of the medical appeal board here shows only that it "considered the

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request for an opportunity to produce further medical testimony. Counsel replied that he believed she could. The board immediately thereafter closed the hearing, made its findings and ordered her excluded.

The dissenting opinion stated: "I would reverse the order and direct that the writ be sustained because of inadequacy of the original certificate of the examining surgeons and total failure of the reviewing Board of Medical Officers to comply with the regulations." 170 F. 2d 1009, 1014.

[3] "(c) Re-examination shall include:

"(1) A medical examination by the board;

"(2) A review of all records submitted;

"(3) Use of any laboratory or diagnostic methods or tests deemed advisable; and

"(4) Consideration of statements regarding the alien's physical or mental condition made by a reputable physician after his examination of the alien.

. . . . . .

"(e) An alien being re-examined may introduce as witnesses before the board such physicians or medical experts as the board may in its discretion permit, at his own cost and expense, ..." 42 Code Fed. Reg. § 34.13 (1947 Supp.).

appeal . . . and after taking into consideration the certificate of Mar. 11, 1948 and the testimony given by Dr. Carlton Simon, reports that it concurs with the above dated certificate." The report of this medical board therefore wholly failed to show any compliance with the requirement of § 34.13 (g) that the board base its "findings and conclusions . . . on its medical examination of the alien . . . ." We think the record makes clear that the appeal board made no such medical examination as was required by the regulations.

The report itself shows that the appellate board based its conclusion on two considerations: (1) the initial certificate of the two public health doctors; (2) testimony given by Dr. Carlton Simon. But the appellate board could not rest its finding that petitioner was a mental defective on the original certificate without denying petitioner the independent review and re-examination which Congress and the Surgeon General had prescribed. Nor could the appellate board relieve itself of its duty to make an independent re-examination by relying on the testimony of Dr. Simon. Moreover, Dr. Simon testified that petitioner was not a mental defective. His testimony was that she was "normal." It hardly seems necessary to add that the statement of the appellate board that it had "considered the appeal," cannot be treated as a certification that petitioner had been given an independent medical examination. We therefore hold that the appellate board's certificate is an inadequate basis on which to rest the exclusion order of the board of special inquiry.

The Government contends, however, that additional data in the record shows that the board did re-examine the petitioner. We may assume without deciding that the defects in the appellate board's report could be cured by additional record data, but we find no such data in the record sufficient to cure the defect. The data on

which the Government relies is contained in a stenographic report of evidence given by petitioner and Dr. Simon, petitioner's witness. Petitioner's evidence, like that of Dr. Simon, was an emphatic denial of any condition which could justify her classification as a mental defective. The stenographic report thus falls far short of showing that the medical appeal board made an independent medical examination of petitioner's mental qualities. That report tends to confirm the fact that the board's conclusions were rested only on the report of the initial examination by the two Public Health Service doctors and on a report of the physician of the ship on which petitioner came to this country. This makes necessary a short statement concerning this report by the ship's doctor and the circumstances under which the record discloses that report was made.

Apparently the second day after petitioner had commenced her voyage to America the ship's doctor visited her. He found her weak and dizzy. She stated that "she could not stand the sea" and would not go to the dining room. The doctor's impression after his first visit was that she was seasick. The next day, according to the doctor's report, she admitted hallucinations, stating that at night she heard cries and saw faces, said she had given the consul "wrong information," and thought this sinful. At this time the ship's doctor wrote down his "impression of an incipient psychosis" and transferred her to the isolation ward of the ship's hospital. The next day according to the doctor, petitioner stated that she had been treated for insanity at her home in Sweden for a six-month period two years before. On the last day of the sea trip, the ship's doctor reported that she had cleared up "remarkably," that she had no recollection of "a lot of strange things she had said before," was sleeping well, denied having any hallucinations, and looked "considerably better."

In her evidence before the medical board petitioner stated that she spoke "terribly bad English"; that prior to boarding the ship she had been to a number of parties and was very tired when she came aboard; that after coming aboard and during the voyage she had taken bromides and sleeping tablets; and that in her condition she just slept and said "yes" to every question the doctor asked.

From the foregoing it appears that the data relied on by the Government was totally inadequate to show that the appellate medical board "re-examined" petitioner. The sum total of that data is testimony given by petitioner and her medical specialist to the effect that petitioner was mentally normal, plus petitioner's admissions that while seasick and under the influence of drugs she had said things that prompted the ship's doctor at one time to suspect "incipient psychosis."

So far as the medical findings and evidence here show, the daily reports made by the ship's doctor while petitioner was a passenger constitute the only affirmative evidence that petitioner is or was a mental defective. The Public Health regulations plainly prohibit the issuance of exclusion orders resting on nothing but a single episode reported by a non-Public-Health doctor. For Congress has provided that before aliens suspected of mental defects are excluded, findings and conclusions shall be made by Public Health doctors based on their own examinations made in compliance with procedural safeguards defined or authorized by Congress. Medical certificates barring aliens are even then to be issued "only if the presence of such . . . defect is clearly established." 42 Code Fed. Reg. § 34.4 (1947 Supp.). And such certificates "shall in no case be issued with respect to an alien having only mental shortcomings due to ignorance, or suffering only from a mental condition attributable to remedial physical causes, or from a psychosis of a

temporary nature caused by a toxin, drug, or disease." 42 Code Fed. Reg. § 34.7 (1947 Supp.). So far as appears from the appellate certificate here, the board made no examination to determine whether the ship episode, as reported by the physician, was the result of petitioner's ignorance of English plus temporary debility or was the result of a mental defect justifying exclusion. Even the report of the ship physician contained no finding on this point, and it is not amiss to add that the verified petition for habeas corpus contains an undenied allegation that the ship's doctor has now stated that "in his opinion the alien is not mentally defective."

Our holding that the appellate board's medical certificate and additional data are inadequate to support the exclusion order makes it unnecessary to decide other questions relating to applicability of the Administrative Procedure Act to hearings before the board of special inquiry. 60 Stat. 237, 239, 5 U. S. C. §§ 1001, 1004.

The judgment is reversed and the cause is remanded to the District Court for entry of an order affording petitioner a proper hearing and medical examination before the appropriate public health authorities.

Reversed and remanded.

MR. JUSTICE REED, with whom THE CHIEF JUSTICE and MR. JUSTICE BURTON join, dissenting.

This Court affirms the decision that a proper medical finding of a physical defect which excludes an alien from entrance into the United States is final and not subject to further inquiry. With the Court's ruling on this point, I agree.

(1) The reversal of the dismissal of the writ of habeas corpus is founded on the Court's premise that the report of the reviewing board of medical officers "shows that the appellate board based its conclusion on two consid-

erations: (1) the initial certificate of the two public health doctors; (2) testimony given by Dr. Carlton Simon [a psychiatrist chosen by the alien]." The Court then concludes that "the appellate board could not rest its finding that petitioner was a mental defective on the original certificate without denying petitioner the independent review and re-examination which Congress and the Surgeon General had prescribed." That is to say, the report, as the Court phrases it, "makes clear that the appeal board made no such medical examination as was required by the regulations." [1] My reading of the opinion is that the Court thinks the record affirmatively shows a failure to comply with the statute and regulation § 34.13 (g) and (h) as to findings and examination.[2]

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[1] The report reads as follows:

"Pursuant to the request of the District Director of Immigration and the order of the Medical Officer in Charge, the following Board of Medical Officers of the U. S. Public Health Service, has considered the appeal regarding subject-named alien May Gunborg Johnson and after taking into consideration the certificate of Mar. 11, 1948 and the testimony given by Dr. Carlton Simon, reports that it concurs with the above dated certificate."

[2] 39 Stat. 885, as amended, 8 U. S. C. § 152:

"Sec. 16. The physical and mental examination of all arriving aliens shall be made by medical officers of the United States Public Health Service who shall conduct all medical examinations and shall certify, for the information of the immigration officers and the boards of special inquiry hereinafter provided for, any and all physical and mental defects or diseases observed by said medical officers in any such alien; . . . . Any alien certified for insanity or mental defect may appeal to the board of medical officers of the United States Public Health Service, which shall be convened by the Surgeon General of the United States Public Health Service, and said alien may introduce before such board one expert medical witness at his own cost and expense. . . ."

42 C. F. R. § 34.13 (1947 Supp.). *"Re-examination; convening of boards; expert witnesses; reports.* (a) The Surgeon General, or

There is a suggestion that a medical appeal board must certify that the alien had been examined.[3] I assume, however, that if the Court intended to require specific certification by the medical board of the steps leading to its findings and conclusions it would have made such a holding definitive.

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when authorized, a medical officer in charge, shall convene a board of medical officers to re-examine an alien

. . . . . .

"(2) Upon an appeal by the alien from a certificate of insanity or mental defect, issued at a port of entry.

. . . . . .

"(c) Re-examination shall include:

"(1) A medical examination by the board;

"(2) A review of all records submitted;

"(3) Use of any laboratory or diagnostic methods or tests deemed advisable; and

"(4) Consideration of statements regarding the alien's physical or mental condition made by a reputable physician after his examination of the alien.

. . . . . .

"(g) The findings and conclusions of the board shall be based on its medical examination of the alien and on the evidence presented to it and made a part of the record of its proceedings.

"(h) The board shall report its findings and conclusions to the Immigration Service, and shall also give prompt notice thereof to the alien if the re-examination has been held upon his appeal. The board's report to the Immigration Service shall specifically affirm, modify, or reject the findings and conclusions of prior examining medical officers."

It will be noted that the evidence presented to the board was made a part of the report to the Board of Special Inquiry as required by the regulation.

[3] "It hardly seems necessary to add that the statement of the appellate board that it had 'considered the appeal,' cannot be treated as a certification that petitioner had been given an independent medical examination."

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I disagree with the Court's interpretation of the report. A strong presumption exists that public officials perform their duty. If the report had added the phrase, "in accordance with the regulations," after the word "considered," there could be no doubt as to the sufficiency of the report. The presumption of regularity until rebutted requires courts to adopt such an interpretation.[4] The statement of the board of medical officers that it "has considered the appeal" means to me that the board has proceeded conformably to the statute and regulations.

(2) There is a graver error in the Court's holding, however, which may interfere with sound administrative procedure. Although petitioner was represented by counsel, no objection to the form of the report was made during the administrative process. This case heretofore has centered around the issue of finality disposed of by the Court. Even in the several hearings of her effort to get relief by habeas corpus, petitioner has never asserted, in this or any other court, that she was not examined by the physicians of the medical review board. This is made plain by the Court's statement of the generalized objections on other grounds to the report of the medical review board, see opinion at note 2, and from the affidavits and objections appearing in the record. The dissenting judge, 170 F. 2d 1009, 1013, did not refer to the failure to examine petitioner. He spoke only of the failure of the Board of Special Inquiry and the medical board to require adequate and revealing certificates and reports. Even the petition for certiorari does not present the question. The brief does not discuss it.

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[4] *Lewis* v. *United States,* 279 U. S. 63, 73: "It is the settled general rule that all necessary prerequisites to the validity of official action are presumed to have been complied with, and that where the contrary is asserted it must be affirmatively shown."

Stearns Co. v. *United States,* 291 U. S. 54, 63, and authorities cited; *United States* v. *Chemical Foundation,* 272 U. S. 1, 14.

The administrative remedy must be exhausted by fair effort to correct administrative errors before resort to habeas corpus or other judicial remedies.[5] To permit occasional reversal of administrative orders on points not brought to the attention of the agency hampers administrative routine and, if adopted as a rule of law, would disorganize administrative procedure. Afterthought cannot take the place of required objection. This is not a case where rules of practice and procedure defeat the ends of justice.[6] There is nothing in this record to indicate that disabilities of petitioner, or difficulties of procedure or practice, the emergence of a new rule of law or any other change of circumstance has affected the course of petitioner's pleas. She has had advantage of every method of relief known to the law but has not seen fit to bring forward the ground upon which this Court reverses.

It is obvious that had objection been made to the form of the report of the Board of Medical Officers at the hear-

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[5] We refused to review an issue not raised before an administrative body in *Unemployment Commission* v. *Aragon,* 329 U. S. 143, 155: "A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the Commission of an opportunity to consider the matter, make its ruling, and state the reasons for its action." *Tri-State Broadcasting Co.* v. *F. C. C.,* 107 F. 2d 956, 958. Cf. *Myers* v. *Bethlehem Corp.,* 303 U. S. 41, 51, note 9; *Blair* v. *Oesterlein Co.,* 275 U. S. 220.

The Administrative Procedure Act contemplates presentation before the administrative agency of every issue that may be made the subject of judicial review by habeas corpus or appellate process. 60 Stat. 237, §§ 7 (c), 8 (b) (2), 10 (b), (c) and (e). The rule against raising questions on judicial review that were not raised in administrative proceedings has general application, see *Caldarone* v. *Zoning Board of Review,* 74 R. I. 196, 199, 60 A. 2d 158, 159; *Reisberg* v. *Board of Standards and Appeals,* 81 N. Y. S. 2d 511, 513; *General Transp. Co.* v. *United States,* 65 F. Supp. 981, 984.

[6] Cf. *Hormel* v. *Helvering,* 312 U. S. 552, 557.

ing before the Board of Special Inquiry, April 6, 1948, a prompt elaboration of the report could have been obtained or, if no examination such as is required by the regulations had already been made, it could have been done promptly. Proper administrative procedure requires that objection to certificates be made at the earliest opportunity which in this case was during the administrative hearing before the Board of Special Inquiry. A litigant's unexplained failure to raise an issue does not justify capricious judicial intervention on behalf of an individual.

I would affirm the judgment below.

EDITORIAL NOTE.

The next page is purposely numbered 901. The numbers from 820 to 901 were purposely omitted, in order to make it possible to publish the *per curiam* decisions and orders in the current advance sheets or "preliminary prints" of the United States Reports with *permanent* page numbers, thus making the *official* citations available immediately.

DECISIONS PER CURIAM AND ORDERS FROM JANUARY 31 THROUGH MAY 9, 1949.

JANUARY 31, 1949.

Per Curiam Decision.

No. 429. ZIMMERMAN *v.* MARYLAND. Certiorari, 335 U. S. 870, to the Court of Appeals of Maryland. Argued January 14, 1949. Decided January 31, 1949. *Per Curiam:* The judgment is affirmed. *Akins* v. *Texas,* 325 U. S. 398 (1945). MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY and MR. JUSTICE RUTLEDGE dissent. *J. Cookman Boyd, Jr.* argued the cause and filed a brief for petitioner. *Hall Hammond,* Attorney General of Maryland, argued the cause for respondent. With him on the brief was *Richard W. Case,* Assistant Attorney General. Reported below: —— Md. ——, 59 A. 2d 675.

Miscellaneous Orders.

No. 500. UNION NATIONAL BANK *v.* LAMB. Appeal from the Supreme Court of Missouri. Further consideration of the question of the jurisdiction of this Court in this case is postponed to the hearing of the case on the merits. Counsel are requested to discuss on briefs and oral argument the question whether the application for appeal was timely.

No. 298, Misc. HOUSE *v.* MAYO, STATE PRISON CUSTODIAN. Supreme Court of Florida. Certiorari denied. Motion for leave to file petition for writ of habeas corpus also denied.

No. 300, Misc. In re Rash. Motion for leave to file petition for writ of mandamus denied.

No. 301, Misc. Shotkin *v.* Westinghouse Electric & Manufacturing Co. et al. Application denied.

No. 308, Misc. Phillips *v.* Ragen, Warden. Motion of petitioner for leave to withdraw the motion for leave to file petition for writ of certiorari granted.

No. 311, Misc. Armstrong *v.* Howard, Warden. Motion for leave to file petition for writ of habeas corpus denied.

No. 319, Misc. Grigsby *v.* Swygert. Motion for leave to file petition for writ of mandamus denied.

No. 327, Misc. In re Canadian River Gas Co. Motion for leave to file petition for writ of mandamus denied. *Dan Moody* and *Wales H. Madden* for petitioner.

No. 329, Misc. Burall *v.* Clark, Attorney General. Petition for injunction denied.

No. 331, Misc. Moss *v.* Swygert, District Judge. Motion for leave to file petition for writ of mandamus denied.

No. 334, Misc. In re McAdam. Motion for leave to file petition for writ of habeas corpus denied.

No. 335, Misc. Bonham *v.* Ragen, Warden. Motion for leave to file petition for writ of certiorari denied.

Certiorari Granted.

No. 464. Clayton Mark & Co. et al. *v.* Federal Trade Commission. C. A. 7th Cir. Certiorari granted.

Albert R. Connelly, Thurlow M. Gordon, Edward H. Green and *W. Denning Stewart* for petitioners. *Solicitor General Perlman* filed a memorandum stating that the Government did not oppose allowance of the petition. Reported below: 168 F. 2d 175.

Certiorari Denied. (*See also No. 298, Misc., supra.*)

No. 170. Estate of Gibb et al. *v.* Commissioner of Internal Revenue. C. A. 2d Cir. Certiorari denied. *Whitney North Seymour, Leslie M. Rapp* and *Richard D. Duncan* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *L. W. Post* for respondent. Reported below: 167 F. 2d 633.

No. 438. Fulton Iron Co. *v.* Larson, War Assets Administrator and Surplus Property Administrator. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *James R. Kirkland, Walter H. Maloney, Edward J. Hayes* and *Irvin Goldstein* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney* and *Edward H. Hickey* for respondent. Reported below: 84 U. S. App. D. C. ——, 171 F. 2d 994.

No. 445. David et al. *v.* Sutton, Executor, et al. C. A. 6th Cir. Certiorari denied. *I. H. Spears* for petitioners. *George A. Sutton* for respondents. Reported below: 170 F. 2d 148.

No. 454. Worcester Woolen Mills Corp. *v.* National Labor Relations Board. C. A. 1st Cir. Certiorari denied. *Cosimo J. Toscano* for petitioner. *Solicitor General Perlman, David P. Findling* and *Ruth Weyand* for respondent. Reported below: 170 F. 2d 13.

No. 458. CARPENTER *v.* ROHM & HAAS CO., INC. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *James R. Morford* for respondent. Reported below: 170 F. 2d 146.

No. 459. CARPENTER *v.* ERIE RAILROAD CO. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Edward J. McGratty, Jr.* for respondent. Reported below: 170 F. 2d 73.

No. 460. CLEARY *v.* CHICAGO TITLE & TRUST CO. Supreme Court of Illinois. Certiorari denied. *Walter F. Dodd* and *John A. Brown* for petitioner. *Joseph B. Fleming* and *Harold L. Reeve* for respondent.

No. 462. GIERENS ET AL. *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *Everett Jennings* for petitioners. Reported below: 400 Ill. 347, 81 N. E. 2d 165.

No. 463. WABASH RAILROAD CO. *v.* DUNCAN, U. S. DISTRICT JUDGE. C. A. 8th Cir. Certiorari denied. *Joseph A. McClain, Jr.* and *Sam B. Sebree* for petitioner. *William A. Franken* for respondent. Reported below: 170 F. 2d 38.

No. 466. STEVENSON *v.* JOHNSON ET AL. C. A. 5th Cir. Certiorari denied. *Dan Moody* for petitioner. *John H. Crooker, John D. Cofer, James V. Allred, Thurman Arnold, Abe Fortas, Alvin J. Wirtz* and *Everett L. Looney* for respondents. Reported below: 170 F. 2d 108.

No. 469. JACKSON *v.* LAMBERT. C. A. 7th Cir. Certiorari denied. *Guy Rogers* for petitioner. *Edmund F. Ortmeyer* for respondent.

No. 470. HENSLEY ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Fred A. Ironside, Jr.* for

petitioners. *Solicitor General Perlman, John R. Benney* and *Robert S. Erdahl* for the United States. Reported below: 171 F. 2d 78.

No. 489. HARRIS ET AL., DOING BUSINESS AS H-C PRODUCTS CO., *v.* NATIONAL MACHINE WORKS, INC. ET AL. C. A. 10th Cir. Certiorari denied. *John H. Bruninga, Charles M. McKnight* and *Richard G. Radue* for petitioners. *D. I. Johnston* and *Robert F. Davis* for respondents. Reported below: 171 F. 2d 85.

No. 456. PATTERSON *v.* GRAY. Supreme Court of Appeals of Virginia. Certiorari denied. Reported below: 188 Va. lxvii.

No. 183, Misc. EXKANO *v.* HIATT, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 170 F. 2d 93.

No. 196, Misc. ADAMS *v.* HIATT, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 170 F. 2d 73.

No. 205, Misc. HAWTHORNE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 170 F. 2d 149.

No. 211, Misc. CUCKOVICH ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 170 F. 2d 89.

No. 280, Misc. SPICHER *v.* RAGEN, WARDEN. Circuit Court of Knox County, Illinois. Certiorari denied.

No. 281, Misc. JORDAN *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 288, Misc. BURNS *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 292, Misc. HICKMAN, ADMINISTRATOR, *v.* TAYLOR ET AL., DOING BUSINESS AS TAYLOR & ANDERSON TOWING & LIGHTERAGE CO. C. A. 3d Cir. Certiorari denied. *Abraham E. Freedman* for petitioner. *Benjamin F. Stahl, Jr.* and *Samuel B. Fortenbaugh, Jr.* for respondents. Reported below: 170 F. 2d 327.

No. 293, Misc. SPICHER *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 295, Misc. UNITED STATES EX REL. HOLDERFIELD *v.* RAGEN, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 170 F. 2d 189.

No. 296, Misc. OAKS *v.* HUDSPETH, WARDEN. Supreme Court of Kansas. Certiorari denied. Reported below: 165 Kan. 664, 198 P. 2d 168.

No. 297, Misc. ALLEN *v.* HUDSPETH, WARDEN. Supreme Court of Kansas. Certiorari denied. Reported below: 165 Kan. 670, 198 P. 2d 170.

No. 303, Misc. DUNKLE *v.* ILLINOIS. Circuit Court of Peoria County, Illinois. Certiorari denied.

No. 313, Misc. BURNETT *v.* STEWART, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 314, Misc. ORMSBY *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied.

No. 316, Misc. BAILEY *v.* STEWART, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 170 F. 2d 1021.

No. 325, Misc. BEVELHYMER *v.* HUDSPETH, WARDEN. Supreme Court of Kansas. Certiorari denied.

No. 328, Misc. PYLE *v.* HUDSPETH, WARDEN. Supreme Court of Kansas. Certiorari denied. Reported below: 165 Kan. 62, 199 P. 2d 469.

No. 333, Misc. TALBOT *v.* CITY OF PASADENA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 170 F. 2d 703.

No. 336, Misc. GAWRON *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

Rehearing Denied.

No. 44. FRAZIER *v.* UNITED STATES, 335 U. S. 497. Rehearing denied.

No. 171, Misc. KISSINGER *v.* UNITED STATES, 335 U. S. 901. Rehearing denied.

No. 272, Misc. JACKSON *v.* GEORGIA, 335 U. S. 905. Rehearing denied.

No. 274, Misc. HOUGHTON *v.* HUDSPETH, WARDEN, 335 U. S. 905. Rehearing denied.

FEBRUARY 7, 1949.

Per Curiam Decision.

No. 121, Misc. TAYLOR *v.* DENNIS, WARDEN. Certiorari, 335 U. S. 890. Argued January 31–February 1, 1949. Decided February 7, 1949. *Per Curiam:* The judgment and order of the United States District Court for the Middle District of Alabama and the order of the United States Court of Appeals for the Fifth Circuit are affirmed by an equally divided Court. MR. JUSTICE BLACK took no part in the consideration or decision of this case. *Nesbitt Elmore* argued the cause for petitioner. With

him on the brief were *Thurgood Marshall, Frank D. Reeves* and *Franklin H. Williams. A. A. Carmichael,* Attorney General of Alabama, and *Bernard F. Sykes,* Assistant Attorney General, submitted on brief for respondent. [See 335 U. S. 252.]

Miscellaneous Orders.

No. 482. SEATRAIN LINES, INC. *v.* WEST INDIA FRUIT & STEAMSHIP CO., INC. ET AL. Petition for writ of certiorari to the Court of Appeals for the Second Circuit dismissed on motion of counsel for the petitioner. *Arthur L. Winn, Jr.* for petitioner. *William Radner, Odell Kominers, Frank J. McConnell, Joseph M. Rault* and *Arthur M. Boal* for the West India Fruit & S. S. Co.; *Joseph Walker* for Loftin et al., Trustees; and *S. Stanley Kreutzer* for McCauley, respondents. Reported below: 170 F. 2d 775.

No. 307, Misc. CLARKE *v.* RAGEN, WARDEN. Petition for writ of certiorari to the Criminal Court of Cook County, Illinois, dismissed on motion of the petitioner.

No. 337, Misc. O'NEILL *v.* CALIFORNIA;

No. 345, Misc. LLOYD *v.* HOWARD, WARDEN; and

No. 347, Misc. STEPHENSON *v.* NEW JERSEY. The motions for leave to file petitions for writs of habeas corpus are severally denied.

Certiorari Granted.

No. 457. HIATT, WARDEN, *v.* SMITH. C. A. 3d Cir. Motion of the Solicitor General to substitute Humphrey, the present warden, for Hiatt granted. Certiorari also granted. *Solicitor General Perlman* for petitioner. *Daniel F. Mathews* for respondent. Reported below: 170 F. 2d 61.

No. 465. Woods *v.* Interstate Realty Co. C. A. 5th Cir. Certiorari granted. *William H. Watkins* and *P. H. Eager, Jr.* for petitioner. *John A. Osoinach* for respondent. Reported below: 170 F. 2d 694.

Certiorari Denied.

No. 450. Pollard et al. *v.* Hawfield et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Luther Robinson Maddox* for petitioners. *Albert Brick* for respondents. Reported below: 83 U. S. App. D. C. 381, 170 F. 2d 170.

No. 471. Wilson Bros. & Co. *v.* Commissioner of Internal Revenue. C. A. 9th Cir. Certiorari denied. *George M. Naus* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Melva M. Graney* for respondent. Reported below: 170 F. 2d 423.

No. 483. Dixie Cup Co. *v.* Paper Container Mfg. Co. C. A. 3d Cir. Certiorari denied. *Carlton Hill, Charles F. Meroni, William A. Smith, Jr.* and *William H. Foulk* for petitioner. *Thomas Cooch, Franklin M. Warden* and *Casper W. Ooms* for respondent. Reported below: 170 F. 2d 333.

No. 497. Bomar *v.* Keyes et al. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *John P. McGrath* and *Seymour B. Quel* for respondent. Reported below: 170 F. 2d 310.

No. 498. American Locomotive Co. *v.* Chemical Research Corp.; and

No. 499. American Locomotive Co. *v.* Gyro Process Co. C. A. 6th Cir. Certiorari denied. *Charles H. Tuttle, C. Dickerman Williams* and *Theodore L. Harrison* for

petitioner. *Howell Van Auken* for respondents. Reported below: 171 F. 2d 115.

No. 185, Misc. D'OSTROPH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 170 F. 2d 148.

No. 229, Misc. NICHOLS *v.* OHIO. Supreme Court of Ohio. Certiorari denied. Reported below: 150 Ohio St. 358, 82 N. E. 2d 543.

No. 278, Misc. GIBBONS *v.* BRANDT ET AL. C. A. 7th Cir. Certiorari denied. *John H. Gately* for petitioner. *L. Duncan Lloyd* and *Henry T. Martin* for respondents. Reported below: 170 F. 2d 385, 389.

No. 321, Misc. PITTS *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 322, Misc. WILLIAMS *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 323, Misc. GARNER *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 324, Misc. CIHA *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

Rehearing Granted.

No. 59. MARZANI *v.* UNITED STATES, 335 U. S. 895. The petition for rehearing is granted and the case is ordered restored to the docket for reargument. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *Osmond K. Fraenkel* and *Allan R. Rosenberg* for petitioner.

Rehearing Denied.

No. 30. KORDEL *v.* UNITED STATES, 335 U. S. 345. Motion for leave to file petition for rehearing out of time denied.

No. 405. GUGGENHEIM *v.* UNITED STATES, 335 U. S. 908. Rehearing denied.

Nos. 658 and 659, October Term, 1945. GRIERSON *v.* ASHE, WARDEN, ET AL., 327 U. S. 790. Rehearing denied.

No. 275, Misc. MARCUS *v.* HUDSPETH, WARDEN, 335 U. S. 912. Rehearing denied.

No. 286, Misc. WILSON *v.* HUDSPETH, WARDEN, 335 U. S. 909. Rehearing denied.

No. 312, Misc. LOWE *v.* KILLINGER, 335 U. S. 910. Rehearing denied.

FEBRUARY 14, 1949.

Per Curiam Decision.

No. 472. HILL *v.* ATLANTIC COAST LINE RAILROAD CO. On petition for writ of certiorari to the Supreme Court of North Carolina. *Per Curiam:* The petition for writ of certiorari is granted and the judgment of the Supreme Court of North Carolina is reversed. See *Tiller* v. *Atlantic Coast Line R. Co.,* 318 U. S. 54 (1943); *Bailey* v. *Central Vermont R. Co.,* 319 U. S. 350 (1943); and *Ellis* v. *Union Pacific R. Co.,* 329 U. S. 649 (1947). MR. JUSTICE FRANKFURTER is of opinion that the petition for certiorari should not be granted, for reasons indicated in his concurring opinion in *Wilkerson* v. *McCarthy,* 336 U. S. 53, at p. 64. *Isaac D. Thorp* for petitioner. *Thomas W. Davis* and *F. S. Spruill* for respondent. Reported below: 229 N. C. 236, 49 S. E. 2d 481.

Miscellaneous Orders.

No. 44. FRAZIER *v.* UNITED STATES, 335 U. S. 497. It is ordered that the first sentence of the last paragraph on page 7 of the slip opinion [335 U. S. at 505, lines 8–13], which begins "Given ten arbitrary choices among twenty-two prospective jurors . . . ," be, and it is hereby, amended to read as follows:

"Given ten arbitrary choices among twenty-two prospective jurors not disqualified for cause, of whom thirteen were Government employees and nine privately engaged, he knowingly, of his own right, rejected nine of the latter and with knowledge or the full opportunity to secure it accepted without challenge all but one of the former."

[The opinion was reported as amended in the bound volume of 335 U. S.]

Certiorari Granted. (*See also No. 472, supra.*)

No. 476. WOODS, HOUSING EXPEDITER, *v.* DURR. C. A. 3d Cir. Certiorari granted. *Solicitor General Perlman* for petitioner. *J. H. Thayer Martin* for respondent. Reported below: 170 F. 2d 976.

Certiorari Denied.

No. 402. LOVE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Robert S. Erdahl* and *Joseph M. Howard* for the United States. Reported below: 170 F. 2d 32.

No. 467. MEYERS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Robert T. Bushnell* and *William J. Butler* for petitioner. *Solicitor General Perlman, Robert S. Erdahl* and *Joseph M. Howard* for the United States. Reported below: 84 U. S. App. D. C. —, 171 F. 2d 800.

No. 468. BARCOTT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Anthony M. Ursich* for petitioner.

Solicitor General Perlman, Assistant Attorney General Caudle, James M. McInerney and *Ellis N. Slack* for the United States. Reported below: 169 F. 2d 929.

No. 478. COFFMAN *v.* FEDERAL LABORATORIES, INC. ET AL. C. A. 3d Cir. Certiorari denied. *John G. Buchanan, James D. Carpenter, Jr., John G. Buchanan, Jr.* and *Samuel M. Coombs, Jr.* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney* and *Melvin Richter* for the United States; and *Thomas McNulty* for the Federal Laboratories, Inc., respondents. Reported below: 171 F. 2d 94.

No. 479. HOUVARDAS *v.* WIXON, DISTRICT DIRECTOR OF IMMIGRATION & NATURALIZATION. C. A. 9th Cir. Certiorari denied. *Carlos R. Freitas* for petitioner. *Solicitor General Perlman, Robert S. Erdahl* and *Andrew F. Oehmann* for respondent. Reported below: 169 F. 2d 980.

No. 480. PANGBORN CORPORATION *v.* AMERICAN FOUNDRY EQUIPMENT CO. C. A. 3d Cir. Certiorari denied. *William F. Hall, E. Ennalls Berl* and *Charles M. Thomas* for petitioner. *Hugh M. Morris* and *Thomas Turner Cooke* for respondent. Reported below: 170 F. 2d 339.

No. 481. AMERICAN FOUNDRY EQUIPMENT CO. *v.* PANGBORN CORPORATION. C. A. 3d Cir. Certiorari denied. *Hugh M. Morris* and *Thomas Turner Cooke* for petitioner. *William F. Hall, E. Ennalls Berl* and *Charles M. Thomas* for respondent. Reported below: 170 F. 2d 339.

No. 485. BRUCE *v.* OHIO OIL CO. ET AL. C. A. 10th Cir. Certiorari denied. *John B. Dudley* for petitioner.

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A. M. Gee for respondents. Reported below: 169 F. 2d 709.

No. 491. LEE FONG FOOK *v.* WIXON, DISTRICT DIRECTOR, IMMIGRATION & NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. *Gus C. Ringole* for petitioner. *Solicitor General Perlman* and *Robert S. Erdahl* for respondent. Reported below: 170 F. 2d 245.

No. 492. KNOWLES ET AL. *v.* WAR DAMAGE CORPORATION. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Philip W. Amram, James M. Carlisle* and *Ward M. French* for petitioners. *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney, Edward H. Hickey* and *Cecelia H. Goetz* for respondent. Reported below: 83 U. S. App. D. C. 388, 171 F. 2d 15.

No. 501. WOLFE *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *Robert H. Montgomery* and *James O. Wynn* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Morton K. Rothschild* for respondent. Reported below: 170 F. 2d 73.

No. 508. MARRIS *v.* SOCKEY. C. A. 10th Cir. Certiorari denied. *H. A. Ledbetter* and *Guy H. Sigler* for petitioner. *Jack T. Conn* for respondent. Reported below: 170 F. 2d 599.

No. 484. SHARBLE ET AL. *v.* KUEHNLE-WILSON, INC. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied for the reason that application therefor was not made within the time provided by law. 28 U. S. C. § 2101 (c). *John H. Hoffman* for petitioners. *Joseph W. Henderson* and *George M. Brodhead* for respondent. Reported below: 359 Pa. 494, 59 A. 2d 58.

No. 339, Misc. DARNELL *v.* HUDSPETH, WARDEN. Supreme Court of Kansas. Certiorari denied. Reported below: 166 Kan. 1, 199 P. 2d 473.

No. 342, Misc. WOFFORD *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 343, Misc. CLARK *v.* RAGEN, WARDEN. Circuit Court of Lake County, Illinois. Certiorari denied.

Rehearing Denied.

No. 7. JUNGERSEN *v.* OSTBY & BARTON CO. ET AL.;

No. 8. OSTBY & BARTON CO. ET AL. *v.* JUNGERSEN; and

No. 48. JUNGERSEN *v.* BADEN ET AL., 335 U. S. 560; and

No. 90. HENSLEE, COLLECTOR OF INTERNAL REVENUE, *v.* UNION PLANTERS BANK & TRUST CO. ET AL., 335 U. S. 595. Motions for leave to file petitions for rehearing denied.

No. 3. ESTATE OF SPIEGEL ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE, 335 U. S. 701. Rehearing denied.

No. 5. COMMISSIONER OF INTERNAL REVENUE *v.* ESTATE OF CHURCH, 335 U. S. 632. Rehearing denied.

No. 426. WORLD PUBLISHING CO. *v.* UNITED STATES, 335 U. S. 911. Rehearing denied.

Nos. 439 and 440. UNIVERSAL OIL PRODUCTS CO. *v.* WILLIAM WHITMAN CO., INC.; and

No. 441. AMERICAN SAFETY TABLE CO. *v.* SINGER SEWING MACHINE CO., 335 U. S. 912. Rehearing denied.

No. 223, Misc. STORY *v.* BURFORD, WARDEN, 335 U. S. 894. Rehearing denied.

FEBRUARY 28, 1949.

Per Curiam Decision.

No. 118. PETTI *v.* UNITED STATES. Certiorari, 335 U. S. 811, to the United States Court of Appeals for the Second Circuit. *Per Curiam:* The Government having moved the Court to vacate the judgments and remand the case to the District Court for a new trial, the motion is granted, and the judgments of the Court of Appeals and the District Court are vacated and the case is remanded to the United States District Court for the Southern District of New York with directions to grant a new trial. *Edward Halle* for petitioner. *Solicitor General Perlman* for the United States. Reported below: 168 F. 2d 221.

Miscellaneous Orders.

No. 202, Misc. QUICKSALL *v.* MICHIGAN. The petition for appeal is denied. Treating the appeal papers as a petition for a writ of certiorari to the Supreme Court of Michigan, certiorari is granted and the case is ordered transferred to the appellate docket. Petitioner *pro se. Stephen J. Roth,* Attorney General of Michigan, *Edmund E. Shepherd,* Solicitor General, and *Daniel J. O'Hara,* Assistant Attorney General, for respondent. Reported below: 322 Mich. 351, 33 N. W. 2d 904.

No. 277, Misc. GRANT *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari denied.

No. 353, Misc. KANE *v.* BURKE, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

No. 358, Misc. EX PARTE GREENE; and

No. 383, Misc. WILSON *v.* SUPERIOR COURT OF SAN JOAQUIN COUNTY, CALIFORNIA. Applications denied.

Certiorari Granted. (*See also No. 202, Misc., supra.*)

No. 442. COHEN, EXECUTRIX, ET AL. *v.* BENEFICIAL INDUSTRIAL LOAN CORP. ET AL.; and

No. 512. BENEFICIAL INDUSTRIAL LOAN CORP. *v.* SMITH, U. S. DISTRICT JUDGE, ET AL. C. A. 3d Cir. Certiorari granted. *Edward J. O'Mara, Charles Hershenstein, Samuel Dreskin* and *Philip B. Kurland* for petitioners in No. 442. *John M. Harlan* and *Charles Danzig* for the Beneficial Industrial Loan Corporation, petitioner in No. 512 and respondent in No. 442. Reported below: 170 F. 2d 44.

No. 495. FEDERAL COMMUNICATIONS COMMISSION *v.* WJR, THE GOODWILL STATION, INC. ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. MR. JUSTICE MURPHY took no part in the consideration or decision of this application. *Solicitor General Perlman* and *Benedict P. Cottone* for petitioner. *Louis G. Caldwell, Donald C. Beelar* and *Percy H. Russell, Jr.* for WJR, The Goodwill Station, Inc., respondent. Reported below: 84 U. S. App. D. C. —, 174 F. 2d 226.

No. 522. RAGAN *v.* MERCHANTS TRANSFER & WAREHOUSE CO., INC. C. A. 10th Cir. Certiorari granted. *Daniel L. Brenner* for petitioner. *Douglas Hudson* for respondent. Reported below: 170 F. 2d 987.

No. 344, Misc. WATTS *v.* INDIANA. Petition for writ of certiorari to the Supreme Court of Indiana granted and case ordered transferred to the appellate docket. The stay order of January 31, 1949, is continued and it is ordered that execution of the sentence of death be stayed pending the final disposition of this case by this Court. *Thurgood Marshall, Franklin H. Williams* and *Henry J. Richardson* for petitioner. *J. Emmett McMan-*

amon, Attorney General of Indiana, *Frank E. Coughlin,* Deputy Attorney General, and *Earl R. Cox* for respondent. Reported below: 226 Ind. —, 82 N. E. 2d 846.

Certiorari Denied.

No. 446. ALLEN ET AL. *v.* MCFADDEN ET AL. Supreme Court of California. Certiorari denied. *Robert W. Kenny* and *Welburn Mayock* for petitioners. *Fred N. Howser,* Attorney General of California, *J. Francis O'Shea,* Assistant Attorney General, and *Leonard M. Friedman,* Deputy Attorney General, for Jordan, Secretary of State; and *Stanley A. Weigel* for McFadden, respondents. Reported below: 32 Cal. 2d 330, 196 P. 2d 787.

No. 475. MCHUGH *v.* FLORIDA. Supreme Court of FLORIDA. Certiorari denied. *L. J. Cushman* for petitioner. *Richard W. Ervin,* Attorney General of Florida, *Reeves Bowen* and *Howard S. Bailey,* Assistant Attorneys General, for respondent. Reported below: 160 Fla. 823, 36 So. 2d 786.

No. 477. ALLIED PAPER MILLS ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 7th Cir. Certiorari denied. *William W. Corlett* and *Alfred McCormack* for petitioners. *Solicitor General Perlman, Assistant Attorney General Bergson, Robert G. Seaks, W. T. Kelley* and *Walter B. Wooden* for respondent. Reported below: 168 F. 2d 600.

No. 487. CHANDLER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Edward C. Park* for petitioner. *Solicitor General Perlman, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 171 F. 2d 921.

No. 488. ROWLAND *v.* ARKANSAS. Supreme Court of Arkansas. Certiorari denied. *C. Floyd Huff, Jr.* for petitioner. *Ike Murry,* Attorney General of Arkansas, *Jeff*

Duty and *Wyatt Cleveland Holland,* Assistant Attorneys General, for respondent. Reported below: 213 Ark. 780, 213 S. W. 2d 370.

No. 496. KELLEY ET AL. *v.* JOHNSON ET AL. Supreme Court of Appeals of Virginia. Certiorari denied. Reported below: 188 Va. lxvi.

No. 505. PENNSYLVANIA RAILROAD CO. *v.* CORRADO. C. A. 2d Cir. Certiorari denied. *Marion H. Fisher* for petitioner. *Vine H. Smith* for respondent. Reported below: 171 F. 2d 73.

No. 510. INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION (C. I. O.) ET AL. *v.* WIRTZ, CIRCUIT COURT JUDGE, ET AL. C. A. 9th Cir. Certiorari denied. *Herbert Resner* for petitioners. *Walter D. Ackerman, Jr.,* Attorney General of Hawaii, *Michiro Watanabe,* Deputy Attorney General, and *Thomas W. Flynn* for Wirtz, Circuit Court Judge; and *C. Nils Tavares* for Maui Agricultural Co., Ltd., respondents. Reported below: 170 F. 2d 183.

No. 603. BRETAGNA *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Harry G. Anderson* for petitioner. Reported below: 298 N. Y. 323, 83 N. E. 2d 537.

No. 511. INCOME BONDHOLDERS OF THE PEORIA & EASTERN RAILWAY CO. *v.* NEW YORK CENTRAL RAILROAD CO. ET AL. United States District Court for the Southern District of New York. Certiorari denied. *Charles S. Aronstam, Arthur A. Ballantine, John M. Harlan, Lyman M. Tondel, Jr.* and *Edward L. Friedman, Jr.* for petitioners. *Gerald E. Dwyer* and *Samuel H. Hellenbrand* for the New York Central Railroad Co. et al.; and *James F. Hart* for the Peoria & Eastern Railway Co., respondents. Reported below: 78 F. Supp. 312.

No. 516. KLOR *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. *Morris Lavine* for petitioner. *Fred N. Howser,* Attorney General of California, *Frank Richards* and *Henry A. Dietz,* Deputy Attorneys General, for respondent. Reported below: 32 Cal. 2d 658, 197 P. 2d 705.

No. 55, Misc. UNITED STATES EX REL. PARKER *v.* RAGEN, WARDEN. C. A. 7th Cir. Certiorari denied. *Walter F. Dodd* and *Eldridge Bancroft Pierce* for petitioner. *Ivan A. Elliott,* Attorney General of Illinois, *William C. Wines, James C. Murray* and *Raymond S. Sarnow,* Assistant Attorneys General, for respondent. Reported below: 167 F. 2d 792.

No. 283, Misc. LE VAN *v.* STILER ET AL. Appellate Department of the Superior Court of California. Certiorari denied.

No. 320, Misc. LILLY *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 326, Misc. DE SOTO *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 346, Misc. MANGAN *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 352, Misc. KUH *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 357, Misc. PITTS *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 361, Misc. KELLY *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 387, Misc. CANADA *v.* JONES, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 170 F. 2d 606.

No. 390, Misc. BROWN *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 393, Misc. PALMER *v.* ARKANSAS. Supreme Court of Arkansas. Certiorari denied. Reported below: 213 Ark. 956, 214 S. W. 2d 372.

No. 218, Misc. CURTIS *v.* HIATT, WARDEN. C. A. 3d Cir. Humphrey substituted as the party respondent. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Robert S. Erdahl* and *Joseph M. Howard* for respondent. Reported below: 169 F. 2d 1019.

Rehearing Denied.

No. 9. KOVACS *v.* COOPER, JUDGE, *ante*, p. 77. Rehearing denied.

No. 372. LEISHMAN *v.* RADIO CONDENSER CO. ET AL., 335 U. S. 891. Rehearing denied.

No. 460. CLEARY *v.* CHICAGO TITLE & TRUST CO., *ante*, p. 904. Rehearing denied.

No. 196, Misc. ADAMS *v.* HIATT, WARDEN, *ante*, p. 905. Rehearing denied.

No 292, Misc. HICKMAN, ADMINISTRATOR, *v.* TAYLOR ET AL., *ante*, p. 906. Rehearing denied.

No. 287, Misc. VILES *v.* JOHNSON, 335 U. S. 912. Leave to file petition for rehearing denied.

MARCH 2, 1949.

Rehearing Denied.

No. 603. BRETAGNA *v.* NEW YORK, *ante*, p. 919. Rehearing denied.

MARCH 7, 1949.

Per Curiam Decisions.

No. 59. MARZANI *v.* UNITED STATES. Certiorari, 334 U. S. 858, to the Court of Appeals for the District of Columbia Circuit. Reargued February 28, 1949. *Per Curiam:* Upon rehearing, 336 U. S. 910, the judgment entered December 20, 1948, 335 U. S. 895, affirming the judgment by an equally divided Court, is adhered to and reaffirmed by an equally divided Court. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case. *Osmond K. Fraenkel* and *Allan R. Rosenberg* reargued the cause for petitioner. *Solicitor General Perlman* reargued the cause for the United States. Reported below: 83 U. S. App. D. C. 78, 168 F. 2d 133.

No. 517. POORE *v.* MISSISSIPPI. Appeal from the Supreme Court of Mississippi. *Per Curiam:* The appeal is dismissed for want of jurisdiction. 28 U. S. C. § 1257 (2). The petition for writ of certiorari is denied. *W. Arlington Jones* for appellant. Reported below: 205 Miss. 528, 37 So. 2d 3.

Miscellaneous Orders.

No. 389, Misc. BADGLEY ET AL. *v.* INDIANA. Petition for writ of certiorari to the Supreme Court of Indiana dismissed on motion of counsel for the petitioners. *Robert A. Buhler* for petitioners. Reported below: 226 Ind. —, 82 N. E. 2d 841.

No. 234, Misc. IN RE DAMMANN;
No. 249, Misc. IN RE SCHALLERMAIR;

No. 259, Misc. IN RE SEIDEL;

No. 318, Misc. IN RE PUHR; and

No. 332, Misc. IN RE SCHMIDT. Treating the application in each of these cases as a motion for leave to file a petition for an original writ of habeas corpus, leave to file is denied. THE CHIEF JUSTICE, MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, and MR. JUSTICE BURTON are of the opinion that there is want of jurisdiction. U. S. Constitution, Article III, § 2, Clause 2; see *Ex parte Betz* and companion cases, all 329 U. S. 672 (1946); *Milch* v. *United States,* 332 U. S. 789 (1947); *Brandt* v. *United States,* 333 U. S. 836 (1948); *In re Eichel,* 333 U. S. 865 (1948); *Everett* v. *Truman,* 334 U. S. 824 (1948). MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, and MR. JUSTICE RUTLEDGE are of the opinion that argument should be heard on the motions for leave to file the petitions in order to settle what remedy, if any, the petitioners have. MR. JUSTICE JACKSON took no part in the consideration or decision of these applications.

No. 362, Misc. SHOTKIN *v.* PERKINS ET AL. Petition for appeal denied.

No. 363, Misc. WILLIS *v.* WRIGHT, WARDEN;

No. 364, Misc. KOZDRON *v.* KETCHUM, WARDEN;

No. 366, Misc. PETERS *v.* LOUISIANA;

No. 369, Misc. ELLIOTT *v.* HOWARD, WARDEN;

No. 385, Misc. MOSELEY *v.* ILLINOIS;

No. 396, Misc. IN RE PARKER;

No. 404, Misc. COOKE *v.* OVERHOLSER;

No. 409, Misc. RUTHVEN *v.* OVERHOLSER, SUPERINTENDENT;

No. 410, Misc. BERTRAND *v.* RAGEN, WARDEN; and

No. 412, Misc. IN RE RAMSEY. The motions for leave to file petitions for writs of habeas corpus are severally denied.

No. 381, Misc. McCann et al. *v.* Clark, Attorney General;

No. 395, Misc. Steinberg *v.* Hoffman, Judge, et al.; and

No. 398, Misc. In re Knight. The motions for leave to file petitions for writs of mandamus are severally denied.

Certiorari Granted.

No. 506. United States ex rel. Johnson *v.* Watkins, District Director of Immigration and Naturalization. C. A. 2d Cir. Certiorari granted. *Gunther Jacobson* for petitioner. *Solicitor General Perlman, Robert W. Ginnane* and *Robert S. Erdahl* for respondent. Reported below: 170 F. 2d 1009.

Certiorari Denied. (*See also No. 517, supra.*)

No. 453. Wade *v.* Michigan. Recorder's Court of Detroit, Michigan. Certiorari denied. *Larry S. Davidow* and *Anne R. Davidow* for petitioner. *Stephen J. Roth,* Attorney General of Michigan, *Edmund E. Shepherd,* Solicitor General, and *Daniel J. O'Hara,* Assistant Attorney General, for respondent.

No. 502. Koehne et al. *v.* Matthews, U. S. Marshal, et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Ira Chase Koehne* and *Orille C. Gaudette* for petitioners. *Solicitor General Perlman, Robert S. Erdahl* and *Joseph M. Howard* for respondents. Reported below: 83 U. S. App. D. C. 401, 169 F. 2d 889.

No. 513. Burnham Chemical Co. *v.* Borax Consolidated, Ltd. et al. C. A. 9th Cir. Certiorari denied. *Thurman Arnold, Sterling Carr* and *Walton Hamilton* for petitioner. *Maurice E. Harrison, Moses Lasky* and

Paul Sandmeyer for Borax Consolidated, Ltd. et al.; and *Joseph W. Burns, Michael F. McCarthy* and *Charles A. Beardsley* for American Potash & Chemical Corp., respondents. Reported below: 170 F. 2d 569.

No. 515. WALKER *v.* GALT ET AL. C. A. 5th Cir. Certiorari denied. *Thomas H. Anderson* for petitioner. *C. A. Hiaasen* for respondents. Reported below: 171 F. 2d 613.

No. 518. ATLANTIC FREIGHT LINES, INC. *v.* PENNSYLVANIA PUBLIC UTILITY COMMISSION ET AL. Superior Court of Pennsylvania. Certiorari denied. *Laurence H. Eldredge* and *Dean D. Sturgis* for petitioner. *Charles E. Thomas* for Pennsylvania Public Utility Commission; and *Harold S. Shertz* for Super Highway Express, Inc. et al., respondents. Reported below: 163 Pa. Super. 215, 60 A. 2d 589.

No. 521. SMITH ET AL. *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. *R. Palmer Ingram* and *T. Barton Harrington* for petitioners. *Hall Hammond,* Attorney General, and *Harrison L. Winter,* Assistant Attorney General, for respondent. Reported below: —— Md. ——, 62 A. 2d 287.

No. 541. TURNER COUNTY, SOUTH DAKOTA, *v.* MILLER. C. A. 8th Cir. Certiorari denied. *Dwight Campbell* and *T. M. Bailey* for petitioner. *Roy E. Willy* for respondent. Reported below: 170 F. 2d 820.

No. 221, Misc. PATRICK ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioners *pro se. Solicitor General Perlman, Robert S. Erdahl* and *Joseph M. Howard* for the United States. Reported below: 170 F. 2d 269.

No. 294, Misc. McINTOSH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Robert S. Erdahl* and *Joseph M. Howard* for the United States. Reported below: 171 F. 2d 705.

No. 306, Misc. BINKLEY *v.* HUNTER, WARDEN. C. A. 10th Cir. Certiorari denied. *Donald H. Latshaw* and *Louis R. Gates* for petitioner. *Solicitor General Perlman, Robert S. Erdahl* and *Joseph M. Howard* for respondent. Reported below: 170 F. 2d 848.

No. 315, Misc. McINTOSH *v.* PESCOR, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 330, Misc. WILLIAMS *v.* OHIO. Supreme Court of Ohio. Certiorari denied.

No. 340, Misc. BARNETT *v.* RAGEN, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 349, Misc. COOK *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Perlman, Robert S. Erdahl* and *Joseph M. Howard* for the United States. Reported below: 171 F. 2d 567.

No. 354, Misc. WHITE *v.* NIERSTHEIMER, WARDEN, ET AL. Circuit Court of St. Clair County, Illinois. Certiorari denied.

No. 355, Misc. STEWART *v.* CHAPMAN, SUPERINTENDENT. Supreme Court of Florida. Certiorari denied. *Zachariah Hicklin Douglas* and *Samuel W. Getzen* for petitioner.

No. 365, Misc. CAMPBELL *v.* PENNSYLVANIA ET AL. Petition for writ of certiorari to the Supreme Court of Pennsylvania, United States District Court for the Western District of Pennsylvania, and United States Court of Appeals for the Third Circuit denied.

No. 367, Misc. DAY *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 368, Misc. FRANKLIN *v.* HUDSPETH, WARDEN, ET AL. Supreme Court of Kansas. Certiorari denied. Reported below: 166 Kan. 218, 200 P. 2d 276.

No. 370, Misc. FOSTER *v.* HUDSPETH, WARDEN, ET AL. Supreme Court of Kansas. Certiorari denied. Reported below: 166 Kan. 60, 199 P. 2d 189.

No. 371, Misc. KOBLITZ *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 401 Ill. 224, 81 N. E. 2d 881.

No. 375, Misc. BOREMAN *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 401 Ill. 566, 82 N. E. 2d 459.

No. 376, Misc. JOHNSON *v.* RAGEN, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 171 F. 2d 630.

No. 382, Misc. SKELTON *v.* HUDSPETH, WARDEN, ET AL. Supreme Court of Kansas. Certiorari denied. Reported below: 166 Kan. 70, 199 P. 2d 470.

No. 386, Misc. JOHNSON *v.* INDIANA ET AL. Lake County Criminal Court of Indiana. Certiorari denied.

No. 388, Misc. BROWN *v.* HUDSPETH, WARDEN, ET AL. Supreme Court of Kansas. Certiorari denied. Reported below: 166 Kan. 93, 199 P. 2d 160.

No. 392, Misc. MATHIS *v.* RAGEN, WARDEN. Circuit Court of Peoria County, Illinois. Certiorari denied.

No. 394, Misc. HOLIDAY *v.* WARDEN OF THE MARYLAND STATE PENITENTIARY. Court of Appeals of Maryland. Certiorari denied. Reported below: —— Md. ——, 62 A. 2d 573.

No. 397, Misc. MEYERS *v.* WILSON ET AL., JUSTICES OF THE SUPREME COURT OF ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 402, Misc. SWAIN *v.* DUFFY, WARDEN. Supreme Court of California. Certiorari denied.

No. 406, Misc. EAGLE *v.* CHERNEY ET AL. Court of Appeals of New York. Certiorari denied. Reported below: See 297 N. Y. 861, 79 N. E. 2d 269.

No. 411, Misc. GORE *v.* RAGEN, WARDEN. Superior Court of Cook County, Illinois. Certiorari denied.

Rehearing Denied.

No. 22. VERMILYA-BROWN CO., INC. ET AL. *v.* CONNELL ET AL., 335 U. S. 377. Rehearing denied.

No. 45. FISHER *v.* PACE, SHERIFF, *ante*, p. 155. Rehearing denied.

No. 244. OTT, COMMISSIONER OF PUBLIC FINANCE, ET AL. *v.* MISSISSIPPI VALLEY BARGE LINE CO. ET AL., *ante*, p. 169. Rehearing denied.

No. 450. POLLARD ET AL. *v.* HAWFIELD ET AL., *ante*, p. 909. Rehearing denied.

No. 483. DIXIE CUP CO. *v.* PAPER CONTAINER MFG. CO., *ante*, p. 909. Rehearing denied.

No. 489. HARRIS ET AL., DOING BUSINESS AS H-C PRODUCTS CO., *v.* NATIONAL MACHINE WORKS, INC. ET AL., *ante*, p. 905. Rehearing denied.

No. 458. CARPENTER *v.* ROHM & HAAS CO., INC., *ante*, p. 904; and

No. 459. CARPENTER *v.* ERIE RAILROAD CO., *ante*, p. 904. Rehearing denied for the reason that the applications were not received within the time provided by Rule 33.

No. 121, Misc. TAYLOR *v.* DENNIS, WARDEN, *ante*, p. 907. Rehearing denied. MR. JUSTICE BLACK took no part in the consideration or decision of this application.

No. 278, Misc. GIBBONS *v.* BRANDT ET AL., *ante*, p. 910. Rehearing denied.

MARCH 14, 1949.

Per Curiam Decisions.

No. 514. COUNTY OF LOS ANGELES *v.* SOUTHERN CALIFORNIA TELEPHONE CO. Appeal from the Supreme Court of California. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Harold W. Kennedy* for appellant. *Oscar Lawler* and *Francis N. Marshall* for appellee. Reported below: See 62 Cal. 2d 378, 196 P. 2d 773.

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Nos. 529, 530 and 531. STANDARD OIL CO. OF INDIANA *v.* SUPERIOR COURT OF DELAWARE IN AND FOR NEW CASTLE COUNTY ET AL. Appeals from the Supreme Court of Delaware. *Per Curiam:* The appeals are dismissed for want of a substantial federal question. *Hugh M. Morris, Ralph S. Harris, John R. McCullough* and *Frederick W. P. Lorenzen* for appellant. Reported below: —— Del. ——, 62 A. 2d 454.

No. 535. THOMAS *v.* DAUGHTERS OF UTAH PIONEERS ET AL. Appeal from the Supreme Court of Utah. *Per Curiam:* The appeal is dismissed for want of a properly presented substantial federal question. *H. A. Rich* for appellant. *Clinton D. Vernon,* Attorney General of Utah, for appellees. Reported below: —— Utah ——, 197 P. 2d 477.

No. 560. Fox *v.* Fox. Appeal from the Supreme Court of New York. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Charles E. Congdon* for appellant. *Alfred M. Saperston* for appellee.

No. 283. RILEY, LABOR COMMISSIONER, ET AL. *v.* INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL UNION No. 633, ET AL. On petition for writ of certiorari to the Supreme Court of New Hampshire. *Per Curiam:* The petition for writ of certiorari is granted. It appearing that the cause has become moot, the judgment of the Supreme Court of New Hampshire is vacated without costs and the cause is remanded for such proceedings as by that Court may be deemed appropriate. *Ernest R. D'Amours,* Attorney General of New Hampshire, for petitioners. *H. Thornton Lorimer* for respondents. Reported below: 95 N. H. 162, 59 A. 2d 476.

Certiorari Granted. (*See also No. 474, ante, p. 368, and No. 283, supra.*)

No. 473. UNITED STATES *v.* WITTEK. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Solicitor General Perlman* for the United States. *Ward B. McCarthy* for respondent. Reported below: 83 U. S. App. D. C. 377, 171 F. 2d 8.

Certiorari Denied.

No. 523. T. M. DUCHE & SONS, INC. *v.* UNITED STATES. United States Court of Customs and Patent Appeals. Certiorari denied. *Albert MacC. Barnes* and *J. Bradley Colburn* for petitioner. *Solicitor General Perlman, Assistant Attorney General Edelstein* and *John R. Benney* for the United States. Reported below: 36 C. C. P. A. (Customs) 19.

No. 524. COSBY *v.* HARTS ET AL. C. A. 7th Cir. Certiorari denied. *B. Lacey Catron* for petitioner. *Hugh J. Graham, Jr.* for respondents. Reported below: 169 F. 2d 689.

No. 539. PAINTER, ADMINISTRATRIX, ET AL. *v.* SOUTHERN TRANSPORTATION CO. C. A. 4th Cir. Certiorari denied. *Abraham E. Freedman* for petitioners. *Leon T. Seawell* for respondent. Reported below: 170 F. 2d 854.

No. 545. SEABOARD AIR LINE RAILROAD CO. *v.* HINTON ET AL. C. A. 4th Cir. Certiorari denied. *James B. McDonough, Jr.* and *W. R. C. Cocke* for petitioner. *Joseph C. Waddy* and *Charles H. Houston* for respondents. Reported below: 170 F. 2d 892.

Rehearing Denied.

No. 7. JUNGERSEN *v.* OSTBY & BARTON CO. ET AL.;
No. 8. OSTBY & BARTON CO. ET AL. *v.* JUNGERSEN; and

No. 48. JUNGERSEN *v.* BADEN ET AL., 335 U. S. 560. Petition for reconsideration of order denying leave to file petition for rehearing denied.

No. 462. GIERENS ET AL. *v.* ILLINOIS, 336 U. S. 904. Motion for leave to file petition for rehearing denied.

No. 329, Misc. BURALL *v.* CLARK, ATTORNEY GENERAL, 336 U. S. 902. Rehearing denied.

MARCH 28, 1949.

Per Curiam Decisions.

No. 533. BOSTON RAILROAD HOLDING CO. ET AL. *v.* DELAWARE & HUDSON CO. ET AL. Appeal from the Supreme Judicial Court of Massachusetts. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *John L. Hall* and *Richard Wait* for appellants. Reported below: 323 Mass. 282, 81 N. E. 2d 553.

No. 551. ODOM *v.* MISSISSIPPI. Appeal from, and petition for writ of certiorari to, the Supreme Court of Mississippi. *Per Curiam:* The appeal is dismissed. See *Bute* v. *Illinois,* 333 U. S. 640. The petition for writ of certiorari is denied. *W. E. Morse* for appellant-petitioner. Reported below: 205 Miss. 592, 37 So. 2d 300.

No. 557. LAGEMANN *v.* LAGEMANN. Appeal from the Supreme Court of Nevada. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. Appellant *pro se. Everett Sanders* for appellee. Reported below: 65 Nev. ——, 196 P. 2d 1018.

No. 569. IANNELLA ET AL. *v.* JOHNSON, RECORDER OF THE TOWNSHIP OF PISCATAWAY, ET AL. Appeal from the Supreme Court of New Jersey. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for

want of a substantial federal question. *John T. Keefe* for appellants. *Maurice M. Bernstein* for appellees. Reported below: 137 N. J. L. 659, 61 A. 2d 237.

No. 581. McLaurin *v.* Mississippi. Appeal from, and petition for writ of certiorari to, the Supreme Court of Mississippi. *Per Curiam:* The appeal is dismissed for want of jurisdiction. 28 U. S. C. § 1257 (2). The petition for writ of certiorari is denied. *Ross R. Barnett* for appellant-petitioner. Reported below: 205 Miss. 554, 37 So. 2d 8.

No. 606. Schnell, Member of the Board of Election Registrars of Mobile County, et al. *v.* Davis et al. Appeal from the United States District Court for the Southern District of Alabama. *Per Curiam:* The judgment is affirmed. *Lane* v. *Wilson,* 307 U. S. 268; *Yick Wo* v. *Hopkins,* 118 U. S. 356. Cf. *Williams* v. *Mississippi,* 170 U. S. 213. Mr. Justice Reed, in view of the fact that a constitutional provision of a state is involved, presented by the Attorney General, is of the opinion that probable jurisdiction should be noted and the case set down for argument. *A. A. Carmichael,* Attorney General of Alabama, and *Silas C. Garrett, III,* Assistant Attorney General, for appellants. *Loring B. Moore* and *George N. Leighton* for appellees. Reported below: 81 F. Supp. 872.

No. 621. Great Northern Railway Co. *v.* United States et al. Appeal from the United States District Court for the District of Delaware. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *Board of Trade* v. *United States,* 314 U. S. 534; *Virginian R. Co.* v. *United States,* 272 U. S. 658; *Central R. Co.* v. *United States,* 257 U. S. 247. *Edwin C. Matthias, Reuben J. Hagman, Louis E. Torinus, Jr., A. Rea Wil-*

liams, Clarence A. Southerland, David F. Anderson and *William Poole* for appellant. *Solicitor General Perlman, Assistant Attorney General Bergson, Edward Dumbauld* and *J. Stanley Payne* for the United States and the Interstate Commerce Commission; and *S. J. Wettrick* and *Floyd F. Shields* for General Mills, Inc. et al., respondents. Reported below: 81 F. Supp. 921.

Miscellaneous Orders.

No. 626. UNITED STATES *v.* ZISBLATT. Appeal from the United States District Court for the Southern District of New York. Dismissed on motion of counsel for the appellant. *Solicitor General Perlman* for appellant. Reported below: 78 F. Supp. 9.

No. 348, Misc. ENFIELD *v.* BIOW COMPANY, INC. ET AL. Motion for leave to file petition for writ of certiorari denied. Petitioner *pro se*. *T. B. Cosgrove* and *Leonard A. Diether* for respondents.

No. 405, Misc. DALE *v.* HEINZE, WARDEN; and

No. 423, Misc. WILLIAMS *v.* OVERHOLSER, SUPERINTENDENT. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 430, Misc. EX PARTE LOUISIANA FARMERS PROTECTIVE UNION, INC. Motion for leave to file petition for writ of mandamus denied. *Cameron C. McCann, James H. Morrison, Edward R. Schowalter* and *K. K. Kennedy* for petitioner.

Certiorari Granted.

No. 528. CHRISTOFFEL *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *O. John Rogge* for peti-

tioner. *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl* and *Joseph M. Howard* for the United States. Reported below: 84 U. S. App. D. C. —, 171 F. 2d 1004.

No. 532. STANDARD-VACUUM OIL CO. *v.* UNITED STATES. Court of Claims. Certiorari granted. *Albert R. Connelly* and *George S. Collins* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison* and *Samuel D. Slade* for the United States. Reported below: 112 Ct. Cl. 137, 80 F. Supp. 657.

No. 537. FAULKNER *v.* GIBBS. C. A. 9th Cir. Certiorari granted. *Harold W. Mattingly* for petitioner. *Herbert A. Huebner* for respondent. Reported below: 170 F. 2d 34.

No. 558. FEDERAL POWER COMMISSION *v.* PANHANDLE EASTERN PIPE LINE CO. ET AL. C. A. 3d Cir. Certiorari granted. *Solicitor General Perlman* and *Bradford Ross* for petitioner. *E. Ennalls Berl* and *Francis J. Syphen* for Panhandle Eastern Pipe Line Co.; *Jeff A. Robertson* and *Jay Kyle* for the State Corporation Commission of Kansas; and *Arthur G. Connolly* and *Charles S. Layton* for Smith et al., respondents. Reported below: 172 F. 2d 57.

No. 565. CARTER *v.* ATLANTA & SAINT ANDREWS BAY RAILWAY CO. C. A. 5th Cir. Certiorari granted. *J. Kirkman Jackson* for petitioner. *James N. Frazer* for respondent. Reported below: 170 F. 2d 719.

Certiorari Denied. (*See also Nos. 551 and 581, supra.*)

No. 507. CITY OF OMAHA ET AL. *v.* FRANK BROTHERS FOOTWEAR, INC. Supreme Court of Nebraska. Certio-

rari denied. *Ralph E. Svoboda* for petitioners. *Charles S. Rhyne* filed a brief for the National Institute of Municipal Law Officers, as *amicus curiae,* supporting the petition. *M. James Spitzer* filed a brief for Best & Co., Inc., as *amicus curiae,* opposing the petition. Reported below: 149 Neb. 888, 33 N. W. 2d 161.

No. 519. Birch Securities Co. *v.* California. District Court of Appeal, 3d Appellate District, of California. Certiorari denied. *R. S. McLaughlin* for petitioner. *Fred N. Howser,* Attorney General of California, and *James E. Sabine,* Deputy Attorney General, for respondent. Reported below: 86 Cal. App. 2d 703, 196 P. 2d 143.

No. 534. J. D. Richardson Co. *v.* United States. United States Court of Customs & Patent Appeals. Certiorari denied. *Eugene R. Pickrell* and *Albert H. Bosch* for petitioner. *Solicitor General Perlman, Assistant Attorney General Edelstein* and *John R. Benney* for the United States. Reported below: 36 C. C. P. A. (Customs) 15.

No. 536. Levine, Executor, *v.* United States. Court of Claims. Certiorari denied. Petitioner *pro se. Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney* and *Morton Hollander* for the United States. Reported below: 112 Ct. Cl. 187, 80 F. Supp. 674.

No. 538. Friedman *v.* Delaney, Collector of Internal Revenue. C. A. 1st Cir. Certiorari denied. *Lee M. Friedman* and *Louis B. King* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Lee A. Jackson* for respondent. Reported below: 171 F. 2d 269.

No. 543. SCHOEN *v.* MOUNTAIN PRODUCERS CORP. ET AL. C. A. 3d Cir. Certiorari denied. *Charles B. McInnis, Louis B. Arnold* and *Herbert L. Cobin* for petitioner. *William S. Potter* and *James L. Latchum* for Johnson et al., respondents. Reported below: 170 F. 2d 707.

No. 546. GUNN *v.* DALLMAN, COLLECTOR OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. *Werner W. Schroeder, Harry B. Sutter* and *Montgomery S. Winning* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle* and *Ellis N. Slack* for respondent. Reported below: 171 F. 2d 36.

No. 549. ALBURN, TRUSTEE, ET AL. *v.* UNION TRUST CO. ET AL.; and

No. 550. ALBURN, TRUSTEE, ET AL. *v.* NATIONAL CITY BANK OF CLEVELAND ET AL. Supreme Court of Ohio. Certiorari denied. *Paul R. Harmel, William S. Evatt* and *Cary R. Alburn* for petitioners. *Herbert S. Duffy,* Attorney General of Ohio, and *W. H. Annat,* Assistant Attorney General, for Superintendent of Banks; *C. W. Sellers* for National City Bank of Cleveland; *Howard F. Burns* for Union Properties, Inc.; and *George Q. Keeley* for Burdick et al., respondents. Reported below: 150 Ohio St. 357, 82 N. E. 2d 543.

No. 552. O'NEILL *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Monroe Goldwater* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Melva M. Graney* for respondent. Reported below: 170 F. 2d 596.

No. 554. CRIPPEN, TRUSTEE IN BANKRUPTCY, *v.* CITY OF DALLAS. C. A. 5th Cir. Certiorari denied. *Webster Atwell* for petitioner. Reported below: 171 F. 2d 526.

No. 559. NEW AMSTERDAM CASUALTY CO. *v.* A. CIMPI EXPRESS LINES, INC. ET AL. Court of Appeals of New York. Certiorari denied. *George R. Fearon* for petitioner. *Charles D. Lewis* for A. Cimpi Express Lines, Inc.; and *George F. Roesch, 2nd,* for Gullberg, respondents. Reported below: 298 N. Y. 693, 82 N. E. 2d 588.

No. 564. TUCKER PRODUCTS CORP. *v.* HELMS ET AL. C. A. 9th Cir. Certiorari denied. *Herbert Resner* for petitioner. *James W. Harvey* for respondents. Reported below: 171 F. 2d 126.

No. 582. HAZELTINE RESEARCH, INC. *v.* GENERAL MOTORS CORP. C. A. 6th Cir. Certiorari denied. *Miles D. Pillars, Philip F. LaFollette, Leonard A. Watson* and *Laurence B. Dodds* for petitioner. *Drury W. Cooper, Stephen H. Philbin* and *C. Blake Townsend* for respondent. Reported below: 170 F. 2d 6.

No. 235, Misc. MORANDY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Morris Lavine* for petitioner. *Solicitor General Perlman, Robert S. Erdahl* and *John R. Benney* for the United States. Reported below: 170 F. 2d 5.

No. 245, Misc. JACKSON *v.* HIATT, WARDEN. C. A. 5th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Perlman, Robert S. Erdahl* and *Joseph M. Howard* for respondent. Reported below: 170 F. 2d 630.

No. 247, Misc. GRIMM *v.* STEWART, WARDEN. Supreme Court of Missouri. Certiorari denied. Petitioner *pro se. J. E. Taylor,* Attorney General of Missouri, *Gordon P. Weir* and *Samuel Watson,* Assistant Attorneys General, for respondent.

No. 257, Misc. CASSEL *v.* OVERHOLSER. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Reported below: 83 U. S. App. D. C. 350, 169 F. 2d 683.

No. 262, Misc. MCGREGOR *v.* RAGEN, WARDEN. C. A. 7th Cir. Certiorari denied. Petitioner *pro se.* *Ivan A. Elliott,* Attorney General of Illinois, *William C. Wines, James C. Murray* and *Raymond S. Sarnow,* Assistant Attorneys General, for respondent.

No. 351, Misc. KELLEY *v.* DELAWARE, LACKAWANNA & WESTERN RAILROAD. C. A. 1st Cir. Certiorari denied. *Henry Lawlor* and *Paul H. Snow* for petitioner. *Paul F. Perkins* for respondent. Reported below: 170 F. 2d 195.

No. 356, Misc. BLACKWELL *v.* NEVADA. Supreme Court of Nevada. Certiorari denied. *Clel Georgetta* for petitioner. *Alan Bible,* Attorney General of Nevada, *Homer Mooney, George P. Annanda,* Deputy Attorneys General, and *Gray Mashburn* for respondent. Reported below: 65 Nev. —, 198 P. 2d 280.

No. 360, Misc. STEELE *v.* JACKSON, WARDEN. C. A. 2d Cir. Certiorari denied. Petitioner *pro se.* *Nathaniel L. Goldstein,* Attorney General of New York, *Wendell P. Brown,* Solicitor General, *Irving I. Waxman* and *Louis Winer,* Assistant Attorneys General, for respondent. Reported below: 171 F. 2d 432.

No. 399, Misc. JANIEC *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. Reported below: See 137 N. J. L. 94, 58 A. 2d 543.

No. 401, Misc. SMITH *v.* HUDSPETH, WARDEN. Supreme Court of Kansas. Certiorari denied. Reported below: 166 Kan. 222, 199 P. 2d 804.

No. 407, Misc. BLEVINS *v.* HUDSPETH, WARDEN. Supreme Court of Kansas. Certiorari denied. Reported below: 166 Kan. 117, 199 P. 2d 171.

No. 418, Misc. BLAUVELT *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Reported below: See 298 N. Y. 928, 85 N. E. 2d 67.

No. 421, Misc. LAWRENCE *v.* STEWART, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 422, Misc. ROGERS *v.* INDIANA. Supreme Court of Indiana. Supreme Court of Indiana. Certiorari denied. Reported below: 226 Ind. —, 82 N. E. 2d 89.

No. 479, Misc. KALLAS *v.* INDIANA. Supreme Court of Indiana. Certiorari denied. *George Cohan* and *Robert G. Estill* for petitioner. *J. Emmett McManamon,* Attorney General of Indiana, *Merl M. Wall* and *Frank E. Coughlin,* Deputy Attorneys General, for respondent. Reported below: 227 Ind. —, 83 N. E. 2d 769.

No. 492, Misc. WALKER *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. *Morris Lavine* for petitioner. Reported below: 33 Cal. 2d 250, 201 P. 2d 6.

Rehearing Denied.

No. 53. WILKERSON *v.* MCCARTHY ET AL., 336 U. S. 53. Rehearing denied.

No. 488. ROWLAND *v.* ARKANSAS, 336 U. S. 918. Rehearing denied.

No. 456. PATTERSON *v.* GRAY, 336 U. S. 905. Motion for leave to file petition for rehearing denied.

No. 193, Misc. HALEY *v.* PENNSYLVANIA, 335 U. S. 904. Rehearing denied.

No. 218, Misc. CURTIS *v.* HUMPHREY, WARDEN, 336 U. S. 921. Rehearing denied.

No. 334, Misc. IN RE MCADAM, 336 U. S. 902. Rehearing denied.

APRIL 4, 1949.

Per Curiam Decisions.

No. 476. WOODS, HOUSING EXPEDITER, *v.* DURR. Certiorari, 336 U. S. 912, to the United States Court of Appeals for the Third Circuit. *Per Curiam:* The motion of the Solicitor General for remand of this case is granted. The judgment of the Court of Appeals is vacated and the cause is remanded to that court for consideration of the effect of § 209 of the Housing and Rent Act of 1947, 61 Stat. 193, 200, as amended by § 206 of the Act of March 30, 1949, 63 Stat. 18, 29, and the eviction regulations of the Housing Expediter issued pursuant thereto, 14 Fed. Reg. 1571. *Solicitor General Perlman* for petitioner. *J. H. Thayer Martin* for respondent. Reported below: 170 F. 2d 976.

No. 622. A/S J. LUDWIG MOWINCKELS REDERI ET AL. *v.* ISBRANDTSEN CO., INC. ET AL. Appeal from the United States District Court for the Southern District of New York. *Per Curiam:* The appeal is dismissed. *Roscoe H. Hupper* and *Burton H. White* for appellants. *John J. O'Connor* and *William L. McGovern* for appellees. Reported below: 81 F. Supp. 544.

No. 643. BUNN *v.* NORTH CAROLINA. Appeal from the Supreme Court of North Carolina. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. Petitioner *pro se. Harry McMullan,* Attorney General of North Carolina, and *T. W. Bruton,* Assistant Attorney General, for appellee. Reported below: 229 N. C. 734, 51 S. E. 2d 179.

Miscellaneous Orders.

No. 42. KLAPPROTT *v.* UNITED STATES. The motion of the respondent to modify the judgment of this Court in this case is granted. The judgment announced January 17, 1949 [335 U. S. 601, 616], reading as follows: "The judgments accordingly are reversed and the cause is remanded to the District Court with instructions to set aside the judgment by default and grant the petitioner a hearing on the merits raised by the denaturalization complaint.", is amended to read: "The judgment of the Court of Appeals is reversed and the cause is remanded to the District Court with directions to receive evidence on the truth or falsity of the allegations contained in petitioner's petition to vacate the default judgment entered in the denaturalization proceedings." MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, and MR. JUSTICE RUTLEDGE dissent from the modification of the order. *Solicitor General Perlman* was on the motion to modify the judgment, for the United States. *P. Bateman Ennis, W. Clifton Stone* and *Morton Singer* were on the brief in opposition, for petitioner.

No. 309, Misc. DOELLE *v.* MICHIGAN;

No. 427, Misc. VAN PELT *v.* RAGEN, WARDEN; and

No. 434, Misc. MORTON *v.* STEELE, WARDEN. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 444, Misc. MOSS *v.* SWYGERT, U. S. DISTRICT JUDGE. The motion for leave to file petition for writ of mandamus is denied.

No. 445, Misc. CORDTS *v.* RAGEN, WARDEN. The motion for leave to file petition for writ of certiorari is denied.

No. 547, Misc. BERRY *v.* FLORIDA. The petition for a stay of execution of the sentence of death is denied.

Certiorari Granted.

No. 567. STEMMER *v.* NEW YORK; and

No. 568. KRAKOWER *v.* NEW YORK. Court of Appeals of New York. Certiorari granted. *Arthur Garfield Hays, Osmond K. Fraenkel* and *Sidney Struble* for petitioner in No. 567; and *Harry G. Anderson* and *Harris B. Steinberg* for petitioner in No. 568. *Frank S. Hogan* and *Whitman Knapp* for respondent. Reported below: 298 N. Y. 728, 83 N. E. 2d 141.

No. 578. OAKLEY *v.* LOUISVILLE & NASHVILLE RAILROAD CO. ET AL.; and

No. 579. HAYNES *v.* SOUTHERN RAILWAY SYSTEM ET AL. C. A. 6th Cir. Certiorari granted. *Solicitor General Perlman* for petitioners. *C. S. Landrum* for respondent in No. 578; *Carl M. Jacobs* and *W. S. MacGill* for respondent in No. 579; and *James Park, Frank L. Mulholland, Clarence M. Mulholland* and *Willard H. McEwen* for System Federations Nos. 21 and 91, Railway Employes' Department, A. F. of L., respondents. Reported below: No. 578, 170 F. 2d 1008; No. 579, 171 F. 2d 128.

No. 400, Misc. CASSELL *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari granted. Reported below: 152 Tex. Cr. Rep. ——, 216 S. W. 2d 813.

Certiorari Denied.

No. 247. Railway Express Agency, Inc. *v.* Commissioner of Internal Revenue. C. A. 2d Cir. Certiorari denied. *Ellsworth C. Alvord* and *Floyd F. Toomey* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Abbott M. Sellers* for respondent. Reported below: 169 F. 2d 193.

No. 504. Kingsland, Commissioner of Patents, *v.* Barron-Gray Packing Co. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Solicitor General Perlman* for petitioner. *Curtis F. Prangley* and *Charles L. Sturtevant* for respondent. Reported below: 84 U. S. App. D. C. —, 171 F. 2d 576.

No. 540. Bottone *v.* Lindsley et al. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Paul M. Segal* and *Harry P. Warner* for respondents. Reported below: 170 F. 2d 705.

No. 548. Brotherhood of Railroad Trainmen *v.* Baltimore & Ohio Railroad Co. et al. C. A. 7th Cir. Certiorari denied. *Burke Williamson* and *Jack A. Williamson* for petitioner. *Solicitor General Perlman, Assistant Attorney General Bergson, Stanley M. Silverberg, Edward Dumbauld, Daniel W. Knowlton* and *Harry Underwood* for the Interstate Commerce Commission; and *Ernest S. Ballard* for Baltimore & Ohio Railroad Co. et al., respondents. Reported below: 170 F. 2d 654.

No. 555. Cummings *v.* Lainson, Warden. Supreme Court of Iowa. Certiorari denied. *Raymond E. Hanke* for petitioner. Reported below: 239 Iowa 1193, 33 N. W. 2d 395.

No. 556. Bethea, Independent Executrix, *v.* Scofield, Collector of Internal Revenue. C. A. 5th Cir. Certiorari denied. *J. B. Lewright* for petitioner. *Solici-*

tor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Lee A. Jackson and *Carlton Fox* for respondent. Reported below: 170 F. 2d 934.

No. 571. KOBER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Mark P. Friedlander* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney* and *Morton Liftin* for the United States. Reported below: 170 F. 2d 590.

No. 572. METROPOLIS THEATRE CO. *v.* BARKHAUSEN ET AL. C. A. 7th Cir. Certiorari denied. *Walter Bachrach, Walter H. Moses, William C. Wines* and *B. B. Fensterstock* for petitioner. *Edward Blackman, Edward R. Johnston, Louis M. Mantynband, George L. Siegel* and *Herbert A. Friedlich* for respondents. Reported below: 170 F. 2d 481.

No. 573. CHESTER & DELAWARE COUNTIES BARTENDERS, HOTEL & RESTAURANT EMPLOYEES UNION, LOCAL No. 677, A. F. L., ET AL. *v.* WILBANK ET UX. Supreme Court of Pennsylvania. Certiorari denied. *Albert Blumberg* for petitioners. *Robert F. Jackson* for respondents. Reported below: 360 Pa. 48, 60 A. 2d 21.

No. 595. ESTATE OF BASSETT *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Prew Savoy* and *Chauncey P. Carter* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, A. F. Prescott* and *Louise Foster* for respondent. Reported below: 170 F. 2d 916.

No. 596. PHILCO CORPORATION *v.* F. & B. MANUFACTURING CO. C. A. 7th Cir. Certiorari denied. *Edward S. Rogers, William T. Woodson* and *Beverly W. Pattishall* for petitioner. *John A. Marzall* and *Lloyd C. Root* for respondent. Reported below: 170 F. 2d 958.

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No. 656. DUNN ET AL. *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Bernard Hershkopf* and *Harry G. Anderson* for petitioners. *Frank S. Hogan* and *Whitman Knapp* for respondent. Reported below: 298 N. Y. 865, 84 N. E. 2d 635.

No. 544. DE MEERLEER *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied. *David W. Louisell* for petitioner. *Stephen J. Roth,* Attorney General of Michigan, *Edmund E. Shepherd,* Solicitor General, and *Daniel J. O'Hara,* Assistant Attorney General, for respondent. Reported below: 323 Mich. 287, 35 N. W. 2d 255.

No. 271, Misc. CIPULLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Richard W. Galiher* for petitioner. *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl* and *Andrew F. Oehmann* for the United States. Reported below: 170 F. 2d 311.

No. 341, Misc. ATKINS *v.* WARDEN OF PRISON SYSTEM OF TEXAS ET AL. Supreme Court of Texas. Certiorari denied.

No. 419, Misc. GRIFFIN *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied. Reported below: See 402 Ill. 247, 83 N. E. 2d 746.

No. 420, Misc. DAVIS *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 426, Misc. WISEMAN *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 428, Misc. MICHAEL *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 429, Misc. STEPHENSON *v.* NEW JERSEY ET AL. Supreme Court of New Jersey. Certiorari denied.

No. 433, Misc. HARRIS *v.* ROBINSON, WARDEN. Circuit Court of Sangamon County, Illinois. Certiorari denied.

No. 435, Misc. CIHA *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 438, Misc. MOORE *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

Rehearing Denied.

No. 458. CARPENTER *v.* ROHM & HAAS CO., INC.; and No. 459. CARPENTER *v.* ERIE RAILROAD CO., 336 U. S. 904. The motions to enlarge the time to file petitions for rehearing are denied.

No. 453. WADE *v.* MICHIGAN, 336 U. S. 924. Rehearing denied.

No. 487. CHANDLER *v.* UNITED STATES, 336 U. S. 918. Rehearing denied.

No. 502. KOEHNE ET AL. *v.* MATTHEWS, U. S. MARSHAL, ET AL., 336 U. S. 924. Rehearing denied.

No. 517. POORE *v.* MISSISSIPPI, 336 U. S. 922. Rehearing denied.

No. 368, Misc. FRANKLIN *v.* HUDSPETH, WARDEN, ET AL., 336 U. S. 927. Rehearing denied.

No. 406, Misc. EAGLE *v.* CHERNEY ET AL., 336 U. S. 928. Rehearing denied.

April 18, 1949.

Per Curiam Decisions.

No. 613. Viator *v.* Stone, Chairman, State Tax Commission of Mississippi, et al. Appeal from the Supreme Court of Mississippi. *Per Curiam:* The appeal is dismissed for the reason that the judgment of the court below is based upon a non-federal ground adequate to support it. *Albert Sidney Johnston, Jr.* and *Weaver E. Gore* for appellant. Reported below: 203 Miss. 109, 37 So. 2d 1.

No. 649. Longyear Holding Co. et al. *v.* Minnesota. Appeal from the Supreme Court of Minnesota. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. 28 U. S. C. § 1257 (2). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by 28 U. S. C. § 2103, certiorari is denied. Mr. Justice Burton took no part in the consideration or decision of this case. *John B. Putnam, Pierce Butler* and *John A. Hadden* for appellants. *J. A. A. Burnquist,* Attorney General of Minnesota, *George B. Sjoselius,* Deputy Attorney General, and *Wm. C. Green* for appellee. Reported below: 227 Minn. 255, 35 N. W. 2d 291.

No. 680. Gulfstream Park Racing Association, Inc. et al. *v.* Hialeah Race Course, Inc. et al. Appeal from the Supreme Court of Florida. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *W. G. Ward* for the Gulfstream Park Racing Assn., Inc.; and *E. Albert Pallot* for the Gables Racing Assn., Inc., appellants. *Lawrence A. Truett* and *William C. Gaither* for appellees. Reported below: 37 So. 2d 692.

No. 593. RYLES *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit. *Per Curiam:* The petition for writ of certiorari is granted. Upon the suggestion of the Solicitor General that the judgments be vacated and the case remanded to the District Court for a new trial, and upon consideration of the record, the judgments of the Court of Appeals and the District Court are vacated and the case is remanded to the United States District Court for the Eastern District of Oklahoma with directions to grant a new trial. *James W. Bounds* for petitioner. *Solicitor General Perlman* and *Assistant Attorney General Campbell* for the United States. Reported below: 172 F. 2d 72.

Miscellaneous Orders.

No. 609. QUICKSALL *v.* MICHIGAN. Certiorari, 336 U. S. 916, to the Supreme Court of Michigan. It is ordered that Isadore Levin, Esquire, of Detroit, Michigan, a member of the Bar of this Court, be appointed to serve as counsel for the petitioner in this case.

No. 42. KLAPPROTT *v.* UNITED STATES, 335 U. S. 601. Motion for clarification of the modified judgment, 336 U. S. 942, denied. MR. JUSTICE BLACK dissents. *P. Bateman Ennis, W. Clifton Stone* and *Morton Singer* for petitioner.

No. 650. PRINTING SPECIALTIES & PAPER CONVERTERS UNION, LOCAL 388, A. F. OF L., ET AL. *v.* LEBARON, REGIONAL DIRECTOR, NATIONAL LABOR RELATIONS BOARD. The petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit is dismissed on motion of counsel for the petitioners. *J. Albert Woll, Herbert S. Thatcher* and *James A. Glenn* for petitioners. Reported below: 171 F. 2d 331.

No. 443, Misc. LUNDY *v.* WARDEN, STATE PRISON OF SOUTHERN MICHIGAN. Supreme Court of Michigan. Certiorari denied. Motion for leave to file petition for writ of habeas corpus also denied.

No. 431, Misc. SHOTKIN *v.* GENERAL ELECTRIC CO. ET AL.; and

No. 447, Misc. LUCAS *v.* TEXAS. Applications denied.

No. 441, Misc. BICKFORD *v.* UNITED STATES; and

No. 559, Misc. BIRD *v.* JOHNSON, SECRETARY OF DEFENSE, ET AL. The motions for leave to file petitions for writs of habeas corpus are denied. *George T. Davis* and *Joseph S. Robinson* for petitioner in No. 559, Misc.

No. 446, Misc. SWEET *v.* HOWARD, WARDEN. Motion for leave to file petition for writ of certiorari denied.

Certiorari Granted. (*See also No. 542, ante, p. 681, and No. 593, supra.*)

No. 574. UNITED STATES *v.* WESTINGHOUSE ELECTRIC & MANUFACTURING CO. C. A. 1st Cir. Certiorari granted. *Solicitor General Perlman* for the United States. *Milton J. Donovan* for respondent. Reported below: 170 F. 2d 752.

No. 633. UNITED STATES *v.* SPELAR, ADMINISTRATRIX. C. A. 2d Cir. Certiorari granted. *Solicitor General Perlman* for the United States. *Gerald F. Finley* and *Arnold B. Elkind* for respondent. Reported below: 171 F. 2d 208.

No. 584. FEDERAL COMMUNICATIONS COMMISSION *v.* BROADCASTING SERVICE ORGANIZATION, INC. United States Court of Appeals for the District of Columbia

Circuit. Certiorari granted. *Solicitor General Perlman* and *Benedict P. Cottone* for petitioner. *Ben S. Fisher, John P. Southmayd* and *Walter M. Bastian* for respondent. Reported below: 84 U. S. App. D. C. —, 171 F. 2d 1007.

Certiorari Denied. (*See also No. 649 and No. 443, Misc., supra.*)

No. 490. EDWARD P. STAHEL & CO., INC. ET AL. *v.* UNITED STATES; and

No. 623. UNITED STATES *v.* EDWARD P. STAHEL & CO., INC. ET AL. Court of Claims. Certiorari denied. *William A. Roberts* and *Irene Kennedy* for petitioners in No. 490 and respondents in No. 623. *Solicitor General Perlman, Assistant Attorney General Morison* and *Paul A. Sweeney* for the United States, respondent in No. 490; and *Solicitor General Perlman* for the United States, petitioner in No. 623. Reported below: 111 Ct. Cl. 682, 78 F. Supp. 800.

No. 576. STINSON CANNING CO. ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Huger Sinkler* for petitioners. *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl* and *Harold D. Cohen* for the United States. Reported below: 170 F. 2d 764.

No. 577. MCEVOY COMPANY *v.* KELLEY ET AL., DOING BUSINESS AS BEN F. KELLEY CO. C. A. 5th Cir. Certiorari denied. *Ben Connally* for petitioner. Reported below: 171 F. 2d 837.

No. 586. MARSHALL *v.* STATE BAR OF CALIFORNIA. Supreme Court of California. Certiorari denied. Petitioner *pro se*. *Edward D. Lyman* for respondent.

No. 587. City of Crystal Lake *v.* National Yeast Corp. C. A. 7th Cir. Certiorari denied. *Homer D. Dines* for petitioner. *Walter J. Cummings, Jr.* for respondent. Reported below: 170 F. 2d 491.

No. 588. Spears *v.* Spears et al. C. A. 6th Cir. Certiorari denied. *I. H. Spears* for petitioner. Reported below: 171 F. 2d 296.

No. 589. Northern Illinois Coal Corp. *v.* Midwest-Radiant Corp. C. A. 7th Cir. Certiorari denied. *David F. Root* and *Leonard Hoffman* for petitioner. *Henry Driemeyer, Frederick E. Merrills* and *Isaac C. Orr* for respondent. Reported below: 171 F. 2d 635.

No. 611. Eagleston *v.* United States. C. A. 9th Cir. Certiorari denied. *George T. Davis, Sol A. Abrams* and *Anthony E. O'Brien* for petitioner. *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl* and *Harold D. Cohen* for the United States. Reported below: 172 F. 2d 194.

No. 612. Leishman *v.* Richards & Conover Co. C. A. 10th Cir. Certiorari denied. *John Flam* for petitioner. *Foorman L. Mueller* for respondent. Reported below: 172 F. 2d 365.

No. 615. Adda *v.* Commissioner of Internal Revenue. C. A. 4th Cir. Certiorari denied. *Hugh Satterlee, Mitchell B. Carroll* and *Rollin Browne* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack, Helen Goodner* and *Irving I. Axelrad* for respondent. Reported below: 171 F. 2d 457.

No. 616. RUTLEDGE ET AL. *v.* UNITED SERVICES LIFE INSURANCE CO. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *P. Bateman Ennis* and *William H. Collins* for petitioners. *Neil Burkinshaw* for respondent. Reported below: 84 U. S. App. D. C. —, 171 F. 2d 27.

No. 632. NEW ORLEANS SHIPWRECKING CORP. *v.* SMITH ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Daniel S. Ring, Robert S. McDaniel* and *Ralph O. Clare* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison* and *Samuel D. Slade* for respondents. Reported below: 84 U. S. App. D. C. —, 172 F. 2d 30.

No. 644. RUAN TRANSPORT CORP. ET AL. *v.* CHICAGO, BURLINGTON & QUINCY RAILROAD CO. C. A. 8th Cir. Certiorari denied. *Rex H. Fowler* for petitioners. *J. C. Pryor* and *Eldon Martin* for respondent. Reported below: 171 F. 2d 781.

No. 562. ALKER ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORP. C. A. 3d Cir. Motion of petitioners to defer consideration denied; certiorari also denied. *Edwin Hall, II,* and *Harry J. Alker, Jr.* for petitioners. *Norris C. Bakke, Allen S. Olmsted, 2d* and *John L. Cecil* for respondent. Reported below: See 169 F. 2d 336.

No. 590. SOUTH CAROLINA PUBLIC SERVICE AUTHORITY *v.* SECURITIES & EXCHANGE COMMISSION ET AL.; and

No. 591. SOUTH CAROLINA PUBLIC SERVICE AUTHORITY *v.* FEDERAL POWER COMMISSION ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion certiorari should be granted. MR. JUSTICE DOUG-

LAS took no part in the consideration or decision of this application. *R. M. Jefferies, Wm. S. Youngman, Jr.* and *Duncan C. Lee* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Stanley M. Silverberg, Paul A. Sweeney, Melvin Richter, Bradford Ross, Howard E. Wahrenbrock, Francis R. Bell, Roger S. Foster* and *Harry G. Slater* for the Securities & Exchange Commission and Federal Power Commission; *George Roberts* for the Commonwealth & Southern Corporation; and *W. C. McLain* and *J. B. S. Lyles* for the South Carolina Electric & Gas Co., respondents. Reported below: 170 F. 2d 948.

No. 627. TILLMAN *v.* TILLMAN. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Emory B. Smith* for petitioner. *Naomi Wheeler* for respondent. Reported below: 84 U. S. App. D. C. —, 172 F. 2d 270.

No. 350, Misc. BLAIR *v.* COEN. C. A. 7th Cir. Certiorari denied. *Elmer McClain* and *William Lemke* for petitioner. *McCawley Baird* for respondent. Reported below: 170 F. 2d 830.

No. 391, Misc. COKER *v.* ILLINOIS CENTRAL RAILROAD CO. ET AL. Supreme Court of Tennessee. Certiorari denied. *Harold R. Ratcliff* for petitioner. *Marion G. Evans* and *Lovick P. Miles* for respondents.

No. 403, Misc. FRIES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Robert P. Hobson* for petitioner. *Solicitor General Perlman, Assistant Attorney General Morison, Paul A. Sweeney* and *Morton Hollander* for the United States. Reported below: 170 F. 2d 726.

No. 413, Misc. BIRD *v.* STATE OF WASHINGTON. Supreme Court of Washington. Certiorari denied. Peti-

tioner *pro se*. *E. N. Eisenhower* for respondent. Reported below: 31 Wash. 2d 777, 198 P. 2d 978.

No. 442, Misc. BONINO *v.* NEW YORK. Appellate Division of the Supreme Court of New York. Certiorari denied.

Rehearing Denied.

No. 513. BURNHAM CHEMICAL CO. *v.* BORAX CONSOLIDATED, LTD. ET AL., 336 U. S. 924. Rehearing denied.

No. 529, 530 and 531. STANDARD OIL CO. *v.* SUPERIOR COURT OF DELAWARE IN AND FOR NEW CASTLE COUNTY ET AL., 336 U. S. 930. Rehearing denied.

No. 554. CRIPPEN, TRUSTEE IN BANKRUPTCY, *v.* CITY OF DALLAS, 336 U. S. 937. Rehearing denied.

No. 306, Misc., October Term, 1947. MCGOUGH *v.* UNITED STATES, 334 U. S. 829. Rehearing denied.

No. 294, Misc. MCINTOSH *v.* UNITED STATES, 336 U. S. 926. Rehearing denied.

No. 303, Misc. DUNKLE *v.* ILLINOIS, 336 U. S. 906. Rehearing denied.

No. 315, Misc. MCINTOSH *v.* PESCOR, WARDEN, 336 U. S. 926. Rehearing denied.

No. 410, Misc. BERTRAND *v.* RAGEN, WARDEN, 336 U. S. 923. Rehearing denied.

No. 301, Misc. SHOTKIN *v.* WESTINGHOUSE ELECTRIC & MANUFACTURING CO. ET AL., 336 U. S. 902. Motion for leave to file petition for rehearing denied.

April 20, 1949.

Miscellaneous Order.

No. 506. United States ex rel. Johnson *v.* Watkins, District Director of Immigration and Naturalization. Certiorari, 336 U. S. 924, to the United States Court of Appeals for the Second Circuit. Shaughnessy, Acting District Director of Immigration and Naturalization, substituted as party respondent, per stipulation of counsel, on motion of *Gunther Jacobson* for the petitioner.

April 25, 1949.

Per Curiam Decisions.

No. 464. Clayton Mark & Co. et al. *v.* Federal Trade Commission. Certiorari, 336 U. S. 902, to the United States Court of Appeals for the Seventh Circuit. Argued March 31, 1949. Decided April 25, 1949. *Per Curiam:* The judgment is affirmed by an equally divided Court. Mr. Justice Jackson took no part in the consideration or decision of this case. *Albert R. Connelly* argued the cause for petitioners. With him on the brief were *Thurlow M. Gordon, Edward H. Green, Earl F. Reed, W. Denning Stewart* and *Milton H. Tucker. Charles H. Weston* argued the cause for respondent. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Bergson, W. T. Kelley, Robert B. Dawkins* and *Walter B. Wooden. Julius Henry Cohen, Burton A. Zorn* and *Edwin P. Kaufman* filed a brief for the Chamber of Commerce of the State of New York, as *amicus curiae,* urging reversal. Reported below: 168 F. 2d 175.

No. 631. Allen *v.* Allen. Appeal from and on petition for writ of certiorari to the Supreme Court of Oklahoma. *Per Curiam:* The motion for leave to file state-

ment as to jurisdiction is granted. The appeal is dismissed for want of jurisdiction. 28 U. S. C. § 1257 (2). The petition for writ of certiorari is denied. *Lynn Adams* and *Robert E. Shelton* for appellant-petitioner. *Tom W. Garrett* for appellee-respondent. Reported below: 201 Okla. —, 201 P. 2d 786.

No. 664. VERDIER *v.* SUPERIOR COURT OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO ET AL. Appeal from the District Court of Appeal, 1st Appellate District, of California. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. MR. JUSTICE MURPHY took no part in the consideration or decision of this case. *Morgan J. Doyle* and *J. Joseph Sullivan* for appellant. Reported below: 88 Cal. App. 2d 527, 199 P. 2d 325.

No. 669. BIG SLOUGH DRAINAGE DISTRICT OF SEDGWICK COUNTY ET AL. *v.* BOARD OF COUNTY COMMISSIONERS OF SEDGWICK COUNTY ET AL. Appeal from the Supreme Court of Kansas. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *J. Wirth Sargent* for appellants. *Charles S. Rhyne* for appellees. Reported below: 166 Kan. 122, 199 P. 2d 530.

No. 690. SMITH *v.* CALIFORNIA. Appeal from the Superior Court in and for the County of Alameda, California. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *George Olshausen* for appellant.

No. 698. ANDERSON *v.* MICHIGAN. Appeal from the Circuit Court of Berrien County, Michigan. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Allan R. Rosenberg* for appellant. *Stephen J. Roth,* Attorney

General of Michigan, *Edmund E. Shepherd,* Solicitor General, and *Daniel J. O'Hara,* Assistant Attorney General, for appellee.

No. 599. MITCHELL ET AL. *v.* WHITE CONSOLIDATED, INC. On petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit. *Per Curiam:* The petition for writ of certiorari is granted. The judgment of the Court of Appeals dismissing the appeal is vacated and the cause remanded to it to determine, pursuant to Rule 86 (b) of the Rules of Civil Procedure, whether the application of amended Rule 73 (a) to this particular action would work injustice. *Jay E. Darlington* for petitioners.

Miscellaneous Orders.

No. 40. OKLAHOMA TAX COMMISSION *v.* TEXAS COMPANY; and

No. 41. OKLAHOMA TAX COMMISSION *v.* MAGNOLIA PETROLEUM CO. The request of counsel for the respondent in No. 41 to adopt the petition for rehearing in No. 40 is granted. The petition for rehearing is denied. In view of its contents, however, it may be added to what was said in the Court's opinion, 336 U. S. 342, that, as with all other questions of state law involved in the case, see *id.* at n. 44, insofar as the law of Oklahoma may permit the application of its taxing statutes only prospectively, nothing in this Court's opinion or decision forbids the Supreme Court of Oklahoma to apply that law to the taxes involved in this case. Cf. *Great Northern R. Co.* v. *Sunburst Co.,* 287 U. S. 358, 364.

No. —, Original. UNITED STATES *v.* LOUISIANA; and

No. —, Original. UNITED STATES *v.* TEXAS. Motion of Annie C. and Agnes E. Lewis for leave to intervene denied.

No. 4, Misc. LANG *v.* WALSH, SHERIFF. The petition for writ of certiorari to the Supreme Court of Illinois is dismissed on motion of counsel for the petitioner. *Wm. Scott Stewart* for petitioner.

No. 448, Misc. RASH *v.* HOWARD, WARDEN; and
No. 474, Misc. TOUCHE *v.* LAINSON, WARDEN. The motions for leave to file petitions for writs of habeas corpus are denied.

Certiorari Granted. (*See also No. 599, supra.*)

No. 575. SECRETARY OF AGRICULTURE *v.* CENTRAL ROIG REFINING CO. ET AL.; and
No. 580. PORTO RICAN AMERICAN SUGAR REFINERY, INC. *v.* CENTRAL ROIG REFINING CO. ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Solicitor General Perlman* for petitioner in No. 575. *Orlando J. Antonsanti, Arthur L. Quinn* and *Gordon P. Peyton* for petitioner in No. 580. *Frederic P. Lee* and *Noel T. Dowling* for the Central Roig Refining Co. et al.; *Howard C. Westwood* and *Donald Hiss* for the American Sugar Refining Co. et al.; and *Thurman Arnold* and *Walton Hamilton* for the Government of Puerto Rico, respondents. Reported below: 84 U. S. App. D. C. —, 171 F. 2d 1016.

No. 585. GOVERNMENT OF PUERTO RICO *v.* SECRETARY OF AGRICULTURE ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Thurman Arnold* and *Walton Hamilton* for petitioner. *Frederic P. Lee* and *Noel T. Dowling* for the Central Roig Refining Co. et al.; and *Howard C. Westwood* and *Donald Hiss* for the American Sugar Refining Co. et al., respondents. Reported below: 84 U. S. App. D. C. —, 171 F. 2d 1016.

No. 617. UNITED STATES *v.* AETNA CASUALTY & SURETY Co. C. A. 2d Cir. Certiorari granted. *Solicitor General Perlman* for the United States. *William A. Hyman* for respondent. Reported below: 170 F. 2d 469.

No. 618. UNITED STATES *v.* WORLD FIRE & MARINE INSURANCE Co. C. A. 10th Cir. Certiorari granted. *Solicitor General Perlman* for the United States. *Pearce C. Rodey* for respondent.

No. 619. UNITED STATES *v.* YORKSHIRE INSURANCE Co.; and

No. 620. UNITED STATES *v.* HOME INSURANCE Co. C. A. 3d Cir. Certiorari granted. *Solicitor General Perlman* for the United States. Reported below: 171 F. 2d 374.

Certiorari Denied. (*See also No. 631, supra.*)

No. 435. INLAND STEEL Co. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 7th Cir. Certiorari denied. *Ernest S. Ballard* for petitioner. *Solicitor General Perlman, David P. Findling, Ruth Weyand* and *Marcel Mallet-Prevost* for the National Labor Relations Board, respondent. Reported below: 170 F. 2d 247.

No. 594. ROETT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Frederic M. P. Pearse* for petitioner. *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl* and *Harold D. Cohen* for the United States. Reported below: 172 F. 2d 379.

No. 597. SHEPARD NILES CRANE & HOIST CORP. *v.* MCCOMB, WAGE & HOUR ADMINISTRATOR. C. A. 2d Cir. Certiorari denied. *James L. Burke* for petitioner. *Solicitor General Perlman, William S. Tyson* and *Bessie Margolin* for respondent. Reported below: 171 F. 2d 69.

No. 602. UNITED STATES *v.* DADDONA. C. A. 2d Cir. Certiorari denied. *Solicitor General Perlman* for the United States. *Francis B. Feeley* and *Stephen K. Elliott* for respondent. Reported below: 170 F. 2d 964.

No. 608. CAPITAL AIRLINES, INC. *v.* CIVIL AERONAUTICS BOARD. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Charles H. Murchison* for petitioner. *Solicitor General Perlman, Assistant Attorney General Bergson, Charles H. Weston, Emory T. Nunneley, Jr.* and *Warren L. Sharfman* for respondent. Reported below: 84 U. S. App. D. C. —, 171 F. 2d 339.

No. 635. WEST VIRGINIA NORTHERN RAILROAD CO. *v.* RILEY, ADMINISTRATRIX. Supreme Court of Appeals of West Virginia. Certiorari denied. *Harry H. Byrer* and *F. E. Parrack* for petitioner. Reported below: — W. Va. —, 51 S. E. 2d 119.

No. 636. WEST VIRGINIA NORTHERN RAILROAD CO. *v.* PRITT. Supreme Court of Appeals of West Virginia. Certiorari denied. *Harry H. Byrer* and *F. E. Parrack* for petitioner. Reported below: — W. Va. —, 51 S. E. 2d 105.

No. 637. STUEBER ET AL. *v.* ADMIRAL CORPORATION. C. A. 7th Cir. Certiorari denied. *Julius L. Sherwin* and *Theodore R. Sherwin* for petitioners. *Francis H. Uriell* for respondent. Reported below: 171 F. 2d 777.

No. 639. ESTATE OF FULLER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *Warren W. Grimes* and *Earl Whittier Shinn* for petitioners. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *S. Walter Shine* for respondent. Reported below: 171 F. 2d 704.

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No. 645. UNIVERSAL ATLAS CEMENT CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *A. Chauncey Newlin* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Morton K. Rothschild* for respondent. Reported below: 171 F. 2d 294.

No. 658. COHN *v.* COHN ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Warren E. Miller* and *David S. Allshouse* for petitioner. *John J. Courtney* for respondents. *Solicitor General Perlman* filed a memorandum for the United States, respondent, asserting that the Government takes no position as to whether the writ of certiorari should issue. Reported below: 84 U. S. App. D. C. —, 171 F. 2d 828.

No. 661. ATWELL BUILDING CORP. *v.* SOUND, INC. ET AL. C. A. 7th Cir. Certiorari denied. *Vincent O'Brien* for petitioner. *John A. Bussian* for respondents. Reported below: 171 F. 2d 253.

No. 665. HILL *v.* TERMINAL RAILROAD ASSOCIATION. Supreme Court of Missouri. Certiorari denied. *Edward F. Prichard, Jr.* and *Roberts P. Elam* for petitioner. *Warner Fuller* and *Arnot L. Sheppard* for respondent. Reported below: 358 Mo. 597, 216 S. W. 2d 487.

No. 473, Misc. SMITH *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 475, Misc. SMITH *v.* HUDSPETH, WARDEN. Supreme Court of Kansas. Certiorari denied.

No. 481, Misc. ROSS *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

Rehearing Denied. (*See also Nos. 40 and 41, supra.*)

No. 262, Misc. McGregor *v.* Ragen, Warden, 336 U. S. 939. Rehearing denied.

No. 306, Misc. Binkley *v.* Hunter, Warden, 336 U. S. 926. Motion for leave to file petition for rehearing denied.

May 2, 1949.

Per Curiam Decisions.

No. 567. Stemmer *v.* New York; and

No. 568. Krakower *v.* New York. Certiorari, 336 U. S. 943, to the Court of Appeals of New York. Argued April 22, 25, 1949. Decided May 2, 1949. *Per Curiam:* The judgment is affirmed by an equally divided Court. Mr. Justice Jackson took no part in the consideration or decision of these cases. *Osmond K. Fraenkel* argued the cause for petitioner in No. 567. With him on the brief were *Arthur Garfield Hays* and *Sidney Struble*. *Harry G. Anderson* argued the cause for petitioner in No. 568. With him on the brief was *Harris B. Steinberg*. *Whitman Knapp* argued the cause for respondent. With him on the brief were *Frank S. Hogan* and *Charles W. Manning*. Reported below: 298 N. Y. 728, 83 N. E. 2d 141.

No. 728. Midwest Haulers, Inc. et al. *v.* Glander, Tax Commissioner. Appeal from the Supreme Court of Ohio. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. 28 U. S. C. § 1257 (2). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by 28 U. S. C. § 2103, certiorari is denied. *Arthur M. Sebastian* for appellants. *Herbert S. Duffy*, Attorney General of Ohio, and *W. H. Annat*, Assistant Attorney General, for appellee. Reported below: 150 Ohio St. 402, 83 N. E. 2d 53.

Miscellaneous Orders.

No. 579. HAYNES *v.* SOUTHERN RAILWAY SYSTEM ET AL. The motion to correct the record by changing the name of respondent, now set forth as Southern Railway System, to read Cincinnati, New Orleans & Texas Pacific Railway Company, is granted.

No. 452, Misc. IN RE MUHLBAUER.* Treating the application in each of these cases as a motion for leave to file a petition for an original writ of habeas corpus, leave to file is denied. THE CHIEF JUSTICE, MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, and MR. JUSTICE BURTON are of

*Together with No. 455, Misc., *In re List;* No. 456, Misc., *In re Rendulic;* No. 457, Misc., *In re Kuntze;* No. 458, Misc., *In re Felmy;* No. 459, Misc., *In re Lanz;* No. 460, Misc., *In re Dehner;* No. 461, Misc., *In re Leyser;* No. 462, Misc., *In re Speidel;* No. 463, Misc., *In re Von Ammon;* No. 464, Misc., *In re Joel;* No. 465, Misc., *In re Klemm;* No. 466, Misc., *In re Lautz;* No. 467, Misc., *In re Mettgenberg;* No. 468, Misc., *In re Oeschey;* No. 469, Misc., *In re Rothaug;* No. 470, Misc., *In re Rothenberger;* No. 471, Misc., *In re Schlegelberger;* No. 493, Misc., *In re Bobermin;* No. 494, Misc., *In re Eirenschmalz;* No. 495, Misc., *In re Frank;* No. 496, Misc., *In re Fanslau;* No. 497, Misc., *In re Hohberg;* No. 498, Misc., *In re Loerner;* No. 499, Misc., *In re Loerner;* No. 500, Misc., *In re Mummenthey;* No. 501, Misc., *In re Pohl;* No. 502, Misc., *In re Sommer;* No. 503, Misc., *In re Volk;* No. 504, Misc., *In re Hohberg;* No. 505, Misc., *In re Pook;* No. 506, Misc., *In re Sommer;* No. 507, Misc., *In re Pohl et al.;* No. 508, Misc., *In re Brueckner;* No. 509, Misc., *In re Creutz;* No. 510, Misc., *In re Hofmann;* No. 511, Misc., *In re Huebner;* No. 512, Misc., *In re Lorenz;* No. 513, Misc., *In re Schwalm;* No. 514, Misc., *In re Biberstein;* No. 515, Misc., *In re Blobel;* No. 516, Misc., *In re Blume;* No. 517, Misc., *In re Braune;* No. 518, Misc., *In re Haensch;* No. 519, Misc., *In re Jost;* No. 520, Misc., *In re Klingelhoefer;* No. 521, Misc., *In re Naumann;* No. 522, Misc., *In re Seibert;* No. 523, Misc., *In re Schubert;* No. 524, Misc., *In re Steimle;* No. 525, Misc., *In re Strauch;* No. 526, Misc., *In re Von Radetzky;* No. 527, Misc., *In re Six;* No. 528, Misc., *In re Ott;* No. 529, Misc., *In re Ohlendorf;* No. 530, Misc., *In re Sandberger;* No. 531, Misc., *In re Von Radetzky;* and No. 532, Misc., *In re Hoth.*

the opinion that there is want of jurisdiction. U. S. Constitution, Article III, § 2, Clause 2; see *Ex parte Betz* and companion cases, all 329 U. S. 672 (1946); *Milch* v. *United States,* 332 U. S. 789 (1947); *Brandt* v. *United States,* 333 U. S. 836 (1948); *In re Eichel,* 333 U. S. 865 (1948); *Everett* v. *Truman,* 334 U. S. 824 (1948). MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, and MR. JUSTICE RUTLEDGE are of the opinion that argument should be heard on the motions for leave to file the petitions in order to settle what remedy, if any, the petitioners have. MR. JUSTICE JACKSON took no part in the consideration or decision of these applications.

No. 534, Misc. WILSON *v.* OKLAHOMA; and

No. 541, Misc. FRITZ *v.* BURKE, WARDEN. The motions for leave to file petitions for writs of habeas corpus are denied.

No. 483, Misc. PHILLIPS *v.* RAGEN, WARDEN. The motion for leave to file petition for writ of certiorari is denied.

Certiorari Granted. (*See also No. 640, ante, p. 804.*)

No. 624. UNITED STATES *v.* TORONTO, HAMILTON & BUFFALO NAVIGATION CO. Court of Claims. Certiorari granted. *Solicitor General Perlman* for the United States. *C. Austin White* and *Frederick L. Wheeler* for respondent. Reported below: 112 Ct. Cl. 240, 81 F. Supp. 237.

No. 652. BROWN *v.* WESTERN RAILWAY OF ALABAMA. Court of Appeals of Georgia. Certiorari granted. *Thomas J. Lewis* for petitioner. *Arthur Heyman* and *Hugh Howell, Sr.* for respondent. Reported below: See 77 Ga. App. 780, 49 S. E. 2d 833.

No. 668. UNITED STATES *v.* BENEDICT ET AL., TRUSTEES, ET AL. Court of Claims. Certiorari granted. *Solicitor General Perlman* for the United States. Reported below: 112 Ct. Cl. 550, 81 F. Supp. 717.

No. 733. UNITED STATES EX REL. KNAUFF *v.* WATKINS, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION. C. A. 2d Cir. Certiorari granted. *Gunther Jacobson* for petitioner. Reported below: 173 F. 2d 599.

No. 265, Misc. SMITH *v.* RAGEN, WARDEN. Circuit Court of Will County, Illinois. Certiorari granted. Petitioner *pro se. Ivan A. Elliott,* Attorney General of Illinois, *William C. Wines, James C. Murray* and *Raymond S. Sarnow,* Assistant Attorneys General, for respondent.

No. 408, Misc. HUGHES ET AL. *v.* SUPERIOR COURT OF CALIFORNIA IN AND FOR THE COUNTY OF CONTRA COSTA. Supreme Court of California. Certiorari granted. *Bertram Edises* for petitioners. *W. H. Orrick* for respondent. *Arthur J. Goldberg* and *Thomas E. Harris* filed a brief for the Congress of Industrial Organizations, as *amicus curiae,* urging reversal. Reported below: 32 Cal. 2d 850, 198 P. 2d 885.

Certiorari Denied.

No. 600. ARONSTAM *v.* NEW YORK CENTRAL RAILROAD CO. ET AL.; and

No. 601. EPPLER & CO. *v.* NEW YORK CENTRAL RAILROAD CO. ET AL. United States District Court for the Southern District of New York. Certiorari denied. *Charles S. Aronstam, Arthur A. Ballantine* and *John M. Harlan* for petitioner in No. 600. *George W. Jaques* for petitioner in No. 601. *Gerald E. Dwyer* and *Samuel H. Hellenbrand* for the New York Central Railroad Co. et

al.; and *Peter Keber* for the Peoria & Eastern Railway Co., respondents.

No. 605. ANDEREGG *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Robert Lewis Young* for petitioner. *Solicitor General Perlman, Assistant Attorney General Vanech, Roger P. Marquis* and *John C. Harrington* for the United States. Reported below: 171 F. 2d 127.

No. 634. DOLL *v.* MEYER. Supreme Court of Louisiana. Certiorari denied. *Delvaille H. Theard* for petitioner. Reported below: 214 La. 444, 38 So. 2d 69.

No. 638. CHESAPEAKE & OHIO RAILWAY CO. *v.* MORRIS. C. A. 7th Cir. Certiorari denied. *Albert H. Cole* for petitioner. *H. K. Cuthbertson* for respondent. Reported below: 171 F. 2d 579.

No. 642. PHILLIPS ET AL. *v.* SAUNDERS ET AL. Court of Appeals of Maryland. Certiorari denied. *Wilson K. Barnes* for petitioners. *Charles H. Houston* for respondents. Reported below: —— Md. ——, 62 A. 2d 602.

No. 647. MOMAND *v.* UNIVERSAL FILM EXCHANGES, INC. ET AL. C. A. 1st Cir. Certiorari denied. *George S. Ryan* for petitioner. *Jacob J. Kaplan* for respondents. Reported below: 172 F. 2d 37.

No. 651. MARYLAND CASUALTY CO. *v.* TOUPS ET AL. C. A. 5th Cir. Certiorari denied. *Roszel C. Thomsen* for petitioner. *Quentin Keith* for respondents. Reported below: 172 F. 2d 542.

No. 657. NEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *E. Chas. Eichenbaum* for petitioner. *Solicitor General Perlman, Assistant Attorney General*

Caudle, Ellis N. Slack and *S. Walter Shine* for the United States. Reported below: 171 F. 2d 449.

No. 660. SPANEL *v.* BERKMAN ET AL. C. A. 7th Cir. Certiorari denied. *Max Swiren* for petitioner. *Francis L. Daily* for respondents. Reported below: 171 F. 2d 513.

No. 666. BROOKLYN & RICHMOND FERRY CO., INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *A. Chauncey Newlin* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Irving I. Axelrad* for respondent. Reported below: 171 F. 2d 616.

No. 684. WOLFE ET AL. *v.* PHILLIPS ET AL. C. A. 10th Cir. Certiorari denied. *James W. Bounds* for petitioners. *Jack T. Conn* for respondents. Reported below: 172 F. 2d 481.

No. 598. HENRY *v.* HODGES, COMMANDING GENERAL. C. A. 2d Cir. Smith substituted for Hodges as the party respondent herein. Certiorari denied. *Robert N. Gorman* for petitioner. *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl* and *Philip R. Monahan.* Reported below: 171 F. 2d 401.

No. 607. BECKER *v.* WEBSTER, COMMANDING OFFICER. C. A. 2d Cir. Certiorari denied. *Edward A. Lipton* for petitioner. *Solicitor General Perlman, Assistant Attorney General Campbell, Robert S. Erdahl* and *Philip R. Monahan* for respondent. Reported below: 171 F. 2d 762.

No. 646. CRAWFORD *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied. Reported below: 401 Ill. 419, 82 N. E. 2d 457.

No. 653. BROWN *v.* HUNTER, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. *Howard F. McCue* for petitioner. Reported below: 172 F. 2d 487.

No. 707. CORRELL *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied. *Raymond Kyle Hayes* for petitioner. *Harry McMullan,* Attorney General of North Carolina, and *T. W. Bruton,* Assistant Attorney General, for respondent. Reported below: 229 N. C. 640, 50 S. E. 2d 717.

No. 30, Misc. ILLINOIS EX REL. MARINO *v.* RAGEN, WARDEN. Circuit Court of Winnebago County, Illinois. Certiorari denied. MR. JUSTICE DOUGLAS, MR. JUSTICE MURPHY, and MR. JUSTICE RUTLEDGE are of the opinion certiorari should be granted. *Wm. Scott Stewart* for petitioner.

No. 276, Misc. MCLAREN *v.* NIERSTHEIMER, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied. Petitioner *pro se.* *Ivan A. Elliott,* Attorney General of Illinois, *William C. Wines, James C. Murray* and *Raymond S. Sarnow,* Assistant Attorneys General, for respondent.

No. 304, Misc. MCLAREN *v.* NIERSTHEIMER, WARDEN. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 439, Misc. WEBER *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 401 Ill. 584, 83 N. E. 2d 297.

No. 472, Misc. MACKENNA *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner

pro se. *Frank S. Hogan* and *Whitman Knapp* for respondent. Reported below: 298 N. Y. 494, 84 N. E. 2d 795.

No. 488, Misc. TABET ET AL. *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 402 Ill. 93, 83 N. E. 2d 329.

No. 539, Misc. WILSON *v.* HINMAN ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 172 F. 2d 914.

No. 543, Misc. BARDELL *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 402 Ill. 93, 83 N. E. 2d 329.

No. 544, Misc. WRONA *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 548, Misc. FOREMAN *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 549, Misc. BONGIORNO *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 588, Misc. BECKMAN *v.* BARRETT, SUPERINTENDENT OF POLICE. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *James J. Laughlin* for petitioner. Reported below: 84 U. S. App. D. C. —, 174 F. 2d 158.

Rehearing Denied.

Nos. 14 and 15. INTERNATIONAL UNION, U. A. W. A., A. F. OF L., LOCAL 232, ET AL. *v.* WISCONSIN EMPLOYMENT RELATIONS BOARD ET AL., 336 U. S. 245. Rehearing denied.

No. 557. LAGEMANN *v.* LAGEMANN, 336 U. S. 932. Rehearing denied.

No. 510. INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION (CIO) ET AL. *v.* WIRTZ, CIRCUIT COURT JUDGE, ET AL., 336 U. S. 919. Rehearing denied.

No. 643. BUNN *v.* NORTH CAROLINA, 336 U. S. 942. Rehearing denied.

No. 360, Misc. STEELE *v.* JACKSON, WARDEN, 336 U. S. 939. Rehearing denied.

No. 218, Misc. CURTIS *v.* HUMPHREY, WARDEN, 336 U. S. 941. Second petition for rehearing denied.

MAY 9, 1949.

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No. 733. UNITED STATES EX REL. KNAUFF *v.* WATKINS, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION. Shaughnessy, Acting District Director, substituted as the party respondent.

No. 597, Misc. IN RE FEDERAL SECURITY ADMINISTRATOR AND THE ATTORNEY GENERAL OF THE UNITED STATES. The motion for leave to file petition for writs of prohibition and/or mandamus is granted. A rule is ordered to issue, returnable on Monday, May 16th, requiring the respondents to show cause why the petition for writs of prohibition and/or mandamus should not be granted and the cause is assigned for argument on that day. The motion of Mytinger & Casselberry, Inc. for leave to intervene is granted. *Solicitor General Perlman* for petitioners. *Charles S. Rhyne* for intervenor.

No. 379, Misc. IN RE BUSH. Motion for leave to file petition for writ of habeas corpus denied without prejudice to the right to apply to any appropriate court that may have jurisdiction. *Curtis Bush* and *A. G. Bush* for petitioner.

Certiorari Denied.

No. 628. COMMERCE COMPANY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Ben Connally* for petitioner. *Solicitor General Perlman, Assistant Attorney General Caudle, Ellis N. Slack* and *Lee A. Jackson* for the United States. *William A. Sutherland* filed a brief, as *amicus curiae,* supporting the petition. Reported below: 171 F. 2d 189.

No. 676. BAILEY ET AL. *v.* PROCTOR ET AL., RECEIVERS. C. A. 1st Cir. Certiorari denied. *Jesse Climenko* and *George Trosk* for petitioners. *Edward O. Proctor* for Proctor et al.; and *William B. Sleigh, Jr.* for Putnam, Bell, Dutch & Santry, respondents. Reported below: 171 F. 2d 980.

No. 677. WEISSMAN, DOING BUSINESS AS FRED P. WEISSMAN CO., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. *Richard C. Stoll* for petitioners. *Solicitor General Perlman, Robert N. Denham, David P. Findling, Ruth Weyand* and *William W. Kapell* for respondent. Reported below: 170 F. 2d 952.

No. 678. FRED P. WEISSMAN CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. *Richard C. Stoll* for petitioner. *Solicitor General Perlman, Robert N. Denham, David P. Findling, Ruth Weyand* and *William W. Kapell* for respondent. Reported below: 170 F. 2d 952.

No. 739. DOAK ET AL. *v.* FEDERAL LAND BANK OF BALTIMORE. C. A. 4th Cir. Certiorari denied.

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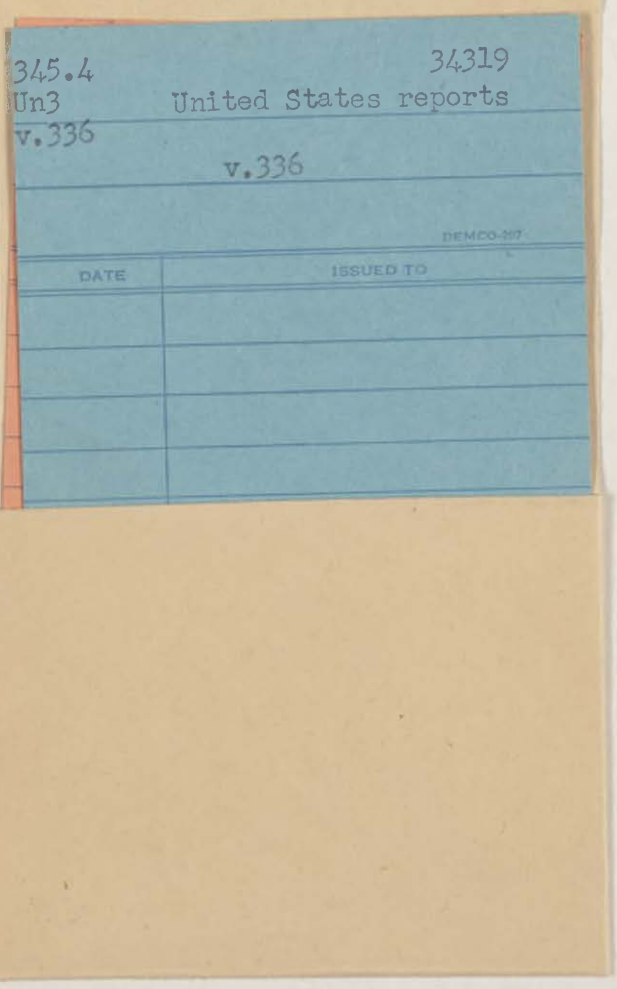
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