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UNITED STATES REPORTS

VOLUME 301

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1936

FROM APRIL 12 TO AND INCLUDING JUNE 1, 1937

(END OF THE TERM)

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Erratum.—P. 176, line 5, "3 Wall. 44" should read 3 Wall. 424.

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS [1]

CHARLES EVANS HUGHES, Chief Justice.
WILLIS VAN DEVANTER, Associate Justice.[2]
JAMES CLARK McREYNOLDS, Associate Justice.
LOUIS D. BRANDEIS, Associate Justice.
GEORGE SUTHERLAND, Associate Justice.
PIERCE BUTLER, Associate Justice.
HARLAN FISKE STONE, Associate Justice.
OWEN J. ROBERTS, Associate Justice.
BENJAMIN N. CARDOZO, Associate Justice.

HOMER S. CUMMINGS, Attorney General.
STANLEY REED, Solicitor General.
CHARLES ELMORE CROPLEY, Clerk.
FRANK KEY GREEN, Marshal.

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[1] For allotment of the Chief Justice and Associate Justices among the several circuits, see next page.

[2] Mr. Justice Van Devanter retired June 2, 1937.

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, Louis Dembitz Brandeis, Associate Justice.

For the Second Circuit, Harlan Fiske Stone, Associate Justice.

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

For the Fourth Circuit, Charles Evans Hughes, Chief Justice.

For the Fifth Circuit, Benjamin N. Cardozo, Associate Justice.

For the Sixth Circuit, James C. McReynolds, Associate Justice.

For the Seventh Circuit, Willis Van Devanter, Associate Justice.

For the Eighth Circuit, Pierce Butler, Associate Justice.

For the Ninth Circuit, George Sutherland, Associate Justice.

For the Tenth Circuit, Willis Van Devanter, Associate Justice.

March 28, 1932.

RETIREMENT OF MR. JUSTICE VAN DEVANTER.

By order of the CHIEF JUSTICE the following correspondence between the Court and MR. JUSTICE VAN DEVANTER was appended to the minutes of June 1, 1937.

SUPREME COURT OF THE UNITED STATES

Washington, D. C.

June 2, 1937.

DEAR JUSTICE VAN DEVANTER:

Your decision to avail yourself of the rights and privileges specified in the recent retirement act gives us a poignant sense of regret at the loss of the close association it has been our privilege to enjoy for so many years. Your temperament and industry, your exact knowledge of precedents and practice, and your precision of statement, have enabled you to render an invaluable service in our conferences, and your labors have entered into the very warp and woof of the jurisprudence of the Court. You will carry into your retirement the assurance of our high esteem and warm affection and we trust that you will have many years of continued vigor. We shall greatly miss your wise counsel and delightful companionship.

Faithfully yours,

CHARLES E. HUGHES,
J. C. MCREYNOLDS,
LOUIS D. BRANDEIS,
GEO. SUTHERLAND,
PIERCE BUTLER,
HARLAN F. STONE,
OWEN J. ROBERTS,
BENJAMIN N. CARDOZO.

MR. JUSTICE VAN DEVANTER.

RETIREMENT OF MR. JUSTICE VAN DEVANTER.

WILLIS VAN DEVANTER
2101 Connecticut Avenue
Washington, D. C.

June 2, 1937.

MY DEAR BRETHREN:

I am grateful for your generous words of esteem and affection. Intimate association with you in the work of the Court has been to me both enjoyable and inspiring; and I shall carry into my retirement happy memories of that association, together with profound respect and true affection for each and all of you.

Cordially and sincerely yours,

WILLIS VAN DEVANTER.

The CHIEF JUSTICE and
ASSOCIATE JUSTICES OF THE SUPREME COURT.

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1812, Acts of Parliament, 52 George III, c. 93..... 580
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6 & 7 Wm. III, c. 6..... 579
17 George III, c. 39, Revenue Act of 1777..... 580
24 Halsbury's Laws of England, 1st ed. pp 692 *et seq.* 580

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1936.

NATIONAL LABOR RELATIONS BOARD *v.* JONES & LAUGHLIN STEEL CORP.*

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

No. 419. Argued February 10, 11, 1937.—Decided April 12, 1937.

1. The distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal form of government. P. 29.
2. The validity of provisions which, considered by themselves, are constitutional, *held* not affected by general and ambiguous declarations in the same statute. P. 30.
3. An interpretation which conforms a statute to the Constitution must be preferred to another which would render it unconstitutional or of doubtful validity. P. 30.
4. Acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional

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* No. 419, *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*; Nos. 420 and 421, *National Labor Relations Board* v. *Fruehauf Trailer Co., post,* p. 49; Nos. 422 and 423, *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co., post,* p. 58; No. 365, *Associated Press* v. *National Labor Relations Board, post,* p. 103; and No. 469, *Washington, Virginia & Maryland Coach Co.* v. *National Labor Relations Board, post,* p. 142, which are known as the "Labor Board Cases," were disposed of in five separate opinions. The dissenting opinion, *post,* p. 76, applies to Nos. 419, 420 and 421, and 422 and 423. The dissenting opinion, *post,* p. 133, applies to No. 365. The opinion in No. 469 was unanimous.

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power; and this includes acts, having that effect, which grow out of labor disputes. P. 31.

5. Employees in industry have a fundamental right to organize and select representatives of their own choosing for collective bargaining; and discrimination or coercion upon the part of their employer to prevent the free exercise of this right is a proper subject for condemnation by competent legislative authority. P. 33.
6. The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a "flow" of such commerce. Pp. 34–36.
7. Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential, or appropriate, to protect that commerce from burdens and obstructions, Congress has the power to exercise that control. P. 37.
8. This power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them would, in view of our complex society, effectually obliterate the distinction between what is national and what is local and create a completely centralized government. The question is necessarily one of degree. P. 37.
9. Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce, is within the regulatory power of Congress under the commerce clause; and it is primarily for Congress to consider and decide the fact of the danger and meet it. P. 37.
10. The close and intimate effect which brings the subject within the reach of federal power may be due to activities in relation to productive industry, although the industry when separately viewed is local. P. 38.
11. The relation to interstate commerce of the manufacturing enterprise involved in this case was such that a stoppage of its operations by industrial strife would have an immediate, direct and paralyzing effect upon interstate commerce. Therefore Congress had constitutional authority, for the protection of interstate commerce, to safeguard the right of the employees in the manufacturing plant to self-organization and free choice of their representatives for collective bargaining. P. 41.

1 Syllabus.

Judicial notice is taken of the facts that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace, and that refusal to confer and negotiate has been one of the most prolific causes of strife.

12. The National Labor Relations Act of July 5, 1935, empowers the National Labor Relations Board to prevent any person from engaging in unfair labor practices "affecting commerce"; its definition of "commerce" (aside from commerce within a territory or the District of Columbia) is such as to include only interstate and foreign commerce; and the term "affecting commerce" it defines as meaning "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." The "unfair labor practices," as defined by the Act and involved in this case, are restraint or coercion of employees in their rights to self-organization and to bargain collectively through representatives of their own choosing, and discrimination against them in regard to hire or tenure of employment for the purpose of encouraging or discouraging membership in any labor organization. §§ 7 and 8. The Act (§ 9a) declares that representatives, for the purpose of collective bargaining, of the majority of the employees in an appropriate unit shall be the exclusive representatives of all the employees in that unit; but that any individual employee or a group of employees shall have the right at any time to present grievances to their employer. *Held:*

(1) That in safeguarding rights of employees and empowering the Board, the statute, in so far as involved in the present case, confines itself to such control of the industrial relationship as may be constitutionally exercised by Congress to prevent burden or obstruction to interstate or foreign commerce arising from industrial disputes. P. 43.

(2) The Act imposes upon the employer the duty of conferring and negotiating with the authorized representatives of the employees for the purpose of settling a labor dispute; but it does not preclude such individual contracts as the employer may elect to make directly with individual employees. P. 44.

(3) The Act does not compel agreements between employers and employees. Its theory is that free opportunity for negotiation

with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel. P. 45.

(4) The Act does not interfere with the normal right of the employer to hire, or with the right of discharge when exercised for other reasons than intimidation and coercion; and what is the true reason in this regard is left the subject of investigation in each case with full opportunity to show the facts. P. 45.

13. A corporation which manufactured iron and steel products in its factories in Pennsylvania from raw materials most of which it brought in from other States, and which shipped 75% of the manufactured products out of Pennsylvania and disposed of them throughout this country and in Canada, was required by orders of the National Labor Relations Board to tender reinstatement to men who had been employed in one of the factories but were discharged because of their union activities and for the purpose of discouraging union membership. The orders further required that the company make good the pay the men had lost through their discharge, and that it desist from discriminating against members of the union, with regard to hire and tenure of employment, and from interfering by coercion with the self-organization of its employees in the plant. *Held* that the orders were authorized by the National Labor Relations Act, and that the Act is constitutional as thus applied to the company. Pp. 30, 32, 34, 41.

14. The right of employers to conduct their own business is not arbitrarily restrained by regulations that merely protect the correlative rights of their employees to organize for the purpose of securing the redress of grievances and of promoting agreements with employers relating to rates of pay and conditions of work. P. 43.

15. The fact that the National Labor Relations Act subjects the employer to supervision and restraint and leaves untouched the abuses for which employees may be responsible, and fails to provide a more comprehensive plan, with better assurance of fairness to both sides and with increased chances of success in bringing about equitable solutions of industrial disputes affecting interstate commerce, does not affect its validity. The question is as to the power of Congress, not as to its policy; and legislative authority, exerted within its proper field, need not embrace all the evils within its reach. P. 46.

16. The National Labor Relations Act establishes standards to which the Board must conform. There must be complaint, notice and hearing. The Board must receive evidence and make findings. These findings as to the facts are to be conclusive, but only if supported by evidence. The order of the Board is subject to review by the designated court; and only when sustained by the court may the order be enforced. Upon that review all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of constitutional right or statutory authority, are open to examination by the court. These procedural provisions afford adequate opportunity to secure judicial protection against arbitrary action, in accordance with the well-settled rules applicable to administrative agencies set up by Congress to aid in the enforcement of valid legislation. P. 47.
17. The provision of the National Labor Relations Act, § 10 (c), authorizing the Board to require the reinstatement of employees found to have been discharged because of their union activity or for the purpose of discouraging membership in the union, is valid. P. 47.
18. The provision of the Act, § 10 (c), that the Board, in requiring reinstatement, may direct the payment of wages for the time lost by the discharge, less amounts earned by the employee during that period, does not contravene the provisions of the Seventh Amendment with respect to jury trial in suits at common law. P. 48.

83 F. (2d) 998, reversed.

CERTIORARI, 299 U. S. 534, to review a decree of the Circuit Court of Appeals declining to enforce an order of the National Labor Relations Board.

Mr. J. Warren Madden and *Solicitor General Reed*, with whom *Attorney General Cummings* and *Messrs. Charles E. Wyzanski, Jr., Charles A. Horsky, A. H. Feller, Charles Fahy, Robert B. Watts, Philip Levy,* and *Malcolm F. Halliday* were on the brief, for petitioner.*

* Arguments in this case are summarized from the briefs. Extracts from the oral arguments in this and in other Labor Act cases immediately following will appear in an appendix in the bound volume.

The National Labor Relations Act is an exercise of the power of Congress to protect interstate commerce from injuries caused by industrial strife.

Before this statute was enacted experience had shown that industrial strife was a recurrent burden upon the interstate commerce of the nation. Not only in its totality had such strife produced obstructions to commerce, but also in many individual instances such strife eventuated in conspiracies to restrain commerce or imposed such substantial burdens upon it that penalties or injunctions were applied under the Sherman Act. These facts are clearly shown by a survey of the results of individual disputes, the statistics with regard to the total number of such disputes, and repeated federal activities in connection with industrial strife.

Congress, in dealing with this evil of industrial strife, might have approached the problem in either of two ways. It might have enacted a statute designed to remove the burden on interstate commerce after it had evinced itself in a particular case, as the Sherman Act did; or, it might have enacted a statute to deal with the causes of the burden in anticipation of their probable effect, as the Packers and Stockyards Act did. Congressional power to enact this second type of statute (hereinafter called the preventive power) extends at least as far as the power to enact a statute to control the burden after its appearance (hereinafter called the control power). *Stafford* v. *Wallace,* 258 U. S. 495, 525.

The National Labor Relations Act, which is an exercise of this preventive power, does not attempt to eliminate causes of strife in *all* enterprises. The statute and the mandate addressd to the administrative Board are specifically directed to the elimination of the proscribed practices only when they are found to be "affecting commerce." § 10 (a). This phrase "affecting commerce"

is defined in § 2 (7) of the statute as "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." These words are plainly patterned upon language used in decisions of this Court in cases arising under other statutes enacted by Congress under the commerce power. This jurisdictional limitation is manifestly a direction to the Board to exercise the national power within the limits permitted by the Constitution. In other words, Congress has taken as the ambit of this particular preventive statute the boundaries to which it would be restricted were it exercising to the full its control power under appropriate legislation.

Of course, in eliminating these proscribed practices in situations which are likely to come within the control power of Congress, the application of the Act will upon occasion result in the prohibition of activities which, even if allowed to spend their force, would not result in industrial strife which did in fact come within the federal control power. But, provided that when the practice was indulged in there was a reasonable likelihood that any industrial strife which resulted would be within the control power, the Board may apply the preventive measure. To hold otherwise would deprive Congress of any preventive power, since no one can predict with absolute accuracy, in advance of the complete development of the effects of a cause, exactly what those effects will be. Compare *Stafford* v. *Wallace,* 258 U. S. 495; *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1. This lack of predictability is particularly true of industrial strife. Moreover, in eliminating the cause of an evil within the power of Congress, the Act may on occasion eliminate the cause of purely local evils. Indeed, this is almost inevitable, since a single event has multiple consequences.

Yet plainly the existence of a granted federal power cannot be limited by the collateral consequences of its exercise. *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288.

The foregoing epitome of the statutory scheme makes it clear that the question of the validity of a specific application of the statute depends upon whether industrial strife resulting from the practices in the particular enterprise under consideration would be of the character which the federal power could control if it occurred. The question of primary importance therefore is the extent of the federal power of control. Since the language of this statute does not go beyond the ambit of this power, whatever it may be, the statute is clearly constitutional on its face, and the only issue is whether it has been constitutionally applied.

This Court has never had occasion to define the full extent to which industrial strife in the manufacturing, producing, or processing divisions of an enterprise engaged extensively in interstate commerce may be subjected to the exercise of the control power of Congress. It has, however, held that certain situations in these divisions are clearly within the control power, and has further laid down general principles which furnish standards for the proper appreciation of the full scope of that power.

It is well settled that an industrial dispute in such an enterprise involving an intent to affect commerce is within the control power of Congress. *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344; *Bedford Cut Stone Co.* v. *Stone Cutters' Assn.,* 274 U. S. 37; *Duplex Printing Co.* v. *Deering,* 254 U. S. 443; *Loewe* v. *Lawlor,* 208 U. S. 274. Consequently, where the situation in a particular enterprise presents a reasonable likelihood that industrial strife, if it occurred, would involve

an intent to affect commerce, the Board can apply the statute to that enterprise.

This Court has also recognized the principle that an industrial dispute having the necessary effect of substantially burdening commerce would be within the control power of Congress. *Industrial Association* v. *United States,* 268 U. S. 64, 81; *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344, 410–411. Hence, the statute is applicable to an enterprise which is shown by evidence before the Board to be of such a character that strife, if it occurred, would have such a necessary effect. The proper application of the statute to such situations depends, of course, on the precise scope of the "necessary effect" principle. Although the Court has recognized the principle it has not heretofore had occasion to define it.

Lastly, the scope of the control power extends to recurring evils which in their totality constitute a burden on interstate commerce. This Court has stated that such recurrent evils may, after appropriate findings, be subjected by Congress to national supervision and restraint. *Stafford* v. *Wallace,* 258 U. S. 495; *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1. This principle extends to industrial strife in enterprises which receive a substantial part of their raw material from, or ship a substantial part of their products in, interstate commerce. *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344, 408; *United Leather Workers* v. *Herkert & Meisel Trunk Co.,* 265 U. S. 457, 469; *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548. Here Congress has found, and experience shows, that industrial strife in such enterprises constitutes such a recurring evil. Under this view of the control power the statute may be applied to the individual instances of this recurring burden—that is, to any enterprise which

receives a substantial part of its materials from, or ships a substantial part of its products in, interstate commerce, and is dependent upon such commerce for the successful conduct of its business.

We believe that the instant case falls within each of these three situations in which the control power of Congress may be exercised.

The reasonable likelihood of a controversy with the intent to affect commerce might be demonstrated in either of two ways: First, evidence might be presented to the Board that in a particular situation the intent already exists; or second, evidence might be presented to the Board that the situation was comparable to, and of the same general type as, others out of which in the past there had evolved controversies with intent to affect commerce, or that in the particular situation confronting the Board, such definite intention might reasonably be expected to develop. In the case at bar it is not claimed that there is evidence of the first sort; but there is abundant evidence that the situation is fraught with the risk that after strife developed it would involve the purpose to curtail the movement of goods in commerce.

As previously stated, the Court has not yet determined the exact scope of the phrase "necessary effect of substantially burdening commerce." It undeniably includes situations in which the participants cannot be charged with a conscious specific desire to interrupt commerce. *United States* v. *Patten,* 226 U. S. 525. The statements of this Court make it clear that the application of this principle may depend upon the magnitude of the effect on commerce. The possible use of such a standard is entirely consistent with *Carter* v. *Carter Coal Co.,* 298 U. S. 238. Three possible definitions of the scope of the "necessary effect" principle may be advanced: (1) a necessary effect on commerce results from industrial strife occurring in

an enterprise which lies within a well-defined stream or flow of commerce, or (2) a necessary effect on commerce results from industrial strife which restrains a substantial part of all the commerce in a particular commodity, or (3) a necessary effect on commerce results from industrial strife which restrains the movement of a substantial volume of goods which would otherwise move in interstate commerce. The instant case falls within all three of these aspects of the principle, but this brief addresses particular attention to the first and second.

Neither *Schechter Corp.* v. *United States,* 295 U. S. 495, nor *Carter* v. *Carter Coal Co.,* 298 U. S. 238, is here applicable. In the *Schechter* case it was urged that wages and hours in local industry bore a relation to interstate commerce by reason of an intricate chain of economic causes and effects. An effect on commerce which occurred in such a manner the Court characterized as indirect. The Act involved in the *Carter* case had as its purpose the "stabilizing" of the bituminous coal industry through regulation of prices and wages. The effect of wage cutting on interstate commerce was held to be indirect on the basis of the *Schechter* case. The collective bargaining provisions of that Act were, as is clear from the face of the statute and from the opinion of the Court, ancillary to the wage fixing provisions and furnished the means through which regulations with respect to wages having the force of law were to be arrived at. On the other hand, the National Labor Relations Act is designed solely to eliminate the burden on interstate commerce caused by industrial strife. Such strife constitutes an interruption to commerce operating directly without "an efficient intervening agency or condition." Thus it deals with matters closely connected with commerce, does not go beyond what is necessary for the protection of commerce, and does not attempt "a broad regulation of industry within the State."

Mr. Earl F. Reed, with whom *Messrs. Charles Rosen* and *W. D. Evans* were on the brief, for respondent.

The respondent contends that the National Labor Relations Act is, in reality, a regulation of labor relations, and not of interstate commerce, and that, as a consequence, it is not within the power of Congress to enact. Even if it should be considered a true regulation of interstate commerce, it still has no application to the respondent's relations with its production employees, because they are not subject to regulation by the Federal Government. In addition, the provisions of the Act which the petitioner seeks to apply in the present cases are invalid, because they violate § 2 of Art. III of the Constitution, as well as the Fifth and Seventh Amendments.

The respondent is a corporation engaged in the manufacture of iron and steel products. In this connection, it owns and operates a large steel plant at Aliquippa, Pennsylvania, in which are employed approximately ten thousand men. The present case is, in reality, a controversy between ten individuals who were formerly employed by the respondent in production work at this plant, and the respondent. These individuals, with three others, filed a complaint with the petitioner, the National Labor Relations Board, charging that they had been discharged or demoted by the respondent because of union affiliations. The respondent objected to the jurisdiction of the petitioner, but its motion to dismiss was overruled and the petitioner, after hearing, determined that the complainants had been wrongfully discharged and ordered their immediate restoration, with compensation for lost pay.

The petitioner has endeavored to justify its assumption of jurisdiction over the respondent's employment relations, by making a finding that the respondent has en-

gaged in unfair labor practices "affecting commerce" within the definition of the National Labor Relations Act. The respondent insists that the facts upon which this "finding" pretends to be based are, in law, insufficient to justify any such conclusion, and that this Court is entitled to reëxamine the facts for the purpose of determining the jurisdictional issue. *Crowell* v. *Benson,* 285 U. S. 22; *St. Joseph Stock Yards* v. *United States,* 298 U. S. 38.

The National Labor Relations Act is not a true regulation of interstate commerce.

The power of Congress is clearly defined by the commerce clause of the Constitution, and considerations of political expediency have no weight in fixing the dividing line between the powers of Congress and the reserved powers of the several States. The argument of the petitioner is, in the last analysis, a plea that, from an economic standpoint, Congress should have power to apply its legislation to the respondent's employment relations. This, we submit, is entirely beside the point if the exercise of such power would run counter to the Constitution.

The jurisdiction of Congress under the commerce clause includes the power to regulate, restrict and protect interstate commerce; but not the right to use such jurisdiction as a pretext for legislation which interferes with the local sovereignty of the separate States. *Gibbons* v. *Ogden,* 9 Wheat. 1. The use of an admitted power of Congress as a pretext to interfere with local activities which are not subject to its jurisdiction, is to be condemned. The commerce clause will not serve as an excuse for legislating with respect to labor relations, which do not constitute a part of interstate commerce. *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495; *Railroad Retirement Board* v. *Alton R. Co.,* 295 U. S. 330; *United States* v. *Butler,* 297 U. S. 1.

The legislative history of the National Labor Relations Act and its substantive provisions are sufficient to demonstrate that the Act, although disguised as a regulation of interstate commerce, is, in actuality, a regulation of labor. The terms of the statute apply to almost every employer and every employee (§ 2), although the jurisdiction of the petitioner to enforce it is somewhat circumscribed.

The provisions of the statute, if carefully analyzed, will indicate that Congress is primarily concerned with the protection and establishment of labor organizations. The provisions condemning plant unions and sanctioning "closed shop" agreements, bear no reasonable relation to interstate commerce. Similarly, the express preservation of the right to strike indicates that Congress was not interested in preventing interruptions to the movement of commerce. The interference with the employer's discretion to hire and fire is another reason for believing that efficiency in the shipment of products in interstate commerce has not been the object of the statute.

Congress has endeavored to save the statute from the taint of invalidity by confining its enforcement to transactions "affecting commerce," which the Act defines as transactions which burden commerce or lead or tend to lead to a labor dispute which burdens commerce. § 2. Despite this limitation on the enforcement of the Act, the substantive provisions make no such exception and are, in fact, broad enough to cover almost every employment relation.

The petitioner has followed the same involved line of reasoning in endeavoring to "find" that the respondent's operations "affect commerce." Like Congress, it has found itself faced with the task of piling premise upon premise and hypothesis upon hypothesis to reach the conclusion that the discharge of a few production em-

ployees at the respondent's plant has a vital bearing upon the movement of interstate commerce. We submit that the ultimate fact remains that Congress has enacted a labor law, and not a regulation of commerce, and it does not help to sustain the pretext that there may be an indirect connection between the two. *Carter* v. *Carter Coal Co.,* 298 U. S. 238.

The National Labor Relations Act can have no application to the respondent's relations with its production employees.

Although the respondent purchases raw materials, which have a point of origin in other States, and ships a large portion of its finished products across state lines, its production activities, including its employment relations, are not thereby subjected to the jurisdiction of Congress. *Howard* v. *Illinois Central R. Co.,* 207 U. S. 463. There is no logical or legal connection between the respondent's limited participation in interstate commerce and the union affiliations of its production employees. *Adair* v. *United States,* 208 U. S. 161; *Hammer* v. *Dagenhart,* 247 U. S. 251; *Railroad Retirement Board* v. *Alton R. Co.,* 295 U. S. 330.

The principle which impeaches the validity of the National Labor Relations Act, viz., that federal power over interstate commerce must be confined to *bona fide* regulation of the movements of commerce, likewise prevents the application of the statute in the present case. An unbroken line of decisions under the commerce clause has established that manufacturing and production activities are not in or a part of interstate commerce, even though they may be preceded or followed by the movement of materials between States. *Kidd* v. *Pearson,* 128 U. S. 1; *Arkadelphia Milling Co.* v. *St. Louis Southwestern Ry. Co.,* 249 U. S. 134; *Oliver Iron Co.* v. *Lord,* 262 U. S. 172; *Utah Light & Power Co.* v. *Pfost,* 286 U. S. 165; *Chas-*

saniol v. *Greenwood,* 291 U. S. 584; *Industrial Association* v. *United States,* 268 U. S. 64. Although most of the decisions have dealt with the police or taxing powers of the States, they are based upon the fundamental principle that manufacturing activities are subject to the exclusive jursdiction of the separate States. *Bacon* v. *Illinois,* 227 U. S. 504; *Susquehanna Coal Co.* v. *South Amboy,* 228 U. S. 665; *Packer Corp.* v. *Utah,* 285 U. S. 105; *Nashville, C. & St. L. Ry.* v. *Wallace,* 288 U. S. 249; *Edelman* v. *Boeing Air Transport,* 289 U. S. 249; *Minnesota* v. *Blasius,* 290 U. S. 1; *Federal Compress Co.* v. *McLean,* 291 U. S. 17; *Cornell* v. *Coyne,* 192 U. S. 418; *Crescent Cotton Oil Co.* v. *Mississippi,* 251 U. S. 129; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245; *Oliver Iron Co.* v. *Lord,* 262 U. S. 172; *Champlin Refining Co.* v. *Corporation Commission,* 286 U. S. 210; *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344; *United Leather Workers* v. *Herkert & Meisel Trunk Co.,* 265 U. S. 457; *Delaware, L. & W. R. Co.* v. *Yurkonis,* 238 U. S. 439.

The distinction between the local manufacturing activities of a business and its subsequent or precedent participation in interstate commerce has been maintained in the field of labor relations. *Hammer* v. *Dagenhart,* 247 U. S. 251; *Industrial Accident Comm'n* v. *Davis,* 259 U. S. 182. Even though an employee may be employed in directly assisting the movement of products in interstate commerce, his relationship to his employer is a status existing wholly within the State, whose incidents, such as wages, hours of labor and the like, are purely domestic in character. *Carter* v. *Carter Coal Co.,* 298 U. S. 238.

Congressional regulation of the labor relations of interstate carriers furnishes no precedent for the present Act. Because interstate carriers are instrumentalities of the movement of commerce, and because they are public

utilities, Congress has subjected them to an exhaustive scheme of regulation, of which the labor legislation is merely an incident. As a result, the decision in *Texas & N. O. R. Co.* v. *Railway Clerks,* 281 U. S. 548, is not controlling.

Decisions such as *Stafford* v. *Wallace,* 258 U. S. 495, and *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1, which sustain federal regulation of stockyards and grain exchanges, have no application to the present case. Grain exchanges and stockyards are instrumentalities of interstate commerce in much the same sense as the actual carriers of interstate commerce. They are focal points through which the stream of commerce in grains and cattle sweeps on its way from producer to the ultimate consumer. The activities which were regulated in both cases were activities in the stream of commerce and exerted a direct effect upon its flow. Neither case sanctions the extension of the doctrine to production activities which may indirectly affect the stream of commerce. *Carter* v. *Carter Coal Co.,* 298 U. S. 238. Cf. *Swift & Co.* v. *United States,* 196 U. S. 376; *Hill* v. *Wallace,* 259 U. S. 44; *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420; *Tyson & Bro.* v. *Banton,* 273 U. S. 418.

The petitioner relies upon decisions which have upheld the application of the Anti-Trust Laws to industrial conspiracies, such as *Coronado Coal Co.* v. *United Mine Workers,* 268 U. S. 295. These were cases involving conspiracies to restrain interstate commerce by means of local combinations. The element of an intentional interference with the movement of interstate commerce was essential in these cases, not only because an intent to restrain commerce was a part of the proscribed offense, but also because the existence of such an intent made the effect on interstate commerce necessarily direct. This is shown by a comparison of the first *Coronado* case, 259

U. S. 344, where there was no intent, with the second *Coronado* case, 268 U. S. 295, where there was both direct and inferential evidence of intent. Cf. *United Leather Workers* v. *Herkert & Meisel Trunk Co.*, 265 U. S. 457.

The petitioner's efforts to show an intended restraint in the present case are futile. Even if a strike should occur at the respondent's plant, the respondent could not be held responsible for the voluntary intervening act of outside agencies. The suggestion that the respondent might be charged with an implied intent to destroy interstate trade, if a labor dispute should occur, is obviously unsound.

The conspiracy cases, such as *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344, and *Local 167* v. *United States*, 291 U. S. 293, although primarily concerned with the application of the Anti-Trust Laws, prove the fallacy of the petitioner's argument, because they establish that Congress cannot regulate local transactions or relations unless they exert a direct effect on interstate commerce. The definition of "affecting commerce" in the National Labor Relations Act is a confession of the indirectness of the connection between the respondent's labor relations and the movement of interstate commerce. See *Schechter Corp.* v. *United States*, 295 U. S. 495; *Industrial Association* v. *United States*, 268 U. S. 64. The petitioner calls attention to the fact that strikes may and frequently do produce an inhibitory effect on the movement of interstate trade to and from the affected area. This is the fundamental error in the petitioner's argument, in that it assumes that it need only establish the connection between strikes and the stoppage of commerce. There has been no strike or labor dispute in the present case. In actuality, the petitioner means that the respondent's discharge of ten employees might have led to dissatisfaction, which might have led to a labor dis-

pute, which might have led to a strike and a consequent interruption of interstate commerce.

The findings of Congress that discriminatory discharges may lead to an interruption of commerce, are unavailing. A declaration by Congress of the need of regulation will not automatically justify its action, where its legislative findings run counter to established rules of construction, which hold that there is no necessary and direct connection between the relations of an employer and his employees and the movement of interstate commerce. In this respect, the present case is clearly controlled by the decision in *Carter* v. *Carter Coal Co.,* 298 U. S. 238.

There are dangerous implications in the petitioner's argument. If it be accepted, there would be no reason why Congress should not use its power over interstate commerce as a pretext to stifle the sovereignty of the States. We therefore believe that the Court will not suffer the powers of the States to be whittled away by a statute which piles speculation upon speculation to attain its ends. *United States* v. *Butler,* 297 U. S. 1; *Schechter Corp.* v. *United States,* 295 U. S. 495.

The National Labor Relations Act confers upon the petitioner exclusive original jurisdiction over controversies between an employee and his employer as to the propriety of the employee's discharge, and the Board is authorized to render affirmative relief to the employee, including the restoration of his employment and compensation for lost wages. The findings of fact of the Board are conclusive and only objections made before the Board will be heard. The Act does not make any provision for a trial *de novo* in the constitutional courts on constitutional or jurisdictional issues.

We submit that the Act is invalid because it authorizes the Board to award a money judgment, depriving the employer of his right to trial by jury in cases in-

volving more than twenty dollars. If, as the petitioner contends, the action of the Board should be considered in the nature of a suit in equity, with authority in the Board to award a mandatory injunction restoring employment, with incidental damages for back pay, then the Act violates the provision of Art. III of the Constitution, for it deprives the constitutional courts of their authority to try constitutional and jurisdictional issues.

The present case presents a controversy between employees and the respondent, in which the petitioner has directed the restoration to employment of the complaining employees, with back pay. This being the case, it is a controversy between private citizens, enforcing private rights. The failure to provide means for a trial *de novo* of jurisdictional issues in such a case is fatal. *Crowell* v. *Benson,* 285 U. S. 22.

The proceedings of the Board are not comparable to those of the Federal Trade Commission.

The petitioner's order constitutes an unlawful interference with the right of the respondent to manage its own business.

The law has always been hesitant to interfere in questions of employer-employee relationships. From the standpoint of the employee, the law has recognized that he should not be forced into a relationship which may be distasteful, and from the employer's viewpoint, the courts have held that the right to judge the capabilities of employees is absolutely essential to the efficient management of the employer's business. The question of retaining or discharging an employee involves delicate considerations of discretion which the law is loath to attempt to weigh. The facts of the present case show the dangers of bureaucratic interference, in that each discharge involved some admitted fault on the part of the complaining employee, but the petitioner determined that it was

better qualified to decide and that the respondent's action had been too drastic. This is clearly an interference with the normal right of the respondent to manage its own business, because it is a dictatorial usurpation of the respondent's discretion to determine the capabilities of its employees.

Another dangerous implication of the law and of the petitioner's decision is that it confers a kind of civil service status upon union employees, which will inevitably encourage laziness, insolence, and inefficiency. This is confirmed by a notice which the petitioner, in its decision, has ordered the respondent to post in its plants, to the effect that it will not discharge members of the union. It would be the equivalent of informing the employees that if they become affiliated with the union, they will be thenceforth immune from discharge.

We submit that the underlying philosophy of the National Labor Relations Act is a constant threat to the respondent's normal right to manage its own business. Not only does the Act provide, in effect, that an unqualified bureau will sit as a higher court over the respondent's employment office, but it also ordains that the respondent must deal with whatever union may be selected by a majority of its employees and refuse to negotiate with other employees or their representatives. The power which it delegates to a majority of the employees to bind the minority is arbitrary and unfair and will necessarily lead to the suffocation of minorities and to the closed shop, forcing the employer to herd his employees into an organization which is not of their own choice. This will in turn seriously disturb the discipline and morale of the respondent's employees, with obvious injury to them and to the respondent. Cf. *Carter* v. *Carter Coal Co.*, 298 U. S. 238.

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

In a proceeding under the National Labor Relations Act of 1935,[1] the National Labor Relations Board found that the respondent, Jones & Laughlin Steel Corporation, had violated the Act by engaging in unfair labor practices affecting commerce. The proceeding was instituted by the Beaver Valley Lodge No. 200, affiliated with the Amalgamated Association of Iron, Steel and Tin Workers of America, a labor organization. The unfair labor practices charged were that the corporation was discriminating against members of the union with regard to hire and tenure of employment, and was coercing and intimidating its employees in order to interfere with their self-organization. The discriminatory and coercive action alleged was the discharge of certain employees.

The National Labor Relations Board, sustaining the charge, ordered the corporation to cease and desist from such discrimination and coercion, to offer reinstatement to ten of the employees named, to make good their losses in pay, and to post for thirty days notices that the corporation would not discharge or discriminate against members, or those desiring to become members, of the labor union. As the corporation failed to comply, the Board petitioned the Circuit Court of Appeals to enforce the order. The court denied the petition, holding that the order lay beyond the range of federal power. 83 F. (2d) 998. We granted certiorari.

The scheme of the National Labor Relations Act—which is too long to be quoted in full—may be briefly stated. The first section sets forth findings with respect to the injury to commerce resulting from the denial by employers of the right of employees to organize and from the refusal of employers to accept the procedure of col-

[1] Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151.

lective bargaining. There follows a declaration that it is the policy of the United States to eliminate these causes of obstruction to the free flow of commerce.[2] The Act

[2] This section is as follows:

"Section 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

"The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

"Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

then defines the terms it uses, including the terms "commerce" and "affecting commerce." § 2. It creates the National Labor Relations Board and prescribes its organization. §§ 3–6. It sets forth the right of employees to self-organization and to bargain collectively through representatives of their own choosing. § 7. It defines "unfair labor practices." § 8. It lays down rules as to the representation of employees for the purpose of collective bargaining. § 9. The Board is empowered to prevent the described unfair labor practices affecting commerce and the Act prescribes the procedure to that end. The Board is authorized to petition designated courts to secure the enforcement of its orders. The findings of the Board as to the facts, if supported by evidence, are to be conclusive. If either party on application to the court shows that additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearings before the Board, the court may order the additional evidence to be taken. Any person aggrieved by a final order of the Board may obtain a review in the designated courts with the same procedure as in the case of an application by the Board for the enforcement of its order. § 10. The Board has broad powers of investigation. § 11. Interference with members of the Board or its agents in the performance of their duties is punishable by fine and imprisonment. § 12. Nothing in the Act is to be construed to interfere with the right to strike. § 13. There is a separability clause to the effect that if any provision of the Act or its application to any person or circumstances shall be held invalid, the remainder of the Act or its application to other persons or circumstances shall not be affected. § 15. The particular provisions which are involved in the instant case will be considered more in detail in the course of the discussion.

The procedure in the instant case followed the statute. The labor union filed with the Board its verified charge.

The Board thereupon issued its complaint against the respondent alleging that its action in discharging the employees in question constituted unfair labor practices affecting commerce within the meaning of § 8, subdivisions (1) and (3), and § 2, subdivisions (6) and (7) of the Act. Respondent, appearing specially for the purpose of objecting to the jurisdiction of the Board, filed its answer. Respondent admitted the discharges, but alleged that they were made because of inefficiency or violation of rules or for other good reasons and were not ascribable to union membership or activities. As an affirmative defense respondent challenged the constitutional validity of the statute and its applicability in the instant case. Notice of hearing was given and respondent appeared by counsel. The Board first took up the issue of jurisdiction and evidence was presented by both the Board and the respondent. Respondent then moved to dismiss the complaint for lack of jurisdiction; and, on denial of that motion, respondent in accordance with its special appearance withdrew from further participation in the hearing. The Board received evidence upon the merits and at its close made its findings and order.

Contesting the ruling of the Board, the respondent argues (1) that the Act is in reality a regulation of labor relations and not of interstate commerce; (2) that the Act can have no application to the respondent's relations with its production employees because they are not subject to regulation by the federal government; and (3) that the provisions of the Act violate § 2 of Article III and the Fifth and Seventh Amendments of the Constitution of the United States.

The facts as to the nature and scope of the business of the Jones & Laughlin Steel Corporation have been found by the Labor Board and, so far as they are essential to the determination of this controversy, they are not in dispute. The Labor Board has found: The corporation is

organized under the laws of Pennsylvania and has its principal office at Pittsburgh. It is engaged in the business of manufacturing iron and steel in plants situated in Pittsburgh and nearby Aliquippa, Pennsylvania. It manufactures and distributes a widely diversified line of steel and pig iron, being the fourth largest producer of steel in the United States. With its subsidiaries—nineteen in number—it is a completely integrated enterprise, owning and operating ore, coal and limestone properties, lake and river transportation facilities and terminal railroads located at its manufacturing plants. It owns or controls mines in Michigan and Minnesota. It operates four ore steamships on the Great Lakes, used in the transportation of ore to its factories. It owns coal mines in Pennsylvania. It operates towboats and steam barges used in carrying coal to its factories. It owns limestone properties in various places in Pennsylvania and West Virginia. It owns the Monongahela connecting railroad which connects the plants of the Pittsburgh works and forms an interconnection with the Pennsylvania, New York Central and Baltimore and Ohio Railroad systems. It owns the Aliquippa and Southern Railroad Company which connects the Aliquippa works with the Pittsburgh and Lake Erie, part of the New York Central system. Much of its product is shipped to its warehouses in Chicago, Detroit, Cincinnati and Memphis,—to the last two places by means of its own barges and transportation equipment. In Long Island City, New York, and in New Orleans it operates structural steel fabricating shops in connection with the warehousing of semi-finished materials sent from its works. Through one of its wholly-owned subsidiaries it owns, leases and operates stores, warehouses and yards for the distribution of equipment and supplies for drilling and operating oil and gas wells and for pipe lines, refineries and pumping stations. It has sales offices in

twenty cities in the United States and a wholly-owned subsidiary which is devoted exclusively to distributing its product in Canada. Approximately 75 per cent. of its product is shipped out of Pennsylvania.

Summarizing these operations, the Labor Board concluded that the works in Pittsburgh and Aliquippa "might be likened to the heart of a self-contained, highly integrated body. They draw in the raw materials from Michigan, Minnesota, West Virginia, Pennsylvania in part through arteries and by means controlled by the respondent; they transform the materials and then pump them out to all parts of the nation through the vast mechanism which the respondent has elaborated."

To carry on the activities of the entire steel industry, 33,000 men mine ore, 44,000 men mine coal, 4,000 men quarry limestone, 16,000 men manufacture coke, 343,000 men manufacture steel, and 83,000 men transport its product. Respondent has about 10,000 employees in its Aliquippa plant, which is located in a community of about 30,000 persons.

Respondent points to evidence that the Aliquippa plant, in which the discharged men were employed, contains complete facilities for the production of finished and semi-finished iron and steel products from raw materials; that its works consist primarily of a by-product coke plant for the production of coke; blast furnaces for the production of pig iron; open hearth furnaces and Bessemer converters for the production of steel; blooming mills for the reduction of steel ingots into smaller shapes; and a number of finishing mills such as structural mills, rod mills, wire mills and the like. In addition there are other buildings, structures and equipment, storage yards, docks and an intra-plant storage system. Respondent's operations at these works are carried on in two distinct stages, the first being the conversion of raw materials into pig

iron and the second being the manufacture of semi-finished and finished iron and steel products; and in both cases the operations result in substantially changing the character, utility and value of the materials wrought upon, which is apparent from the nature and extent of the processes to which they are subjected and which respondent fully describes. Respondent also directs attention to the fact that the iron ore which is procured from mines in Minnesota and Michigan and transported to respondent's plant is stored in stock piles for future use, the amount of ore in storage varying with the season but usually being enough to maintain operations from nine to ten months; that the coal which is procured from the mines of a subsidiary located in Pennsylvania and taken to the plant at Aliquippa is there, like ore, stored for future use, approximately two to three months' supply of coal being always on hand; and that the limestone which is obtained in Pennsylvania and West Virginia is also stored in amounts usually adequate to run the blast furnaces for a few weeks. Various details of operation, transportation, and distribution are also mentioned which for the present purpose it is not necessary to detail.

Practically all the factual evidence in the case, except that which dealt with the nature of respondent's business, concerned its relations with the employees in the Aliquippa plant whose discharge was the subject of the complaint. These employees were active leaders in the labor union. Several were officers and others were leaders of particular groups. Two of the employees were motor inspectors; one was a tractor driver; three were crane operators; one was a washer in the coke plant; and three were laborers. Three other employees were mentioned in the complaint but it was withdrawn as to one of them and no evidence was heard on the action taken with respect to the other two.

While respondent criticises the evidence and the attitude of the Board, which is described as being hostile toward employers and particularly toward those who insisted upon their constitutional rights, respondent did not take advantage of its opportunity to present evidence to refute that which was offered to show discrimination and coercion. In this situation, the record presents no ground for setting aside the order of the Board so far as the facts pertaining to the circumstances and purpose of the discharge of the employees are concerned. Upon that point it is sufficient to say that the evidence supports the findings of the Board that respondent discharged these men "because of their union activity and for the purpose of discouraging membership in the union." We turn to the questions of law which respondent urges in contesting the validity and application of the Act.

First. The scope of the Act.—The Act is challenged in its entirety as an attempt to regulate all industry, thus invading the reserved powers of the States over their local concerns. It is asserted that the references in the Act to interstate and foreign commerce are colorable at best; that the Act is not a true regulation of such commerce or of matters which directly affect it but on the contrary has the fundamental object of placing under the compulsory supervision of the federal government all industrial labor relations within the nation. The argument seeks support in the broad words of the preamble (section one [3]) and in the sweep of the provisions of the Act, and it is further insisted that its legislative history shows an essential universal purpose in the light of which its scope cannot be limited by either construction or by the application of the separability clause.

If this conception of terms, intent and consequent inseparability were sound, the Act would necessarily fall

[3] See Note 2, *supra*, p. 23.

by reason of the limitation upon the federal power which inheres in the constitutional grant, as well as because of the explicit reservation of the Tenth Amendment. *Schechter Corp.* v. *United States,* 295 U. S. 495, 549, 550, 554. The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce "among the several States" and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system. *Id.*

But we are not at liberty to deny effect to specific provisions, which Congress has constitutional power to enact, by superimposing upon them inferences from general legislative declarations of an ambiguous character, even if found in the same statute. The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same. *Federal Trade Comm'n* v. *American Tobacco Co.,* 264 U. S. 298, 307; *Panama R. Co.* v. *Johnson,* 264 U. S. 375, 390; *Missouri Pacific R. Co.* v. *Boone,* 270 U. S. 466, 472; *Blodgett* v. *Holden,* 275 U. S. 142, 148; *Richmond Screw Anchor Co.* v. *United States,* 275 U. S. 331, 346.

We think it clear that the National Labor Relations Act may be construed so as to operate within the sphere of constitutional authority. The jurisdiction conferred upon the Board, and invoked in this instance, is found in § 10 (a), which provides:

"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."

The critical words of this provision, prescribing the limits of the Board's authority in dealing with the labor practices, are "affecting commerce." The Act specifically defines the "commerce" to which it refers (§ 2 (6)):

"The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country."

There can be no question that the commerce thus contemplated by the Act (aside from that within a Territory or the District of Columbia) is interstate and foreign commerce in the constitutional sense. The Act also defines the term "affecting commerce" (§ 2 (7)):

"The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

This definition is one of exclusion as well as inclusion. The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds. It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power. Acts having that effect are not

rendered immune because they grow out of labor disputes. See *Texas & N. O. R . Co.* v. *Railway Clerks,* 281 U. S. 548, 570; *Schechter Corp.* v. *United States, supra,* pp. 544, 545; *Virginian Railway* v. *System Federation, No. 40,* 300 U. S. 515. It is the effect upon commerce, not the source of the injury, which is the criterion. *Second Employers' Liability Cases,* 223 U. S. 1, 51. Whether or not particular action does affect commerce in such a close and intimate fashion as to be subject to federal control, and hence to lie within the authority conferred upon the Board, is left by the statute to be determined as individual cases arise. We are thus to inquire whether in the instant case the constitutional boundary has been passed.

Second. The unfair labor practices in question.—The unfair labor practices found by the Board are those defined in § 8, subdivisions (1) and (3). These provide:

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

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

"(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: . . ."[4]

[4] What is quoted above is followed by this proviso—not here involved—"*Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, 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 (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) 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."

Section 8, subdivision (1), refers to § 7, which is as follows:

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

Thus, in its present application, the statute goes no further than to safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer.

That is a fundamental right. Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents. Discrimination and coercion to prevent the free exercise of the right of employees to self-organization and representation is a proper subject for condemnation by competent legislative authority. Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer. *American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U. S. 184, 209. We reiterated these views when we had under consideration the Railway Labor Act of 1926. Fully recognizing the legality of collective action on the part of employees in

order to safeguard their proper interests, we said that Congress was not required to ignore this right but could safeguard it. Congress could seek to make appropriate collective action of employees an instrument of peace rather than of strife. We said that such collective action would be a mockery if representation were made futile by interference with freedom of choice. Hence the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees, "instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both." *Texas & N. O. R. Co.* v. *Railway Clerks, supra.* We have reasserted the same principle in sustaining the application of the Railway Labor Act as amended in 1934. *Virginian Railway Co.* v. *System Federation, No. 40, supra.*

Third. The application of the Act to employees engaged in production.—The principle involved.—Respondent says that whatever may be said of employees engaged in interstate commerce, the industrial relations and activities in the manufacturing department of respondent's enterprise are not subject to federal regulation. The argument rests upon the proposition that manufacturing in itself is not commerce. *Kidd* v. *Pearson,* 128 U. S. 1, 20, 21; *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344, 407, 408; *Oliver Iron Co.* v. *Lord,* 262 U. S. 172, 178; *United Leather Workers* v. *Herkert & Meisel Trunk Co.,* 265 U. S. 457, 465; *Industrial Association* v. *United States,* 268 U. S. 64, 82; *Coronado Coal Co.* v. *United Mine Workers,* 268 U. S. 295, 310; *Schechter Corp.* v. *United States, supra,* p. 547; *Carter* v. *Carter Coal Co.,* 298 U. S. 238, 304, 317, 327.

The Government distinguishes these cases. The various parts of respondent's enterprise are described as interdependent and as thus involving "a great movement of

iron ore, coal and limestone along well-defined paths to the steel mills, thence through them, and thence in the form of steel products into the consuming centers of the country—a definite and well-understood course of business." It is urged that these activities constitute a "stream" or "flow" of commerce, of which the Aliquippa manufacturing plant is the focal point, and that industrial strife at that point would cripple the entire movement. Reference is made to our decision sustaining the Packers and Stockyards Act.[5] *Stafford* v. *Wallace,* 258 U. S. 495. The Court found that the stockyards were but a "throat" through which the current of commerce flowed and the transactions which there occurred could not be separated from that movement. Hence the sales at the stockyards were not regarded as merely local transactions, for while they created "a local change of title" they did not "stop the flow," but merely changed the private interests in the subject of the current. Distinguishing the cases which upheld the power of the State to impose a non-discriminatory tax upon property which the owner intended to transport to another State, but which was not in actual transit and was held within the State subject to the disposition of the owner, the Court remarked: "The question, it should be observed, is not with respect to the extent of the power of Congress to regulate interstate commerce, but whether a particular exercise of state power in view of its nature and operation must be deemed to be in conflict with this paramount authority." *Id.,* p. 526. See *Minnesota* v. *Blasius,* 290 U. S. 1, 8. Applying the doctrine of *Stafford* v. *Wallace, supra,* the Court sustained the Grain Futures Act of 1922[6] with respect to transactions on the Chicago Board of Trade, although these transactions were "not in and of themselves interstate commerce." Congress had found

[5] 42 Stat. 159.

[6] 42 Stat. 998.

that they had become "a constantly recurring burden and obstruction to that commerce." *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1, 32; compare *Hill* v. *Wallace,* 259 U. S. 44, 69. See, also, *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420.

Respondent contends that the instant case presents material distinctions. Respondent says that the Aliquippa plant is extensive in size and represents a large investment in buildings, machinery and equipment. The raw materials which are brought to the plant are delayed for long periods and, after being subjected to manufacturing processes, "are changed substantially as to character, utility and value." The finished products which emerge "are to a large extent manufactured without reference to pre-existing orders and contracts and are entirely different from the raw materials which enter at the other end." Hence respondent argues that "If importation and exportation in interstate commerce do not singly transfer purely local activities into the field of congressional regulation, it should follow that their combination would not alter the local situation." *Arkadelphia Milling Co.* v. *St. Louis Southwestern Ry. Co.,* 249 U. S. 134, 151; *Oliver Iron Co.* v. *Lord, supra.*

We do not find it necessary to determine whether these features of defendant's business dispose of the asserted analogy to the "stream of commerce" cases. The instances in which that metaphor has been used are but particular, and not exclusive, illustrations of the protective power which the Government invokes in support of the present Act. The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a "flow" of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources. The fundamental principle is that the power to regulate commerce is

the power to enact "all appropriate legislation" for "its protection and advancement" (*The Daniel Ball,* 10 Wall. 557, 564); to adopt measures "to promote its growth and insure its safety" (*Mobile County* v. *Kimball,* 102 U. S. 691, 696, 697); "to foster, protect, control and restrain." *Second Employers' Liability Cases, supra,* p. 47. See *Texas & N. O. R. Co.* v. *Railway Clerks, supra.* That power is plenary and may be exerted to protect interstate commerce "no matter what the source of the dangers which threaten it." *Second Employers' Liability Cases,* p. 51; *Schechter Corp.* v. *United States, supra.* Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. *Schechter Corp.* v. *United States, supra.* Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. *Id.* The question is necessarily one of degree. As the Court said in *Chicago Board of Trade* v. *Olsen, supra,* p. 37, repeating what had been said in *Stafford* v. *Wallace, supra*: "Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause and it is primarily for Congress to consider and decide the fact of the danger and meet it."

That intrastate activities, by reason of close and intimate relation to interstate commerce, may fall within federal control is demonstrated in the case of carriers who

are engaged in both interstate and intrastate transportation. There federal control has been found essential to secure the freedom of interstate traffic from interference or unjust discrimination and to promote the efficiency of the interstate service. *Shreveport Case*, 234 U. S. 342, 351, 352; *Wisconsin Railroad Comm'n* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, 588. It is manifest that intrastate rates deal *primarily* with a local activity. But in rate-making they bear such a close relation to interstate rates that effective control of the one must embrace some control over the other. *Id.* Under the Transportation Act, 1920,[7] Congress went so far as to authorize the Interstate Commerce Commission to establish a state-wide level of intrastate rates in order to prevent an unjust discrimination against interstate commerce. *Wisconsin Railroad Comm'n* v. *Chicago, B. & Q. R. Co., supra; Florida* v. *United States*, 282 U. S. 194, 210, 211. Other illustrations are found in the broad requirements of the Safety Appliance Act and the Hours of Service Act. *Southern Railway Co.* v. *United States*, 222 U. S. 20; *Baltimore & Ohio R. Co.* v. *Interstate Commerce Comm'n*, 221 U. S. 612. It is said that this exercise of federal power has relation to the maintenance of adequate instrumentalities of interstate commerce. But the agency is not superior to the commerce which uses it. The protective power extends to the former because it exists as to the latter.

The close and intimate effect which brings the subject within the reach of federal power may be due to activities in relation to productive industry although the industry when separately viewed is local. This has been abundantly illustrated in the application of the federal Anti-Trust Act. In the *Standard Oil* and *American Tobacco* cases, 221 U. S. 1, 106, that statute was applied to combinations of employers engaged in productive industry.

[7] §§ 416, 422, 41 Stat. 484, 488; Interstate Commerce Act, § 13 (4).

Counsel for the offending corporations strongly urged that the Sherman Act had no application because the acts complained of were not acts of interstate or foreign commerce, nor direct and immediate in their effect on interstate or foreign commerce, but primarily affected manufacturing and not commerce. 221 U. S. pp. 5, 125. Counsel relied upon the decision in *United States* v. *Knight Co.*, 156 U. S. 1. The Court stated their contention as follows: "That the act, even if the averments of the bill be true, cannot be constitutionally applied, because to do so would extend the power of Congress to subjects *dehors* the reach of its authority to regulate commerce, by enabling that body to deal with mere questions of production of commodities within the States." And the Court summarily dismissed the contention in these words: "But all the structure upon which this argument proceeds is based upon the decision in *United States* v. *E. C. Knight Co.*, 156 U. S. 1. The view, however, which the argument takes of that case and the arguments based upon that view have been so repeatedly pressed upon this court in connection with the interpretation and enforcement of the Anti-trust Act, and have been so necessarily and expressly decided to be unsound as to cause the contentions to be plainly foreclosed and to require no express notice" (citing cases). 221 U. S. pp. 68, 69.

Upon the same principle, the Anti-Trust Act has been applied to the conduct of employees engaged in production. *Loewe* v. *Lawlor*, 208 U. S. 274; *Coronado Coal Co.* v. *United Mine Workers, supra; Bedford Cut Stone Co.* v. *Stone Cutters' Assn.*, 274 U. S. 37. See, also, *Local 167* v. *United States*, 291 U. S. 293, 397; *Schechter Corp.* v. *United States, supra.* The decisions dealing with the question of that application illustrate both the principle and its limitation. Thus, in the first *Coronado* case, the Court held that mining was not interstate commerce, that the power of Congress did not extend to its regulation as such,

and that it had not been shown that the activities there involved—a local strike—brought them within the provisions of the Anti-Trust Act, notwithstanding the broad terms of that statute. A similar conclusion was reached in *United Leather Workers* v. *Herkert & Meisel Trunk Co., supra, Industrial Association* v. *United States, supra,* and *Levering & Garrigues Co.* v. *Morrin,* 289 U. S. 103, 107. But in the first *Coronado* case the Court also said that "if Congress deems certain recurring practices, though not really part of interstate commerce, likely to obstruct, restrain or burden it, it has the power to subject them to national supervision and restraint." 259 U. S. p. 408. And in the second *Coronado* case the Court ruled that while the mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce, nevertheless when the "intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-Trust Act." 268 U. S. p. 310. And the existence of that intent may be a necessary inference from proof of the direct and substantial effect produced by the employees' conduct. *Industrial Association* v. *United States,* 268 U. S. p. 81. What was absent from the evidence in the first *Coronado* case appeared in the second and the Act was accordingly applied to the mining employees.

It is thus apparent that the fact that the employees here concerned were engaged in production is not determinative. The question remains as to the effect upon interstate commerce of the labor practice involved. In the *Schechter* case, *supra,* we found that the effect there was so remote as to be beyond the federal power. To find "immediacy or directness" there was to find it "almost

everywhere," a result inconsistent with the maintenance of our federal system. In the *Carter* case, *supra,* the Court was of the opinion that the provisions of the statute relating to production were invalid upon several grounds,—that there was improper delegation of legislative power, and that the requirements not only went beyond any sustainable measure of protection of interstate commerce but were also inconsistent with due process. These cases are not controlling here.

Fourth. Effects of the unfair labor practice in respondent's enterprise.—Giving full weight to respondent's contention with respect to a break in the complete continuity of the "stream of commerce" by reason of respondent's manufacturing operations, the fact remains that the stoppage of those operations by industrial strife would have a most serious effect upon interstate commerce. In view of respondent's far-flung activities, it is idle to say that the effect would be indirect or remote. It is obvious that it would be immediate and might be catastrophic. We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum. Because there may be but indirect and remote effects upon interstate commerce in connection with a host of local enterprises throughout the country, it does not follow that other industrial activities do not have such a close and intimate relation to interstate commerce as to make the presence of industrial strife a matter of the most urgent national concern. When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war? We have often said that interstate commerce itself is a practical

conception. It is equally true that interferences with that commerce must be appraised by a judgment that does not ignore actual experience.

Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer and negotiate has been one of the most prolific causes of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances. The opinion in the case of *Virginian Railway Co.* v. *System Federation, No. 40, supra,* points out that, in the case of carriers, experience has shown that before the amendment, of 1934, of the Railway Labor Act "when there was no dispute as to the organizations authorized to represent the employees and when there was a willingness of the employer to meet such representative for a discussion of their grievances, amicable adjustment of differences had generally followed and strikes had been avoided." That, on the other hand, "a prolific source of dispute had been the maintenance by the railroad of company unions and the denial by railway management of the authority of representatives chosen by their employees." The opinion in that case also points to the large measure of success of the labor policy embodied in the Railway Labor Act. But with respect to the appropriateness of the recognition of self-organization and representation in the promotion of peace, the question is not essentially different in the case of employees in industries of such a character that interstate commerce is put in jeopardy from the case of employees of transportation companies. And of what avail is it to protect the facility of transportation, if interstate commerce is throttled with respect to the commodities to be transported!

These questions have frequently engaged the attention of Congress and have been the subject of many inquiries.[8] The steel industry is one of the great basic industries of the United States, with ramifying activities affecting interstate commerce at every point. The Government aptly refers to the steel strike of 1919–1920 with its far-reaching consequences.[9] The fact that there appears to have been no major disturbance in that industry in the more recent period did not dispose of the possibilities of future and like dangers to interstate commerce which Congress was entitled to foresee and to exercise its protective power to forestall. It is not necessary again to detail the facts as to respondent's enterprise. Instead of being beyond the pale, we think that it presents in a most striking way the close and intimate relation which a manufacturing industry may have to interstate commerce and we have no doubt that Congress had constitutional authority to safeguard the right of respondent's employees to self-organization and freedom in the choice of representatives for collective bargaining.

Fifth. The means which the Act employs.—Questions under the due process clause and other constitutional restrictions.—Respondent asserts its right to conduct its business in an orderly manner without being subjected to arbitrary restraints. What we have said points to the fallacy in the argument. Employees have their correlative

[8] See, for example, Final Report of the Industrial Commission (1902), vol. 19, p. 844; Report of the Anthracite Coal Strike Commission (1902), Sen. Doc. No. 6, 58th Cong., spec. sess.; Final Report of Commission on Industrial Relations (1916), Sen. Doc. No. 415, 64th Cong., 1st sess., vol. I; National War Labor Board, Principles and Rules of Procedure (1919), p. 4; Bureau of Labor Statistics, Bulletin No. 287 (1921), pp. 52–64; History of the Shipbuilding Labor Adjustment Board, U. S. Bureau of Labor Statistics, Bulletin No. 283.

[9] See Investigating Strike in Steel Industries, Sen. Rep. No. 289, 66th Cong., 1st sess.

right to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work. *Texas & N. O. R. Co.* v. *Railway Clerks, supra; Virginian Railway Co.* v. *System Federation, No. 40.* Restraint for the purpose of preventing an unjust interference with that right cannot be considered arbitrary or capricious. The provision of § 9 (a)[10] that representatives, for the purpose of collective bargaining, of the majority of the employees in an appropriate unit shall be the exclusive representatives of all the employees in that unit, imposes upon the respondent only the duty of conferring and negotiating with the authorized representatives of its employees for the purpose of settling a labor dispute. This provision has its analogue in § 2, Ninth, of the Railway Labor Act which was under consideration in *Virginian Railway Co.* v. *System Federation, No. 40, supra.* The decree which we affirmed in that case required the Railway Company to treat with the representative chosen by the employees and also to refrain from entering into collective labor agreements with anyone other than their true representative as ascertained in accordance with the provisions of the Act. We said that the obligation to treat with the true representative was exclusive and hence imposed the negative duty to treat with no other. We also pointed out that, as conceded by the Government,[11] the injunc-

[10] The provision is as follows: "SEC. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer."

[11] See *Virginian Railway Co.* v. *System Federation, No. 40,* 300 U. S. 515.

tion against the Company's entering into any contract concerning rules, rates of pay and working conditions except with a chosen representative was "designed only to prevent collective bargaining with anyone purporting to represent employees" other than the representative they had selected. It was taken "to prohibit the negotiation of labor contracts generally applicable to employees" in the described unit with any other representative than the one so chosen, "but not as precluding such individual contracts" as the Company might "elect to make directly with individual employees." We think this construction also applies to § 9 (a) of the National Labor Relations Act.

The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer "from refusing to make a collective contract and hiring individuals on whatever terms" the employer "may by unilateral action determine."[12] The Act expressly provides in § 9 (a) that any individual employee or a group of employees shall have the right at any time to present grievances to their employer. The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel. As we said in *Texas & N. O. R. Co.* v. *Railway Clerks, supra,* and repeated in *Virginian Railway Co.* v. *System Federation, No. 40, supra,* the cases of *Adair* v. *United States,* 208 U. S. 161, and *Coppage* v. *Kansas,* 236 U. S. 1, are inapplicable to legislation of this character. The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their

[12] See Note 11.

self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion. The true purpose is the subject of investigation with full opportunity to show the facts. It would seem that when employers freely recognize the right of their employees to their own organizations and their unrestricted right of representation there will be much less occasion for controversy in respect to the free and appropriate exercise of the right of selection and discharge.

The Act has been criticised as one-sided in its application; that it subjects the employer to supervision and restraint and leaves untouched the abuses for which employees may be responsible; that it fails to provide a more comprehensive plan,—with better assurances of fairness to both sides and with increased chances of success in bringing about, if not compelling, equitable solutions of industrial disputes affecting interstate commerce. But we are dealing with the power of Congress, not with a particular policy or with the extent to which policy should go. We have frequently said that the legislative authority, exerted within its proper field, need not embrace all the evils within its reach. The Constitution does not forbid "cautious advance, step by step," in dealing with the evils which are exhibited in activities within the range of legislative power. *Carroll* v. *Greenwich Insurance Co.*, 199 U. S. 401, 411; *Keokee Coke Co.* v. *Taylor*, 234 U. S. 224, 227; *Miller* v. *Wilson*, 236 U. S. 373, 384; *Sproles* v. *Binford*, 286 U. S. 374, 396. The question in such cases is whether the legislature, in what it does prescribe, has gone beyond constitutional limits.

The procedural provisions of the Act are assailed. But these provisions, as we construe them, do not offend against the constitutional requirements governing the

creation and action of administrative bodies. See *Interstate Commerce Comm'n* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 91. The Act establishes standards to which the Board must conform. There must be complaint, notice and hearing. The Board must receive evidence and make findings. The findings as to the facts are to be conclusive, but only if supported by evidence. The order of the Board is subject to review by the designated court, and only when sustained by the court may the order be enforced. Upon that review all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of constitutional right or statutory authority, are open to examination by the court. We construe the procedural provisions as affording adequate opportunity to secure judicial protection against arbitrary action in accordance with the well-settled rules applicable to administrative agencies set up by Congress to aid in the enforcement of valid legislation. It is not necessary to repeat these rules which have frequently been declared. None of them appears to have been transgressed in the instant case. Respondent was notified and heard. It had opportunity to meet the charge of unfair labor practices upon the merits, and by withdrawing from the hearing it declined to avail itself of that opportunity. The facts found by the Board support its order and the evidence supports the findings. Respondent has no just ground for complaint on this score.

The order of the Board required the reinstatement of the employees who were found to have been discharged because of their "union activity" and for the purpose of "discouraging membership in the union." That requirement was authorized by the Act. § 10 (c). In *Texas & N. O. R. Co.* v. *Railway Clerks, supra,* a similar order for restoration to service was made by the court in contempt proceedings for the violation of an injunction issued by the court to restrain an interference with

the right of employees as guaranteed by the Railway Labor Act of 1926. The requirement of restoration to service, of employees discharged in violation of the provisions of that Act, was thus a sanction imposed in the enforcement of a judicial decree. We do not doubt that Congress could impose a like sanction for the enforcement of its valid regulation. The fact that in the one case it was a judicial sanction, and in the other a legislative one, is not an essential difference in determining its propriety.

Respondent complains that the Board not only ordered reinstatement but directed the payment of wages for the time lost by the discharge, less amounts earned by the employee during that period. This part of the order was also authorized by the Act. § 10 (c). It is argued that the requirement is equivalent to a money judgment and hence contravenes the Seventh Amendment with respect to trial by jury. The Seventh Amendment provides that "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." The Amendment thus preserves the right which existed under the common law when the Amendment was adopted. *Shields* v. *Thomas,* 18 How. 253, 262; *In re Wood,* 210 U. S. 246, 258; *Dimick* v. *Schiedt,* 293 U. S. 474, 476; *Baltimore & Carolina Line* v. *Redman,* 295 U. S. 654, 657. Thus it has no application to cases where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law. *Clark* v. *Wooster,* 119 U. S. 322, 325; *Pease* v. *Rathbun-Jones Engineering Co.,* 243 U. S. 273, 279. It does not apply where the proceeding is not in the nature of a suit at common law. *Guthrie National Bank* v. *Guthrie,* 173 U. S. 528, 537.

The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding. Reinstatement of the employee and payment for time lost are

requirements imposed for violation of the statute and are remedies appropriate to its enforcement. The contention under the Seventh Amendment is without merit.

Our conclusion is that the order of the Board was within its competency and that the Act is valid as here applied. The judgment of the Circuit Court of Appeals is reversed and the cause is remanded for further proceedings in conformity with this opinion.

Reversed.

For dissenting opinion, see p. 76.

NATIONAL LABOR RELATIONS BOARD *v.* FRUEHAUF TRAILER CO.

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

Nos. 420 and 421. Argued February 11, 1937.—Decided April 12, 1937.

The National Labor Relations Act, and orders made under it by the National Labor Relations Board, *sustained* upon the authority of *National Labor Relations Board* v. *Jones & Laughlin Steel Corp., ante,* p. 1, as applied to a manufacturer of commercial "trailers," (vehicles designed for the transportation of merchandise), having its factory in Michigan, but which obtained from outside of Michigan more than 50% in value of the materials and parts used in the plant, and shipped to States other than Michigan and to foreign countries more than 80% of its finished products. P. 53.

85 F. (2d) 391, reversed.

CERTIORARI, 299 U. S. 534, to review two decrees of the Circuit Court of Appeals, one dismissing a petition of the National Labor Relations Board for the enforcement of an order made by it under the National Labor Relations Act, the other setting the order aside at the petition of the trailer company.

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Solicitor General Reed, with whom *Attorney General Cummings* and *Messrs. Charles E. Wyzanski, Jr., Charles A. Horsky, A. H. Feller, Charles Fahy,* and *Robert B. Watts* were on the brief, for petitioner.

Respondent's enterprise is the focal point for a stream or flow of interstate commerce. Over 50% by value of the raw, unfinished and other materials which are used by the respondent in the construction of trailers are shipped to it from other States.

More than 80% of respondent's sales are to customers outside of Michigan. Efficiency in respondent's enterprise requires the maintenance of a steady flow of materials into and through its plant, and a steady stream of trailers out to its purchasers.

Thus we have a large and constant movement of goods into the Detroit plant; the briefest possible pause there, in part for manufacture, and in part merely for the assembly of completed parts, and immediate shipment to all parts of the United States. We submit, therefore, that industrial strife in respondent's Detroit plant would have the necessary effect of burdening and obstructing interstate commerce.

It is apparent that industrial strife in respondent's plant, the largest of its kind in the United States, would immediately curtail the movement from and into the channels of commerce, not only of a substantial volume of goods, but also of a substantial part of the interstate commerce in the trailer industry as a whole. Consequently, we submit that there is a reasonable likelihood that industrial strife in respondent's enterprise would, if it occurred, have the necessary effect of substantially burdening interstate commerce.

If, as we contend, the control power of Congress extends to recurrent industrial strife in these interstate enterprises, there can be no doubt that the order of the Board in the present case was within its jurisdiction.

Mr. Thomas G. Long, with whom *Mr. Victor W. Klein* was on the brief, for respondent.

They made the following points:

I. The National Labor Relations Act is not a regulation of interstate commerce but of (a) industry in general, and (b) labor relationships generally (by imposing "collective bargaining"), and is in excess of the power of Congress under the commerce clause and violative of the Tenth Amendment, and hence is void in its entirety.

II. In its manufacturing operations respondent and its production employees are not (a) in commerce, (b) in the "stream," "current," or "flow" of commerce; and they (c) do not "affect commerce," and hence are not subject to federal control.

The orders of the Board here before the Court exceed any power which Congress did or could confer upon said Board and contravene the Tenth Amendment.

The findings of the Board in relation to the respondent and its discharged employees (which are at all of material consequence) are arbitrary and capricious and without substantial basis in the evidence.

III. The Act is repugnant to and in violation of the Fifth Amendment both in respect of procedural rights and of substantive rights.

IV. The Act denies the right of trial by jury in violation of the Seventh Amendment.

V. The Act violates the First Amendment, which guarantees to citizens freedom of speech.

By leave of Court, *Messrs. Charlton Ogburn* and *Arthur E. Reyman,* as *amici curiae,* filed a brief on behalf of the American Federation of Labor, supporting the Act.

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

In October, 1935, charges against the respondent, Fruehauf Trailer Company, were filed with the National Labor

Relations Board. The Board issued its complaints (in two cases) alleging that the Company was engaged in unfair labor practices as described in § 8, subdivisions (1) and (3) of the National Labor Relations Act. 49 Stat. 449; 29 U. S. C. 151 *et seq.* The practices were said to consist in the discharge of, and threats to discharge, employees because of their affiliation with, and activity in, the labor organization known as United Automobile Workers Federal Labor Union No. 19375.

Notice of hearing was given and the complaints were consolidated. Respondent appeared specially and filed motions to dismiss the complaints upon the ground that the Board was without jurisdiction and that the Act as applied to respondent violated Article I, § 1, and the First, Fifth, Seventh and Tenth Amendments of the Constitution of the United States. Answers were also filed, denying the charges and reserving the same jurisdictional and constitutional objections. Hearing was had. The Board received evidence upon the jurisdictional issue and, reaffirming an earlier ruling, denied the motions to dismiss. Hearing upon the merits proceeded, and in December, 1935, the Board made its findings and entered its order.

The order required the respondent to cease and desist from discharging, or threatening to discharge, any of its employees because of their joining the Union; from employing detectives for the purpose of espionage within the Union; and from interfering in any other manner with or coercing its employees in the exercise of their right to self-organization for the purpose of collective bargaining or other mutual aid or protection as guaranteed in § 7 of the Act. The order also required the respondent to cease and desist from discouraging membership in the Union or, in any other labor organization of its employees, by discrimination in regard to hire or tenure of employment. Respondent was directed to offer reinstatement to the employees who had been discharged, to make good their

losses in pay, and to post for thirty days notices that it had complied with the order in ceasing the interferences set forth.

The Circuit Court of Appeals dismissed the petition of the Board to enforce its order and set the order aside. 85 F. (2d) 391. This Court granted certiorari.

With respect to the nature of respondent's business the Board made the following findings: Respondent is a corporation organized under the laws of Michigan and is engaged in the manufacture, assembly, sale and distribution of commercial trailers and of trailer parts and accessories. The trailers are vehicles designed for the transportation of merchandise. Respondent's plant is located in Detroit and is the largest concern of its kind in the United States. Respondent maintains 31 branch sales offices in 12 different States and has distributors and dealers in the principal cities of the country. A wholly-owned subsidiary operates in Toronto, Canada, where sales are made and considerable assembly work is done with materials obtained from the Detroit plant and in Canada. More than 50 per cent. in value of the materials used by the respondent in manufacture, assembly and shipping during the year 1934 were transported to its Detroit plant from Ohio, Illinois, Indiana and other States. Most of the lumber was transported from southern States and most of the finished parts were transported from States other than Michigan. In 1934, respondent's sales amounted to $3,318,000. Its nearest competitor sold only 37 per cent. of that amount. More than 80 per cent. of its sales are of products shipped outside the State of Michigan through and to other States and to foreign countries. Between January 1 and November 1, 1935, 112 carloads of respondent's products were shipped to points outside the State of Michigan by railroad and 400 to 500 trailers with accessories were hauled over the highways by motor trucks or tractors to

points outside the State. About 30 chassis a day are finished at the Detroit plant of which 80 per cent. are started on their way to destinations outside Michigan. In connection with its interstate sales, respondent furnishes service in the determination of customers' needs and assists in the laying out of special construction requirements. Respondent's sales of trailers in Canada are accomplished through its Canadian subsidiary, and its sales in States other than Michigan are made through its branch sales offices and its distributors and dealers. It is a practice of respondent to consign trailers and parts to distributors and dealers in various States with title retained in respondent until payment is made. The manufacturing and assembly operations at the Detroit plant are essentially connected with and dependent upon the purchase, sales and distribution operations without the State of Michigan. The findings also describe various features of respondent's manufacturing and distributing activities.

With respect to the alleged unfair labor practices, the Board found in substance as follows: The United Automobile Workers Federal Labor Union No. 19375 had been organized among the production and maintenance employees of respondent's Detroit plant and, at the time of the occurrences described, included 177 active members and about 100 members who at one time or another paid dues and did not usually attend meetings. The production and maintenance men at respondent's factory at that time numbered about 400. Early in 1934, respondent hired a detective whose duty it was "to ferret out the union activities of the men" and to keep the respondent informed. This, as the respondent's vice president stated, was to avoid trouble and "to keep a steady flow of business." For purposes of deception, and in order to make the detective eligible for membership in the

Union, respondent gave him employment. He joined the Union and became its treasurer. He thus obtained a list of all the members of the Union. He made frequent reports to respondent and with the lists thus obtained respondent's superintendent went about the factory from time to time and warned various employees against union activities. The result of these measures "caused suspicion, unrest and confusion among the employees." A sub-foreman, who was later discharged, was urged by the superintendent to resign his office in the Union and work with the superintendent "to see that the Union did not gain strength in the plant." The sub-foreman, who interviewed applicants for work, was also instructed by his foreman to learn whether they belonged to a union or believed in unionism and was told that, if they did, they would be objectionable. Respondent "determined to put a stop to all attempts on the part of its factory workers to form an efficient independent bargaining agency and in furtherance of that purpose summarily discharged nine men and threatened three others with discharge." Two of the men were discharged before the Act became effective.

The Board found: "As to the remaining seven men who were discharged, the evidence is found principally in the testimony of the discharged men and other employees. There was no credible or substantial contradiction of this testimony. Our conclusions as to the unfair labor practices charged are reached after a consideration of such evidence and argument as were offered by the respondent, who failed to produce witnesses in its own employ obviously having knowledge of the facts surrounding these discharges, and who in its brief does not argue that its conduct did not constitute unfair labor practices."

The Board reviewed the particular cases of discharge and found that, in each, the employee was discharged be-

cause he joined and assisted the Union. The Board found that as a result of the discharges the members of the Union were coerced and restrained from any attempt to organize for collective bargaining; that respondent's acts "led to confusion, resentment, and bitterness among the employees, and tended to lead to a labor dispute burdening and obstructing commerce and the free flow of commerce" between Michigan and other States and foreign countries.

Respondent, on its part, traces the history of the development of its business from its small beginnings, emphasizing the outstanding success of its enterprise. Respondent criticises the finding as to the number of its employees who were members of the Union and states there was no proper basis for the finding that there were only 400 employees in the manufacturing and production departments. Respondent contends that the testimony negatived any showing of labor difficulties and that since its first operations there had not been a strike at the plant which hampered its operations. It is also urged that it was not shown that the discharges caused a strike at the plant or delay in operations. Respondent points to evidence that only 35 men voted for a strike out of a total of 700 production and manufacturing employees; that only 67 employees voted at the Union meeting and that the suggestion of a strike was voted down. Respondent contends that the testimony of its vice-president showed that, in discharging and laying off men during a slack period of production, the same standard was applied to Union and non-Union men, the determining factors "being the efficiency of the workman, his coöperation and whether or not he appeared to have the Company's best interests at heart in performing his duties."

Counsel for respondent in their brief state that "Respondent called no witnesses and offered no proof on the

question of alleged unfair labor practices, except that brought out on cross-examination of discharged employees and from witness Vosler [its vice president], called by the Board on this phase of the case. The Company at all times relied upon its position that the Board had neither jurisdiction over the subject-matter of these proceedings, nor over the person of Respondent, that the Act, as a whole, was invalid and the attempted application thereof by the Board to respondent in these proceedings was unconstitutional."

The Board in its findings stated that respondent's witness, Vosler, testified that "he knew none of the facts" surrounding any of the discharges "of his own knowledge" and the Board commented upon the failure of respondent to produce the foreman, or the superintendent, who were in a position to contradict the statements of employees, if they could be contradicted, with respect to the reasons for the discharge.

We have examined respondent's contentions and we are of the opinion that the findings of the Board, with respect to the nature of the respondent's business and the circumstances of the discharges complained of, are supported by the evidence.

The questions relating to the construction and validity of the Act have been fully discussed in our opinion in *National Labor Relations Board* v. *Jones & Laughlin Corp., ante,* p. 1. We hold that the principles there stated are applicable here. The decree of the Circuit Court of Appeals is reversed and the cause is remanded for further proceedings in conformity with this opinion.

Reversed.

For dissenting opinion, see p. 76.

NATIONAL LABOR RELATIONS BOARD *v.* FRIEDMAN-HARRY MARKS CLOTHING CO.

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

Nos. 422 and 423. Argued February 11, 1937.—Decided April 12, 1937.

The National Labor Relations Act, and orders made under it by the National Labor Relations Board, *sustained* upon the authority of *National Labor Relations Board* v. *Jones & Laughlin Steel Corp., ante,* p. 1, as applied to a manufacturer of garments, having its factory in Virginia but which imported its cloth from other States and sold almost all of the finished products in other States. P. 72.

85 F. (2d) 1, reversed.

CERTIORARI, 299 U. S. 535, to review decrees of the Circuit Court of Appeals refusing to enforce orders of the National Labor Relations Board.

Messrs. Charles Fahy and *Charles E. Wyzanski, Jr.,* with whom *Attorney General Cummings, Solicitor General Reed,* and *Messrs. A. H. Feller, Charles A. Horsky, Robert B. Watts, Laurence A. Knapp,* and *A. L. Wirin* were on the brief, for petitioner.*

I. Where the situation in a particular enterprise presents the likelihood that a labor dispute, if it occurred, would involve an intent to restrain commerce, then the Board can apply the preventive measures of this statute to that enterprise. It is not claimed in the present case that there is any proof of the existence of an actual intent to affect commerce. However, respondent's enterprise

*Arguments in this case are summarized from the briefs. Extracts from the oral arguments in this and other Labor Act cases will appear in an appendix in the bound volume.

presents a situation in which a labor controversy over employees' basic rights of self-organization and freedom from interference in choice of representatives for purposes of collective bargaining would be likely to involve the purpose not merely by stopping production, but also by interrupting or hindering actual sales and shipments in interstate commerce.

Over 125,000 employees in the men's clothing industry are members of the Amalgamated Clothing Workers of America, the largest collective bargaining agency in the industry. Acting through that representative those employees have secured collective agreements which cover the greater part of the industry. By those agreements, wages have been increased, hours shortened, and other ameliorating standards of employment obtained and maintained. By them, also, the processes of negotiation and arbitration have been substituted for the strike and lock-out as a peaceful method of solving industrial problems affecting employer and employee.

Employees who are members of this organization will not lightly yield to influences endangering the favorable conditions of employment now established and existing in the principal centers of the industry. On the contrary, it is only reasonable to assume that they would endeavor effectively to counteract any such dangers. Dangers of the character suggested in fact exist today.

With effective competition between the industry's enterprises an accepted fact regardless of location, and bearing in mind the purpose and effect of the migration of enterprises, it seems unavoidable that the members of the Amalgamated Clothing Workers should, as they do, regard the industry as one whose economic organization is not based on the interests of each individual enterprise, but is one in which union conditions, to be maintained at all, must prevail generally. Industrial strife

in respondent's enterprise would, therefore, be likely to have as its object, not merely the application of economic pressure upon respondent, but the cessation of shipments from respondent's plant into the national market, in order to safeguard the organization and collective bargaining rights in competing enterprises and areas beyond the State of Virginia. Cf. *Coronado Coal Co.* v. *United Mine Workers,* 268 U. S. 295, 310.

We are not here contending that the circumstances described above establish a valid basis for wage stabilization legislation under the commerce clause. We do contend that such circumstances give rise to a reasonable probability of industrial strife involving the purpose to restrain actual sales and shipments in the channels of interstate commerce, and that they do establish a valid basis for a statute such as this, dealing solely with the problem of labor disputes as they affect the national interest.

II. It is true that respondent's enterprise is not so clearly within a stream of interstate commerce as that of the Jones & Laughlin Steel Corporation, *ante,* p. 1. Nevertheless, we submit that respondent's enterprise may be considered as an integral part of a stream of commerce among the States.

This stream or flow begins with the movement of the raw wool from the West to the New England States. Most of the cloth moves on in interstate commerce to the centers of the industry, such as New York (50.2% of the enterprises), Pennsylvania (10.4%), and Maryland (10.2%).

This interstate flow of goods from mill to manufacturer is likewise true to a substantial extent of many other materials essential to clothing.

Large interstate movements occur even during the actual fabrication of the garments. The purchaser of the cloth commonly cuts the fabric to shape and size, but

the actual sewing, finishing, and pressing are frequently done in other States.

The interstate movement in the distribution of products is, of course, a matter of common knowledge.

The Board was justified in applying the preventive measures of the Act to respondent in order to remove the causes of industrial strife which would be apt to spread, by sympathetic action, until a substantial part of all the commerce in men's clothing had been restrained.

Respondent is, compared to other firms in the clothing industry, of relatively large size, being among the fifty largest of the three thousand firms which make up the industry. Industrial strife in its plant would cause the cessation of this large volume of interstate commerce even if confined to respondent's enterprise. Even if it were so limited, however, it seems impossible to believe that Congress is powerless to prevent a burden on commerce of that magnitude. As we have shown in the brief for the Board in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp., ante,* p. 1, the effect of industrial strife on interstate commerce, even though arising out of local activity, is immediate and would be substantial here. Certainly the cessation of purchases and shipments by an enterprise of the size of respondent's cannot be regarded as without national significance. Nor can the fact that other units of the industry could probably increase production sufficiently to supply the deficiency caused by respondent be determinative of the power of Congress, for the disruption of the channels of commerce, even with no change in the amount of material shipped, is in itself a burden on interstate commerce within the constitutional concern of Congress.

III. Where Congress, after investigation, directs its legislation to the prevention of certain activities which, even though usually only of local concern, recur with

such frequency as to constitute an undue burden on commerce, those activities may be subjected to the control of Congress.

If, as we contend, the control power of Congress extends to recurrent industrial strife in these interstate enterprises, there can be no doubt that the order of the Board in the present case was within its jurisdiction. Respondent is dependent upon the products of States other than Virginia for almost 100% of the woolen and worsted goods which it uses. The same condition prevails with respect to cotton, rayon and silk linings, felt, wigan and cotton tape, Hymo and under-collar cloth. It can fairly be said that the contribution of Virginia enterprises to the operations conducted at respondent's plant is negligible.

Mr. Leonard Weinberg, with whom *Mr. Harry J. Green* was on the brief, for respondent.

The Act is unconstitutional. Its real purpose is social and economic, and to be accomplished in an arbitrary, capricious and discriminatory manner through unionization of all industry by fiat.

The validity of legislation depends upon its true substance, not upon its form or its declaration of "Findings and Policy." *Railroad Retirement Board* v. *Alton R. Co.,* 295 U. S. 330, 363, 371, 374; *United States* v. *Butler,* 297 U. S. 1; *United States* v. *Constantine,* 296 U. S. 287, 296; *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 51, 52; *Carter* v. *Carter Coal Co.,* 298 U. S. 238, 289, 291.

The "Findings and Policy" of § 1 of the Act attempt to conceal the real objectives in a vain effort to justify illegality. The objectives avowed in the Title are belied by the terms of the Act itself.

The Act is arbitrary and capricious. The most significant feature is its utter failure to regulate the practices of labor unions or to make them responsible, in any degree, for their acts or for the acts of their representatives.

It goes farther in assisting unionization and disarming employers than any previous legislation ever enacted in any country operating under a republican form of government. If strikes and industrial strife burden or obstruct interstate commerce, and if Congress really intends to eliminate them, mutual obligations must be placed on both employer and employee.

The Act arbitrarily discriminates against non-union workers, by practically requiring every worker to join a labor union, or be bound by its agreements with his employer, or forfeit his job. He cannot turn to his employer, because the employer is forbidden by § 8 to take any steps whatever to help him. He cannot turn to the Labor Relations Board, because the Act gives it no jurisdiction over any complaints against labor unions. While § 8 prohibits an employer from discharging any employee because he is a member of a labor union, the same section gives him the right to discharge his employee if he refuses to become a member.

Thus the Act fosters and gives statutory sanction to the "closed shop," traditionally the fundamental objective and prime demand of every union. Not only that, but this section 8 places the bewildered and helpless employer at the mercy of rival unions, each of which may be demanding, on its own behalf, a closed shop, one being in the ascendancy one day and the other the next.

Section 9 provides that when a majority of employees are members of a labor organization, the employer must bargain collectively with it, and the terms of that bargain shall be binding upon non-union workers. The only recourse open to non-union workers is that found in subsection (a) of § 9, that they "shall have the right at any time to present grievances to their employer." What a mockery this is!

The Act discriminates in favor of a selected type of labor organization and arbitrarily outlaws all others.

Subdivision 2 of § 8 refers to "any" organization of workers, and makes it unlawful for an employer to contribute financial "or other support" to it. Then, by subdivision 3 of § 8, the employer is prohibited from contracting with such an organization of his workers. All company unions and local organizations of workers are thereby arbitrarily outlawed. This intolerant, bigoted and prejudiced attitude exemplified not only in the Act but by the decisions of the Board, is emphasized by the provisions contained in subdivision 2 of § 8 and subdivision (a) of § 9, which provide that the employer may "confer" with his individual employees and that they may "present grievances" to him, "subject to rules and regulations made and published by the Board." In other words, the employer may talk to his employees about their work and they, on their part, may talk to him about it, only at the times and under the conditions prescribed by the National Labor Relations Board.

Thus, this Act actually erects a barrier between their free intercourse and relations, attributes improper motives both to all employers and their workers not having union agreements, prevents even the possibility of mutual understanding of mutual problems, and forces them to deal with each other at arms' length.

Certainly, it need not be argued that the efficiency of employees is enhanced, and labor turnover decreased, in proportion to the employer's ability to inspire and hold the goodwill, loyalty, confidence, and coöperation of his employees by his friendly association with and sympathetic attitude toward them and their interests. This is fundamental in good business management. It must be obvious that no considerations of general public welfare or industrial peace, much less the regulation of interstate commerce, dictated this arbitrary distinction between company unions and national labor unions, but

that the outlawing of company unions was inserted in this Act solely at the behest of the national labor unions, which sought by statutory enactment to destroy all organizations of workers in industry which they did not or could not control.

The administrative procedure outlined in the Act, and the procedure adopted by the Board in its administration of the Act, demonstrate its discriminatory, arbitrary, unreasonable, and unlawful character.

Manufacturing is a purely local activity which may not be regulated under the commerce clause.

In the *Schechter* case the articles were imported from other States in advance of the activity over which the Federal Government sought to impose labor regulations. In the *Carter* case the conditions regulated preceded the exportation of the coal to other States. In the present case, raw materials are imported into Virginia before the manufacturing operations take place, and the finished product thereafter finds its way into other States. This factual difference has no legal significance.

The dealings and transactions between the respondent and its employees, with respect to and in the course of manufacture of its product, bear no relationship to interstate commerce.

Here the Board is driven to the following sophistry: (1) men's clothing is an important commodity; (2) the raw materials necessary come from various States of the Union and from foreign lands to the point of manufacture; (3) the clothing is produced in only some of the States, while it is shipped to and used in all of them; (4) employees in this industry are not on a level with their employers with respect to bargaining powers; (5) to secure an equal footing for them it is necessary that they be permitted to organize and exercise their bargain-

ing powers through organizations; (6) labor organizations must be permitted complete freedom, to attempt to unionize industries and business, because they offer the best medium for representation of employees; (7) strikes, industrial strife and unrest are the inevitable result of the failure of employers to recognize the rights of their employees to organize and bargain collectively; (8) when these conditions exist the movement of commerce among the various States may be affected and impaired; (9) if the flow of interstate commerce is interfered with, a decrease in purchasing power may result and may lead to economic depression; and (10) that therefore and thereby interstate commerce is directly affected.

Not only is this sophistry specious and fallacious, and beyond the realm of any valid legal concept, but it is especially ridiculous in the light of the particular facts in this case.

When it is sought to apply it here to this case, the Government is constrained to make even these additional assumptions:

(11) that the discharge of nineteen employees and the hostility of the employer toward the union might cause other employees to become suspicious of and dissatisfied with their employer; (12) unrest might be caused in the plant; (13) other employees might join the union; (14) more discharges might follow; (15) such discharges might produce a strike; (16) respondent might not be able to obtain new workers to replace strikers; (17) respondent might not have sufficient finished product on hand to supply the demands of his customers during the strike; (18) production of merchandise might fall below demand; (19) the amount of respondent's goods moving in interstate commerce might decrease; (20) such decrease might suffice to "affect the free flow of commerce" in men's clothing; and (21) such an effect upon interstate commerce would be a "direct" one.

The record in this case directly belies such hypotheses. Respondent discharged nineteen of its eight hundred employees. There is no evidence that the garments upon which they were working were destined to be shipped to customers outside, rather than within, the State of Virginia. There was and has been no disorder, no strife, no interference with the orderly conduct of the business of respondent, and no strike resulting from the discharge of these workers. The action of respondent, undefended in this case, has not burdened, obstructed, or affected the flow of interstate commerce, nor has it tended to burden, obstruct or affect the flow of interstate commerce. It has not even affected in any way the flow of production in respondent's own factory, much less the flow of interstate commerce or the flow of men's clothing into interstate commerce.

But the Government contends it has the right to utterly disregard the facts of this case and the patent actuality that the alleged unfair labor practices in no wise burdened or obstructed interstate or even intrastate commerce. It argues that the men's clothing industry is an important national industry; that the industry will be able to function better and with less strife if unions are encouraged; that labor disputes between employers and employees have in the past caused and will continue to cause strikes and labor unrest; and that such recurrent controversies and evils affect production, consumption and the flow of the article in interstate commerce, and, therefore, the Federal Government may prevent as well as remedy such evils.

Exactly the same contention was made and rejected in the *Carter* case.

Five different Circuit Courts of Appeals have thus far passed upon cases involving the question of whether this Act is, under the commerce clause, applicable to various manufacturing businesses. Without a dissenting voice

the proposition has been rejected. *Foster Brothers Mfg. Co.* v. *National Labor Relations Board,* CCA–4, 85 F. (2d) 984; *Fruehauf Trailer Co.* v. *National Labor Relations Board,* CCA–6, 85 F. (2d) 391; *Pratt* v. *Stout,* CCA–8, 85 F. (2d) 172; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* CCA–5, 83 F. (2d) 998; *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co.,* CCA–2, 85 F. (2d) 1.

This Act violates the Fifth Amendment in four particulars:

First, subsections 3 and 4 of § 8 attempt to regulate the conditions under which an employer may engage his workers and under which he may discharge them. This actually substitutes management by the Board for that of the owner of the business.

Even from the standpoint of the employee, these subsections are an arbitrary and unreasonable interference with his rights. Moreover, they place union employees in a favored status over non-union workers as to tenure of employment and advancement therein. Cf. *Rosenthal-Ettlinger* v. *Schlossberg,* 226 N. Y. S. 762.

Second, § 9 (a) prohibits an employer from dealing individually with his employees, and from dealing with minority groups of his employees, in respect of rates of pay, wages, hours or other conditions of employment. It makes agreements between the majority group and the employer, as to all conditions of employment, binding upon all individual workers and upon all minority groups, thereby depriving each of them of his right to make his own terms with his employer. Cf. *Carter* v. *Carter Coal Co., supra,* p. 311.

Third, subsection 5 of § 8 makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of § 9 (a)."

The old National Labor Relations Board, set up under the terms of the National Industrial Recovery Act, as well as the present National Labor Relations Board, operating under the National Labor Relations Act, have uniformly and consistently held in numerous cases that this requirement, that an employer collectively bargain with his employees, means that the employer shall continue to bargain with his employees until an agreement actually has been reached.

With the intent of this provision thus disclosed, it will be seen that this section of the National Labor Relations Act interferes with the rights of the employer by requiring him to enter into contractual negotiations with persons with whom he may not care to contract and coercing him into agreeing to terms which may not be acceptable to him.

The worst feature of this so-called "collective bargaining" lies in the fact that it does not require bargaining by both parties to the controversy. The employer is forced to bargain. He must recede from his original position in order to compromise with the union demands; and then he is bound to carry out his agreement. On the other hand, the union cannot be required to bargain, even if the employer desires or demands it. It need not retreat from its original demands, however preposterous; and it and the employees it represents are not bound and cannot be compelled to carry out any agreement it makes.

Fourth, subsection 3 of § 8 specifically provides that an employer may agree with the majority of his employees, through collective bargaining, to employ only union members; while, at the same time, §§ 7, 8, and 9, make it unlawful for an employer to agree to employ only non-union workers. This invades the rights of individual workers and employers by permitting unions, through the

medium of compulsory collective bargaining, to prescribe that non-union employees shall join their union as a condition precedent to obtaining or retaining their positions, at the same time making it unlawful for any individual employee or group of employees to obtain an agreement from his or their employer not to employ union workers.

Cf. *Allgeyer* v. *Louisiana,* 165 U. S. 578, 589; *Adair* v. *United States,* 208 U. S. 161; *Adkins* v. *Children's Hospital,* 261 U. S. 525; *Morehead* v. *New York ex rel. Tipaldo,* 298 U. S. 587; *Wolff* v. *Kansas,* 262 U. S. 522, s. c., 267 U. S. 552. Distinguishing: *Texas & N. O. R. Co.* v. *Railway Clerks,* 281 U. S. 548.

The basic purpose of the Act is to accomplish compulsory collective bargaining, binding upon minority employees; this being invalid, the entire statute must fall.

The Act gives to the Board, and the Board has assumed, powers which, if valid at all, may be exercised only by Congress and the duly constituted courts of the United States.

The order of the Board requiring the reinstatement of the employees, with back pay, is arbitrary and illegal.

Mr. Chief Justice Hughes delivered the opinion of the Court.

The National Labor Relations Board, by its orders of March 28, 1936, required the respondent, Friedman-Harry Marks Clothing Company, Inc., to cease and desist from discharging any of its employees or otherwise discriminating in regard to the tenure and conditions of their employment, and from threatening such action, for the reason that such employees have joined or assisted the Amalgamated Clothing Workers of America or otherwise engaged in union activity; from maintaining surveillance

of the activities of the labor organization and of their employees in connection therewith; and from interfering in any manner with, or coercing, its employees in the exercise of their right to self-organization and representation for the purpose of collective bargaining or other mutual aid or protection as guaranteed in § 7 of the National Labor Relations Act. The orders also required respondent to offer reinstatement to certain discharged employees, to make good their loss of pay, and to post notices for thirty days that respondent would cease and desist from the practices restrained by the orders. The Circuit Court of Appeals refused to enforce the orders, 85 F. (2d) 1, and this Court granted certiorari.

The proceeding was initiated by the National Labor Relations Board upon charges that the respondent had discharged certain employees because they had engaged in union activities. The Board issued two complaints alleging unfair labor practices within the meaning of the National Labor Relations Act. Notice of hearing was given. Respondent appeared specially and moved to dismiss the complaints upon the grounds that the Act, and the proceedings before the Board, were in contravention of Articles I and III and the First, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Thirteenth Amendments of the Constitution of the United States. Reserving these objections, respondent filed answers denying all the allegations of the complaints except that respondent is a Virginia corporation engaged in the business of manufacturing men's clothing in Richmond. The Board overruled the objections to its jurisdiction and the validity of the Act. For the purpose of presenting the constitutional questions, and to expedite the proceedings, counsel for respondent announced at the beginning of the hearings "that he would not cross-examine any of the Board's witnesses and would not offer any countervailing evi-

dence." The Board received evidence and made its findings. There were numerous objections by respondent to the competency and relevancy of certain testimony.

The Board found: Respondent, a Virginia corporation, has its plant at Richmond, where it is engaged in the purchase of raw materials and the manufacture, sale and distribution of men's clothing. The principal materials are woolen and worsted goods. 99.57 per cent. of these goods come from States other than Virginia, 75 per cent. being purchased in New York and fabricated for the most part in other States. Cotton linings come from several southern States. Particulars as to the sources of other materials are set forth. Of the garments manufactured by respondent, 82.8 per cent. are purchased by customers outside the State, mainly by department stores and men's clothing stores in the larger cities throughout the country. Respondent maintains a sales office and showroom in New York City through which 15 or 20 per cent. of the total sales are made. Orders are sent to the Richmond plant, the goods being sold f.o.b. Richmond. In 1932, the volume of respondent's business amounted to $800,000 and 80,000 units, increasing to $1,750,000 and 150,000 units in the first ten months of 1935.

The Board made elaborate findings with respect to the clothing manufacturing industry and its relation to interstate commerce. Among these findings are the following: The men's clothing industry is among the twenty most important manufacturing industries in this country. Fifty per cent. of the manufacturing establishments are in the State of New York; most of the remainder are in Pennsylvania, Maryland, New Jersey, Illinois, Massachusetts, California and Ohio. Since the men's wear fabrics are produced largely in the New England States, the goods must be transported from the mills across state lines to the fabricating establishments in the States above

mentioned. The manufactured clothing is sold throughout the nation, only about 48 per cent. of the total sales being made in the seven States which produce about 90 per cent. of the total men's clothing. The findings describe the methods of sales, the New York market being the largest in the country. The Board concluded: "The men's clothing industry is thus an industry which is nearly entirely dependent in its operations upon purchases and sales in interstate commerce and upon interstate transportation. There is a constant flow of raw wool from the western States and foreign countries to the mills of New England where it is transformed into men's wear fabrics, thence to the sponging and shrinking plants of New York and Philadelphia, then, joined by the other necessary raw materials, to the fabricating factories of the Middle Atlantic States for manufacture into clothing. . . . The industry itself has no doubt as to its status, for the Executive Director of the New York Clothing Manufacturers Exchange, Inc., which represents about 250 manufacturers doing 70 per cent. of the total business in the New York market, stated in his affidavit that the industry is conducted as an interstate business and is entirely dependent upon interstate commerce."

The Board also made findings in relation to the labor organization here involved. The Board found: "The Amalgamated Clothing Workers of America is a labor organization composed of over 125,000 men and women employed in the men's and boys' clothing industry. . . . The period before the recognition by the employers of the Amalgamated was marked by long and bitter strikes. In 1921 there had been a general strike in New York City which had lasted for eight months and caused losses of millions of dollars to employers and employees. A similar general strike in New York in 1924 lasted for six weeks and involved all of the 500 firms in that area and their

35,000 workers. The wage loss to the workers was nearly $6,000,000, the financial loss to the manufacturers ran into the millions. . . . This costly industrial strife resulted finally in recognition of the Amalgamated by the employers. . . . The New York strike of 1924 was ended by the establishment of a collective agreement between the leading manufacturers and the Amalgamated which was soon joined in by other manufacturers in that area. Factories in Rochester, Baltimore, Boston, Cincinnati, Cleveland, St. Louis and Philadelphia recognized the union and entered into agreements with it. Today the Amalgamated has collective agreements with clothing manufacturers and contractors employing the greater number of the clothing workers in the United States. These collective agreements have brought peace to that portion of the industry that has entered such agreements. . . . Since the signing of the collective agreement for the New York area, the New York Clothing Manufacturers Exchange, Inc. and the Amalgamated have handled jointly a total of 21,193 complaints and disputes. In only 898 of these cases, or slightly over 4 per cent., was a resort to arbitration required because of inability to agree. Of these 898, 30 per cent. were settled by the impartial chairman acting as a mediator; in the remainder he sat as an arbitrator and rendered a decision. . . . The President of the New York Clothing Manufacturers Exchange, Inc. . . . has stated that the 'organization of collective bargaining machinery, the establishment of an impartial tribunal, and the founding of unemployment insurance are the outstanding achievements' in the industry and that the Amalgamated Clothing Workers 'has been perhaps the largest single contributing factor to the lasting peace and harmony that have characterized those clothing markets where the Amalgamated Clothing Workers of America was the other contracting party to the collective agreement.' "

With respect to unfair labor practices, the Board found that in the summer of 1935 employees of respondent had formed a local union of the Amalgamated Clothing Workers of America and were soliciting membership therein. Respondent's management "at once indicated hostility to the union organization of its employees and declared that it would not permit them to join the Amalgamated." Statements of the president of the respondent showing his antagonism to the union were quoted by the Board. At one time he stated to a group of employees that he would discharge every one that attended the union meeting. Similar statements were made by respondent's secretary. Respondent's management "has maintained surveillance over union meetings and activities." The findings set forth the circumstances of the discharge of employees. The Board concluded that these discharges were because of the membership of the employees in the labor organization and their activities in connection with it. The Board also found that interference in the industry with the activities of employees in joining and assisting labor organizations and the refusal to accept the procedure of collective bargaining had led and tends to lead to strikes and other labor disputes that burden and obstruct commerce.

The findings of the Board both as to the nature of respondent's business and the circumstances of the discharge of its employees are supported by the evidence.

For the reasons stated in our opinion in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp., ante,* p. 1, we hold that the objections raised by respondent to the construction and validity of the National Labor Relations Act are without merit. The decrees of the Circuit Court of Appeals are reversed and the causes are remanded for further proceedings in conformity with this opinion.

Reversed.

MR. JUSTICE MCREYNOLDS delivered the following dissenting opinion in the cases preceding:

MR. JUSTICE VAN DEVANTER, MR. JUSTICE SUTHERLAND, MR. JUSTICE BUTLER and I are unable to agree with the decisions just announced.

We conclude that these causes were rightly decided by the three Circuit Courts of Appeals and that their judgments should be affirmed. The opinions there given without dissent are terse, well-considered and sound. They disclose the meaning ascribed by experienced judges to what this Court has often declared, and are set out below in full.

Considering the far-reaching import of these decisions, the departure from what we understand has been consistently ruled here, and the extraordinary power confirmed to a Board of three,[1] the obligation to present our views becomes plain.

The Court, as we think, departs from well-established principles followed in *Schechter Corp.* v. *United States,* 295 U. S. 495 (May, 1935) and *Carter* v. *Carter Coal Co.,* 298 U. S. 238 (May, 1936). Upon the authority of those decisions, the Circuit Courts of Appeals of the Fifth, Sixth and Second Circuits in the causes now before us have held the power of Congress under the commerce clause does not extend to relations between employers and their employees engaged in manufacture, and therefore the Act conferred upon the National Labor Relations Board no authority in respect of matters covered by the questioned orders. In *Foster Bros. Mfg. Co.* v. *National Labor Relations Board,* 85 F. (2d) 984, the Circuit Court of Appeals, Fourth Circuit, held the Act inapplicable to manufacture and expressed the view that if so extended it

[1] National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; U. S. C., Sup. I, Tit. 29, §§ 151 *et seq.*).

would be invalid. Six district courts, on the authority of *Schechter's* and *Carter's* cases, have held that the Board has no authority to regulate relations between employers and employees engaged in local production.[a] No decision or judicial opinion to the contrary has been cited, and we find none. Every consideration brought forward to uphold the Act before us was applicable to support the Acts held unconstitutional in causes decided within two years. And the lower courts rightly deemed them controlling.

By its terms the Labor Act extends to employers—large and small—unless excluded by definition,[2] and declares that if one of these interferes with, restrains, or coerces any employee regarding his labor affiliations, etc., this shall be regarded as unfair labor practice. And a "labor organization" means any organization of any kind or any agency or employee representation committee or plan which exists for the purpose in whole or in part of dealing with employers concerning grievances, labor dis-

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[a] *Stout* v. *Pratt,* 12 F. Supp. 864. *Bendix Products Corp.* v. *Beman,* 14 F. Supp. 58. *Eagle-Picher Lead Co.* v. *Madden,* 15 F. Supp. 407. *Bethlehem Shipbuilding Corp.* v. *Meyers,* 15 F. Supp. 915. *El Paso Electric Co.* v. *Elliott,* 15 F. Supp. 81. *Oberman & Co.* v. *Pratt,* 16 F. Supp. 887.

[2] SEC. 2. (2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

SEC. 2. (3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent

putes, wages, rates of pay, hours of employment or conditions of work.[b]

The three respondents happen to be manufacturing concerns—one large, two relatively small. The Act is now applied to each upon grounds common to all. Obviously what is determined as to these concerns may gravely affect a multitude of employers who engage in a great variety of private enterprises—mercantile, manufacturing, publishing, stock-raising, mining, etc. It puts into the hands of a Board power of control over purely local industry beyond anything heretofore deemed permissible.

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employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

SEC. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

[b] SEC. 2. (5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

SEC. 3. (a) There is hereby created a board, to be known as the "National Labor Relations Board" (hereinafter referred to as the "Board"), which shall be composed of three members, who shall be appointed by the President, by and with the advice and consent of the Senate. One of the original members shall be appointed for a term of one year, one for a term of three years, and one for a term of five years, but their successors shall be appointed for terms of five years each, except that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

II.

[No. 419] Circuit Court of Appeals (Fifth Circuit)
Opinion June 15, 1936, 83 F. (2d) 998
Before Foster, Sibley, and Hutcheson, Circuit Judges

"*Per Curiam.* The National Labor Relations Board has petitioned us to enforce an order made by it, which requires Jones & Laughlin Steel Corporation, organized under the laws of Pennsylvania, to reinstate certain discharged employees in its steel plant in Aliquippa, Pa., and to do other things in that connection.

"The petition must be denied, because, under the facts found by the Board and shown by the evidence, the Board has no jurisdiction over a labor dispute between employer and employees touching the discharge of laborers in a steel plant who were engaged only in manufacture. The Constitution does not vest in the Federal Government the power to regulate the relation as such of employer and employee in production or manufacture.

" 'One who produces or manufactures a commodity, subsequently sold and shipped by him in interstate commerce, whether such sale and shipment were originally intended or not, has engaged in two distinct and separate activities. So far as he produces or manufactures a commodity, his business is purely local. So far as he sells and ships, or contracts to sell and ship, the commodity to customers in another state, he engages in interstate commerce. In respect of the former, he is subject only to regulation by the state; in respect of the latter, to regulation only by the federal government. Utah Power & L. Co. v. Pfost, 286 U. S. 165, 182. Production is not commerce but a step in preparation for commerce. Chassaniol v. Greenwood, 291 U. S. 584–587.

" 'We have seen that the word "commerce" is the equivalent of the phrase "intercourse for the purposes of trade."

Plainly the incidents leading up to and culminating in the mining of coal do not constitute such intercourse. The employment of men, the fixing of their wages, hours of labor and working conditions, the bargaining in respect of these things—whether carried on separately or collectively—each and all constitute intercourse for the purposes of production, not of trade. The latter is a thing apart from the relation of employer and employee, which in all producing occupations is purely local in character. Extraction of coal from the mine is the aim and the completed result of local activities. Commerce in the coal mined is not brought into being by force of these activities but by negotiations, agreements, and circumstances entirely apart from production. Mining brings the subject matter of commerce into existence. Commerce disposes of it.' Carter v. Carter Coal Co., 298 U. S. 238, decided May 18, 1936.

"That the employer has a very large business, the interruption of which by a strike of employees which might happen, and that in consequence of such strike production might be stopped and interstate commerce in the products affected, does not make the regulation of the relation justified under the commerce power of Congress, because the possible effect on interstate commerce is too remote to warrant Federal invasion of the State's right to regulate the employer-employee relation. Nor is it important that the employer imports part of his raw materials in interstate commerce and sells and exports a large part of his product in interstate commerce, which imports and exports would possibly be stopped by a possible strike. The employers' entire business thus connected together does not, as respects Federal power, make a case different from that in which importation of materials, manufacture of them, and sale and export of the product are conducted by three persons. The employer here by doing

all three things does not alter the respective constitutional spheres of the Federal and State governments. The making and fabrication of steel by Jones & Laughlin Steel Corporation is production regulable by the State of Pennsylvania, notwithstanding the corporation also engages in interstate commerce regulable by Congress in bringing in its raw materials and again in selling and delivering its products. No specific present intent appears to impede or destroy interstate commerce by means of a strike in a manufacturing plant, or other like direct obstruction to or burden on interstate commerce. The order we are asked to enforce is not shown to be one authorized to be made under the authority of Congress. Carter v. Carter Coal Co., supra.

"The petition is denied."

III.

[Nos. 420-421] Circuit Court of Appeals (Sixth Circuit)
Opinion June 30, 1936, 85 F. (2d) 391
Before Moorman, Hicks, and Simons, Circuit Judges.

"*Per Curiam.* The National Labor Relations Board has filed a petition in this court to enforce an order issued by it in proceedings which it instituted against the Fruehauf Trailer Company. The order directs the Trailer Company to cease and desist from discharging or threatening to discharge any of its employees because of their activities in connection with the United Automobile Workers Federal Labor Union No. 19,375, to cease discouraging its employees from becoming members of that union, to offer to certain of its former employees immediate and full reinstatement in their former positions without prejudice to their seniority rights, to make such employees whole for any losses of pay that they have suffered by reason of their discharge by paying

them what they would have earned as wages from the dates of their discharges, and to post notices throughout its Detroit plant, in conspicuous places, stating that it has ceased and desisted from discharging or threatening to discharge its employees for joining the United Automobile Workers Federal Labor Union No. 19,375. The Fruehauf Trailer Company has filed its petition seeking a review of the order and praying that the court set it aside. The record of the proceeding before the Labor Board has been filed and the two petitions have been heard together in this court.

"The Fruehauf Trailer Company is a corporation organized and existing under the laws of the State of Michigan and is engaged in the manufacture, assembly, and sale of automobile trailers at its plant in Detroit, Mich. The material and parts used in the manufacture and production of the trailers are shipped to the plant. After the trailers are manufactured, many of them are shipped to other states for sale and use. The order in question undertakes to regulate and control the Trailer Company's relations and dealings with its employees engaged in the production and manufacture of trailers at the company's plant in Detroit and does not directly affect any of the activities of the Trailer Company in the purchasing and transporting to its plant of materials and parts for the manufacture and production of trailers or in the shipping or selling of such trailers after they are manufactured. It was issued under the authority of the Act of Congress of July 5, 1935, known as the National Labor Relations Act. (29 U. S. C. A., § 151 et seq.) The authority for the Act is claimed under the commerce clause of the Constitution. Since the order is directed to the control and regulation of the relations between the Trailer Company and its employees in respect to their activities in the manufacture and production of

trailers and does not directly affect any phase of any interstate commerce in which the Trailer Company may be engaged, and since, under the ruling of Carter v. Carter Coal Company, 298 U. S. 238, the Congress has no authority or power to regulate or control such relations between the Trailer Company and its employees, the National Labor Relations Board was without authority to issue the order. See National Labor Relations Board v. Jones & Laughlin Steel Corporation, 83 F. (2d) 998 (C. C. A. 5), decided June 15, 1936.

"The petition of the Board is accordingly dismissed and the order is set aside."

IV.

[Nos. 422-423] Circuit Court of Appeals (Second Circuit)
Opinion July 13, 1936, 85 F. (2d) 1
Before Manton, Swan, and A. N. Hand, Circuit Judges.

"*Per Curiam.* The respondent, a Virginia corporation, is a manufacturer of men's clothing with its principal office and its factory in Richmond, Va. Practically all the raw materials used are brought from other states down into Virginia where respondent manufactures them into men's clothing. About 83% of the manufactured products are sold f.o.b. Richmond, to customers located in states other than Virginia.

"Two sets of charges were filed with petitioner's local Regional Director by the Amalgamated Clothing Workers of America, a labor union of workers in the men's clothing industry, in which it was alleged that the respondent violated the National Labor Relations Act (29 U. S. C. A., § 151 et seq.) by discharging from its employ and discriminating against, 29 out of 800 of its employees, because they had engaged in union activities. The Board filed complaint under § 10 (b) of the Act (29 U. S. C. A.,

§ 160 (b)) and after a hearing respondent was found to have violated the Act and was ordered to cease and desist from the unfair labor practices.

"Petitioner's theory is that the respondent is engaged in interstate commerce because of the shipment of raw materials to it from other states and the shipment of its finished products to other states, and, in addition, that the flow of commerce doctrine, as exemplified in Swift & Co. v. United States, 196 U. S. 375, brings this manufacturer within the federal power to regulate commerce. Respondent contends that the National Labor Relations Act as applied to it, is unconstitutional and therefore invalid and that the attempt to enforce its provisions against it is illegal.

"It is shown that the alleged unfair labor practices complained of occurred in the manufacture of clothing in Richmond, Va. None of the workers involved had to do with the transportation of the clothing after its manufacture. They were engaged in various operations in the Richmond factory.

"The relations between the employer and its employees in this manufacturing industry were merely incidents of production. In its manufacturing, respondent was in no way engaged in interstate commerce, nor did its labor practices so directly affect interstate commerce as to come within the federal commerce power. Carter v. Carter Coal Co., 298 U. S. 238; Schechter Poultry Corp. v. United States, 295 U. S. 495. No authority warrants the conclusion that the powers of the Federal Government permit the regulation of the dealings between employers or employees when engaged in the purely local business of manufacture.

"Therefore the orders to cease and desist may not be enforced.

"Petitions denied."

V.

In each cause the Labor Board formulated and then sustained a charge of unfair labor practices towards persons employed only in production. It ordered restoration of discharged employees to former positions with payment for losses sustained. These orders were declared invalid below upon the ground that respondents while carrying on production operations were not thereby engaging in interstate commerce; that labor practices in the course of such operations did not directly affect interstate commerce; consequently respondents' actions did not come within Congressional power.

Respondent in No. 419 is a large, integrated manufacturer of iron and steel products—the fourth largest in the United States. It has two production plants in Pennsylvania where raw materials brought from points outside the state are converted into finished products, which are thereafter distributed in interstate commerce throughout many states. The Corporation has assets amounting to $180,000,000, gross income $47,000,000, and employs 22,000 people—10,000 in the Aliquippa plant where the complaining employees worked. So far as they relate to essential principles presently important, the activities of this Corporation, while large, do not differ materially from those of the other respondents and very many small producers and distributors. It has attained great size; occupies an important place in business; owns and operates mines of ore, coal, and lime-stone outside Pennsylvania, the output of which, with other raw material, moves to the production plants. At the plants this movement ends. Having come to rest this material remains in warehouses, storage yards, etc., often for months, until the process of manufacture begins. After this has been completed, the finished products go into interstate commerce. The discharged employees labored only in the manufac-

turing department. They took no part in the transportation to or away from the plant; nor did they participate in any activity which preceded or followed manufacture.

Our concern is with those activities which are common to the three enterprises. Such circumstances as are merely fortuitous—size, character of products, etc.—may be put on one side. The wide sweep of the statute will more readily appear if consideration be given to the Board's proceedings against the smallest and relatively least important—the Clothing Company. If the Act applies to the relations of that Company to employees in production, of course it applies to the larger respondents with like business elements although the affairs of the latter may present other characteristics. Though differing in some respects, all respondents procure raw materials outside the state where they manufacture, fabricate within and then ship beyond the state.

In Nos. 420–21 the respondent, Michigan corporation, manufactures commercial trailers for automobiles from raw materials brought from outside that state, and thereafter sells these in many states. It has a single manufacturing plant at Detroit and annual receipts around $3,000,000; 900 people are employed.

In Nos. 422–23 the respondent is a Virginia corporation engaged in manufacturing and distributing men's clothing. It has a single plant and chief office at Richmond, annual business amounting perhaps to $2,000,000, employs 800, brings in almost all raw material from other states and ships the output in interstate commerce. There are some 3,300 similar plants for manufacturing clothing in the United States, which together employ 150,000 persons and annually put out products worth $800,000,000.

VI.

The Clothing Company is a typical small manufacturing concern which produces less than one-half of one per cent of the men's clothing produced in the United States and employs 800 of the 150,000 workmen engaged therein. If closed today, the ultimate effect on commerce in clothing obviously would be negligible. It stands alone, is not seeking to acquire a monopoly or to restrain trade. There is no evidence of a strike by its employees at any time or that one is now threatened, and nothing to indicate the probable result if one should occur.

Some account of the Labor Board's proceedings against this Company will indicate the ambit of the Act as presently construed.

September 28, 1935, the Amalgamated Clothing Workers of America, purporting to act under § 10 (b) of the National Relations Act,[3] filed with the Board a

[3] SEC. 10. (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

"Charge" stating that the Clothing Company had engaged in unfair labor practices within the meaning of the Act—§ 8 (1) (3)—in that it had, on stated days in August and September, 1935, unjustifiably discharged, demoted or discriminated against some twenty named members of that union and, in other ways, had restrained, interfered with and coerced employees in the exercise of their right of free choice of representatives for collective bargaining. And further "that said labor practices are unfair labor practices affecting commerce within the meaning of said Act."

This "Charge" contained no description of the Company's business, no word concerning any strike against it past, present or threatened. The number of persons employed or how many of these had joined the union is not disclosed.

Thereupon the Board issued a "Complaint" which recited the particulars of the "Charge," alleged incorporation of the Company in Virginia, and ownership of a plant at Richmond where it is continuously engaged in the "production, sale and distribution of men's clothing"; that material is brought from other states and manufactured into clothing, which is sold and shipped to many states, etc.,—"all of aforesaid constituting a continuous flow of commerce among the several states." Also that while operating the Richmond plant the Clothing Company discharged, demoted, laid off or discriminated against some twenty persons "employed in production at the said plant . . . for the reason that all of the said employees, and each of them, joined and assisted a labor organization known as the Amalgamated Clothing Workers of America, and engaged in concerted activities with other employees for the purpose of collective bargaining and other mutual aid and protection," etc. Further that the Company circulated among its employees and under-

took to coerce them to sign a writing expressing satisfaction with conditions; induced some members of the union to withdraw; did other similar things, etc.—all of which amounted to unfair labor practices affecting commerce within the meaning of § 8 (1) (3) (4)[4] and § 2 (6) (7)[5] of the Labor Act. "The aforesaid unfair labor practices occur in commerce among the several states, and on the basis of experience in the aforesaid plant and others in the same and other industries, burden and obstruct such commerce and the free flow thereof and have led and tend to lead to labor disputes burdening and obstructing such commerce and the free flow thereof."

The complaint says nothing concerning any strike against the Clothing Company past, present or threatened; there is no allegation concerning the number of persons employed, how many joined the union, or the value of the output.

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[4] SEC. 8. It shall be an unfair labor practice for an employer—

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

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

(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 the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, 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 (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein if such labor organization is the representative of the em-

The respondent filed a special appearance objecting to the Board's jurisdiction, which was overruled; also an answer admitting the discharge of certain employees, but otherwise it generally denied the allegations of the "Complaint."

Thereupon the Board demanded access to the Company's private records of accounts, disclosure of the amount of capital invested by its private owners, the names of all of its employees, its payrolls, the amounts and character of all purchases and from whom made, the amounts of sales and to whom made, including the number and kind of units, the number of employees in the plant

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ployees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

[5] SEC. 2 (6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

during eight years, the names and addresses of the directors and officers of the Company, the names and addresses of its salesmen, the stock ownership of the Company, the affiliation, if any, with other companies, and the former occupations and businesses of its stockholders.

During hearings held at Richmond and Washington, unfettered by rules of evidence, it received a mass of testimony—largely irrelevant. Much related to the character of respondent's business, general methods used in the men's clothing industry, the numbers employed and the general effect of strikes therein. The circumstances attending the discharge or demotion of the specified employees were brought out.

Following this the Board found—

The men's clothing industry of the United States ranks sixteenth in the number of wage earners employed, with more than 3,000 firms and 150,000 workers engaged. The steps in the typical process of manufacture are described. Raw material is brought in from many states, and after fabrication the garments are sold and delivered through canvassers and retailers. "The men's clothing industry is thus an industry which is nearly entirely dependent in its operations upon purchases and sales in interstate commerce and upon interstate transportation."

The Amalgamated Clothing Workers of America is a labor organization composed of over 125,000 men and women employed in making clothing. Members are organized in local unions. Before recognition of this union by employers long and bitter strikes occurred, some of which are described. The union has striven consistently to improve the general economic and social conditions of members. Benefits that flow from recognizing and cooperating with it are realized by manufacturers.

Description is given of the Clothing Company's operations, the sources of its raw material (nearly all outside

Virginia), and the method used to dispose of its output. Eighty-two per cent is sold to customers beyond Virginia. It is among the fifty largest firms in the industry, and among the ten of that group paying the lowest average wage.

In the summer of 1935 the employees at the Richmond plant formed a local of the Amalgamated Clothing Workers and solicited memberships. The management at once indicated opposition and declared it would not permit employees to join. Hostile acts and the circumstances of the discharge or demotion of complaining employees are described. It is said all were discharged or demoted because of union membership. And further that "Interference by employers in the men's clothing industry with the activities of employees in joining and assisting labor organizations and their refusal to accept the procedure of collective bargaining has led and tends to lead to strikes and other labor disputes that burden and obstruct commerce and the free flow thereof. In those cases where the employees have been permitted to organize freely and the employers have been willing to bargain collectively, strikes and industrial unrest have gradually disappeared, as shown in Finding 19. But where the employer has taken the contrary position, strikes have ensued that have resulted in substantial or total cessation of production in the factories involved and obstruction to and burden upon the flow of raw materials and finished garments in interstate commerce."

The number of employees who joined the union does not appear; the general attitude of employees towards the union or the Company is not disclosed; the terms of employment are not stated—whether at will, by the day or by the month. What the local Chapter was especially seeking at the time we do not know.

It does not appear that, either prior or subsequent to the "Complaint," there has been any strike, disorder or

industrial strife at respondent's factory, or any interference with or stoppage of production or shipment of its merchandise. Nor that alleged unfair labor practices at its plant had materially affected manufacture, sale or distribution; or materially affected, burdened or obstructed the flow of products; or affected, burdened or obstructed the flow of interstate commerce, or tended to do so.

The Board concluded that the Clothing Company had discriminated in respect to tenure and employment and thereby had discouraged membership in the union; that it had interfered with, restrained and coerced its employees in violation of rights guaranteed by § 7 of the National Labor Relations Act; that these acts occurred in the course and conduct of commerce among the states, immediately affect employees engaged in the course and conduct of interstate commerce, and tend to lead to labor disputes burdening and obstructing such commerce and the free flow thereof.

An order followed, March 28, 1936, which commanded immediate reinstatement of eight discharged employees and payment of their losses; also that the Company should cease and desist from discharging or discriminating against employees because of connections with the union, should post notices, etc. On the same day the Board filed a petition asking enforcement of the order in the United States Circuit Court of Appeals (Second Circuit) at New York, which was denied July 13, 1936.

VII.

The precise question for us to determine is whether in the circumstances disclosed Congress has power to authorize what the Labor Board commanded the respondents to do. Stated otherwise, in the circumstances here existing could Congress by statute direct what the Board has ordered? General disquisitions concerning the en-

actment are of minor, if any, importance. Circumstances not treated as essential to the exercise of power by the Board may, of course, be disregarded. The record in Nos. 422-23—a typical case—plainly presents these essentials and we may properly base further discussion upon the circumstances there disclosed.

A relatively small concern caused raw material to be shipped to its plant at Richmond, Virginia, converted this into clothing, and thereafter shipped the product to points outside the state. A labor union sought members among the employees at the plant and obtained some. The Company's management opposed this effort, and in order to discourage it discharged eight who had become members. The business of the Company is so small that to close its factory would have no direct or material effect upon the volume of interstate commerce in clothing. The number of operatives who joined the union is not disclosed; the wishes of other employees are not shown; probability of a strike is not found.

The argument in support of the Board affirms: "Thus the validity of any specific application of the preventive measures of this Act depends upon whether industrial strife resulting from the practices in the particular enterprise under consideration would be of the character which Federal power could control if it occurred. If strife in that enterprise could be controlled, certainly it could be prevented."

Manifestly that view of Congressional power would extend it into almost every field of human industry. With striking lucidity, fifty years ago, *Kidd* v. *Pearson,* 128 U. S. 1, 21, declared: "If it be held that the term [commerce with foreign nations and among the several states] includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in

the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry." This doctrine found full approval in *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 12, 13; *Schechter Poultry Corp.* v. *United States, supra,* and *Carter* v. *Carter Coal Co., supra,* where the authorities are collected and principles applicable here are discussed.

In *Knight's* case Chief Justice Fuller, speaking for the Court, said: "Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it . . . It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality."

In *Schechter's* case we said: "In determining how far the federal government may go in controlling intrastate transactions upon the ground that they 'affect' interstate

commerce, there is a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle . . . But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government. Indeed, on such a theory, even the development of the State's commercial facilities would be subject to federal control."

Carter's case declared—"Whether the effect of a given activity or condition is direct or indirect is not always easy to determine. The word 'direct' implies that the activity or condition invoked or blamed shall operate proximately—not mediately, remotely, or collaterally—to produce the effect. It connotes the absence of an efficient intervening agency or condition. And the extent of the effect bears no logical relation to its character. The distinction between a direct and an indirect effect turns, not upon the magnitude of either the cause or the effect, but entirely upon the manner in which the effect has been brought about. If the production by one man of a single ton of coal intended for interstate sale and shipment, and actually so sold and shipped, affects interstate commerce indirectly, the effect does not become direct by multiplying the tonnage, or increasing the number of men employed, or adding to the expense or complexities of the business, or by all combined."

Any effect on interstate commerce by the discharge of employees shown here, would be indirect and remote in

the highest degree, as consideration of the facts will show. In No. 419 ten men out of ten thousand were discharged; in the other cases only a few. The immediate effect in the factory may be to create discontent among all those employed and a strike may follow, which, in turn, may result in reducing production, which ultimately may reduce the volume of goods moving in interstate commerce. By this chain of indirect and progressively remote events we finally reach the evil with which it is said the legislation under consideration undertakes to deal. A more remote and indirect interference with interstate commerce or a more definite invasion of the powers reserved to the states is difficult, if not impossible, to imagine.

The Constitution still recognizes the existence of states with indestructible powers; the Tenth Amendment was supposed to put them beyond controversy.

We are told that Congress may protect the "stream of commerce" and that one who buys raw material without the state, manufactures it therein, and ships the output to another state is in that stream. Therefore it is said he may be prevented from doing anything which may interfere with its flow.

This, too, goes beyond the constitutional limitations heretofore enforced. If a man raises cattle and regularly delivers them to a carrier for interstate shipment, may Congress prescribe the conditions under which he may employ or discharge helpers on the ranch? The products of a mine pass daily into interstate commerce; many things are brought to it from other states. Are the owners and the miners within the power of Congress in respect of the miners' tenure and discharge? May a mill owner be prohibited from closing his factory or discontinuing his business because so to do would stop the flow of products to and from his plant in interstate commerce?

May employees in a factory be restrained from quitting work in a body because this will close the factory and thereby stop the flow of commerce? May arson of a factory be made a Federal offense whenever this would interefere with such flow? If the business cannot continue with the existing wage scale, may Congress command a reduction? If the ruling of the Court just announced is adhered to these questions suggest some of the problems certain to arise.

And if this theory of a continuous "stream of commerce" as now defined is correct, will it become the duty of the Federal Government hereafter to suppress every strike which by possibility may cause a blockade in that stream? *In re Debs,* 158 U. S. 564. Moreover, since Congress has intervened, are labor relations between most manufacturers and their employees removed from all control by the state? *Oregon-Washington R. & N. Co.* v. *Washington,* 270 U. S. 87 (1926).

To this argument *Arkadelphia Milling Co.* v. *St. Louis Southwestern R. Co.,* 249 U. S. 134, 150, affords an adequate reply. No such continuous stream is shown by these records as that which counsel assume.

There is no ground on which reasonably to hold that refusal by a manufacturer, whose raw materials come from states other than that of his factory and whose products are regularly carried to other states, to bargain collectively with employees in his manufacturing plant, directly affects interstate commerce. In such business, there is not one but two distinct movements or streams in interstate transportation. The first brings in raw material and there ends. Then follows manufacture, a separate and local activity. Upon completion of this, and not before, the second distinct movement or stream in interstate commerce begins and the products go to other states. Such is the common course for small as well as

large industries. It is unreasonable and unprecedented to say the commerce clause confers upon Congress power to govern relations between employers and employees in these local activities. *Stout* v. *Pratt,* 12 F. Supp. 864. In *Schechter's* case we condemned as unauthorized by the commerce clause assertion of federal power in respect of commodities which had come to rest after interstate transportation. And, in *Carter's* case, we held Congress lacked power to regulate labor relations in respect of commodities before interstate commerce has begun.

It is gravely stated that experience teaches that if an employer discourages membership in "any organization of any kind" "in which employees participate, and which exists for the purpose in whole or in part of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work," discontent may follow and this in turn may lead to a strike, and as the outcome of the strike there may be a block in the stream of interstate commerce. Therefore Congress may inhibit the discharge! Whatever effect any cause of discontent may ultimately have upon commerce is far too indirect to justify Congressional regulation. Almost anything—marriage, birth, death—may in some fashion affect commerce.

VIII.

That Congress has power by appropriate means, not prohibited by the Constitution, to prevent direct and material interference with the conduct of interstate commerce is settled doctrine. But the interference struck at must be direct and material, not some mere possibility contingent on wholly uncertain events; and there must be no impairment of rights guaranteed. A state by taxation on property may indirectly but seriously affect the cost of transportation; it may not lay a direct tax upon

the receipts from interstate transportation. The first is an indirect effect, the other direct.

This power to protect interstate commerce was invoked in *Standard Oil Co.* v. *United States,* 221 U. S. 1, and *United States* v. *American Tobacco Co.,* 221 U. S. 106. In each of those cases a combination sought to monopolize and restrain interstate commerce through purchase and consequent control of many large competing concerns engaged both in manufacture and interstate commerce. The combination was sufficiently powerful and action by it so persistent that success became a dangerous probability. Here there is no such situation, and the cases are inapplicable in the circumstances. There is no conspiracy to interfere with commerce unless it can be said to exist among the employees who became members of the union. There is a single plant operated by its own management whose only offense, as alleged, was the discharge of a few employees in the production department because they belonged to a union, coming within the broad definition of "labor organization" prescribed by § 2 (5) of the Act. That definition includes any organization in which employees participate and which exists for the purpose in whole or in part of dealing with employers concerning grievances, wages, &c.

Section 13 of the Labor Act provides—"Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike." And yet it is ruled that to discharge an employee in a factory because he is a member of a labor organization (any kind) may create discontent which may lead to a strike and this may cause a block in the "stream of commerce"; consequently the discharge may be inhibited. Thus the Act exempts from its ambit the very evil which counsel insist may result from discontent caused by a discharge of an association member, but permits coercion of a non-member to join one.

The things inhibited by the Labor Act relate to the management of a manufacturing plant—something distinct from commerce and subject to the authority of the state. And this may not be abridged because of some vague possibility of distant interference with commerce.

IX.

Texas & New Orleans R. Co. v. *Brotherhood of Railway & Steamship Clerks,* 281 U. S. 548, is not controlling. There the Court, while considering an act definitely limited to common carriers engaged in interstate transportation over whose affairs Congress admittedly has wide power, declared: "The petitioners invoke the principle declared in *Adair* v. *United States,* 208 U. S. 161, and *Coppage* v. *Kansas,* 236 U. S. 1, but these decisions are inapplicable. The Railway Labor Act of 1926 does not interfere with the normal exercise of the right of the carrier to select its employees or to discharge them. The statute is not aimed at this right of the employers but at the interference with the right of employees to have representatives of their own choosing. As the carriers subject to the Act have no constitutional right to interfere with the freedom of the employees in making their selections, they cannot complain of the statute on constitutional grounds."

Adair's case, *supra,* presented the question—"May Congress make it a criminal offense against the United States—as by the tenth section of the act of 1898 it does—for an agent or officer of an interstate carrier, having full authority in the premises from the carrier, to discharge an employee from service simply because of his membership in a labor organization?" The answer was no. "While, as already suggested, the rights of liberty and property guaranteed by the Constitution against deprivation without due process of law, are subject to such reasonable restraints as the common good or the general welfare may

require, it is not within the functions of government—at least in the absence of contract between the parties—to compel any person in the course of his business and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee. It was the legal right of the defendant Adair—however unwise such a course might have been—to discharge Coppage because of his being a member of a labor organization, as it was the legal right of Coppage, if he saw fit to do so—however unwise such a course on his part might have been—to quit the service in which he was engaged, because the defendant employed some persons who were not members of a labor organization. In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land." "The provision of the statute under which the defendant was convicted must be held to be repugnant to the Fifth Amendment and as not embraced by nor within the power of Congress to regulate interstate commerce, but under the guise of regulating interstate commerce and as applied to this case it arbitrarily sanctions an illegal invasion of the personal liberty as well as the right of property of the defendant Adair."

Coppage v. *Kansas*, following the *Adair* case, held that a state statute, declaring it a misdemeanor to require an

employee to agree not to become a member of a labor organization during the time of his employment, was repugnant to the due process clause of the Fourteenth Amendment.

The right to contract is fundamental and includes the privilege of selecting those with whom one is willing to assume contractual relations. This right is unduly abridged by the Act now upheld. A private owner is deprived of power to manage his own property by freely selecting those to whom his manufacturing operations are to be entrusted. We think this cannot lawfully be done in circumstances like those here disclosed.

It seems clear to us that Congress has transcended the powers granted.

ASSOCIATED PRESS *v.* NATIONAL LABOR RELATIONS BOARD.

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

No. 365. Argued February 9, 10, 1937.—Decided April 12, 1937.

1. Interstate communication of a business nature, whatever the means employed, is interstate commerce subject to regulation by Congress. P. 128.
2. The Associated Press, a non-profit-making corporation whose members are the owners of newspapers published for profit throughout the country, is engaged as their agency in exchanging news between those publications, using the telegraph and telephone and other means of communication, and in supplying them in like manner with domestic and foreign news collected by itself. *Held* engaged in interstate commerce within the meaning of the National Labor Relations Act and Constitution, Art. I, § 8. P. 125.
3. This conclusion is unaffected by the facts that the Associated Press does not itself sell news or operate for profit and that technically it retains title to the news during interstate transmission. P. 128.

4. Provisions of the National Labor Relations Act empowering the National Labor Relations Board, in protection of interstate commerce, to require that employees discharged for union activities and advocacy of collective bargaining be restored to employment and their losses of pay made good, *held* valid as applied to the Associated Press in the case of an employee whose duties were editorial, having to do with the preparation of news for transmission rather than its actual transmission in interstate commerce. *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515; *Texas & N. O. R. Co. v. Railway Clerks*, 281 U. S. 548. P. 129.
5. The National Labor Relations Act, as so applied in this case, does not unconstitutionally abridge the freedom of the press. P. 130.

   The Act does not compel the Associated Press to employ anyone, or to retain an incompetent editor, or one who fails faithfully to edit the news without bias. It does not interfere with the right to discharge any employee (including one who has been so reinstated by order of the Labor Board) for any cause deemed proper by the employer, save only the forbidden reasons of union activities and advocacy of collective bargaining.
6. The contentions that the National Labor Relations Act deprives petitioner of property without due process; that the order of the Board requiring restoration of lost pay deprives petitioner of the right to trial by jury; and that the Act is invalid on its face because it seeks to regulate both interstate and intrastate commerce, are rejected upon the authority of *Texas & N. O. R. Co.* v. *Railway Clerks*, 281 U. S. 548, and *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, *ante*, p. 1. P. 133.

85 F. (2d) 56, affirmed.

CERTIORARI, 299 U. S. 532, to review a decree sustaining an order of the National Labor Relations Board. The case came before the court below on the Board's petition for enforcement of its order.

Mr. John W. Davis, with whom *Messrs. William C. Cannon, Harold W. Bissell*, and *Edwin F. Blair* were on the brief, for the petitioner.*

* Arguments in this case are summarized from the briefs. Extracts from the oral arguments in this and in the other Labor Act cases will appear in an appendix in the bound volume.

I. The Act is void in its entirety as an unrestricted attempt to regulate the relationship between all industrial employers and employees by imposing "collective bargaining" in violation of the Tenth Amendment.

This sweeping purpose appears in the preamble and is even more clearly shown by the very provisions and definitions in the Act. The legislative history leaves no possible doubt.

In this respect the Act is inseverable, notwithstanding the separability clause. *Railroad Retirement Board* v. *Alton R. Co.,* 295 U. S. 330, 362.

The entire Act, therefore, is a patent violation of the Tenth Amendment. *Carter* v. *Carter Coal Co.,* 298 U. S. 238; *United States* v. *Butler,* 297 U. S. 1; *Jacobson* v. *Massachusetts,* 197 U. S. 11, 22; *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495; *McCulloch* v. *Maryland,* 4 Wheat. 316.

II. The relation between the Associated Press and its editorial employees is not interstate commerce, does not affect such commerce, and is not subject to federal control.

An interruption in the process of production or manufacture, although it may lessen the supply of goods available for commerce, is not, *per se,* an obstruction to commerce nor does it directly affect it.

It is direct causes operating directly with which Congress is empowered to deal. There may be borderline cases, but the principle is clear. *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344, 408; *United Leather Workers* v. *Herkert,* 265 U. S. 457.

The assertion that labor disputes between the editorial employees and their employer might or would directly affect interstate commerce, is incomprehensible in the light of this Court's decisions. Manifestly the effect would be quite as remote and no more direct than that produced by labor disputes in any producing industry.

Carter v. *Carter Coal Co.,* 298 U. S. 238; *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495; *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344.

So far as this record shows, a walkout in the New York office would not of necessity materially affect the flow of news.

If Congress can pass a law to compel collective bargaining and to forbid the discharge of employees, as prescribed by § 8, it can, when it chooses, go on to laws compelling in express terms the closed shop, the open shop, maximum and minimum wages, hours of employment, safety devices, sanitary arrangements, housing, the times and manner of payment—everything in short which by any possibility could be thought to promote the contentment of the laborer in any and every industry and thus lead to industrial peace.

The question of power does not turn upon the magnitude of the cause or of the effect, but entirely upon the manner in which the effect has been brought about. *Carter* v. *Carter Coal Co.,* 298 U. S. 238, 307–308.

The Associated Press is in no sense an instrumentality of interstate commerce. Its editorial employees, including the complainant Morris Watson, are not engaged in interstate or foreign commerce.

Commerce means more than communication. The word "is the equivalent of the phrase 'intercourse for the purposes of trade.'" *Carter* v. *Carter Coal Co.,* 298 U. S. 238, 303.

Basically, the Associated Press is an exchange of news system and nothing more. Even if this exchange were the equivalent of a sale, it would not amount to "trade," because the Associated Press does not exchange news with the public, but only with its own members and other news agencies. Private or intracorporate exchange is not interstate commerce. See *Pipe Line Cases,* 234 U. S.

548, 561–562; *Hopkins* v. *United States,* 171 U. S. 578, 603; *Anderson* v. *United States,* 171 U. S. 604, 612. Distinguishing: *International Textbook Co.* v. *Pigg,* 217 U. S. 91; *Indiana Farmer's Guide Pub. Co.* v. *Prairie Farmer Publishing Co.,* 293 U. S. 268, 276.

It is well settled that the regulation of so much of a business as constitutes interstate commerce cannot be extended to embrace the rest. *First Employers' Liability Cases,* 207 U. S. 463, 502; *Railroad Retirement Board* v. *Alton R. Co.,* 295 U. S. 330; *United States* v. *Chicago, M., St. P. & P. R. Co.,* 282 U. S. 311, 327; cf. *Western Union* v. *Kansas,* 216 U. S. 1.

The business of the Associated Press in its New York office consists of two distinct functions, namely, production and transmission. Editorial employees are engaged exclusively in production. In this sense the analogy is exact between these employees and the employees of a manufacturing plant engaged in transforming the raw materials into the completed article. The speed of their production, the shortness of the interval between production and transmission, do not change the essential character of either function. *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165. See *First Employers' Liability Cases,* 207 U. S. 463, 502.

In the so-called "throat," "current" or "flow" of commerce cases the persons and things regulated were necessary agencies of interstate commerce, affected with a national public interest, and therefore subject to the regulations in question, which related to matters in, directly affecting, or inextricably intermingled with, interstate commerce. Furthermore, the "flow" cases advance no new doctrine, but only hold that Congress may properly keep certain persons from obstructing or closing the avenues of commerce to other persons. Likewise, even when Congress does not act, the individual States are themselves

prohibited from obstructing, burdening, or discriminating against interstate commerce. Cf. *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420; *Carter* v. *Carter Coal Co.,* 298 U. S. 238, 305.

The Railroad Cases. Such regulation as Congress has attempted of the relation between employer and employee on the railroads is bottomed on the fact that the railroads are the essential instrumentalities by which interstate commerce is carried on and may be compelled to furnish safe and continuous service of transportation. *Railroad Retirement Board* v. *Alton R. Co.,* 295 U. S. 330, 376. Extensive as the power of Congress over the railroads may be, the regulation of the employer-employee relation on railroads has never been permitted to reach beyond (a) the removal of actual or immediately threatened obstructions to interstate transportation service, or (b) obvious measures for the promotion of the safety of such service. *Employers' Liability Cases,* 207 U. S. 463; *Adair* v. *United States,* 208 U. S. 161; *Mondou* v. *New York, N. H. & H. R. Co.,* 223 U. S. 1; *Wilson* v. *New,* 243 U. S. 332.

The mere circumstance of engaging in interstate commerce is not decisive. The two all important considerations are (1) the duty of both employer and employee to render the public reasonable transportation service, and (2) the obviously direct connection between the attempted regulation and the performance of that duty. Cf. *Pennsylvania R. Co.* v. *Labor Board,* 261 U. S. 72, 85; *Pennsylvania Railroad System* v. *Pennsylvania R. Co.,* 267 U. S. 203, 217.

In *Texas & N. O. R. Co.* v. *Railway Clerks,* 281 U. S. 548, it was held that the Railway Labor Act of 1926, unlike its predecessor, imposed certain definite obligations enforceable by judicial proceedings, the "outstanding feature" being the provision for an enforceable award. The provision for free designation of representatives "for

the purposes of this Act," was upheld as forming an integral part of the arbitration scheme which Congress had devised in the exercise of its power to "facilitate the amicable settlement of disputes which threaten the service of the necessary agencies of interstate transportation." The reinstatement of employees discharged during a pending controversy was required, however, not in obedience to any express mandate of the Act, but to purge the railroad of a contempt of the court's injunction. That case has no bearing on the power of Congress to enforce collective bargaining, or to compel the reinstatement of discharged employees, in a private business.

The doctrine of the *Adair* case was recognized by the Court in the *Texas & New Orleans* case in pointing out that its principle was inapplicable, because the enforcement of voluntary arbitration had nothing to do with the "normal" right of an employer to discharge his employees at will. By the "normal exercise of the right of the carrier to select its employees or to discharge them," the Court obviously referred to the discharge or selection of employees (1) when there was no actual dispute, (2) when there was no controversy pending before a mediation board, and (3) when the discharge was not in flagrant disobedience of an injunction properly issued by a court of equity.

The decision in the *Railroad Pension* case, 295 U. S. 330, referred to the fact that the *Texas* case did not interfere with "normal" rights. Furthermore, the *Railroad Pension* case leaves no doubt about the limited application of the *Texas* case, as well as all cases sustaining the power of Congress to influence or control the relation of employer and employee in any manner. This limited application is conclusively shown, not only by the majority opinion, but also by the dissenting opinion of the Chief Justice.

The decision of this Court in the *Railroad Pension* case stands for the proposition, therefore, that even as

to the railroads any compulsory control by Congress of employer-employee relations, no matter what it may be, is void unless it has an obvious and direct bearing on the obligations of public service incident to the calling of the railroads. The regulation is too remotely connected with transportation service if it merely relates to the causes of disruptions, such as, for example, the malcontent of the persons rendering the service. To have a direct effect upon interstate commerce the regulation of the employment relation must at least, as was the case with the Railway Labor Act of 1926, facilitate the amicable settlement of disputes which threatened the service of the necessary agencies of interstate transportation and tended to prevent interruptions of service. In other words, the dispute must be actual, not conjectural; the disruption of transportation service must be presently threatened thereby, not remotely possible.

The Strike, or Anti-Trust Cases. All of the strike cases, following the second *Coronado* case, 268 U. S. 295, related exclusively to the removal of existing, intentional obstructions to interstate commerce; the injunctions were not granted except where the actual intent or purpose of the strikers was to prevent the flow of goods across state lines. The same is true as to the regulation of any combination or conspiracy under the anti-trust laws. For this reason the strike cases do not properly fall into the category of regulations of the employer-employee relationship, but relate solely to the removal of actual and existing obstructions to interstate commerce in the form of a combination or conspiracy in restraint of trade.

As in the "flow" of commerce cases, heretofore discussed, it should be noted that the "strike" cases involve a regulation of A in order to keep him from obstructing B or depriving him of the facilities to which he is entitled. There is no indication whatever in them that an

employer may be regulated to keep him from obstructing himself.

The Act violates the Fifth Amendment because its terms are arbitrary, unreasonable and capricious, having no real and substantial relation to the accomplishment of legitimate ends.

The enforcement by statutory compulsion of the collective action which the Act prescribes is an arbitrary encroachment upon the constitutional rights of the unwilling employer and his non-consenting employees.

Exceptional circumstances being absent, the statutory compulsion is arbitrary *per se.*

The Act even goes beyond the compulsory enforcement of collective action in general in that it is designed to compel the universal acceptance, by both employer and employee, of a rigid and hitherto unaccepted conception of collective action which, carried to its logical conclusion, completely destroys the rights of the employer and his non-consenting employees. Instead of seeking a reasonable balance between employer rights and the rights of individual employees on the one hand, and the collective rights of employees on the other, the Act fosters the domination of all industry by labor unions. This domination is sought, irrespective of harsh, one-sided, and discriminatory results, as the one and only method of adjusting inequality of bargaining between employer and employee. That such an arbitrary program has been adopted by the Act would seem to be apparent from no more than a cursory consideration of the provisions of §§ 8 and 9.

The Act deliberately and openly fosters the closed union shop. The company union or any other employer-employee coöperation is outlawed. The unreasoning sweep of the prohibition in § 8 (2) is merely emphasized by the proviso that the employer may confer with his employees

during working hours "subject to rules and regulations made and published by the Board," but not otherwise. Irrespective of whether or not the company union is inherently evil, it would seem on principle alone that no law could remain reasonable and at the same time deprive both employer and employee of the advantages of friendship, mutual loyalty and wise coöperation.

Subdivision (3) of § 8 reënacts those very restrictions upon the employer which were declared arbitrary and invalid in the *Adair* and *Coppage* cases. The prohibition here, moreover, extends to tenure of employment as well as to any discrimination in hire, discharge, or employment contracts. Accordingly, an employer must always find reasons which would safely withstand the scrutiny of the Board before he even went so far as to demote, reduce the salary, or even change the routine employment of a union man. By the same token, it would seem that he must carefully examine his conscience and his records before he promotes or encourages a non-union man. These provisions against discrimination contained in § 8 (3) virtually place union members in a status secure against discharge or demotion however deserved. See *Rosenthal-Ettlinger Co.* v. *Schlossberg,* 266 N. Y. S. 762.

The Act expressly sanctions discriminatory closed union shop agreements.

The Act does not permit freedom in collective bargaining by employees. On the contrary, collective bargaining is prohibited except upon rigid conditions which are both restrictive and discriminatory.

The only permissible bargaining unit is the one selected as appropriate by the Board, whether it be "the employer unit, craft unit, plant unit, or subdivision thereof." § 9 (b). The Board's discretion in making this selection is virtually unlimited. The employer and the

individual employees are utterly helpless except in so far as they are able to influence the Board in the exercise of its unlimited power of discrimination.

The selection of the unit appropriate for the purposes of collective bargaining is, however, of the utmost concern to both employee and employer, particularly because there can be but one, "exclusive," representative for the entire unit.

Furthermore, the minority in the designated unit are not only deprived of the power to contract with their employer, either individually or through representatives of their own choosing, but they are also bound by the terms of any agreement which the employer makes with the representatives of the majority. See *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 311.

Under this Act it is possible, either by gerrymandering of bargaining units, or by rulings on elections, to subject the majority employees to the will of the minority. See *Bendix Products Corp.* v. *Beman*, 14 F. Supp. 58, 66.

Section 8 (5) provides that it is an unfair labor practice for the employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of § 9 (a)." The Board has interpreted this as imposing upon the employer an affirmative duty to bargain and negotiate with the exclusive representatives of the unit which it prescribes. Thus, when a labor organization, such as the American Newspaper Guild, demands a closed shop, the employer may not flatly refuse but must seek to reach an agreement with the union. And, in the final analysis, it is left to the Board to determine for the employer whether or not the closed shop demand of the union is to be accepted.

Mutuality of contract is totally lacking in that the employer, who is the only party under an obligation to "bargain," is likewise the sole party bound by an agreement.

The employees are not bound by force of any provision in the Act (which specifically preserves the right to strike); nor are they bound as a matter of contract, since they may refuse to work from the instant a "bargain" is reached.

The "collective bargain" which the Act commands is nothing more than "compulsory unilateral arbitration." See *Bendix Products Corp.* v. *Beman,* 14 F. Supp. 58. This "compulsory unilateral arbitration" is, therefore, much more arbitrary than the compulsory mutual arbitration unanimously declared invalid in *Wolff Packing Co.* v. *Industrial Court,* 262 U. S. 522, s. c., 267 U. S. 552.

It would seem to be fully demonstrated that the Act does not seek to protect collective bargaining and collective action on the part of employees, but that it unquestionably attempts to place all labor relations in an iron vise by reducing employment to a closed union shop basis. This is shown not only by express sanction of closed union shop agreements, § 8 (3), but by the requirement that the employer must bargain, § 8 (5), with the representatives of the unit selected by the Board, § 9 (b), who, though having the power to bind or exclude all, § 9 (a), may not in fact represent the interests of all the employees in such unit.

The methods of enforcement which the Act adopts are themselves arbitrary and unreasonably intrusive. Intrusive and unlimited power is conferred upon the Board.

The power to compel employers to reinstate discharged employees with back pay violates the Seventh Amendment as well as the Fifth.

It has long been a maxim of courts of equity that contracts of personal service will not be specifically enforced. The reason for this has been the recognition that compulsory personal service is not only intolerable but that it is seldom satisfactory from the point of view of either party. It is true that in *Texas & N. O. R. Co.* v. *Rail-*

way Clerks, 281 U. S. 548, reinstatement of employees, discharged in defiance of an injunction, was ordered as a proper method of purging the railroad of contempt. That was an unusual situation where the court deemed such extreme action necessary in order to restore the *status quo.* It does not follow that legislation may supersede court action. Yet this, in substance, is what § 10 (c) attempts to accomplish.

Here the Associated Press must employ a person whom it does not want. Neither the subject, the terms, nor the duration of the contract are of its own choosing. The Associated Press must refrain from employing other persons more to its liking in order to leave room for Watson, or may even be compelled to discharge some non-union editorial employee in order to make room for Watson. And, presumably, the Board will maintain a constant surveillance over Watson and the Associated Press, if he is reinstated, to be sure that he has been reinstated "to his former position, without prejudice to any rights or privileges previously enjoyed by him." *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.,* 87 F. (2d) 611.

It would seem that, even if the discharge were wrongful, the proper and only reasonable reparation would be to permit Watson to sue in a court of law for damages. The order of reinstatement, however, would not only compel the Associated Press unwillingly to accept and pay for the personal services of Watson at the rate in force at the time of his discharge, but it also grants Watson, without jury trial, an award of money damages in excess of $2,000. This it would seem is done in flagrant violation of the Seventh Amendment which guarantees the right to trial by jury. See case last cited.

The Act, in its application to the Associated Press, violates the First Amendment which guarantees to citizens freedom of speech and freedom of the press.

Watson must be reëmployed by the Associated Press against its will, as an editorial worker in compiling and editing news for publication in American newspapers. This is ordered irrespective of his present capacity or qualification or his acceptability by his employer and irrespective of whatever bias he may have acquired by reason of his discharge.

It is asserted as the basis of jurisdiction in this case that the question of Watson's discharge and reinstatement is a matter directly affecting the interstate commerce activities of the Associated Press and that, as Congress may regulate those interstate activities, so it must necessarily have the power to regulate any matters which directly affect them. The sole basis for jurisdiction in regard to Watson's employment must, therefore, stand or fall upon the power of Congress to regulate the activities in which the Associated Press is engaged. That is to say, the order to reinstate Watson presupposes, and is wholly dependent upon, the power to regulate the gathering, production, and dissemination of news for the American press. News and intelligence are, in disregard of the First Amendment, treated as ordinary articles of commerce, subject to federal supervision and control. Logically, and on principle alone, the National Labor Relations Act, as applied to the Associated Press, is thus an infringement upon that freedom of expression which is the essence of free speech and of a free press.

Furthermore, the Act, as applied in this case, actually destroys the independence of the press of this country. Can freedom and independence of the press be maintained if a federal bureau may dictate to the American newspapers the persons they employ to prepare their news reports? How can impartiality and independence of reporting be maintained under such a system of administrative supervision? How can accuracy, independence and impartiality survive a deliberate attempt by

the Government to impose upon the Associated Press a requirement that its news editors be union men?

Interference with the internal management of any private concern is inconsistent with due process of law. Where, however, the private concern is not dealing in ordinary commercial commodities but is engaged exclusively in the formulation and dissemination of news for the press, such interference is still more intolerable in that it constitutes an encroachment upon the management and policy of the press itself. Whenever a union editorial employee of the Associated Press is discharged, a case is at once made for the Labor Board by the claim, whether rightly or not, that membership in a labor organization has been discouraged or that the employee has been discriminated against. The question of editorial personnel then becomes a question for the Board to determine. And the management of the editorial affairs of this great news service of the American press, in the gathering and preparation of news, is displaced by the Labor Board which Congress has created.

Freedom of the press and of speech, as guaranteed by the First Amendment, means more than freedom from censorship by government; it means that freedom of expression must be jealously protected from any form of governmental control or influence. *Near* v. *Minnesota,* 283 U. S. 697.

Freedom of expression, it would seem, is as precious as either due process or the equal protection of law. *Grosjean* v. *American Press Co.,* 297 U. S. 233; *DeJonge* v. *Oregon,* 299 U. S. 353.

Messrs. Charles E. Wyzanski, Jr., and *Charles Fahy,* with whom *Attorney General Cummings, Solicitor General Reed,* and *Messrs. A. H. Feller, Charles A. Horsky, Robert B. Watts, Philip Levy, Laurence A. Knapp,* and *David A. Moscovitz* were on the brief, for respondent.

The power of Congress is sufficient to cope with problems raised by each new form of intercommunication among the States. *Pensacola Telegraph Co.* v. *Western Union,* 96 U. S. 1, 9–10; *Gibbons* v. *Ogden,* 9 Wheat. 1, 189. Assuming, *arguendo,* that petitioner does not sell news, the fact is not material on the question of congressional authority. *Caminetti* v. *United States,* 242 U. S. 470; *United States* v. *California,* 297 U. S. 175, 183.

The Board was correct in finding that the editorial employees at the New York office were either in, or intimately and directly connected with, interstate commerce.

Subsections (1) and (3) of § 8 bear a reasonable and direct relation to the protection of interstate commerce from industrial strife, and are, consequently, valid. *Texas & N. O. R. Co.* v. *Railway Clerks,* 281 U. S. 548; *Railroad Retirement Board* v. *Alton R. Co.,* 295 U. S. 330, 369. Distinguishing: *Carter* v. *Carter Coal Co.,* 298 U. S. 238, 308.

Congress may control even local activity to assist in removing a burden or injury to interstate commerce. *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, 544.

Decisions of this Court, investigations of numerous commissions, experience of the Government, and findings of Congress in this Act, are in accord in the conclusion that the provisions of subsections (1) and (3) of § 8, will not only eliminate the causes of industrial strife arising from attempts of employees to organize and establish the procedure of collective bargaining, but will also, by affording a basis for amicable adjustment, reduce industrial strife arising out of the substantive terms of the employment contract.

We submit, therefore, that these subsections were properly applied to petitioner in this case. Indeed, the deci-

sion in *Texas & N. O. R. Co.* v. *Railway Clerks,* 281 U. S. 548, seems conclusive. Moreover, apart from that case, industrial strife in petitioner's New York City office would seriously and directly burden interstate commerce, and involve, at least, difficult and expensive rerouting of news, and at most, a paralysis of much of petitioner's system. Furthermore, the work is carried on at a "throat" of a well-defined "flow" or "stream" of commerce, and is therefore even more clearly within the federal power to regulate and control. *Stafford* v. *Wallace,* 258 U. S. 495; *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420; *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1.

Finally, even if it be admitted, *arguendo,* that editorial employees in the New York office are engaged in some occupation analogous to "production" or "manufacturing," we submit that the Act was properly applied under the principles discussed in the brief for the Board in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp., ante,* p. 1.

II. The validity of the order of the Board under the Fifth Amendment is settled by *Texas & N. O. R. Co.* v. *Railway Clerks,* 281 U. S. 548. Distinguishing: *Adair* v. *United States,* 208 U. S. 161; *Coppage* v. *Kansas,* 236 U. S. 1.

The provisions of the Act are reasonable and consonant with due process. The procedural machinery is reasonable and well adapted to achieve its purpose. The prohibition on discriminatory discharges imposes no restriction on the normal exercise of the employer's right to hire and discharge employees. Employees have the right to organize for the advancement of their interests; such organization is a vital necessity. *American Foundries* v. *Tri-City Council,* 257 U. S. 184, 209. This right is destroyed by the unrestricted freedom of an employer to discharge employees because of membership in a labor

union or participation in its affairs. The present Act merely safeguards the recognized and essential liberty of employees by a limited restriction on the employer's power of discharge. Similar curtailments of employer's liberty have repeatedly been sustained by this Court. The principle upon which this Act is based has been developed from over a half century of experience. It is the established policy of both Congress and many of the States. The Act is, in fact, very limited. It does not compel organization, or the "closed shop." It does not interfere with the employer's normal conduct of his business. It does not fix wages or hours, or provide for compulsory arbitration of labor disputes. And it does not weaken any of the existing laws protecting employers against illegal action of employees or labor organizations. Cf. *Local No. 167* v. *United States,* 291 U. S. 293.

III. That part of the order which requires restitution of lost pay does not deprive petitioner of a jury trial in violation of the Seventh Amendment. *Texas & N. O. R. Co.* v. *Railway Clerks,* 281 U. S. 548. The Seventh Amendment applies only to rights and remedies as they were generally known and enforced at common law, *Shields* v. *Thomas,* 18 How. 253, 262, and consequently has no application here. *Pennsylvania Federation* v. *Pennsylvania R. Co.,* 267 U. S. 203, 210. The order for back pay is merely a supplement to a decree essentially injunctive in character. Cf. *Clark* v. *Wooster,* 119 U. S. 232.

IV. The order does not violate the guarantee of the freedom of the press. A valid statute of general application does not become invalid when applied to the press. *Robertson* v. *Baldwin,* 165 U. S. 275, 281; *Indiana Farmer's Guide Publishing Co.* v. *Prairie Farmer Publishing Co.,* 293 U. S. 268. The Act does not discriminate against the press, nor constitute a device to

limit its freedom under the guise of a regulation of commerce. Nor does it curtail the privilege of petitioner to discharge employees who exhibit actual bias in editing the news. Petitioner is accordingly reduced to the contention that a member of a labor organization must be conclusively presumed to be biased, a proposition which is obviously unsound.

V. The application of the Act to persons other than petitioner, and certain provisions of the Act other than those here applied to petitioner, are not in issue in the present case. Consequently, the validity of the present order is not to be determined by the validity of those other provisions or applications. In any event, the applications and provisions of the Act to which petitioner objects are clearly separable.

The jurisdiction of the Board is limited by § 10 (a) to unfair labor practices "affecting commerce," as defined in § 2 (7) of the Act. Should the Board err in applying the Act, the courts will correct the error by holding that the order was unauthorized. It is clear from the terms of the Act and its legislative history that it was not intended to apply beyond the limits of the commerce power as judicially defined. It cannot be urged that the Act is invalid because it has been, in practice, applied to all industry. That contention is based upon a complete misapprehension of the facts. Unlike the statutes in the *Trade Mark Cases,* 100 U. S. 82, and the *Employers' Liability Cases,* 207 U. S. 463, the present Act is applicable on its face only to matters that are within the power of Congress.

Nor is the Act invalid because of the alleged invalidity of § 8 (5). That subsection, dealing with the refusal of an employer to bargain collectively, is not "inseparably connected" with the first four subsections. Congress would not have intended that the whole Act should

fall if § 8 (5) were to be declared unenforcible. The presumption of separability arising from the separability provision is buttressed not only by the separate listing of the five proscribed labor practices, but also by the fact that a substantial amount of protection of collective bargaining may be obtained by prohibition against interference with organization and free choice of representatives, even if the obligation to bargain may not itself be enforced. The decision in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, is, therefore, not in point here.

By leave of Court, briefs were filed by *Messrs. Harry Friedman* and *Maurice Friedman*, on behalf of the Commercial Telegraphers' Union, and by *Messrs. Morris L. Ernst, Callman Gottesman* and *Joseph B. Ullman* and *Harriet F. Pilpel*, on behalf of the American Newspaper Guild, as *amici curiae*, supporting the Act.

By leave of Court, a brief was filed by *Mr. Elisha Hanson*, on behalf of the American Newspaper Publishers Association, as *amicus curiae*, challenging the Act.

Mr. Justice Roberts delivered the opinion of the Court.

In this case we are to decide whether the National Labor Relations Act,[1] as applied to the petitioner by an order of the National Labor Relations Board, exceeds the power of Congress to regulate commerce pursuant to Article I, § 8, abridges the freedom of the press guaranteed by the First Amendment, and denies trial by jury in violation of the Seventh Amendment of the Constitution.

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[1] July 5, 1935, c. 372, 49 Stat. 449; U. S. C. Supp. I, Tit. 29, §§ 151, etc. The terms of the act, the procedure thereunder, and the relief which may be granted pursuant thereto, are set forth in the opinion in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, *ante*, p. 1.

In October, 1935, the petitioner discharged Morris Watson, an employee in its New York office. The American Newspaper Guild, a labor organization, filed a charge with the Board alleging that Watson's discharge was in violation of § 7 of the National Labor Relations Act, which confers on employees the right to organize, 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; that the petitioner had engaged in unfair labor practices contrary to subsections (1) and (3) of § 8 by interfering with, restraining or coercing Watson in the exercise of the rights guaranteed him by § 7 and by discriminating against him in respect of his tenure of employment and discouraging his membership in a labor organization. The Board served a complaint upon the petitioner charging unfair labor practices affecting commerce within the meaning of the statute. The petitioner answered admitting Watson's discharge but denying that it was due to his joining or assisting the Guild or engaging in union activities, and denying, on constitutional grounds, the validity of the act and the jurisdiction of the Board.

At a hearing before a trial examiner the petitioner appeared specially and moved to dismiss the complaint on constitutional grounds. The motion was overruled on all grounds except upon the question whether the proceeding was within the federal commerce power. Counsel thereupon withdrew from the hearing and the matter was further heard without the participation of the petitioner or its counsel. After receiving voluminous evidence as to the character of the petitioner's business, the examiner overruled the contention that interstate commerce was not involved and proceeded to hear the merits. At the close of the hearing he recommended that an order be entered against the petitioner. Notice of the filing of this report

and of hearing thereon by the Board was given the petitioner but it failed to appear. Based upon the examiner's report the Board made findings of fact, stated its conclusions of law, and entered an order that the Associated Press cease and desist from discouraging membership in the American Newspaper Guild or any other labor organization of its employees, by discharging, threatening to discharge, or refusing to reinstate any of them for joining the Guild or any other labor organization of its employees, and from discriminating against any employee in respect of hire, or tenure of employment, or any term or condition of employment for joining the Guild or any other such organization, and from interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in § 7 of the Act. It further enjoined the Associated Press to offer Watson reinstatement to his former position without prejudice to any rights and privileges previously enjoyed by him; to make him whole for any loss of pay suffered by reason of his discharge; to post notices in its New York office stating it would cease and desist from the enjoined practices, and to keep such notices posted for thirty days.[2]

The petitioner refused to comply with the order, and the Board, pursuant to § 10 (e) of the Act, petitioned the Circuit Court of Appeals for enforcement. The petitioner answered, again setting up its contentions with respect to the constitutionality of the act as applied to it. After argument, the court made a decree enforcing the order.[3]

In its answer to the Board's petition for enforcement, the petitioner did not challenge the Board's findings of fact, and no error is assigned in this court to the action of the Circuit Court of Appeals in adopting them. We, therefore, accept as established that the Associated Press

[2] 1 N. L. R. B. 788.
[3] 85 F. (2d) 56.

did not, as claimed in its answer before the Board, discharge Watson because of unsatisfactory service, but, on the contrary, as found by the Board, discharged him for his activities in connection with the Newspaper Guild. It follows that § 8, subsections (1) and (3) authorize the order, and the only issues open here are those involving the power of Congress under the Constitution to empower the board to make it in the circumstances.

First. Does the statute, as applied to the petitioner, exceed the power of Congress to regulate interstate commerce? The solution of this issue depends upon the nature of the petitioner's activities, and Watson's relation to them. The findings of the Board in this aspect are unchallenged, and the question becomes, therefore, solely one of law to be answered in the light of the uncontradicted facts.

The Associated Press is a membership corporation under the laws of New York which does not operate for profit but is a coöperative organization whose members are representatives of newspapers. It has about 1350 members in the United States and practically all the newspapers represented in its membership are conducted for profit. Its business is the collection of news from members and from other sources throughout the United States and foreign countries and the compilation, formulation, and distribution thereof to its members. In the process, the news is prepared for members' use by editing, rewriting, selecting, or discarding, the information received, in whole or in part. The product is transmitted to member newspapers and also to foreign agencies pursuant to mutual exchange agreements. The service is not sold but the entire cost is apportioned amongst the members by assessment.

Petitioner maintains its principal office in New York City but has also division points scattered over the United

States each of which is charged with the duty of collecting information from a defined territory and preparing and distributing it to newspapers within the assigned area and to other division points for use within their respective areas. Each member newspaper forwards news deemed important to the divisional headquarters of its area. In addition, employees of the petitioner obtain news which is transmitted to the appropriate division headquarters to be edited and forwarded to members within the area represented by that headquarters and to other divisions for distribution to member newspapers within their respective areas. The means of communication commonly used in receiving and transmitting news consists of wires leased from telegraph and telephone companies, but messenger service, the wireless, and the mail are also employed. Each division point is connected with every other by telegraph wires for exchange of news. Regional circuits supplement these primary circuits. All these lines of communication are utilized throughout the twenty-four hours of every day.

Consideration of the relation of Watson's activities to interstate commerce may be confined to the operations of the New York office where he was employed. This office is the headquarters of the Eastern Division and, through it operates the petitioner's foreign service, with offices, staffs, and correspondents throughout the world. News received in New York from foreign parts, from newspaper members within the Eastern Division, and from other division points, is edited by employees acting under the direction of supervising editors and, in its edited form, is transmitted throughout the division and to the headquarters of other divisions. The distributees of any given item are selected by those employed for the purpose in accordance with their judgment as to the usefulness of that item to the members or the divisions to which

it is transmitted. Thus the New York office receives and dispatches news from and to all parts of the world, in addition to that from New York State and other northeastern and Middle Atlantic States which comprise the Eastern Division. The work of the office is divided into two departments known as the Traffic Department and the News Department. All those employed in the actual receipt and transmission of news are in the Traffic Department; all others, including editorial employees, are grouped in the News Department. Watson, at the time of his discharge, was in the latter class, whose duty is to receive, rewrite, and file for transmission news coming into the office. An executive news editor, assisted by supervising editors and editorial employees, has general charge of the revision of news received from so-called filing editors who are in immediate charge of the telegraph wires connecting with the sources and destination of news. These filing editors supervise the news as it goes out from New York City; they determine what news, from the total copy delivered to them, is to be sent over the wires of which they have charge to the area reached by those wires, and they have charge of rewriting such copy as it comes from the other editors as may be appropriate for use in their respective circuits and the delivery of the selected and rewritten news to teletype operators for transmission over their wires. The function of editors and editorial employees such as Watson is to determine the news value of items received and speedily and accurately to rewrite the copy delivered to them, so that the rewritten matter shall be delivered to the various filing editors who are responsible for its transmission, if appropriate, to the areas reached by their circuits.

Upon the basis of these facts the Board concluded that the Associated Press was engaged in interstate commerce; that Watson's services bore a direct relation to petitioner's

interstate commerce activities; and that labor disputes between petitioner and employees of his class, and labor disturbances or strikes affecting that class of employees, tend to hinder and impede interstate commerce. These conclusions are challenged by the petitioner.

Section 2 (6) of the Act defines the term "commerce" as meaning "trade, traffic, commerce, transportation, or communication among the several States . . . or between any foreign country and any State . . ." Subsection (7) provides: "The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce."

The Associated Press is engaged in interstate commerce within the definition of the statute and the meaning of Article I, § 8 of the Constitution. It is an instrumentality set up by constituent members who are engaged in a commercial business for profit, and as such instrumentality acts as an exchange or clearing house of news as between the respective members, and as a supplier to members, of news gathered through its own domestic and foreign activities. These operations involve the constant use of channels of interstate and foreign communication. They amount to commercial intercourse, and such intercourse is commerce within the meaning of the Constitution.[4] Interstate communication of a business nature, whatever the means of such communication, is interstate commerce regulable by Congress under the Constitution.[5] This conclusion is unaffected by the fact that the petitioner

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[4] *Gibbons* v. *Ogden*, 9 Wheat. 1, 189.

[5] *Pensacola Telegraph Co.* v. *Western Union*, 96 U. S. 1, 9, 10; *Federal Radio Comm'n* v. *Nelson Bros. Co.*, 289 U. S. 266, 279; *International Textbook Co.* v. *Pigg*, 217 U. S. 91, 107; *Indiana Farmer's Guide Publishing Co.* v. *Prairie Farmer Publishing Co.*, 293 U. S. 268, 276.

does not sell news and does not operate for profit,[6] or that technically the title to the news remains in the petitioner during interstate transmission.[7] Petitioner being so engaged in interstate commerce, the Congress may adopt appropriate regulations of its activities for the protection and advancement, and for the insurance of the safety of, such commerce.

The National Labor Relations Act seeks to protect the employees' right of collective bargaining, and prohibits acts of the employer discriminating against employees for union activities and advocacy of such bargaining, by denominating them unfair practices to be abated in accordance with the terms of the act. As is shown in the opinion in *Virginian Ry. Co.* v. *System Federation No. 40,* 300 U. S. 515, the experience under the Railway Labor Act has demonstrated the efficacy of such legislation in preventing industrial strikes and obviating interference with the flow of interstate commerce. The petitioner, however, insists that editorial employees such as Watson are remote from any interstate activity and their employment and tenure can have no direct or intimate relation with the course of interstate commerce. We think, however, it is obvious that strikes or labor disturbances amongst this class of employees would have as direct an effect upon the activities of the petitioner as similar disturbances amongst those who operate the teletype machines or as a strike amongst the employees of telegraph lines over which petitioner's messages travel.

In *Texas & N. O. R. Co.* v. *Brotherhood of Railway and Steamship Clerks,* 281 U. S. 548, 570, we held a statute

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[6] *United States* v. *Hill,* 248 U. S. 420; *United States* v. *Simpson,* 252 U. S. 465.

[7] *Pipe Line Cases,* 234 U. S. 548, 560.

protecting the rights of collective bargaining by railway employees was within the competence of Congress under the commerce clause and that its provisions extended to clerks who had no direct contact with the actual facilities of railway transportation. We there said:

"Exercising this authority, Congress may facilitate the amicable settlement of disputes which threaten the service of the necessary agencies of interstate transportation. In shaping its legislation to this end, Congress was entitled to take cognizance of actual conditions and to address itself to practicable measures. The legality of collective action on the part of employees in order to safeguard their proper interests is not to be disputed. It has long been recognized that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work. *American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U. S. 184, 209. Congress was not required to ignore this right of the employees but could safeguard it and seek to make their appropriate collective action an instrument of peace rather than of strife."

In *Virginian Railway Co.* v. *System Federation No. 40, supra,* we have held an amendment of the Railway Labor Act, in all material respects analogous to the statute here under consideration, applicable to so-called back-shop employees of railroads despite the contention that their employment is remote from interstate transportation.

These decisions foreclose the petitioner's contention that Watson's employment had no relation to interstate commerce and could not be subjected to the regulatory provisions of the National Labor Relations Act.

Second. Does the statute, as applied to the petitioner, abridge the freedom of speech or of the press, safeguarded by the First Amendment? We hold that it does not. It

is insisted that the Associated Press is in substance the press itself, that the membership consists solely of persons who own and operate newspapers, that the news is gathered solely for publication in the newspapers of members. Stress is laid upon the facts that this membership consists of persons of every conceivable political, economic, and religious view, that the one thing upon which the members are united is that the Associated Press shall be wholly free from partisan activity or the expression of opinions, that it shall limit its function to reporting events without bias in order that the citizens of our country, if given the facts, may be able to form their own opinions respecting them. The conclusion which the petitioner draws is that whatever may be the case with respect to employees in its mechanical departments it must have absolute and unrestricted freedom to employ and to discharge those who, like Watson, edit the news, that there must not be the slightest opportunity for any bias or prejudice personally entertained by an editorial employee to color or to distort what he writes, and that the Associated Press cannot be free to furnish unbiased and impartial news reports unless it is equally free to determine for itself the partiality or bias of editorial employees. So it is said that any regulation protective of union activities, or the right collectively to bargain on the part of such employees, is necessarily an invalid invasion of the freedom of the press.

We think the contention not only has no relevance to the circumstances of the instant case but is an unsound generalization. The ostensible reason for Watson's discharge, as embodied in the records of the petitioner, is "solely on the grounds of his work not being on a basis for which he has shown capability." The petitioner did not assert and does not now claim that he had shown bias in the past. It does not claim that by reason

of his connection with the union he will be likely, as the petitioner honestly believes, to show bias in the future. The actual reason for his discharge, as shown by the unattacked finding of the Board, was his Guild activity and his agitation for collective bargaining. The statute does not preclude a discharge on the ostensible grounds for the petitioner's action; it forbids discharge for what has been found to be the real motive of the petitioner. These considerations answer the suggestion that if the petitioner believed its policy of impartiality was likely to be subverted by Watson's continued service, Congress was without power to interdict his discharge. No such question is here for decision. Neither before the Board, nor in the court below, nor here has the petitioner professed such belief. It seeks to bar all regulation by contending that regulation in a situation not presented would be invalid. Courts deal with cases upon the basis of the facts disclosed, never with nonexistent and assumed circumstances.

The act does not compel the petitioner to employ anyone; it does not require that the petitioner retain in its employ an incompetent editor or one who fails faithfully to edit the news to reflect the facts without bias or prejudice. The act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees. The restoration of Watson to his former position in no sense guarantees his continuance in petitioner's employ. The petitioner is at liberty, whenever occasion may arise, to exercise its undoubted right to sever his relationship for any cause that seems to it proper save only as a punishment for, or discouragement of, such activities as the act declares permissible.

The business of the Associated Press is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws. He has no special privi-

lege to invade the rights and liberties of others. He must answer for libel.[8] He may be punished for contempt of court.[9] He is subject to the anti-trust laws.[10] Like others he must pay equitable and nondiscriminatory taxes on his business.[11] The regulation here in question has no relation whatever to the impartial distribution of news. The order of the Board in nowise circumscribes the full freedom and liberty of the petitioner to publish the news as it desires it published or to enforce policies of its own choosing with respect to the editing and rewriting of news for publication, and the petitioner is free at any time to discharge Watson or any editorial employee who fails to comply with the policies it may adopt.

Third. The contentions that the act deprives the petitioner of property without due process, that the order of the Board deprives petitioner of the right to trial by jury, and that the act is invalid on its face because it seeks to regulate both interstate and intrastate commerce, are sufficiently answered in the opinion in *Texas and N. O. R. Co.* v. *Brotherhood of Railway and Steamship Clerks, supra,* and in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp., ante,* p. 1, and need no further discussion here.

The judgment of the Circuit Court of Appeals is

Affirmed.

MR. JUSTICE SUTHERLAND, dissenting.

MR. JUSTICE VAN DEVANTER, MR. JUSTICE MCREYNOLDS, MR. JUSTICE BUTLER and I think the judgment below should be reversed.

One of the points made in the court below, and assigned as error here is that the statute involved, as applied,

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[8] *Robertson* v. *Baldwin,* 165 U. S. 275, 281.

[9] *Toledo Newspaper Co.* v. *United States,* 247 U. S. 402.

[10] *Indiana Farmer's Guide Publishing Co.* v. *Prairie Farmer Publishing Co., supra.*

[11] *Grosjean* v. *American Press Co.,* 297 U. S. 233, 250.

abridges the freedom of the press in violation of the First Amendment.

The Associated Press is engaged in collecting, editing and distributing news to its members, publishers of some 1300 newspapers throughout the United States. These newspapers represent many diverse policies and many differences in point of view. It, obviously, is essential that the news furnished should not only be without suppression but that it should be, as far as possible, free from color, bias or distortion. Such is the long-established policy of the Associated Press. If the Congressional act here involved, upon its face or in its present application, abridges the freedom of petitioner to carry its policy into effect, the act to that extent falls under the condemnation of the First Amendment. We shall confine ourselves to that question, the gravity of which is evident; but we do not mean thereby to record our assent to all that has been said with regard to other questions in the case.

The first ten amendments to the Constitution safeguard the fundamental rights therein mentioned from every form of unpermitted federal legislation. The due process clause of the Fifth Amendment protects the person against deprivation of life, liberty or property except by due process of law. "Liberty" is a word of wide meaning, and, without more, would have included the various liberties guaranteed by the First Amendment. *De Jonge* v. *Oregon,* 299 U. S. 353, 364, and cases cited; *Grosjean* v. *American Press Co.,* 297 U. S. 233, 243–245; *Near* v. *Minnesota,* 283 U. S. 697, 707; *Pierce* v. *Society of Sisters,* 268 U. S. 510, 534–535.

But the framers of the Bill of Rights, regarding certain liberties as so vital that legislative denial of them should be specifically foreclosed, provided by the First Amendment:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The difference between the two amendments is an emphatic one and readily apparent. Deprivation of a liberty not embraced by the First Amendment, as for example the liberty of contract, is qualified by the phrase "without due process of law"; but those liberties enumerated in the First Amendment are guaranteed without qualification, the object and effect of which is to put them in a category apart and make them incapable of abridgment by any process of law. That this is inflexibly true of the clause in respect of religion and religious liberty cannot be doubted; and it is true of the other clauses save as they may be subject in some degree to rare and extreme exigencies such as, for example, a state of war. Legislation which contravenes the liberties of the First Amendment might not contravene liberties of another kind falling only within the terms of the Fifth Amendment. Thus, we have held that the governmental power of taxation, one of the least limitable of the powers, may not be exerted so as to abridge the freedom of the press (*Grosjean* v. *American Press Co., supra*), albeit the same tax might be entirely valid if challenged under the "liberty" guaranty of the Fifth Amendment, apart from those liberties embraced by the First. Compare *Louisville & Nashville R. Co.* v. *Mottley,* 219 U. S. 467, 482–483.

No one can read the long history which records the stern and often bloody struggles by which these cardinal rights were secured, without realizing how necessary it is to preserve them against any infringement, however slight. For, as Mr. Justice Bradley said in *Boyd* v. *United States,* 116 U. S. 616, 635, "illegitimate and unconstitutional practices get their first footing in that way, namely,

by silent approaches and slight deviations from legal modes of procedure. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*" "Experience should teach us," it was said in another case, "to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead* v. *United States,* (dissent), 277 U. S. 471, 479. A little water, trickling here and there through a dam, is a small matter in itself; but it may be a sinister menace to the security of the dam, which those living in the valley below will do well to heed.

The destruction or abridgment of a free press—which constitutes one of the most dependable avenues through which information of public and governmental activities may be transmitted to the people—would be an event so evil in its consequences that the least approach toward that end should be halted at the threshold.

The grants of the Constitution always are to be read in the light of the restrictions. Thus, the exercise of the power to make laws on the subject of bankruptcies, the exercise of the war powers, of the power to tax, of the power to exclude aliens, or of the power to regulate commerce, is each subject to the qualified restrictions of the Fifth Amendment (*Louisville Bank* v. *Radford,* 295 U. S. 555, 589); as each, also, is subject, so far as appropriate, to the unqualified restrictions of the First. Congress has no power to regulate the relations of private employer and employee as an end in itself, but only if that be an appropriate and legitimate means to a constitutional end, which here is the regulation of interstate commerce. Assuming that the statute upon its face satisfies this test, does the

present application of it satisfy the requirement that the freedom of the press shall not be abridged?

Freedom is not a mere intellectual abstraction; and it is not merely a word to adorn an oration upon occasions of patriotic rejoicing. It is an intensely practical reality, capable of concrete enjoyment in a multitude of ways day by day. When applied to the press, the term freedom is not to be narrowly confined; and it obviously means more than publication and circulation. If freedom of the press does not include the right to adopt and pursue a policy without governmental restriction, it is a misnomer to call it freedom. And we may as well deny at once the right of the press freely to adopt a policy and pursue it, as to concede that right and deny the liberty to exercise an uncensored judgment in respect of the employment and discharge of the agents through whom the policy is to be effectuated.

In a matter of such concern, the judgment of Congress—or, still less, the judgment of an administrative censor—cannot, under the Constitution, be substituted for that of the press management in respect of the employment or discharge of employees engaged in editorial work. The good which might come to interstate commerce or the benefit which might result to a special group, however large, must give way to that higher good of all the people so plainly contemplated by the imperative requirement that "Congress shall make *no* law . . . abridging the freedom . . . of the press."

The present case illustrates the necessity for the enforcement of these principles. The board found, in effect, that the actual reason for Watson's discharge was his activity as a member of a labor organization in the furtherance of its aims. Accepting this as a true statement of the reason for the discharge, let us consider the question from the standpoint of that finding; although, as already indicated, we are of opinion that the constitutional im-

munity of the press does not permit any legislative restriction of the authority of a publisher, acting upon his own judgment, to discharge anyone engaged in the editorial service. Such a restriction of itself would be an abridgment of the freedom of the press no less than a law restricting the constitutional liberty of one to speak would be an abridgment of the freedom of speech.

For many years there has been contention between labor and capital. Labor has become highly organized in a wide effort to secure and preserve its rights. The daily news with respect to labor disputes is now of vast proportions; and clearly a considerable part of petitioner's editorial service must be devoted to that subject. Such news is not only of great public interest; but an unbiased version of it is of the utmost public concern. To give a group of employers on the one hand, or a labor organization on the other, power of control over such a service is obviously to endanger the fairness and accuracy of the service. Strong sympathy for or strong prejudice against a given cause or the efforts made to advance it has too often led to suppression or coloration of unwelcome facts. It would seem to be an exercise of only reasonable prudence for an association engaged in part in supplying the public with fair and accurate factual information with respect to the contests between labor and capital, to see that those whose activities include that service are free from either extreme sympathy or extreme prejudice one way or the other. And it would be no answer to say that dealing with news of this character constitutes only a part of the duties of the editorial force. The interest of a juror, for example, in the result, which excludes him from sitting in a case, may be small and the adverse effect upon his verdict by no means certain. Nevertheless, the party affected cannot be called upon to assume the hazard. In the present case, by a parity of reasoning, the hope of benefit to a cherished cause which may bias the edi-

torial employee is a contingency the risk of which the press in the exercise of its unchallengeable freedom under the Constitution may take or decline to take, without being subject to any form of legislative coercion.

What, then, are the facts here involved? Morris Watson was employed by petitioner first in 1928 as a reporter and rewrite editor in petitioner's Chicago office. In 1930, he was transferred to the New York office, and there served as editorial employee until his discharge on October 18, 1935. One of his duties was to rewrite and supervise the news received at the New York office and determine what portion of it should be sent to points outside. As the court already has pointed out, he had authority to determine the news value of items received and was required to speedily and accurately rewrite the copy delivered to him.

In November, 1933, Watson was instrumental in organizing the Associated Press Unit of the New York Newspaper Guild, a labor organization, constituting a part of the American Newspaper Guild; and he was, from the beginning, recognized as the outstanding union representative of the press associations. He served successively as chairman of the Associated Press Unit and as treasurer and secretary of the New York Guild, and at the time of his discharge was vice-president for wiring services of the American Guild. His guild activities were immediately objected to by petitioner; and thereafter, on numerous occasions, these activities were objected to by petitioner's executives and inducements were held out to him to abandon them. The findings of the board disclose that Watson continued in various ways to promote the interests of the guild; and there is no doubt that his sympathies were strongly enlisted in support of the guild's policies, whether they clashed with the policies of petitioner or not. We do not question his right to assume and maintain that attitude. But, if petitioner con-

cluded, as it well could have done, that its policy to preserve its news service free from color, bias or distortion was likely to be subverted by Watson's retention, what power has Congress to interfere in the face of the First Amendment?

And that question may not be determined by considering Watson only; for the power to compel his continuance in the service includes the power to compel the continuance of all guild members engaged in editorial work, with the result that the application of the statute here made, if carried to the logical extreme, would give opportunity for the guild to exercise a high degree of control over the character of the news service. Due regard for the constitutional guaranty requires that the publisher or agency of the publisher of news shall be free from restraint in respect of employment in the editorial force. And we are dealing here not with guild members employed in the mechanical or purely clerical work of the press but with those engaged as Watson was in its editorial work and having the power thereby to affect the execution of its policies.

An illustration may be helpful: The right to belong to a labor union is entitled to the shield of the law, but no more so than the right not to belong. Neither can be proscribed. So much must be true, or we do not live in a free land. Let us suppose the passage of a statute of like character with that under review, having the same objective, but to be effected by forbidding the discharge of employees on the ground not that they are but that they are not members of a labor association. Let us suppose further that a labor association is engaged in publishing an interstate-circulated journal devoted to furthering the interests of labor, and that members of its editorial staff, resigning their membership in the association, transfer their allegiance from the cause of the workingman to that of the employer. Can it be doubted that an order re-

quiring the reinstatement of an editorial writer who had been discharged under these circumstances would abridge the freedom of the press guaranteed by the First Amendment?

And if that view of the amendment may be affirmed in the case of a publication issued for the purpose of advancing a particular cause, how can it be denied in the case of a press association organized to gather and edit the news fairly and without bias or distortion for the use of all causes? To hold that the press association must await a concrete instance of misinterpretation of the news before it can act is to compel it to experiment with a doubt when it regards certainty as essential.

The conclusion that the First Amendment is here infringed does not challenge the right of employees to organize, to bargain collectively with their employers about wages and other matters respecting employment, or to refuse to work except upon conditions they are willing to accept. Nor, the First Amendment aside, does it challenge the act in so far as it is an allowable regulation of interstate commerce. All affirmations in respect of these matters may be fully conceded without prejudice to our very definite view that the application of the act here has resulted in an unconstitutional abridgment of the freedom of the press.

Do the people of this land—in the providence of God, favored, as they sometimes boast, above all others in the plenitude of their liberties—desire to preserve those so carefully protected by the First Amendment: liberty of religious worship, freedom of speech and of the press, and the right as freemen peaceably to assemble and petition their government for a redress of grievances? If so, let them withstand all *beginnings* of encroachment. For the saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time.

WASHINGTON, VIRGINIA & MARYLAND COACH CO. *v.* NATIONAL LABOR RELATIONS BOARD.

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

No. 469. Argued February 10, 1937.—Decided April 12, 1937.

1. A corporation engaged in the business of transporting passengers and express, for hire, between points in the District of Columbia and points in Virginia, *held* an instrumentality of interstate commerce and subject to provisions of the National Labor Relations Act against discharge of employees because of their membership in a union and their advocacy of collective bargaining. P. 146.
2. The National Labor Relations Act limits the jurisdiction of the National Labor Relations Board to instances within the commerce power, and its orders in excess of its jurisdiction may be challenged by any party aggrieved. P. 146.
3. Claims not made in the petition for certiorari are not open for decision. P. 146.
4. Findings of the National Labor Relations Board upon matters within its jurisdiction will not be reversed or modified unless clearly improper or unsupported by substantial evidence. P. 147.
5. An order of the National Labor Relations Board requiring a common carrier by motor to reinstate in its employment several drivers and garage mechanics found by the Board to have been discharged because of their membership in a union, and to make good the losses of pay due to their discharge, and directing the carrier to post notices of its intention to comply with the Board's order,—*held* valid upon the authority of *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, *ante*, p. 1. P. 147.

85 F. (2d) 990, affirmed.

CERTIORARI, 299 U. S. 533, to review a judgment for enforcement of an order of the National Labor Relations Board, entered by the court below upon petition of the Board under the National Labor Relations Act.

Messrs. Robert E. Lynch and *William J. Hughes, Jr.*, with whom *Mr. William E. Leahy* was on the brief for petitioner.

The evidence does not sustain the findings.

Where a constitutional right is alleged to have been violated, the federal courts can make their own independent determination of all questions of law and fact.

The Act is unconstitutional in its entirety.

Petitioner has the necessary standing to argue inseparability.

The statute shows on its face a comprehensive scheme to regulate intrastate as well as interstate activities, with an object in view which could not be attained through the regulation of interstate relationships alone. Hence it appears affirmatively that Congress would never have passed the statute to regulate the few remaining lines of interstate activity if it could not constitutionally regulate labor relations in intrastate industry as well. In this aspect the question is one of statutory construction, i. e., having already in the Railway Labor Act of 1934 regulated the railroads and allied transportation systems with respect to labor, can it be fairly argued that, the "comprehensive scheme" and the "object" of the Act being outlawed, Congress intended in the present Act to regulate the few remaining interstate activities such as bus companies and communications systems. In this respect the present case seems somewhat similar to the *Trade-Mark Cases,* 100 U. S. 82.

This Court having before it a number of cases involving the intrastate application of the Act, it is proper for the present petitioner to argue the lack of intention on the part of Congress to apply the Act to petitioner if the Act is held unconstitutional as beyond the commerce clause in an intrastate case.

Mr. Charles Fahy, with whom *Attorney General Cummings, Solicitor General Reed,* and *Messrs. Charles E. Wyzanski, Jr., A. H. Feller, Charles A. Horsky, Robert B. Watts, Philip Levy,* and *A. Norman Somers* were on the brief, for respondent.

By leave of Court, *Messrs. Charlton Ogburn* and *Arthur E. Reyman,* as *amici curiae,* filed a brief on behalf of the American Federation of Labor et al., supporting the validity of the Act.

By leave of Court, *Messrs. Ivan Bowen, Charles H. Young,* and *M. H. Boutelle,* as *amici curiae,* filed a brief on behalf of the Pennsylvania Greyhound Lines, Inc., et al., challenging the validity of the Act.

Mr. Justice Roberts delivered the opinion of the Court.

In this case the petitioner, an operator of motor buses for the transportation of passengers and express for hire between points in the District of Columbia and in the State of Virginia, challenges the enforcement of the National Labor Relations Act against it as in contravention of the commerce clause and the Fifth and Seventh Amendments of the Constitution.

Pursuant to a written charge filed with the National Labor Relations Board by Local No. 1079 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, a labor organization, the Board issued a complaint alleging that the petitioner had discharged and refused to reinstate certain drivers and garage workmen because of their membership and activity in Local No. 1079 and that this constituted engaging in unfair labor practices affecting commerce within the intent of § 8, subsections (1) and (3), and § 2, subsections (6) and (7) of the National Labor Relations Act.[1] The petitioner appeared specially and filed a motion to dismiss the complaint on constitutional grounds, and, without waiving its objections to the

[1] July 5, 1935, c. 372, 49 Stat. 449; U. S. C. Supp. I, Tit. 29, §§ 151, ff.

Board's jurisdiction, filed an answer substantially admitting the allegations of the complaint with respect to the interstate character of its business, admitting the discharge and refusal to reinstate the employees mentioned in the complaint, and alleging that its action was motivated by the employees' inefficiency and not affected by their membership or activity in the union. The Board overruled the objections to its jurisdiction, fully heard the case, received evidence offered by both parties, and at the conclusion of the hearing denied a motion to dismiss the proceeding on the ground that the evidence did not support the allegations of the complaint, except as to three of the twenty-one employees concerned as to whom the complaint was dismissed for lack of evidence. The Board rendered a decision setting forth its findings of fact and entered an order prohibiting the petitioner from discrimination against its employees based upon membership in a union or advocacy of collective bargaining, and requiring the petitioner to restore eighteen of the discharged employees to their former positions with compensation for loss due to their discharge and to post notices to the effect that it would comply with the Board's order.[2]

Because of non-compliance with the order the Board filed a petition in the Circuit Court of Appeals for its enforcement. That court refused to disturb the findings of fact made by the Board, overruled the contentions as to unconstitutionality of the act as applied to petitioner and passed a decree enforcing the order.[3]

While the petitioner, in its specifications of error, attacks the holding of the Circuit Court of Appeals that the act as applied does not violate the Fifth and Seventh

[2] 1 N. L. R. B. 769.

[3] 85 F. (2d) 990.

Amendments, the argument in brief and at the bar was confined to two propositions: first, that the act is an attempt on the part of Congress to regulate labor relations in all employments whether interstate or intrastate and as it is void as an attempted regulation of intrastate commerce the whole must fall because its provisions are inseverable; secondly, that the evidence does not sustain the findings and the Board committed substantial error in the exclusion of evidence.

First. No contention is made that the petitioner is other than an instrumentality of interstate commerce. It is engaged in interstate transportation for hire. Our decisions in *Texas and N. O. R. Co.* v. *Brotherhood of Railway and Steamship Clerks,* 281 U. S. 548, and *Virginian Railway Co.* v. *System Federation No. 40,* 300 U. S. 515, put beyond debate the validity of the statute as applied to the petitioner. The contention that the act on its face seeks to regulate labor relations in all employments, whether in interstate commerce or not, is plainly untenable. As we have had occasion to point out in decisions rendered this day the act limits the jurisdiction of the Board to instances which fall within the commerce power, and if the Board should exceed the jurisdiction conferred upon it, any party aggrieved is at liberty to challenge its action.

Second. The petition for certiorari made no mention of any claim with respect to the sufficiency of the evidence to support the findings. In the light of this fact the question is not open for decision here.[4] But, were this not so, we should not review the facts, since § 10 (e) of the act provides that "the findings of the Board as to the facts, if supported by evidence, shall be conclu-

[4] *Alice State Bank* v. *Houston Pasture Co.,* 247 U. S. 240, 242; *Helvering* v. *Taylor,* 293 U. S. 507, 511; *Clark* v. *Williard,* 294 U. S. 211, 216; *Morehead* v. *Tipaldo,* 298 U. S. 587, 605.

sive," and there was substantial evidence to support the findings.

This is not a case of alleged confiscation,[5] nor is it one where the Board lacked jurisdiction,[6] for admittedly the petitioner's activities are in interstate commerce. The complaint is merely of error in appreciating and weighing evidence. In the case of statutory provisions like § 10 (e), applicable to other administrative tribunals, we have refused to review the evidence or weigh the testimony and have declared we will reverse or modify the findings only if clearly improper or not supported by substantial evidence.[7] The contentions respecting the rejection of evidence are not well founded.

Third. The specifications of error addressed to other questions are answered by the decision of this court in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp., ante,* p. 1.

The judgment is

Affirmed.

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[5] Compare *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38; *Baltimore & Ohio R. Co.* v. *United States,* 298 U. S. 349, 368.

[6] Compare *Crowell* v. *Benson,* 285 U. S. 22.

[7] *Florida* v. *United States,* 292 U. S. 1, 12; *Federal Trade Comm'n* v. *Algoma Lumber Co.,* 291 U. S. 67, 73; *Del Vecchio* v. *Bowers,* 296 U. S. 280; *Acker* v. *United States,* 298 U. S. 426, 433, 434.

SOUTHERN NATURAL GAS CORP. ET AL. *v.* ALABAMA.

APPEAL FROM THE SUPREME COURT OF ALABAMA.

No. 570. Argued March 10, 1937.—Decided April 26, 1937.

1. A tax on a foreign corporation for the privilege of doing local business and measured on its property owned in the State, is not invalid because a part of that property is used by it in interstate commerce, there being no direct burden on interstate commerce, and the effect thereon being incidental and remote. P. 156.
2. An Alabama law imposes on foreign corporations doing business in the State an annual "franchise tax" of $2.00 on each $1,000 of the capital employed in the State. *Held* consistent with the commerce clause and valid, as applied to a Delaware corporation qualified to do business in Alabama and maintaining its commercial domicile there, and whose business consisted in purchasing natural gas in Louisiana and Mississippi gas fields, transporting it through its pipe line system, part of which was in Alabama, and selling it in Alabama and other States. The gas moved continuously from the gas fields under natural pressure to the points of delivery. Of the gas delivered in Alabama, part went to public utility distributors, but the rest was sold for consumption in divers industrial plants, delivery to them being made upon orders, as required, through service lines installed and maintained by the corporation, after it had reduced the pressure of the gas and had metered it. P. 153.

233 Ala. 81; 170 So. 178, affirmed.

APPEAL from a judgment sustaining a tax and reversing the state circuit court, which had held otherwise on an appeal from the assessment.

Messrs. Forney Johnston and *Joseph F. Johnston* for appellants.

Mr. Frontis H. Moore, with whom *Messrs. A. A. Carmichael,* Attorney General of Alabama, and *Noel T. Dowling* were on the brief, for appellee.

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

This case presents the question of the validity of a franchise tax assessed pursuant to a statute of the State of Alabama upon the Southern Natural Gas Corporation. The imposition of the tax was assailed as a direct burden upon interstate commerce and as also depriving the corporation of its property without due process of law and denying it the equal protection of the laws contrary to the Fourteenth Amendment of the Federal Constitution. The Supreme Court of the State sustained the tax (170 So. 178) and the case comes here on appeal.

The statute, enacted in pursuance of § 232 of the state constitution, is § 54 of Act No. 163, General Acts of Alabama, 1927, page 176, and provides:

"That every corporation organized under the laws of any other state, nation, or territory, and doing business in this State, except strictly benevolent, educational or religious corporations, shall pay annually to the State an annual franchise tax of Two dollars ($2.00) on each One Thousand Dollars of the actual amount of capital employed in this State."

The assessment was made by the State Tax Commission for the year 1931 in the sum of $11,047.43 and was said to be based upon capital employed in Alabama amounting to $5,523,715. Appellant resisted the assessment upon the ground that it was not doing business and did not propose to do business in the State of Alabama except in interstate commerce and that the property by which the tax was measured was used exclusively in interstate commerce.

The case was submitted upon an agreed statement from which the following facts appear:

Appellant was organized prior to May 12, 1928, under the laws of Delaware and on that date it qualified to do

business in Alabama. It named a statutory agent and filed in the office of the Secretary of State a copy of its charter which covered a wide range of activities.[1] It has paid annually the required permit fee. At the time of the assessment in question appellant maintained its office and chief place of business in the city of Birmingham, Alabama. The entire management, control and conduct of its business was conducted from that office.

Appellant is engaged in the transmission and distribution of gas which it purchases from the producers in the Louisiana and Mississippi fields. In May, 1929, it began the construction of its pipe lines and by January, 1931, it had constructed its main lines from the Louisiana fields to Atlanta and Columbus, Georgia, the Columbus line turning south from the Atlanta line at a point near Tuscaloosa, Alabama. In 1931, appellant owned approximately 564 miles of pipe and various items of real and personal property located within Alabama, all constituting part of its general transmission system. It was agreed that in the event that it should be held that all of appellant's property located in the State was subject to the assessment of a franchise tax, the value of that property as of January 1 to May 13, 1931, the date of the final assessment, was $5,500,000.

Appellant had contracts for the delivery of natural gas in Alabama to only four purchasers. Three were intrastate utilities in Alabama, the Alabama Natural Gas Corporation, the Southern Cities Public Service Com-

[1] The charter authorized appellant to store, transport, buy and sell oil, gas, salt, brine and other mineral solutions; to manufacture, acquire, distribute, use and sell artificial gas, with by-products; to mine, produce, buy, use, sell and distribute natural gas, with by-products; to produce, buy, use, sell and distribute a mixture of artificial and natural gas; to construct, acquire and operate all works and all pipe lines, mains, plants, systems, etc. for the above purposes, with the power of eminent domain; to acquire, manufacture and deal in ice.

pany and the Birmingham Gas Company. These companies were not consumers but were engaged, either directly or through subsidiaries, in the distribution of natural gas as public utilities in the State of Alabama. The fourth purchaser was the Tennessee Coal, Iron & Railroad Company, a subsidiary of the United States Steel Corporation, which purchased gas for itself and affiliated companies operating steel and industrial plants in the Birmingham district and which were not public utilities but consumers. A majority of orders for gas were received by and cleared through the Birmingham office; all collections for sales were received and disbursements for expenses were made or authorized at that office. The sales to the Tennessee Company and its affiliates were made from time to time upon orders given by the Birmingham office as the needs of the purchasers required.

The gas sold to the above-named purchasers was delivered in continuous movement from the gas fields in Louisiana or Mississippi without break or interruption, to the point where it was delivered, viz., the meter house at which the gas so sold was measured for the purpose of payment. The gas was moved under unregulated gas pressure, as produced by the natural pressure of the gas wells, to the designated points of delivery. The stipulation of facts also states that in the sales to the Tennessee Company and its affiliates the pressure is reduced at the point of delivery for the accommodation of the purchaser to meet its needs and requirements. The general practice is thus described in appellant's brief: "All gas delivered in Alabama moved under main line pressure in continuous movement from the wells in Louisiana to the immediate point of delivery in Alabama, where it was reduced in pressure and measured for the sole purpose of effecting delivery." [2]

[2] Appellant makes an explanatory statement in a foot note as follows: "It is a matter of general knowledge that long distance trans-

The agreed statement set forth appellant's contracts with the Alabama Natural Gas Corporation and the Tennessee Company, respectively. These contained detailed provisions as to delivery, pressure, measurement, etc. In the contract with the Tennessee Company provision was made for the establishment of service lines to the consuming plants, as follows, appellant being described as "Seller":

"Seller shall at its own expense provide in advance of the initial delivery date of March 1, 1930, service lines of suitable size to a point mutually agreed upon on the property of Buyer's Bessemer plant. To reach Buyer's Fairfield Plant Seller shall provide a service line that will cross Buyer's Ensley property and run in a southwesterly direction on the property of Buyer to some point mutually agreed upon, on Buyer's Fairfield premises. Buyer agrees that it will make no charge for right of way for any part of the service lines traversing its property. A suitable meter will be provided for metering gas that may be used in the Bessemer plant, in the Ensley plant and in the Fairfield plant of the Buyer and the plants of other subsidiary companies."

These plants, the state court said, were "widely separated." The contract also provides:

"The natural gas shall be delivered at a pressure of not less than 30 pounds gauge at some mutually satisfactory location or locations upon the premises of Buyer, and Seller shall there furnish, install, operate and maintain at its own expense regulating and measuring station or stations properly equipped with orifice meters and recording gauges or other type of meter or meters of stand-

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mission of natural gas (appellant's system comprising about 1000 miles) moves under line pressure of approximately 400 pounds, greatly in excess of the requirement or required tensile strength of the distribution pipes of the utility or other purchasers from the long distance transportation company."

ard style as may be mutually agreed upon conformable to the current recommendations of Gas Measurements Committee of American Gas Association, the measurement by which shall fix the total amount of natural gas delivered by Seller to Buyer.

"The measuring equipment so installed by Seller, together with any building erected by it for such equipment, shall be and remain its property."

First.—The statute, which is challenged as here applied, was under consideration in *Anglo-Chilean Nitrate Sales Corp.* v. *Alabama,* 288 U. S. 218. In the light of the decisions of the Supreme Court of the State, this Court concluded that the tax was laid "not upon the authorization, right or privilege to do business in Alabama, but upon the actual doing of business." *Id.,* p. 223. The tax was held invalid as applied to a foreign corporation whose sole business in the State consisted in the landing, storage and sale in the original packages, of goods imported from abroad. In the instant case the Supreme Court of the State has reviewed its rulings and has expounded the meaning of the statute. The state court holds that the tax is a franchise tax laid "upon the right to do business." It is a tax levied "on foreign corporations as a prerogative to the right of exercise of its corporate functions in the State." It "is not on any basis a tax on business" but is laid "on the exercise of corporate functions, or on the privilege of exercising corporate functions within the State and its employment of its capital in Alabama."

By compliance with the statute appellant obtained the privilege of engaging within the State in any of the activities which its charter authorized.

Second.—Appellant made Birmingham, Alabama, its headquarters for the transaction of business. The "entire management" was conducted from its principal office at that place. There, as the state court said, was "the control of the business in all of its aspects." There orders

for deliveries of gas under its contracts and all collections from sales were received and all disbursements were made or authorized. While Delaware was the State of incorporation, appellant's commercial domicile was in Alabama. *Wheeling Steel Corp.* v. *Fox,* 298 U. S. 193, 211.

From the agreed facts we are unable to conclude that the business thus conducted in Alabama was entirely an interstate business. While the gas which appellant sold was brought into the State from Louisiana, it appears that appellant carried on in Alabama activities of an intrastate character. We had occasion in *East Ohio Gas Co.* v. *Tax Commission,* 283 U. S. 465, 470, to consider the distinction between the transportation of gas into a State and the furnishing of the gas so transported to consumers within the State. We observed in that case that "when the gas passes from the distribution lines into the supply mains, it necessarily is relieved of nearly all the pressure put upon it at the stations of the producing companies," its volume is expanded, and it is divided into the smaller streams that enter the service lines connecting such mains with the pipes on the consumer's premises. In that case, the Ohio Company furnished gas to consumers in municipalities by means of distribution plants and that activity was held to be not interstate commerce but a business of purely local concern exclusively within the jurisdiction of the State. The Court quoted with approval the statement in *Missouri* v. *Kansas Gas Co.,* 265 U. S. 298, 309, that "The business of supplying, on demand, local consumers is a local business, even though the gas be brought from another State and drawn for distribution plants directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies. In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance."

While the facts of the two cases are not the same, there is a clear analogy. For here under its contract with the Tennessee Company, which bought for consumption by itself and its subsidiaries in industrial plants, appellant agreed not simply to install metering stations, for measuring the amount of gas delivered, but to establish the requisite service lines running to the described plants in order that the gas might be furnished in a manner suited to the consumers' needs. The gas was supplied through these service lines on the orders received from time to time at the Birmingham office. We perceive no essential distinction in law between the establishment of such a local activity to meet the needs of consumers in industrial plants and the service to consumers in the municipalities which was found in the Ohio case to constitute an intrastate business. As was said in that case: "The treatment and division of the large compressed volume of gas is like the breaking of an original package, after a shipment in interstate commerce, in order that its contents may be treated, prepared for sale and sold at retail."

The facts thus distinguish the instant case from that of *Ozark Pipe Line Corp.* v. *Monier,* 266 U. S. 555. There the corporation operated a pipe line extending from Oklahoma through Missouri to a point in Illinois. Missouri sought to tax the privilege of doing business within the State. But nothing was done in Missouri except in furtherance of transportation. Oil was neither received nor delivered in that State. The business actually carried on "was exclusively in interstate commerce" and whatever was done within Missouri in the maintenance of an office or otherwise was "all exclusively in furtherance of its interstate business." *Id.,* p. 565. In *Missouri* v. *Kansas Gas Co., supra,* as noted above, the distinction was pointed out. There "the transportation, sale and delivery" of the gas constituted an "unbroken chain, fundamentally interstate from beginning to end." So,

the case of *State Tax Commission* v. *Interstate Natural Gas Co.*, 284 U. S. 41, rested upon the conclusion that what was done was wholly incidental to interstate commerce between Louisiana and Mississippi. There were no such local activities as are present here to carry the transactions of the company into the field of state authority.

That authority was held to be properly exerted in the case of *Atlantic Lumber Co.* v. *Commissioner,* 298 U. S. 553. The corporation was organized in Delaware but it did not "function there" but in Massachusetts. There it established its office for the exercise of its corporate powers. That was the headquarters for salesmen who solicited orders in that and other States. There orders were accepted and remittances received. The corporation was engaged in the wholesale lumber business and owned practically all the stock of three subsidiaries, two of which were engaged in cutting timber and manufacturing lumber in other States, and a third held title to timber lands in Louisiana. The court said that if appellant did nothing but transact interstate business, the excise tax sought to be levied with respect to the doing of business in Massachusetts could not stand, but in view of the activities conducted in Massachusetts and the corporate functions there exercised, the court decided that the privilege tax was valid and that the effect upon interstate commerce, so far as there was any, was "remote and incidental." Because of the local activities, the decision in the *Ozark* case was held to be inapplicable.

Third.—As Alabama was competent to lay a franchise tax upon appellant for the privilege of doing an intrastate business, it was competent to measure the tax by the capital employed within the State provided the tax was not so laid as to discriminate against interstate commerce or otherwise lay a direct burden upon it. *Postal Telegraph Cable Co.* v. *Adams,* 155 U. S. 688, 696; *St. Louis South-*

western Ry. Co. v. *Arkansas,* 235 U. S. 350, 364–367; *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113, 119, 120; *St. Louis-San Francisco Ry. Co.* v. *Middlekamp,* 256 U. S. 226, 231; *Hump Hairpin Co.* v. *Emmerson,* 258 U. S. 290, 294; *International Shoe Co.* v. *Shartel,* 279 U. S. 429, 433; *Western Cartridge Co.* v. *Emmerson,* 281 U. S. 511, 513, 514; *Atlantic Lumber Co.* v. *Commissioner, supra.*

There is here no attempt to tax property that is beyond the boundaries of the State. The tax was laid only upon property employed within the State and enforcement is left to the ordinary means of collecting taxes. The rule was thus stated in *International Shoe Co.* v. *Shartel, supra:* "A franchise tax imposed on a corporation, foreign or domestic, for the privilege of doing a local business, if apportioned to business done or property owned within the State, is not invalid under the commerce clause merely because a part of the property or capital included in computing the tax is used by it in interstate commerce." There is no showing of any direct burden upon interstate commerce, the effect upon that commerce being incidental and remote, not differing in this respect from the effect of ordinary *ad valorem* taxation of property within the State. *Postal Telegraph Cable Co.* v. *Adams, supra; St. Louis Southwestern Ry. Co.* v. *Arkansas, supra.*

The judgment of the Supreme Court of Alabama is

Affirmed.

RAY *v.* UNITED STATES.

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

No. 604. Argued March 30, 1937.—Decided April 26, 1937.

1. In a criminal case, when the time for filing a bill of exceptions is extended by the judge to a date which is a Sunday, that day is to be excluded and the bill may be filed on the day following. Criminal Appeals Rule XIII. P. 161.

   Rule XIII provides: "For the purpose of computing time as specified in the foregoing rules, Sundays and legal holidays (whether under Federal law or under the law of the State where the case was brought) shall be excluded."
2. The limitation imposed upon the trial judge by Criminal Appeals Rule IX with respect to extension of the time for filing a bill of exceptions, does not apply to the Circuit Court of Appeals or to the trial judge acting under direction of that Court. P. 161.
3. The fundamental policy of the Criminal Appeals Rules is that as speedily as possible, upon the taking of the appeal, the Circuit Court of Appeals shall be invested with jurisdiction to see that the appeal is properly expedited and to supervise and control all proceedings on the appeal "including the proceedings relating to the preparation of the record on appeal." P. 163.
4. The duty of the Clerk of the trial court, under Rule IV, upon the filing of a notice of appeal, immediately to forward the duplicate notice to the clerk of the appellate court, together with a statement from the docket entries in the case substantially as provided in the form annexed to the Rules, is a ministerial duty. P. 163.
5. Under Rule IV, the Circuit Court of Appeals is empowered to vacate or modify any order of the trial court or judge in relation to the prosecution of the appeal, and this embraces the proceedings relating to the preparation of the record on appeal, including an order of the trial judge fixing the time for filing the bill of exceptions. P. 163.
6. The Circuit Court of Appeals has authority to return a bill of exceptions to the trial judge for appropriate corrections, including the setting forth of the evidence in condensed and narrative form. Rule IX. P. 164.

7. Supervision and control by the Circuit Court of Appeals under the Criminal Appeals Rules calls for the exercise of a sound judicial discretion, which will not be reviewed unless abused. A refusal to extend the time for filing a bill of exceptions beyond that fixed by the trial judge,—*held*, in the circumstances of this case, not an abuse of discretion. P. 166.

86 F. (2d) 942, affirmed.

CERTIORARI, 300 U. S. 647, to review a judgment of the Circuit Court of Appeals overruling a motion to amend the record and dismissing the appeal in a criminal case.

Mr. Reynolds Robertson, with whom *Mr. William D. Whitney* was on the brief, for petitioner.

Mr. Gordon Dean, with whom *Solicitor General Reed, Assistant Attorney General McMahon,* and *Mr. William W. Barron* were on the brief, for the United States.

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

Certiorari was granted to determine important questions which have arisen in the administration of the Criminal Appeals Rules promulgated May 7, 1934. 292 U. S. pp. 660 *et seq.*

Petitioner was convicted of violation of the mail fraud and conspiracy statutes. His timely appeal was taken on June 30, 1936. Within thirty days thereafter the trial judge extended the time to file a bill of exceptions to and including November 1, 1936, which was a Sunday. The trial had been long and the testimony was voluminous. On October 20, 1936, after unsuccessful efforts to obtain an agreement as to the condensation of the evidence, petitioner applied to the trial judge for an extension of time to settle and file the bill of exceptions. As it was found that the trial judge was without authority to grant that extension, petitioner sought an extension

from the Circuit Court of Appeals, but his motion was denied on October 27th. He then asked the trial judge to settle the stenographer's minutes as the bill of exceptions. That motion was first denied on October 29th, but on the following day the trial judge expressed his willingness to receive a similar application if the colloquy of counsel was stricken from the transcript, that application to be made on Monday, November 2d. On that day the bill of exceptions, so prepared, was settled and filed. On November 16, 1936, the Government moved to docket and dismiss the appeal upon the ground that petitioner had failed to comply with Rules VIII and IX of the Criminal Appeals Rules. The motion was granted. Petitioner asked for a rehearing and was heard. Insisting that it was impossible within the allotted time to set forth the evidence in condensed and narrative form, petitioner requested the Circuit Court of Appeals to exercise its discretionary power under Rule IX to the end that the defect in the bill of exceptions might be cured. That request was made simultaneously with the motion to dismiss. It appears to have been treated as a motion to amend the record and it was denied. The court took the view that as, by the assignment of errors filed with the bill of exceptions, the question was raised as to the sufficiency of the evidence to support the conviction, it was necessary under the rule that the evidence should be properly presented in condensed and narrative form. The court held that the time for the settlement of the bill of exceptions could not be enlarged, and that if the bill were returned to the trial judge he would be powerless to correct, amend or resettle it as the time for such action had expired.

Finally the court decided that petitioner was inexcusably delinquent. The court said: "This appellant had four months and has offered insufficient excuses for his delinquency. The bill of exceptions was insufficient."

The motion to amend the record was denied and the motion to dismiss the appeal was granted. 86 F. (2d) 942.

First.—The Government contends that the bill of exceptions filed on November 2d was too late. The Circuit Court of Appeals correctly held the contrary. The trial judge, by valid order, had extended the time "to and including the 1st day of November, 1936." That day being Sunday, on which the bill of exceptions could not be filed, the trial judge construed his order as permitting the settlement and filing on the following day. Rule XIII of the Criminal Appeals Rules provides:

"For the purpose of computing time as specified in the foregoing rules, Sundays and legal holidays (whether under Federal law or under the law of the State where the case was brought) shall be excluded."

The Government argues that this rule refers to a "computation," as where the extension is for a certain term or period, and not to a case where a specific date is fixed. The latter case is said to lie outside the rule and we are referred to various decisions which are deemed to furnish analogies for our guidance in reaching a conclusion upon a point left open. But there appears to be no reason why Rule XIII should be so narrowly construed. The phrase "For the purpose of computing time" was plainly intended to be of general application and "computing" naturally embraces whatever reckoning is necessary to fix the time allowed. When a specific date is fixed and that date falls on Sunday or a holiday, the rule for the reckoning requires that that day be excluded and hence the bill of exceptions, in this case, apart from other questions, was settled and filed in time.

Second.—The Circuit Court of Appeals had authority to extend the time for filing the bill of exceptions. Rule IX does limit the power of the trial judge to grant extensions. The purpose of the Rule being to expedite appeals in criminal cases, it was sought to put an end to the inor-

dinate delays due to extensions of time to prepare bills of exceptions. Such extensions had been one of the most prolific causes of the delays in the disposition of criminal appeals. Accordingly Rule IX provides:

"In cases other than those described in Rule VIII [which refers to the record on appeal without bill of exceptions], the appellant, within thirty (30) days after the taking of the appeal, or within such further time as within said period of thirty days may be fixed by the trial judge, shall procure to be settled, and shall file with the clerk of the court in which the case was tried, a bill of exceptions setting forth the proceedings upon which the appellant wishes to rely in addition to those shown by the clerk's record as described in Rule VIII."

The Rule presupposes that the trial judge, who is familiar with the proceedings on the trial, is in a position to estimate the length of time that is necessary for the preparation and filing of the bill of exceptions, and he is permitted within thirty days after the taking of the appeal to fix that time. That is the limit of his authority,[1] save as he may act under the direction of the Circuit Court of Appeals. But while this limit is placed upon

[1] See *White* v. *United States,* C. C. A. 4th, 80 F. (2d) 515, 516; *Yep* v. *United States,* C. C. A. 10th, 81 F. (2d) 637; *United States* v. *Adamowicz,* C. C. A. 2d, 82 F. (2d) 288; *Gallagher* v. *United States,* C. C. A. 8th, 82 F. (2d) 721; *Wolpa* v. *United States,* C. C. A. 8th, 84 F. (2d) 829; *Cusamano* v. *United States,* C. C. A. 8th, 85 F. (2d) 132; *Spero* v. *United States,* C. C. A. 8th, 85 F. (2d) 134; *Slade* v. *United States,* C. C. A. 10th, 85 F. (2d) 786; *Cary* v. *United States,* C. C. A. 9th, 86 F. (2d) 461; *St. Charles* v. *United States,* C. C. A. 9th, 86 F. (2d) 463; *Goddard* v. *United States,* C. C. A. 10th, 86 F. (2d) 884; *In re Lee,* C. C. A. 5th, 87 F. (2d) 142; *Wainer* v. *United States,* C. C. A. 7th, 87 F. (2d) 77; *Fitzpatrick* v. *United States,* C. C. A. 7th, 87 F. (2d) 471; *Miller* v. *United States,* C. C. A. 9th, 88 F. (2d) 102; *Hightower* v. *United States,* C. C. A. 9th, 88 F. (2d) 302; *Young* v. *United States,* C. C. A. 10th, 88 F. (2d) 305. Compare *Fierman* v. *United States,* C. C. A. 3d, 84 F. (2d) 968.

the power of the trial judge, the Criminal Appeals Rules give full authority to the Circuit Court of Appeals to set aside or modify his order whenever it appears that there has been an abuse of discretion or that the interests of justice require it.

The fundamental policy of the Criminal Appeals Rules is that as speedily as possible, upon the taking of the appeal, the Circuit Court of Appeals shall be invested with jurisdiction to see that the appeal is properly expedited and to supervise and control all proceedings on the appeal "including the proceedings relating to the preparation of the record on appeal." For this purpose the Rules provide that the notice of the appeal shall be filed in duplicate with the clerk of the trial court and a copy of the notice shall be served upon the United States Attorney. Rule III. By Rule IV it becomes the duty of the clerk of the trial court immediately to forward the duplicate notice of appeal to the clerk of the appellate court, together with a statement from the docket entries in the case substantially as provided in the form annexed to the Rules. This is a ministerial duty which the clerk of the trial court must perform. With respect to the authority of the Circuit Court of Appeals, Rule IV provides:

"From the time of the filing with its clerk of the duplicate notice of appeal, the appellate court shall, subject to these rules, have supervision and control of the proceedings on the appeal, including the proceedings relating to the preparation of the record on appeal.

"The appellate court may at any time, upon five (5) days' notice, entertain a motion to dismiss the appeal, or for directions to the trial court, or to vacate or modify any order made by the trial court or by any judge in relation to the prosecution of the appeal, including any order for the granting of bail."

These provisions are comprehensive. The clause that the appellate court's supervision and control shall be

"subject to these rules" refers to the rules governing the action of the appellate court. To make effective this supervision and control, any matter requiring correction may be brought before the appellate court upon the short notice of five days. Thus there may be not only a motion to dismiss the appeal but "for directions to the trial court" and "to vacate or modify *any order* made by the trial court or by any judge in relation to the prosecution of the appeal." As the supervision and control of the proceedings on the appeal expressly embraces the proceedings "relating to the preparation of the record on appeal," it cannot be said that an order made by the trial judge fixing the time for the settlement and filing of a bill of exceptions is excluded. It is, of course, assumed that the Circuit Court of Appeals will not lightly interfere with the action of the trial judge. But the Rules appropriately provide for the correction of any miscarriage of justice in this respect, and the lodging of the supervision and control with the appellate court gives the highest assurance that on the one hand the action of the trial judge will not be interfered with unnecessarily and on the other that neither party will be remediless when corrective action is required. For example, it may clearly appear on a showing by the Government that the time allowed by the trial judge for the filing of a bill of exceptions is altogether too long and that, in the interests of a reasonably prompt disposition of the appeal, it should be shortened; or it may clearly appear that the time allowed is unreasonably short and that justice requires that an extension should be granted. To give a desirable flexibility, the Rules do not attempt to lay down specific requirements to meet various situations but place upon the Circuit Court of Appeals full responsibility for the exercise of a reasonable control over all proceedings pertaining to the appeal and all the orders of the trial court or judge in that relation.

Third.—The Circuit Court of Appeals had authority to

return the bill of exceptions to the trial judge and to require such correction as might be found to be appropriate, including the setting forth of the evidence in condensed and narrative form. Rule IX provides:

"Bills of exceptions shall conform to the provisions of Rule 8 of the Rules of the Supreme Court of the United States.

"Upon the filing of the bill of exceptions and assignment of errors, the clerk of the trial court shall forthwith transmit them, together with such matters of record as are pertinent to the appeal, with his certificate, to the clerk of the appellate court, and the papers so forwarded shall constitute the record on appeal.

"The appellate court may at any time, on five (5) days' notice, entertain a motion by either party for the correction, amplification, or reduction of the record filed with the appellate court, and may issue such directions to the trial court, or trial judge, in relation thereto, as may be appropriate."

The authority of the Circuit Court of Appeals thus extends to the "correction, amplification, or reduction" of the record on appeal of which the bill of exceptions is a part. The appellate court is authorized to require a proper bill of exceptions and to give any directions to the trial court or trial judge that may be necessary to attain that end.

Rule 8 of the Rules of this Court to which Rule IX refers, provides (Rule 8, par. 2):

"Only so much of the evidence shall be embraced in a bill of exceptions as may be necessary to present clearly the questions of law involved in the rulings to which exceptions are reserved, and such evidence as is embraced therein shall be set forth in condensed and narrative form, save as a proper understanding of the questions presented may require that parts of it be set forth otherwise. See Equity Rule 75b, 226 U. S. Appendix, p. 23, as amended, 286 U. S. 570."

Under Equity Rule 75b we have held that the Circuit Court of Appeals is authorized, when a bill of exceptions is presented to it showing that the requirement for condensation or narration has been transgressed, to remit the transcript to the District Court so that a further opportunity may be had to comply with the Equity Rule. We also said that, in such a remission, care should be taken to require that the proceedings under the rule be conducted with reasonable dispatch. *Barber Asphalt Co.* v. *Standard Asphalt Co.*, 275 U. S. 372, 387. In that case this court concluded that the Circuit Court of Appeals had passed the bounds of sound discretion in affirming the decree appealed from, because of the violation of the Equity Rule, and upon proper terms, should have remitted the transcript to the District Court for appropriate revision. Nothing in the Criminal Appeals Rules, in incorporating the requirement of Rule 8 of the Rules of this Court, deprives the Circuit Court of Appeals of like authority in dealing with bills of exceptions in criminal cases. On the contrary, Rule IX gives to the Circuit Court of Appeals that authority. The ruling in the instant case that the trial judge could "no longer act to put the evidence in narrative form" and that the appellate court had "no power to order him to do so" is erroneous. The trial judge could act under the direction of the appellate court and that court could give whatever direction the case required in order to give effect to the Rule as to the proper preparation of the bill of exceptions.

Fourth.—The supervision and control of the Circuit Court of Appeals under the Criminal Appeals Rules calls for the exercise of a sound judicial discretion, and its action will not be reviewed unless it appears that its discretion has been abused. In the instant case, despite the mistaken view of its authority, the court appears to have rested its final conclusion upon the ground that,

even if the court had the power to grant petitioner's request, the circumstances justified its denial. The court pointed to the fact that petitioner had four months to procure the settlement of the bill of exceptions and the court thought his excuses insufficient. While petitioner strongly insists upon the authority of the appellate court, he apparently took no steps to have that authority exercised in his favor until toward the end of October. He complains that at that time, upon his motion for an extension of time or other relief, the court itself suggested that an application should be made to the trial judge for an order settling the stenographer's minutes as the bill of exceptions, and that the circuit judges intimated to the Government's counsel that opposition to that course should be withdrawn. This, it is said, took place on October 27th. Petitioner urges that in directing the settlement of the bill of exceptions in its inappropriate form he was but following the suggestion of the appellate court in view of his exigency and with the idea that the condensation and narration of the evidence could later be obtained. But the Circuit Court of Appeals was fully acquainted with all that had taken place. When the later motions came before the court, it was clearly entitled to review the whole matter and reach a conclusion as to the proper exercise of its discretion. It was the province of the court to weigh the petitioner's excuses. It did so and found them to be without merit. In the light of its statement as to the ultimate ground of its action we cannot say that the court failed to exercise its discretion or that its action was an abuse of discretion. In that view the order is

Affirmed.

MUMM *v.* JACOB E. DECKER & SONS.

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

No. 627. Argued March 29, 1937.—Decided April 26, 1937.

1. In a patent infringement suit, the bill should contain "a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence. . . ." Eq. Rule 25. P. 170.
2. In a suit for infringement of a patent it is not a part of the plaintiff's case to negative prior publication or prior use or the other matters to which R. S., §§ 4886 and 4887 refer. P. 171.
3. The issue of the patent is enough to show, until the contrary appears, that all the conditions under which a discovery is patentable in accordance with the statutes have been met. The burden of proving want of novelty rests upon the defendant, and is a heavy one. *Id.*

86 F. (2d) 77, reversed.

CERTIORARI, 300 U. S. 646, to review a decree affirming the dismissal of the bill in a suit for patent infringement.

Mr. Ralph F. Merchant, with whom *Mr. Frank W. Dahn* was on the brief, for petitioner.

Mr. Maurice M. Moore, with whom *Messrs. R. F. Clough, Harold Olsen,* and *O. W. Giese* were on the brief, for respondent.

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

This case presents a question of equity pleading in patent suits.

The suit is for infringement and the question is as to the sufficiency of what is called the "short" bill of complaint. That is, the bill alleges the issue and ownership of certain patents, of which profert is made, compliance with all the requirements of the statute and rules of

practice of the Patent Office, and infringement. The bill does not allege compliance with the requirements of R. S. 4886 and 4887 (35 U. S. C. 31, 32), that is, that the invention, of each of the patents in suit, was not known or used by others in this country before the inventor's invention or discovery thereof, was not patented or described in any printed publication in this or any foreign country before his invention or discovery, or for more than two years prior to his application, and was not in public use or on sale in this country for more than two years prior to his application, that the invention had not been abandoned, and that no application for foreign patents had been filed more than twelve months prior to the filing of the application in this country.

The defendant moved for dismissal of the bill of complaint upon the ground of insufficiency of fact to constitute a valid cause of action in equity. Equity Rule 29. The District Court granted the motion and directed dismissal subject to leave to amend and, amendment not having been made, a final decree was entered, which the Circuit Court of Appeals affirmed. 86 F. (2d) 77. Because of conflict of decisions in the Circuit Courts of Appeals, we granted certiorari. See *Moeller* v. *Scranton Glass Co.*, C. C. A. 3d, 19 F. (2d) 14, sustaining the "short" bill, and *Ingrassia* v. *A. C. W. Manufacturing Corp.*, C. C. A. 2d, 24 F. (2d) 703, to the contrary.[1]

[1] For the diverse rulings of District Courts, see *Zenith Carburetor Co.* v. *Stromberg Co.*, 205 Fed. 158; *Maxwell Steel Vault Co.* v. *National Casket Co.*, 205 Fed. 515; *General Bakelite Co.* v. *Nikolas*, 207 Fed. 111; *Pittsburgh Water Heater Co.* v. *Beler Water Heater Co.*, 222 Fed. 950; *Bayley & Sons* v. *Braunstein Co.*, 237 Fed. 671; *Schaum & Uhlinger Co.* v. *Copley Plaza Co.*, 243 Fed. 924; *Jost* v. *Borden Co.*, 262 Fed. 163; *American Laundry Machinery Co.* v. *Prosperity Co.*, 294 Fed. 144; *Aluminum Corporation* v. *Allied Corporation*, 15 F. (2d) 880; *Davis* v. *Motive Parts Corp.*, 16 F. (2d) 148; *White* v. *Studebaker Corporation*, 30 F. (2d) 835; *McCullough Co.* v. *Poultry Producers*, 50 F. (2d) 945.

Prior to the adoption of the Equity Rules in 1912, it was necessary for the plaintiff to allege not only that he was the first, original and sole inventor but also compliance with the negative requirements of R. S. 4886 and 4887. *Sullivan* v. *Redfield,* 23 Fed. Cas. 357; *Blessing* v. *Trageser Copper Works,* 34 Fed. 753; *American Graphophone Co.* v. *National Phonograph Co.,* 127 Fed. 349, 350, 351, and cases there cited. The present diversity of opinion has arisen in relation to the true construction of Equity Rule 25, which provides:

"Hereafter it shall be sufficient that a bill in equity shall contain, in addition to the usual caption:

"First, the full name, when known, of each plaintiff and defendant, and the citizenship and residence of each party. If any party be under any disability that fact shall be stated.

"Second, a short and plain statement of the grounds upon which the court's jurisdiction depends.

"Third, a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence. . . ."

The purpose of the Equity Rules was to simplify equity pleading and practice, and with respect to the former to dispense with prolix and redundant averments which had made equity pleading an outstanding example of unnecessary elaboration. The needed improvement in the interest of simplicity and conciseness made the test not what was time-honored in the verbiage of the past but what was essential to set forth the plaintiff's case. His statement was required to be "short and simple." The "ultimate facts" which are to be stated are manifestly distinguished from evidentiary facts. What are these "ultimate facts"? They are the facts which the plaintiff must prove, the facts "upon which the plaintiff asks relief," not the facts which the defendant must prove in

establishing an affirmative defence. No analysis of Equity Rule 25 can make it other than a requirement that the plaintiff must concisely set forth the ultimate facts which are sufficient to constitute his cause of action.

This construction is decisive of the present question. In a suit for infringement of a patent it is not a part of the plaintiff's case to negative prior publication or prior use or the other matters to which R. S. 4886 and 4887 refer. These are matters of affirmative defense. As this Court said in *Cantrell* v. *Wallick,* 117 U. S. 689, 695, 696: "For the grant of letters patent is *prima facie* evidence that the patentee is the first inventor of the device described in the letters patent and of its novelty. *Smith* v. *Goodyear Dental Vulcanite Co.,* 93 U. S. 486; *Lehnbeuter* v. *Holthaus,* 105 U. S. 94." The issue of the patent is enough to show, until the contrary appears, that all the conditions under which a discovery is patentable in accordance with the statutes have been met. Hence, the burden of proving want of novelty is upon him who avers it. Walker on Patents, § 116. Not only is the burden to make good this defense upon the party setting it up, but his burden is a heavy one, as it has been held that "every reasonable doubt should be resolved against him." *Id., Cantrell* v. *Wallick, supra; Coffin* v. *Ogden,* 18 Wall. 120, 124; *Barbed Wire Patent,* 143 U. S. 275, 284, 285; *Adamson* v. *Gilliland,* 242 U. S. 350, 353. What must be so completely established by the defendant cannot be regarded as a part of the plaintiff's case which is to be set forth in his bill under the Equity Rule.

The argument is advanced that it may be salutary as a practical matter to compel the plaintiff to negative affirmative defenses under R. S. 4886 and 4887, as it may sometimes happen that he may not be able to make oath to that effect. A similar requirement as to possible affirmative defenses might prove to be advantageous to a

defendant in other suits than those for patent infringement, but that possibility of benefit does not justify a departure from the standards of correct pleading. There is nothing in the Equity Rule which indicates an intention to preserve the anomalous practice of compelling a plaintiff in a patent suit to allege what he is not required to prove in order to establish his case.

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

Reversed.

SHULMAN ET AL. *v.* WILSON-SHERIDAN HOTEL CO. ET AL.

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

No. 688. Argued April 5, 1937.—Decided April 26, 1937.

1. An allowance by a state court for legal services in foreclosure proceedings, "to be paid in due course of administration," but without any direction to pay, remains subject to the control of that court and becomes subject to the control and revision of the bankruptcy court in subsequent proceedings under § 77B. P. 173.
2. An order of the bankruptcy court disallowing the fee, is not appealable under § 25a of the Bankruptcy Act as from a judgment rejecting a claim, nor under § 24a, as from a determination of a controversy arising in bankruptcy proceedings, but only under § 24b, in the discretion of the appellate court. P. 173.

86 F. (2d) 898, affirmed.

CERTIORARI, 300 U. S. 649, to review an order dismissing the appeal in a case under § 77B of the Bankruptcy Act.

Mr. Meyer Abrams, with whom *Mr. Max Shulman* was on the brief, for petitioners.

Mr. C. S. Bentley Pike, with whom *Mr. I. E. Ferguson* was on the brief, for respondents.

PER CURIAM.

In a proceeding under § 77 B of the Bankruptcy Act for the reorganization of the Wilson-Sheridan Hotel Company, petitioners filed a claim for $1750. The basis of the claim was a balance alleged to be due pursuant to an allowance of $2250 by a decree of the state court in a foreclosure suit antedating the proceedings in the bankruptcy court. That allowance was stated to be for legal services rendered by petitioners and the amount was "to be paid in due course of administration." Of this amount petitioners received $500 under a later order of the state court, leaving $1750 unpaid. Upon the confirmation of the plan of reorganization, the District Court reserved jurisdiction to pass upon the petitioners' claim at the time of the allowance of fees and expenses; and, on the subsequent hearing of the application for such allowances to be charged as costs of administration, the claim was disallowed. An appeal from the order, not having been allowed by the Circuit Court of Appeals, was dismissed for the want of jurisdiction. 86 F. (2d) 898. Certiorari was granted March 1, 1937.

Petitioners urge that the appeal should have been entertained under § 25a of the Bankruptcy Act as an appeal from a judgment rejecting a claim of over $500, or under § 24a as an appeal from a determination of a controversy arising in bankruptcy proceedings. Neither contention is sound. The allowance by the state court for legal services fixed an amount but without direction to pay, and the allowance remained subject to the supervising control of the court until payment was directed. Compare *People* v. *Illinois State Bank,* 312 Ill. 613, 616; 144 N. E. 327; *Hume* v. *Myers,* 242 Fed. 827, 830. There was no finality of action in this respect prior to the proceeding in the bankruptcy court and the allowance was a purely administrative matter upon which the latter

court was entitled to pass. The record shows that petitioners' claim was pressed, heard and determined as one belonging in that category.

The case of *Duparquet Co.* v. *Evans,* 297 U. S. 216, is not in point. There is no question here as to the jurisdiction of the District Court to entertain the proceeding for reorganization. The order was made in the exercise of the general jurisdiction conferred by § 77 B (a) which embraced the authority to pass upon fees and expenses incident to administration, including claims such as the present one for legal services rendered in the prior suit in the state court. Compare *Gross* v. *Irving Trust Co.,* 289 U. S. 342, 345.

Appeal could be taken only under § 24b, in the discretion of the appellate court. See *Wingert* v. *Smead,* 70 F. (2d) 351; *In re New York Investors, Inc.,* 79 F. (2d) 179; *Meyer* v. *Kenmore Hotel Co.,* 297 U. S. 160, 166. The order of the Circuit Court of Appeals is

Affirmed.

ALASKA PACKERS ASSN. *v.* PILLSBURY, DEPUTY COMMISSIONER, ET AL.

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

No. 558. Argued March 9, 1937.—Decided April 26, 1937.

1. The rule of the Circuit Court of Appeals for the Ninth Circuit which would permit an appeal to be taken in admiralty by simply filing in the office of the clerk of the District Court, and serving on the proctor for the adverse party, a notice of appeal, is in conflict with § 8 (c) of the Act of February 13, 1925; 28 U. S. C. 230, which, in admiralty as in equity cases, requires an application and judicial allowance. P. 175.
2. A rule of court in conflict with a statute is void. P. 177.

78 F. (2d) 587, reversed.

CERTIORARI, 299 U. S. 538, to review an order of the Circuit Court of Appeals overruling a motion to dismiss an appeal in admiralty. That court's decision on the merits was not included for consideration in the order granting certiorari.

Mr. Eugene M. Prince, with whom *Messrs. Marshall P. Madison* and *Francis Gill* were on the brief, for petitioner.

Mr. J. Frank Staley, with whom *Solicitor General Reed* and *Messrs. William W. Scott* and *Charles A. Horsky* were on the brief, for respondents.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

The question here presented is whether an appeal to a circuit court of appeals from a decree in admiralty in a district court may be taken by simply filing in the office of the clerk of the district court, and serving on the proctor of the adverse party, a notice of appeal. In this case the circuit court of appeals, in deference to a rule adopted by it in 1900 and readopted in 1928, sustained an appeal so taken and overruled the appellee's contention that the rule is in conflict with § 8 (c) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 940; 28 U. S. C. § 230; which provides:

"No writ of error or appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree."

We are of opinion that the statute is both applicable and controlling.

Prior to the creation of the circuit courts of appeals the recognized mode of taking an appeal from a decree

in admiralty, as well as from a decree in equity, was by making application to the court rendering the decree, or to a judge or justice, and obtaining an allowance of an appeal. The authorized procedure in this regard is shown in *Barrel* v. *Transportation Co.*, 3 Wall. 44, where an appeal in admiralty was sought to be taken by simply filing a petition in the office of the clerk of the court. This Court dismissed the appeal, saying:

"The proceeding in the case is not warranted by any act of Congress, and we have no authority to act on such a petition. The filing of it in the clerk's office, even if it could be regarded as addressed to the Circuit Court, would be of no avail, unless accompanied by an allowance of an appeal by that court; and in the case before us there was no allowance."

The act creating the circuit courts of appeals [1] and investing them with stated appellate jurisdiction, including appeals in admiralty, made no change in the prior procedure. On the contrary, § 11 of that act provided:

"And all provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the circuit courts of appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error, and any judge of the circuit courts of appeals, in respect of cases brought or to be brought to that court, shall have the same powers and duties as to the allowance of appeals or writs of error, and the conditions of such allowance, as now by law belong to the justices or judges in respect of the existing courts of the United States respectively." [2]

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[1] Act of March 3, 1891, c. 517, 26 Stat. 826.

[2] See Title 28, U. S. C., § 228.

The reasons for requiring that an appeal be duly applied for and allowed are that there may be some assurance that the suit is one in which there may be a review in the circuit court of appeals; that the decree is of such finality or character that it may be reëxamined on appeal; and that appropriate security for costs may be taken where the appellant is not by law exempted from giving such security.[3] In this way improvident and unauthorized appeals are prevented. While an appeal in a proper case is matter of right the question whether the case is a proper one under the law regulating appeals is not left to the appellant, but is to be examined and primarily determined by the court or judge to whom the application is to be made. The reasons for thus conditioning the right of appeal have the same application to decrees in admiralty that they have to decrees in equity and judgments at law; and the act of 1925 includes one as much as another, for it says: "No . . . appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made." In all of the circuits other than the one in which the decision now under review was made full effect is given to this requirement. In the one circuit a rule exists whereby appeals in admiralty are excepted. But that rule contravenes the statute and has no force, for the power of a court to make rules necessarily is confined to such as are consistent with controlling laws.

It follows that the circuit court of appeals was without jurisdiction to entertain the attempted appeal.

Decree reversed.

[3] See *Bartemeyer* v. *Iowa,* 14 Wall. 26, 27; *Havnor* v. *New York,* 170 U. S. 408, 410; *Ireland* v. *Woods,* 246 U. S. 323, 328.

NATIONAL FERTILIZER ASSN., INC. ET AL. *v.* BRADLEY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

No. 731. Argued April 5, 1937.—Decided April 26, 1937.

1. A federal court will not enjoin the enforcement of a state law which has not been construed by the enforcing officers nor by the supreme court of the State, and which is susceptible of a construction that would bring it within the police power of the State. P. 180.
2. The right of a manufacturer to maintain secrecy as to his compounds and processes is subject to the right of the State, in the exercise of its police power and in promotion of fair dealing, to require that the nature of the product offered for sale be fairly set forth. P. 182.
3. The requirement may be extended to the sale of products manufactured prior to the passage of the legislation. P. 182.

18 F. Supp. 263, affirmed.

APPEAL from a decree of the District Court, of three judges, denying an injunction and dismissing the bill in a suit by an association representing manufacturers of commercial fertilizer to enjoin the enforcement of a state law requiring that on the containers in which mixed fertilizer is sold there shall be disclosed the poundages and analyses of materials used in the manufacture. The defendants were the members of a state board and the state Attorney General.

Messrs. W. C. McLain and *Daniel S. Murph* for appellants.

Messrs. J. Ivey Humphrey, Assistant Attorney General of South Carolina, and *William C. Wolfe,* with whom *Messrs. John M. Daniel,* Attorney General, and *Harold Major* were on the brief, for appellees.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Prior to 1936 the laws of South Carolina required that manufacturers, before offering mixed commercial fertilizer for sale, should affix to each container a tag disclosing certain facts concerning the contents. Code of Laws, 1932, §§ 6363–6385. An Act approved April 6, 1936, added to § 6367 the following so-called "Open Formula" amendment, to become effective August 1, 1936.

"(b) The amount and analysis of each material, or source, of each plant food element used in manufacture, of a fertilizer mixture containing two or more plant food elements be stated on a tag attached to each sack or container, such amount of material to be stated in pounds per hundred pounds of mixture contained in the sack or other container. This statement of pounds of materials used in the manufacture of a fertilizer mixture shall be in addition to the statement of chemical analysis as required by Section No. 6366 of the Code of Laws of South Carolina, 1932."

Section 6366 and Section 6367 as amended, are in the margin.[1]

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[1] SEC. 6366. *Contents of Labels.*—Every person or corporation, before selling or offering for sale in this State any commercial fertilizer or fertilizing material shall brand on each bag or package the brand name of the fertilizer, the weight of the package, the name and address of the manufacturer, and the minimum percentage only guaranteed to be present of available phosphoric acid, of nitrogen (ammonia equivalent), and of potash soluble in water. The items shall be printed on the package in the following order:

Weight of each package.
Brand name or trade-mark.
Guaranteed analysis:
Available phosphoric acid.....per cent.
Ammonia equivalent of nitrogen.....per cent.

July 22, 1936, before the officers charged with enforcement of statutes relating to fertilizers formulated any rule or instruction regarding the "Open Formula" amendment, and before the Supreme Court had considered or construed it, many manufacturers filed their joint bill in the court below, wherein they alleged the amendment offended the Fourteenth Amendment to the Federal Constitution and asked for an injunction. After answer, testimony was presented by both sides. Three judges heard the cause; found the facts; pointed out a possible construction under which they held the Act would not be arbitrary or oppressive; and dismissed the bill. The matter is here by appeal.

As the enactment has not been construed by the enforcing officers nor interpreted by the Supreme Court

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Guaranteed analysis—Continued.

Potash soluble in water.....per cent.

Name and address of the manufacturer.

In addition to the above there must be printed on the package, or on a tag attached thereto, the per cent. of water soluble nitrogen (ammonia equivalent), guaranteed, within such limits as the said board of trustees, or a committee thereof, may prescribe. And, in addition, further, it must be stated whether the potash is derived from muriate or sulphate. And, in addition, further, the per cent. of borax or other substance, or substances, injurious to plants must be stated, if in excess of limits prescribed by the board of trustees, or a committee thereof: *Provided,* The said board of trustees, or a committee thereof, shall have power to direct in what manner the branding and labeling shall be done.

Sec. 6367. *Classification of Materials—Labeling—Substitution—Special Contracts—Damages and Penalty.*—(a) The materials used in the manufacture and mixing of all fertilizers supplying nitrogen or ammonia, and offered for sale in this State, shall be divided into two classes, namely, water-soluble and available water-insoluble; and the percentage of nitrogen or ammonia coming from either of these two classes shall be guaranteed, but allowing a variability of one-fourth of one per cent. for goods containing two per cent. of ammonia or under, and a variability of one-third of one per cent for goods containing two and three per cent. ammonia, and a variability of one-

of the State, it is impossible to say what ultimately will be demanded of the complainants. The Court below was of the opinion that, reasonably construed, the Act would be satisfied if the tag upon a given container revealed the general average of the designated items which went into the storage or curing pile of fertilizer at the factory from which such container was filled. "These piles range from 100 tons up to 5,000 tons." This interpretation is, at least, permissible. So construed, we cannot say that the Act is clearly arbitrary, unreasonable and beyond the police power of the State. Apparently it can be complied with without prohibitive expense.[2]

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half of one per cent. for goods containing over three per cent. ammonia, and the several materials in each of these two classes shall be named on the bag or on a tag attached thereto, and it shall be permissible for the manufacturer to substitute one or more materials in either class of approximately equal agricultural value for other materials of the same class: *Provided:* That where there is a contract of agreement between a manufacturer and a purchaser of fertilizer that the fertilizer will be manufactured by the use of certain definite sources and amounts of ammonia and potash, the fertilizer must be manufactured from these materials without substitution of other materials and failure on the part of the manufacturer to comply with this requirement shall render the manufacturer liable to the purchaser for damages as it is now prescribed by law, and in addition thereto the manufacturer shall pay to the purchaser a penalty equal to one-fourth of the purchase price of such fertilizer.

(b) The amount and analysis of each material, or source, of each plant food element used in manufacture, of a fertilizer mixture containing two or more plant food elements be stated on a tag attached to each sack or container, such amount of material to be stated in pounds per hundred pounds of mixture contained in the sack or other container. This statement of pounds of materials used in the manufacture of a fertilizer mixture shall be in addition to the statement of chemical analysis as required by Section No. 6366 of the Code of Laws of South Carolina, 1932.

[2] Findings of Fact as to Reasonableness of Regulations—No. VI.

"With the foregoing illustration of the application of the requirements of the new law to the actual facts of agriculture, we have no hesitation in finding as a fact that the requirements of the 1936

In response to the assertion that compliance with the "Open Formula" amendment would require complainants to reveal secret formulas and thus unlawfully deprive them of property, it is enough to refer to *Corn Products Refining Co.* v. *Eddy,* 249 U. S. 427, 431–432. "The right of a manufacturer to maintain secrecy as to his compounds and processes must be held subject to the right of the State, in the exercise of its police power and in promotion of fair dealing, to require that the nature of the product be fairly set forth." And the same principle is broad enough to meet the further claim of right to sell products manufactured prior to the passage of the amending Act of 1936.

We find no material error. The challenged decree must be

Affirmed.

Amendment do most positively tend to meet an actually existing need and to serve the purpose which the Legislature clearly had in mind; namely, to so regulate the fertilizer business as to give the farmer that information which would tend to aid in the carrying on of the major industry of the State of South Carolina."

Findings of Fact as to Information Required by the Act, &c.—No. II.

"The word 'mixture' has under the testimony come to have a rather definite meaning in the fertilizer business. It relates not so much to the finished product in the sack as it does to the actual pile of fertilizer as mixed in the manufacturing plant and left to cure before being finally ground up and put into sacks. The testimony deals fully with the actual processes followed in the mixing of the fertilizer, and the greater weight of the testimony suggests that the average unit of mixture as actually made by the larger fertilizer companies when making a typical fertilizer for sale in large quantities is about five thousand tons. Under the testimony we find that in some cases a strict compliance with the statute will probably call for a large warehouse and the inauguration of a more elaborate system of bookkeeping as to the exact materials put into each mixture but these increased expenses will not be so great as to render the cost of the manufacture of the finished product prohibitive and out of line with the probable increase of prices which the actual trade would bear."

Syllabus.

BOURJOIS, INC. *v.* CHAPMAN ET AL.

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

No. 534. Argued March 5, 1937.—Decided April 26, 1937.

1. A state law requiring, as a health measure, that cosmetic preparations be registered before being offered for sale in the State, which applies only to those who deal in or apply the preparations within the State, and which does not demand that the application for registration be made by the manufacturer or proprietor but permits any person interested to make it, does not infringe the rights, under the commerce clause, of one whose preparations are manufactured in another State and there sold to customers who deal in or apply them in the State requiring the registration. P. 186.
2. A state inspection fee will not be adjudged a direct burden on interstate commerce where not unreasonable on its face and where, because of the recent adoption of the regulation involved, it is impossible to know whether it will yield in excess of the administrative requirement. P. 187.
3. Where interstate commerce is only indirectly affected, the burden of proving that state inspection fees will actually burden such commerce rests upon him who challenges the legislation. The mere fact that the fees imposed might exceed the cost of inspection is immaterial. P. 187.
4. A state statute imposing fees for the enforcement of a regulation affecting but one class of activity, the fees and expenditures being entered in a separate account, presents no question under the equal protection clause of the Fourteenth Amendment. P. 188.
5. A Maine statute requires that cosmetics offered for sale in the State be registered, penalizes sale without registration, and empowers a Board to "regulate or to refuse the issuance of certificates of registration or to prohibit the sale of cosmetic preparations which in its judgment contain injurious substances in such amounts as to be poisonous, injurious or detrimental to the person." *Held:*

   (1) It will not be assumed, as a basis for attack under the Fourteenth Amendment or the state constitution, that one who has not applied for it will be refused a certificate, or that the Board will deny any right to which he is entitled. P. 188.

(2) The delegation of power to the Board is not obnoxious to the state constitution or the Fourteenth Amendment. P. 189.

(3) Due process is safeguarded by a provision of the statute for judicial review when the Board refuses a certificate. *Id.*

(4) The question whether provisions of the statute concerning seizure and forfeiture of unregistered cosmetics violate the constitution of Maine does not arise in the case of a manufacturer whose goods are disposed of to others in another State before they enter Maine. P. 190.

Affirmed.

APPEAL from a decree of the District Court, of three judges, dismissing the bill in a suit to enjoin enforcement of a statute requiring registration of cosmetic preparations offered for sale, etc.

Mr. Asher Blum, with whom *Messrs. Hugo Mock* and *Robert Hale* were on the brief, for appellant.

Mr. Ralph W. Farris, Assistant Attorney General of Maine, with whom *Messrs. Franz U. Burkett,* Attorney General, and *Clyde R. Chapman* were on the brief, for appellees.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Bourjois, Inc., a New York corporation, brought, in the federal court for Maine, this suit seeking to enjoin, both temporarily and permanently, the enforcement of Chapter 109 of the Public Laws of Maine, 1935, entitled "An Act for the Regulation of Cosmetics." The bill was filed before January 1, 1936, the effective date of the Act. The Attorney General of Maine, the Commissioner of Health and Welfare and the Director of Public Health were made defendants. The answers denied the material allegations of the bill. The case was heard before three judges; the application for a temporary injunction was denied, on the ground that plaintiff's objections were prematurely raised; and leave was granted to renew its

motion if in enforcing the Act interstate commerce should be interfered with or due process denied. Thereafter, a supplemental bill and answer were filed; the case was again heard; the court concluded that there was both federal and equitable jurisdiction; denied a motion for a temporary injunction; and entered a final decree dismissing the bill. The case is here on appeal.

Section 1 of the Act provides:

"Registration of cosmetics. On and after January 1, 1936 no person, firm, corporation or copartnership shall hold for sale, sell, offer for sale, in intrastate commerce, give away, deal in, within this state, supply or apply in the conduct of a beauty shop, barber shop, hairdressing establishment or similar establishment, any cosmetic preparation unless the said preparation has been registered with and a certificate of registration secured from the department of health and welfare."

Section 2 declares that the purpose of the Act is to safeguard the public health; and provides for the issue of certificates of registration by the department of health and welfare "to the manufacturer, proprietor, or producer of any cosmetic preparation." Other sections of the Act contain elaborate provisions for the seizure and forfeiture of "cosmetic preparations kept or deposited within the state intended for unlawful sale or use"; and for imposition of fines upon violators of the statute.

The plaintiff manufactures cosmetics in New York; has no place of business in Maine; and does not hold, use, apply, or sell cosmetics within that State. Among its many customers are some whose places of business are in Maine; and their purchases are made in part on orders given in Maine to travelling salesmen of the plaintiff. But no order so given is binding until approved by the plaintiff in New York. All shipments to Maine customers are made from New York; and the sales of the

cosmetics in Maine are not made in the original packages, the large containers in which the cosmetics are shipped from New York. Compare *Purity Extract Co.* v. *Lynch,* 226 U. S. 192, 201; *Hebe Co.* v. *Shaw,* 248 U. S. 297, 304.

The plaintiff has not applied for a certificate of registration of any of its preparations; and it announces that it will refuse to do so, because the statute is void under the Federal and State Constitutions. Sixteen distinct grounds of invalidity are urged with great earnestness. None is well founded. Only a few need to be discussed.

First. Most prominent is the claim that the legislation violates the commerce clause. By its terms, the statute is limited in operation to intrastate commerce. It does not attempt to prohibit or regulate the introduction of cosmetics into the State. It is not directed to manufacturers. It applies only to persons who deal in cosmetics, or apply them, within the State; and the plaintiff does not do so. No doubt the plaintiff will lose its Maine customers unless its preparations may be sold there; and their sale will be prohibited within the State unless the preparations are registered. But the State does not demand that the application for registration be made by the manufacturer or proprietor of the preparation. The defendants who administer the statute have construed it as permitting any one interested to make the application. As some cosmetics may be of a character to injure the health of the users, the State may prohibit the sale in intrastate commerce of a preparation unless it has been found, upon due enquiry, to be harmless. The fact that plaintiff's products are made in New York does not confer immunity from such regulation in Maine. Compare *Mutual Film Corp.* v. *Hodges,* 236 U. S. 248, 258; *Armour & Co.* v. *North Dakota,* 240 U. S. 510, 517; *Pacific States Box & Basket Co.* v. *White,* 296 U. S. 176, 184.

There is no discrimination against interstate commerce, since the regulation applies equally to all preparations, whether manufactured within or without the State of Maine.

Second. The plaintiff contends that its interstate commerce is directly burdened, because registration, which is indispensable to the maintenance of its trade in Maine, involves payment of a fee; that only an inspection fee can be justified; and that the State has failed to show that the fee charged is not in excess of the cost of inspection. Section 2 of the statute fixes the initial fee at 50 cents per preparation, with a similar annual renewal fee; and stipulates that:

"Fees received under the provisions of this act shall be used by said department for carrying out the purposes of this act."

Even if it had been necessary, under the rules applied in *Foote & Co.* v. *Stanley,* 232 U. S. 494, and *Great Northern Ry. Co.* v. *Washington,* 300 U. S. 154, for the State to establish that the fees here charged are not excessive, the State must be deemed to have sustained that burden. The fact that the fee for registration is only 50 cents suggests that it may prove inadequate rather than excessive. The case was heard shortly after the statute became operative. It was obviously impossible then to determine whether the fees would prove to be in excess of the administrative requirement, and in this situation it is sufficient if it is shown that the charges are not unreasonable on their face. As was said in *Patapsco Guano Co.* v. *Board of Agriculture,* 171 U. S. 345, 354, "If the receipts are found to average largely more than enough to pay the expenses, the presumption would be that the legislature would moderate the charge." See *Red "C" Oil Co.* v. *Board of Agriculture,* 222 U. S. 380, 393. Here, the statute operates directly only upon intrastate commerce. Where interstate commerce is only indirectly affected, it rests upon one challenging the legislation to show actual

undue burden upon such commerce. See *Pacific Telephone & Telegraph Co.* v. *Tax Commission,* 297 U. S. 403. The mere fact that the fees imposed might exceed the cost of inspection is immaterial. See *General Oil Co.* v. *Crain,* 209 U. S. 211, 231; *Texas Co.* v. *Brown,* 258 U. S. 466, 475, 476.

The Maine statute presents no question under the equal protection clause of the Fourteenth Amendment such as was dealt with in *Great Northern Ry. Co.* v. *Washington, supra.* The statute provides that the fees collected shall be devoted solely to the enforcement of this Act; and the Act directly regulates but one class of activity. The record shows that the State Treasurer has set up a separate account to which all cosmetic fees are credited, and against which are to be charged only the expense of enforcement. Compare *Gundling* v. *Chicago,* 177 U. S. 183, 189; *Mountain Timber Co.* v. *Washington,* 243 U. S. 219, 237; *Texas Co.* v. *Brown,* 258 U. S. 466, 479.

Third. The plaintiff contends that in other respects the statute violates rights protected by the Fourteenth Amendment and the Constitution of the State. It objects that the power conferred upon the board to grant or deny a certificate is unlimited; that the board has issued no regulations; and that neither the statute nor the board has provided for hearing an applicant. The plaintiff has not applied for a certificate; and it is not to be assumed that, if it concludes to do so, its application will be refused, or that the board will deny any right to which it is entitled. See *Gundling* v. *Chicago,* 177 U. S. 183, 186; *Lehon* v. *Atlanta,* 242 U. S. 53, 56; *Smith* v. *Cahoon,* 283 U. S. 553, 562; *Highland Farms Dairy* v. *Agnew,* 300 U. S. 608.[1] There are also other answers to this con-

[1] Compare *Dalton Adding Machine Co.* v. *State Corporation Comm'n,* 236 U. S. 699; *Lehmann* v. *State Board of Accountancy,* 263 U. S. 394, 398; *Continental Baking Co.* v. *Woodring,* 286 U. S. 352, 368, 369.

tention. Section 2 defines the department's control of registration:

"The said department is authorized to regulate or to refuse the issuance of certificates of registration or to prohibit the sale of cosmetic preparations which in its judgment contain injurious substances in such amounts as to be poisonous, injurious or detrimental to the person."

Delegation of the power to exercise that judgment is not obnoxious to the Constitution of Maine. Compare *Bangor Railway & Electric Co.* v. *Orono,* 109 Me. 292, 296; 84 Atl. 385; *In re Knox County Electric Co.,* 119 Me. 179, 182; 109 Atl. 898; *McKenney* v. *Farnsworth,* 121 Me. 450, 452–454; 118 Atl. 237. And obviously, it contravenes no provision of the Federal Constitution. Compare *United States* v. *Grimaud,* 220 U. S. 506, 517; *Mutual Film Corp.* v. *Industrial Commission,* 236 U. S. 230, 246; *Hall* v. *Geiger-Jones Co.,* 242 U. S. 539, 554; *Highland Farms Dairy* v. *Agnew, supra.* Neither constitution requires that exercise of such a power be preceded by the adoption of regulations. And neither constitution requires that there must be a hearing of the applicant before the board may exercise a judgment under the circumstances and of the character here involved. The requirement of due process of law is amply safeguarded by § 2 of the statute, which provides:

"From the refusal of said department to issue a certificate of registration for any cosmetic preparation appeal shall lie to the superior court in the county of Kennebec or any other county in the state from which the same was offered for registration."

Compare *Hagar* v. *Reclamation District No. 108,* 111 U. S. 701, 711, 712; *Hall* v. *Geiger-Jones Co.,* 242 U. S. 539, 554; *Bragg* v. *Weaver,* 251 U. S. 57, 59; *Phillips* v. *Commissioner,* 283 U. S. 589, 597; *State* v. *McCann,* 59 Me. 383, 385; *Bennett* v. *Davis,* 90 Me. 102, 106; 37 Atl.

864; *McInnes* v. *McKay,* 127 Me. 110, 116; 141 Atl. 699 279 U. S. 820.

Fourth. Plaintiff urges that relief should be granted because the provisions of the statute concerning seizure and forfeiture of unregistered cosmetics violate the Constitution of Maine. To that claim it is a sufficient answer that if there is a wrongful seizure, it will be of goods belonging to others. For, as the bill and findings reveal, no goods of the plaintiff will ever be liable to seizure, since the plaintiff will have none in Maine. If under this statute the constitutional rights of others are violated by an unlawful seizure and forfeiture, they, and not the plaintiff, must seek the redress. Compare *Tyler* v. *Judges,* 179 U. S. 405, 409, 410; *Standard Stock Food Co.* v. *Wright,* 225 U. S. 540, 550; *Dier* v. *Banton,* 262 U. S. 147, 149–150. Hence, we intimate no opinion on the merits of the point raised by plaintiff.

Affirmed

WELCH, FORMER COLLECTOR OF INTERNAL REVENUE, *v.* OBISPO OIL CO.

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

No. 602. Argued March 10, 11, 1937.—Decided April 26, 1937.

Where a taxpayer's profits tax has been determined by the Commissioner under §§ 327 and 328 of the Revenue Act of 1918, the District Court and the Circuit Court of Appeals are without jurisdiction to entertain an action for a refund of part of the accompanying income tax on the ground that the income was erroneously determined. P. 194.

85 F. (2d) 860, reversed.

CERTIORARI, 300 U. S. 647, to review a judgment sustaining jurisdiction over a suit to recover money exacted as income tax, and increasing the amount allowed by the District Court.

Mr. J. Louis Monarch, with whom *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. John G. Remey* and *Charles A. Horsky* were on the brief, for petitioner.

Mr. Joseph D. Peeler, with whom *Mr. Robert N. Miller* was on the brief, for respondent.

By leave of Court, *Mr. Percy W. Phillips* filed a brief, as *amicus curiae,* urging affirmance of the judgment below.

Mr. Justice Brandeis delivered the opinion of the Court.

The Revenue Act of 1918, c. 18, 40 Stat. 1057, laid upon corporations, in addition to the income tax, a war profits and excess profits tax at very high rates. Because the profits tax might prove unduly burdensome, Congress provided by §§ 327 and 328 for a special assessment of the profits tax by the Commissioner of Internal Revenue under certain circumstances. The question for decision in this case is whether, when a special assessment has been made of the profits tax, a court may entertain an action for refund of an amount paid on the accompanying income tax on the ground that the income was erroneously determined.

Obispo Oil Company brought, in the federal court for southern California, this action to recover an amount alleged to have been illegally exacted as income tax for the year 1920. Upon final assessment, the Commissioner had assessed its net income for that year at $1,476,330.52. Under § 236 (b), it was necessary to deduct the profits tax and other amounts from the net income in order to determine the amount of the taxable net income. Because the net income of that year included large funds theretofore long in litigation, the Commissioner made a

special assessment under § 327 (d) to determine the profits tax.[1] Where a special assessment is made, § 328 commands that "the tax shall be the amount which bears the same ratio to the net income of the taxpayer . . . for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business, bears to their average net income . . . for such year." The Commissioner fixed that ratio as 9.67 per cent; and, applying it to the Obispo Company's net income of $1,476,330.52, computed the profits tax at $142,765.73. When this and other allowable sums were deducted, the taxable net income was found to be $1,245,430.63.

The statutory tax rate on net income being 10 per cent., the income tax was determined to be $124,543.06. The Company paid the income tax so assessed; filed then a claim for refund thereof, setting up several grounds of recovery; and, the refund being refused, brought this suit against the Collector of Internal Revenue for the Sixth Collection District of California for alleged overpayment. The amended complaint alleged that the sum had been "illegally exacted from the plaintiff on account of additional income and profits taxes for the year 1920." In a trial held in 1931, the District Court held that the company was entitled to recover the full amount claimed. 48 F. (2d) 872. The Collector appealed to the United States Circuit Court of Appeals; but before the appeal was determined there, the case was, upon agreement of the parties, referred back to the District Court for correction, to accord with our decision in *North American Oil Consolidated* v. *Burnet,* 286 U. S. 417, which had meanwhile been rendered. Then the Collector moved in the District Court for judgment, claiming that the Com-

[1] The amended complaint alleged that §§ 327 and 328 were applied "due to the abnormality resulting from the inclusion in plaintiff's income for that year [1920] of said impounded funds."

pany was not entitled to recover any part of the sum sued for; and, specifically, that the court had "no jurisdiction of the subject matter of this action, the tax sought to be recovered having been assessed under the special assessment provisions of Sections 327 and 328 of the Revenue acts of 1918 and 1921."

The District Court overruled the Collector's motion to dismiss; ruled that the net income as determined by the Commissioner was excessive in the net amount of $40,102.44; and entered judgment for the Company in the sum of $4,010.24 with interest and costs. The Company appealed to the Circuit Court of Appeals, claiming chiefly that the 1920 net income should have been reduced by an additional depletion allowance of $516,598.10. The Collector filed a cross-appeal, claiming, among other things, that the District Court was without jurisdiction over the subject matter of the action, "the tax sought to be recovered having been determined and assessed by the Commissioner . . . under the special assessment provisions of Sections 327 and 328 of the Revenue Acts of 1918 and 1921." The Circuit Court of Appeals affirmed the District Court in holding that it had jurisdiction of the subject matter; but reversed the judgment on the ground that the assessment had overstated the net income by the net amount of $556,700.54, so that there should have been deducted the sum of $516,598.10 for depletion, in addition to the sum found by the District Court. 85 F. (2d) 860. Certiorari was granted upon petition of the Collector because of the practical importance of the question of jurisdiction presented.[2]

The Commissioner's action in applying or rejecting the procedure of §§ 327 and 328, and his computation of the

[2] The question was present in *United States* v. *Supplee-Biddle Hardware Co.*, 265 U. S. 189, and in *Heiner* v. *Diamond Alkali Co.*, 288 U. S. 502, but was not submitted to the Court for decision.

profits tax thereunder and of the regular income tax are reviewable by the Board of Tax Appeals. When no special assessment has been made of the profits tax, an action will lie to recover an amount erroneously exacted either for income or for profits taxes. But no court has power to review the grant or denial of a special assessment or the correctness of the computation made thereon. *Williamsport Wire Rope Co.* v. *United States,* 277 U. S. 551; *Heiner* v. *Diamond Alkali Co.,* 288 U. S. 502. The Company concedes that the amount of the profits taxes, being the subject of a special assessment under §§ 327 and 328, could not be reviewed by the court; but it insists that recovery may be had of the sum alleged to have been erroneously exacted for income tax.

In *Heiner* v. *Diamond Alkali Co.,* 288 U. S. 502, 503, where a special assessment had been made of profits taxes under §§ 327 and 328, the taxpayer sued to recover a part of the profits tax, alleging error in the determination of the net income on which it was based. The Circuit Court of Appeals allowed recovery (60 F. (2d) 505, 513, 514). We reversed its judgment, holding that the court may not, in an action for a refund of profits tax, recalculate the taxpayer's net income and recompute the profits tax by applying to the corrected net income the ratio fixed by the Commissioner for the computation of the tax. We did not pass upon the question whether the same rule should be applied if the taxpayer seeks a refund of the income tax because of an alleged error in the computation of the net income. But the reasoning of the opinion leads to that conclusion.

The Company insists that, as it would, in view of the large deductions allowed by the Court of Appeals, be entitled to a substantial refund even if it were denied the deduction of the whole of the profits tax from the net income, Congress could not have intended that the deduc-

tion provision should deprive the courts of jurisdiction to correct errors in determining the amount of the income from which the income tax is computed; that Congress intended to benefit the taxpayer when it directed that before computing the 10 per cent. income tax the net income fund should be reduced by deducting the profits tax therefrom; and that, therefore, it is unreasonable to adopt a construction of the law under which the allowance of the profits tax credit would be considered as so essential an element in the computation of the tax that the taxpayer would be deprived of all other adjustments in the event there is uncertainty as to the particular items.

By the statute the amount of the income tax payable is dependent upon the amount of the profits tax; and the amount of the profits tax is dependent upon the amount of the income. In order to determine the corporate income tax payable at the statutory rate of 10 per cent., of the taxable net income, there must first be deducted from the net income the amount of the profits tax. § 236 (b). Thus, to compute the income tax in the case at bar, it was necessary first to deduct from the net income ascertained as being $1,476,330.52, the profits tax which by applying, under § 328 (a), the ratio of 9.67 per cent. to the net income, was determined to be $142,765.73.

A change in the amount of net income to which the rate was applied would, of course, produce a change in the amount of the profits tax. Indeed, a different computation of net income might have made it proper to compare the taxpayer with a wholly different group of representative corporations, and hence might have resulted in the determination of a different rate for the profits tax. And moreover, the Commissioner, having authority, in his discretion, to determine whether there should be a special assessment, might have refused to make one. It is no less

true in the present situation than in *Heiner* v. *Diamond Alkali Co., supra,* 506, that the taxpayer's true net income is an essential factor in the determination of his liability under §§ 327 and 328; and it follows that the making of the special assessment precludes review by a court of the income tax determined.

Reversed.

BOSEMAN *v.* CONNECTICUT GENERAL LIFE INSURANCE CO.

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

No. 531. Argued March 4, 5, 1937.—Decided April 26, 1937.

1. In a suit in a federal court in Texas, brought by an employee of an oil company upon a policy of group insurance, issued to the company in Pennsylvania by a Connecticut insurer—it appearing that the insurer had never executed or delivered any contract of insurance of any kind in Texas; that none of the negotiations for the policy had taken place in Texas; that all of the insurer's dealings in connection with the policy were with the oil company and not with any of its employees; that the company and the insurer intended the law of Pennsylvania to apply, and the policy expressly so provided; and that the employee in his application for the insurance, made to and filed with the oil company, agreed to be bound by the provisions of the policy—*held*, that the validity of a provision of the policy requiring as a condition precedent to payment, after the termination of employment, of any claim for permanent total disability incurred during the period of employment, notice within 60 days after the termination of the employment, was governed by the law of Pennsylvania. Pp. 202, 206.
2. The law of Texas, which forbids notice of less than 90 days as a condition precedent to suit upon any contract requiring notice, *held* not rendered applicable to the policy in question by

   (a) The fact that the insurer was authorized to do business in Texas—it actually had no qualified agents there and had never executed or delivered any contract of insurance of any kind in that State. P. 204.

(b) The delivery to the employee in Texas of a certificate, issued by the insurer to the oil company, acknowledging that the employee was insured under the policy. The certificate was no part of the contract of insurance. P. 203.

(c) The fact that the employee became one of the insured group through the execution in Texas of a payroll deduction order approved by the employer, to compensate the employer in part for its payment of the premium. P. 202.

(d) The acts of the oil company in obtaining the insurance, receiving applications therefor from its employees, taking payroll deduction orders, reporting changes in the insured group, paying premiums, etc.,—all of which were done by the oil company not as agent of the insurer but for and on behalf of itself and its employees. P. 204.

(e) Arts. 5054 and 5056, Rev. Civ. Stats. of Texas—which are inapplicable to the facts and the question presented in this case. P. 205.

3. In determining a question as to the construction of an insurance policy, involving only general law, the federal courts are not bound to follow the decisions of the courts of the State in which the controversy arises, but may exercise their own independent judgment. P. 203.

84 F. (2d) 701, affirmed.

CERTIORARI, 299 U. S. 537, to review a judgment reversing a judgment of the district court in favor of the claimant in a suit against the insurance company upon a policy of group insurance. The suit had been removed to the district court from a state court of Texas.

Mr. Leon P. Howell, with whom *Mr. Sterling D. Bennett* was on the brief, for petitioner.

Messrs. Wm. Marshall Bullitt and *Major T. Bell,* with whom *Mr. B. M. Anderson* was on the brief, for respondent.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Petitioner, a citizen and resident of Texas, brought this action against respondent, a Connecticut corporation, in

a Texas court to recover $4,000 with interest and attorney's fees. Respondent removed the case to the federal court for the eastern district of Texas.

The suit was to recover for permanent total disability under a policy of group insurance issued in Pennsylvania by respondent to the Gulf Oil Corporation. It covers employees of that corporation and its subsidiaries, of which the Gulf Refining Company is one. Petitioner, an employee of that company, by that policy was insured in respect of life and disability. It provides that "no claim for permanent total disability incurred by any employee during his period of employment shall be paid after the termination of such employment unless such employee gave written notice of such disability to the Company during the said period of employment or within 60 days thereafter." That provision is conceded to be valid under Pennsylvania law. Petitioner failed to give the notice within the time specified. Article 5546, Revised Civil Statutes of Texas, declares that no stipulation in a contract requiring notice as a condition precedent to the right to sue thereon shall be valid unless reasonable. "Any such stipulation fixing the time within which such notice shall be given at a less period than ninety days shall be void . . ." The district court held the Texas law controlling and refused to give effect to the quoted policy provision. The Circuit Court of Appeals held the Pennsylvania law applicable, the policy provision valid, and that petitioner, having failed to give the required notice, was not entitled to recover. 84 F. (2d) 701. The sole question is whether the Pennsylvania law or the Texas law governs.

In 1916 petitioner became an employee of the refining company and thereafter worked for it until October 8, 1932. During parts of that period he was insured by two group policies issued by defendant to the oil corporation. Both covered employees of the refining com-

pany. One, No. G5039, became effective in 1919; the employer paid the premiums; the employees contributed nothing to reimburse the employer or to procure the insurance or to keep the policies in force. The other, No. G5545, became effective in 1925; employees contributed part of the premiums thereon. Both terminated at the time of the taking effect, April 1, 1932, of the one, No. G5039R, under which petitioner brought this action.

March 7, 1932, plaintiff made an application under the last mentioned policy—then in contemplation—for the amount applicable on and after April 1, 1932, according to his salary classification and continuous service as provided in the policy. In his application he agreed to be bound by the rules governing the insurance, authorized his employer to deduct in advance the proper amount per month from his pay to cover a part of the premiums to be paid by the oil corporation to defendant on the policy to be issued, accepted cancelation of his insurance and released claims under the earlier policies and, in lieu of that protection, took the benefits granted by the new policy. The application was not addressed, made or sent to defendant. It was delivered to, and became and remained a part of the permanent records of, the refining company.

March 15, 1932, the oil corporation made written application, which was signed by it and delivered to defendant in Pennsylvania, for the policy of insurance, and in the same instrument asked cancelation of the earlier policies. It requested that the policy be issued in Pennsylvania and that it be governed by the laws of that State. Final agreement between defendant and the oil corporation for execution and delivery of the policy was reached in Pennsylvania. On or about the same day defendant accepted the application; it signed the policy in Connecticut and issued and delivered it to the oil corporation in Pennsylvania. In that state the oil corporation paid the binding

premium required by the policy. None of the negotiations for the policy and no act done for its execution or delivery took place in Texas or in any State other than Pennsylvania and Connecticut.

The policy also provides: It is issued for a term of one year in consideration of the application of the employer, the payment of a binding premium and of other premiums provided for. Each employee in service April 1, 1932, insured up to that date under policy G5545 becomes eligible on April 1, 1932. An employee may elect insurance under the policy by completing any form of payroll deduction order approved by the employer. Each employee electing the insurance before becoming eligible will be insured automatically on the day he becomes eligible. On the effective date of the policy and on each annual renewal date an average annual premium rate will be established. The employer shall give the insurer notice of terminations of insurance and additions of employees becoming eligible. The changes shall be considered as having taken effect as if notice thereof had been given in advance. Upon termination of employment of any insured employee his insurance shall be canceled. "The Company will issue to the Employer for each insured employee an individual certificate. This certificate will in no way void any of the terms and conditions outlined in the policy but will show the insurance protection to which the employee is entitled . . . The policy and the application of the Employer . . . and the applications of the employees, if any, shall constitute the entire contract between the parties . . . This contract is issued and delivered . . . in the Commonwealth of Pennsylvania and is governed by the laws of that Commonwealth."

Defendant was not writing disability, life or group insurance in Texas in 1918, 1925 or 1932, the years respectively in which it issued to the oil corporation the above

mentioned policies, Nos. G5039, G5545 and G5039R. March 21, 1932, the Texas Board of Insurance Commissioners issued its certificate authorizing defendant to pursue the business of life, health and accident insurance within that State for the year ending February 28, 1933. But since 1917 defendant has not written any contracts of insurance nor has it had there any agent qualified so to do. It has no licensed agent, has not qualified to write insurance contracts in Texas or since 1917 accepted any application for insurance originating in that State. The evidence is that respondent "has never written or delivered a contract or policy of insurance of any kind or character in the State of Texas."

On April 1, 1932, petitioner automatically became insured under the policy. The monthly premium for his insurance was $3; monthly deductions of $2.40 were made by the refining company and sent by it to the oil corporation at Pittsburgh. Defendant charged the premiums to the oil corporation and the latter paid them by check sent from Pittsburgh to defendant at Hartford.

About May 1, 1932, respondent issued and delivered to the oil corporation an individual certificate stating that it was issued pursuant to the policy and that subject to its terms and conditions petitioner, John Boseman, an employee was insured under Schedule B of the policy. The certificate contained the above quoted policy provision requiring notice of disability. The oil corporation sent the certificate to petitioner's employer and July 20, 1932, the latter delivered it to petitioner in Texas. The defendant did not deal with the plaintiff or any of the employees of the refining company with reference to the insurance, certificates issued under the policy or premiums. All its dealings were with the oil corporation. Petitioner became totally disabled prior to termination of his employment which ended October 8, 1932. His insurance was canceled as of that date.

1. The oil corporation and respondent intended, and the policy definitely declares, that Pennsylvania law should govern. Undoubtedly, as between employer and insurer, Pennsylvania law controls.[1] "In every forum a contract is governed by the law with a view to which it was made."[2] But the precise issue for decision is whether, as between petitioner and insurer, the policy provision requiring notice of claim is governed by Pennsylvania law or Texas law. Petitioner and other insured employees were not parties to, nor did they have any voice in, the negotiation or consummation of the contract. The terms of the policy were settled by the oil corporation and respondent. Eligible employees were given opportunity upon specified conditions to have insurance by giving payroll deduction orders approved by their employer. The policy did not of itself insure petitioner or any other person. It merely made available specified insurance to certain employees. For the payment of premiums the insurer looked only to the corporation. The latter, for the benefit of its insured employees, assumed the burden of paying to the insurer premiums to which they by the deduction orders had contributed.[3]

[1] *Equitable Life Society* v. *Clements*, 140 U. S. 226, 232. *Mutual Life Ins. Co.* v. *Cohen*, 179 U. S. 262, 264–265, 267. *Northwestern Mutual Life Ins. Co.* v. *McCue*, 223 U. S. 234, 246–247. *New York Life Ins. Co.* v. *Dodge*, 246 U. S. 357, 372 *et seq.* *Mutual Life Ins. Co.* v. *Liebing*, 259 U. S. 209, 214. *Hartford Indemnity Co.* v. *Delta Co.*, 292 U. S. 143, 150. Cf. *Seeman* v. *Philadelphia Warehouse Co.*, 274 U. S. 403, 408–409. *Home Insurance Co.* v. *Dick*, 281 U. S. 397, 408. *John Hancock Mutual Life Ins. Co.* v. *Yates*, 299 U. S. 178.

[2] *Wayman* v. *Southard*, 10 Wheat. 1, 48. *Pritchard* v. *Norton*, 106 U. S. 124, 136.

[3] See *Meyerson* v. *New Idea Hosiery Co.*, 217 Ala. 153, 157; 115 So. 94.

By his application petitioner accepted the provisions of the policy including the agreement of the oil corporation and respondent that the policy is governed by Pennsylvania law.

2. Petitioner insists that the delivery of the certificate in Texas made the law of that State, Art. 5546, applicable. But the certificate is not a part of the contract of, or necessary to, the insurance.[4] It is not included among the documents declared "to constitute the entire contract of insurance." Petitioner was insured on the taking effect of the policy long before the issue of the certificate. It did not affect any of the terms of the policy. It was issued to the end that the insured employee should have the insurer's statement of specified facts in respect of protection to which he had become entitled under the policy. It served merely as evidence of the insurance of the employee. Petitioner's rights and respondent's liability would have been the same if the policy had not provided for issue of the certificate. And plainly delivery of the certificate by the refining company to petitioner in Texas has no bearing upon the question whether Pennsylvania law or Texas law governs in respect of the notice of claim. We are unable to agree with decisions of the Court of Civil Appeals of Texas in cases similar to this that the certificate is a part of the contract of insurance or that its delivery

[4] *All States Life Ins. Co.* v. *Tillman,* 226 Ala. 245, 248; 146 So. 393. *Equitable Life Assurance Society* v. *Austin,* 255 Ky. 23, 26; 72 S. W. (2d) 716. *Seavers* v. *Metropolitan Life Ins. Co.,* 132 Misc. 719, 722; 230 N. Y. S. 366. *Thull* v. *Equitable Life Assurance Society,* 40 Ohio App. 486, 488. *Metropolitan Life Ins. Co.* v. *Lewis* (La. App.) 142 So. 721, 722. *Hardie* v. *Metropolitan Life Ins. Co.* (Mo. App.) 7 S. W. (2d) 746, 747. *McBride* v. *Connecticut General Life Ins. Co.,* 14 F. Supp. 240, 241.

is necessary to make the policy effective.[5] Nor are we required to follow their construction.[6]

3. In support of his contention that Texas law applies petitioner suggests that the insurer, acting through the employer as its agent in that State, solicited and procured him to take insurance under the policy. There is no evidence that the insurer expressly authorized the oil corporation or any of its subsidiaries to act for it in consummating insurance under the policy. Petitioner's election and the employer's application for the policy were made before the Texas Board authorized the insurer to do business in that State. By uncontradicted evidence it is shown that the insurer did not qualify to solicit or write insurance or accept any application originating there. Employers regard group insurance not only as protection at low cost for their employees but also as advantageous to themselves in that it makes for loyalty, lessens turn-over and the like.[7] When procuring the policy, obtaining applications of employees, taking payroll deduction orders, reporting changes in the insured group, paying premiums and generally in doing whatever may serve to obtain and keep the insurance in force, employers act not as agents of the insurer but

[5] *Connecticut General Life Ins. Co.* v. *Moore,* 75 S. W. (2d) 329. *Connecticut General Life Ins. Co.* v. *Dent,* 84 S. W. (2d) 250. *Connecticut General Life Ins. Co.* v. *Lockwood,* 84 S. W. (2d) 245. *Metropolitan Life Ins. Co.* v. *Worton,* 70 S. W. (2d) 216. *Metropolitan Life Ins. Co.* v. *Wann,* 81 S. W. (2d) 298.

[6] *Carpenter* v. *Providence Washington Insurance Co.,* 16 Pet. 495, 511–512. *Washburn & Moen Mfg. Co.* v. *Reliance Ins. Co.,* 179 U. S. 1, 15. *Aetna Life Ins. Co.* v. *Moore,* 231 U. S. 543, 559. See *Swift* v. *Tyson,* 16 Pet. 1, 19. *B. & W. Taxi Co.* v. *B. & Y. Taxi Co.,* 276 U. S. 518, 530, and cases cited.

[7] *Nohl* v. *Board of Education,* 27 N. M. 232, 234 *et seq.;* 199 Pac. 373. *State ex rel. Thompson* v. *Memphis,* 147 Tenn. 658, 663 *et seq.;* 251 S. W. 46. *Aetna Life Ins. Co.* v. *Lembright,* 32 Ohio App. 10, 14; 166 N. E. 586. Encyclopaedia of Social Sciences, Vol. 7, Group Insurance, pp. 182, 185.

for their employees or for themselves.[8] And wholly in accord with that view are the acts done in Texas that are claimed by petitioner to be attributable to the refining company or its agents. They are: The termination of the earlier policies; acceptance of petitioner's release of claims under them and his application under the new policy by the giving of payroll deduction orders; delivery of the certificate to petitioner; the forwarding to the oil corporation of the amounts deducted from his pay on account of premiums. None of these was done for or on behalf of the insurer. The undisputed circumstantial facts require the conclusion that the employer acted not as agent of the insurer but for and on behalf of petitioner and other insured employees and in its own interest.[9]

4. Petitioner cites Arts. 5054 and 5056, Revised Civil Statutes, as opposed to the lower court's ruling: "If employes in Texas desire to join in an insurance plan about to be set up or already in operation in Pennsylvania, and either in person or through their employer take steps in Pennsylvania to do so, the laws of Texas do not control it." Article 5054 applies only to contracts of insurance made by an insurance company doing business in Texas.[10] The respondent did no business in that State.[11] Article 5056 merely declares that one who in Texas does specified things in respect of insurance shall be held to be the agent of the insurance company for which the act is done or the risk taken "as far as relates

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[8] *Duval* v. *Metropolitan Life Ins. Co.*, 82 N. H. 543, 548; 136 Atl. 400. *People ex rel. Kirkman* v. *Van Amringe*, 266 N. Y. 277, 282; 194 N. E. 754. *Connecticut General Life Ins. Co.* v. *Speer*, 185 Ark. 615, 617; 48 S. W. (2d) 553. *Leach* v. *Metropolitan Life Ins. Co.*, 124 Kan. 584, 589; 261 Pac. 603. *Equitable Life Assurance Society* v. *Hall*, 253 Ky. 450, 452–453; 69 S. W. (2d) 977. *Dewease* v. *Travelers Insurance Co.*, 208 N. C. 732, 734; 182 S. E. 447.

[9] See Note 8.

[10] Art. 5054 (then Art. 4950, Rev. Civ. Stat. 1911) is quoted in *Aetna Life Ins. Co.* v. *Dunken*, 266 U. S. 389, 390–391.

[11] Cf. *Minnesota Association* v. *Benn*, 261 U. S. 140, 145.

to all the liabilities, duties, requirements and penalties set forth in this chapter." Clearly there is nothing in that article as expounded by the Supreme Court of Texas (*Insurance Co.* v. *Walker,* 94 Tex. 473; 61 S. W. 711) that has any bearing on the question under consideration. The challenged ruling is sound and well supported by our decisions.[12]

5. The conclusion that Pennsylvania law governs the policy provision requiring notice of claim is supported not only by the making and delivery of the contract of insurance in that State, the declaration in the policy that Pennsylvania law shall govern and petitioner's acceptance of the insurance according to the terms of the policy but also by the purpose of the parties to the contract that everywhere it shall have the same meaning and give the same protection and that inequalities and confusion liable to result from applications of diverse state laws shall be avoided.[13]

Affirmed.

OPPENHEIMER *v.* HARRIMAN NATIONAL BANK & TRUST CO. ET AL.*

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

No. 588. Argued March 11, 12, 1937.—Decided April 26, 1937.

1. A fraudulent sale of its own stock by a national bank may be rescinded by the defrauded purchaser. U. S. C., Title 12, §§ 24 (Seventh), 56, 59, and 83, do not prevent. P. 211.
2. Where, through misrepresentation by its officers, a national bank makes a fraudulent sale of its own stock belonging to an undis-

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[12] *Allgeyer* v. *Louisiana,* 165 U. S. 578, 588. *Minnesota Association* v. *Benn,* 261 U. S. 140, 145. *Aetna Life Ins. Co.* v. *Dunken,* 266 U. S. 389, 399. *Hartford Indemnity Co.* v. *Delta Co.,* 292 U. S. 143, 149.

[13] See Note 11. Cf. *Royal Arcanum* v. *Green,* 237 U. S. 531, 542. *Modern Woodmen* v. *Mixer,* 267 U. S. 544, 551.

* Together with No. 670, *Harriman National Bank & Trust Co.* v. *Oppenheimer,* also on certiorari to the Circuit Court of Appeals for the Second Circuit.

closed principal, it is liable to the purchaser just as though it had acted for itself. P. 212.

3. The liability of a national bank to a purchaser who was defrauded in a fraudulent sale by the bank of its own stock, is covered by the phrase "contracts, debts and engagements" for which stockholders are individually responsible (U. S. C., Title 12, § 64), and the proceeds of assessments against stockholders, as assets of the receivership, may be charged with such liability. P. 212.
4. A claim against a national bank by a stockholder who rescinded, on account of fraud, a sale to him by the bank of its own stock—the stockholder having paid the comptroller's assessment levied on him after the bank's insolvency—*held* entitled to rank on a parity with the claims of other unsecured creditors in the receivership estate. P. 213.

85 F. (2d) 582, reversed.

WRITS of certiorari, 300 U. S. 647, to review a judgment reversing a judgment of the District Court in a suit against the bank to recover the purchase price of shares of the bank's stock, the sale of which to the plaintiff was alleged to have been induced by fraud.

Mr. Edward S. Greenbaum, with whom *Messrs. Theodore S. Jaffin* and *Benjamin Kaplan* were on the brief, for Oppenheimer.

Mr. Martin Conboy, with whom *Messrs. George P. Barse* and *John F. Anderson* were on the brief, for The Harriman National Bank & Trust Co.

MR. JUSTICE BUTLER delivered the opinion of the Court.

For some years prior to the occurrences out of which this litigation arose the defendant bank was doing business in New York City. Being unable to meet current demands, it closed March 3, 1933. March 13 a conservator was appointed;[1] October 16 the comptroller declared

[1] 12 U. S. C., § 203.

it insolvent and appointed a receiver.[2] Later, he assessed the stockholders par value of their stock.[3] May 31, Oppenheimer brought this action in the federal court for the southern district of New York to recover damages upon an executed rescission of a sale to him of stock of the bank by means of fraudulent representations made by its president and vice president. At the close of the evidence, the parties respectively sought a directed verdict, and, no request for submission of any issue to the jury having been made,[4] the court found the bank not enriched by the sale, and the president and vice president without actual or apparent authority to make representations in connection with the sale, and directed a verdict and entered judgment for the bank. The Circuit Court of Appeals reversed and ordered that judgment for the amount demanded in the complaint be entered against the bank collectible out of assets of the receivership after payment in full of all who were creditors when the bank became insolvent. 85 F. (2d) 582.

Plaintiff applied for a writ of certiorari, contending that the Circuit Court of Appeals erred in holding that his judgment is not entitled to rank with other unsecured creditors' claims and that its ruling conflicts with decisions of other Circuit Courts of Appeals.[5] Defendant presented its cross-petition asserting that the court erred in

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[2] 12 U. S. C., § 191.

[3] 12 U. S. C., §§ 63, 64; see also § 192.

[4] *Beuttell* v. *Magone,* 157 U. S. 154, 157. *Empire State Cattle Co.* v. *Atchison, T. & S. F. Ry. Co.,* 210 U. S. 1, 8. *Sena* v. *American Turquoise Co.,* 220 U. S. 497, 498. *American National Bank* v. *Miller,* 229 U. S. 517, 520. *Williams* v. *Vreeland,* 250 U. S. 295, 298.

[5] *Salter* v. *Williams,* (C. C. A. 3rd) 244 Fed. 126, 129. *Florida Land & Imp. Co.* v. *Merrill,* (C. C. A. 5th), 52 Fed. 77, 80; *Merrill* v. *Florida Land & Imp. Co.,* 60 Fed. 17. *Williams* v. *Green,* (C. C. A. 4th) 23 F. (2d) 796, 797. *Clark* v. *Boston-Continental Nat. Bank,* (C. C. A. 1st) 84 F. (2d) 605, 607. And see *Lantry* v. *Wallace,* 182 U. S. 536, 555.

holding: that plaintiff is entitled to participate in the distribution of proceeds of assessments on stockholders collected under 12 U. S. C., § 64; that it may be compelled to take and pay for shares of its own capital stock in a manner not authorized by 12 U. S. C., § 83; that it is liable for fraud of its officers in connection with the sale of shares which were the property of another, the bank not being enriched by the transaction; and that plaintiff is entitled to judgment against defendant. This court granted both petitions.

November 1, 1930, plaintiff purchased 10 shares of the bank's stock for $15,120. He was induced to buy the stock by false and fraudulent representations of the president and vice president of the bank. It sent him a bill for the purchase price. Having considerably more on deposit in the bank, plaintiff sent his check for that amount drawn on it and payable to its order. A vice president acknowledged receipt of the check and sent plaintiff a stock certificate for the shares purchased. His check marked paid and the bill receipted were returned to him. Plaintiff received dividends on the stock amounting to $525 and sold two shares for $2,408. Later, May 6, 1933, he gave the bank notice of rescission, tendered it the certificate and demanded that his account be credited with the amount of his payment less the sums he had received as dividends and from the sale of the two shares. The bank rejected his demand; he brought this suit for $12,187 with interest and costs. In addition to a general denial, defendant's answer set up affirmative defenses of ratification after knowledge of the fraud and of laches but at the trial these were abandoned.

Defendant's evidence tended to prove that the stock was not owned by it but by Harriman Securities Corporation, the shares of which were held in trust for the benefit of the stock of the bank. The bank maintained in its bond department a "suspense account" in which

were reflected purchases and sales of its own stock made by it for account of that corporation. The bank lent the affiliate the sums required for purchasing the stock and the amounts were charged to the latter. When the stock was sold the proceeds were credited to the affiliate. Stock so purchased was taken in the name of Kelly, not an employee of the bank, as nominee of the affiliate. The shares in question were so held. Of the amount paid by plaintiff $100 was retained by the bank as its commission for making the sale; the balance was entered in the suspense account. Plaintiff had no knowledge of any transactions between the bank and its affiliate; he believed he was dealing with the bank as principal. He has paid the assessment that the comptroller made against him as stockholder and has not challenged its validity or sought repayment of any part of it.

1. Defendant maintains that a national bank may not incur liability to retake shares of its stock sold by it either as principal or agent.

It cites provisions of Title 12, U. S. C., governing national banking associations, the substance of which follows. Section 24 (Seventh) limits the business of dealing in securities and stock to purchasing and selling without recourse. Section 56 prohibits withdrawal of capital by dividends or otherwise. Section 59 permits reduction of capital by vote of two-thirds of the stock. Section 83 declares that no such association shall make any loan or discount on the security of its own capital stock nor be a purchaser or hold its shares unless the security or purchase shall be necessary to prevent loss upon a debt previously contracted; it requires that the stock so obtained shall be sold within six months.

Defendant suggests that, save as otherwise definitely authorized, these provisions require that the outstanding stock of a national bank shall not be reduced while its banking operations continue. On that basis it main-

tains that to enforce rescission would in effect allow a national bank to repurchase its stock and so to accomplish by indirection what it may not do directly.

The bank had power to sell the stock in question whether acquired by it in accordance with or contrary to § 83,[6] and whether the stock belonged to it, the affiliate or a third party.[7] As the stock was fully paid in when originally issued, recovery by the plaintiff would not violate statutory provisions prohibiting reduction of capital.[8] It is to be remembered that plaintiff has fully paid his statutory liability. The bank's liability does not differ from what it would be if, instead of shares of its own stock, it had fraudulently sold to plaintiff bonds or other investment securities.[9] It cites § 24 (Seventh) as construed in *Awotin* v. *Atlas Exchange Bank,* 295 U. S. 209. But that decision does not support its contention. There the bank sold bonds and in connection with the sale agreed with the buyer that at maturity it would repurchase at par value and accrued interest. We held the agreement repugnant to § 24 (Seventh) requiring sales to be without recourse. The sale was a valid executed contract; the bank's promise to repurchase was forbidden by law and therefore void. The purchaser, chargeable with knowledge of the statute, could not invoke estoppel. The statutes relied on by defendant cannot reasonably be construed to forbid rescission of fraudulent sales by national banks of their own stock. In the absence of language unquestionably disclosing that purpose, Congress may not be held to have so in-

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[6] *Lantry* v. *Wallace,* 182 U. S. 536, 553. *Scott* v. *Deweese,* 181 U. S. 202, 211. *National Bank of Xenia* v. *Stewart,* 107 U. S. 676. *National Bank* v. *Matthews,* 98 U. S. 621, 629.

[7] 12 U. S. C. § 24 (Seventh). *Awotin* v. *Atlas Exchange Bank,* 295 U. S. 209, 212.

[8] *Salter* v. *Williams,* 244 Fed. 126, 130.

[9] Cf. *National Bank & Loan Co.* v. *Petrie,* 189 U. S. 423, 425.

tended. There is no evidence of that intention. Defrauded purchasers may rescind fraudulent sales by national banks of their own capital stock.

2. Defendant maintains that it may not be held liable for misrepresentations made by its officers when making the sale to plaintiff. It does not challenge the authority of its president or vice president to act for it in making sales of investment securities or stock. Through them it represented to plaintiff that the shares offered him belonged to an estate, made the sale, obtained his check for the purchase price, took the amount from his deposit, issued and sent him a stock certificate. If, as it claimed at the trial, the shares belonged to its affiliate, the latter was an undisclosed principal, and plaintiff was entitled to look to the bank as if acting for itself.[10] It is immaterial whether, as between the bank and its affiliate, the amount obtained from plaintiff belonged to the former or was received by it as agent for the latter.

3. Defendant maintains that the proceeds of assessments may not be charged with the claim of a rescinding shareholder.

It argues that, the bank being insolvent and in receivership, the recovery cannot be had from the assets of the bank and will of necessity come out of the money paid by shareholders. It calls attention to § 64 which declares that stockholders shall be held individually responsible for all "contracts, debts, and engagements" of the bank.

But that contention misconstrues the judgment directed below. It is to be "collectible out of the assets of the receivership after payment in full" of others. Manifestly the assets referred to are not limited to assessments collected from stockholders but include assets passing from the bank to the receiver. The phrase quoted from

[10] *McClure* v. *Central Trust Co.*, 165 N. Y. 108, 128; 58 N. E. 777.

§ 64 relates to the liability of stockholders enforceable upon finding of insolvency, appointment of receiver and assessment by the comptroller, and not to provability or rank of claims. His determination as to the necessity and amount of assessments against shareholders is conclusive upon them and immune from collateral attack.[11] The bank may not in this suit invoke the rights of stockholders to defeat plaintiff's claim against it.

Moreover, the quoted provision was enacted for the protection of the public dealing with national banks and should be reasonably construed in favor of claimants against them. To give full effect to the purpose of Congress a liberal construction is required. A technical or narrow view would be inconsistent with the true intent and meaning of the measure. There is nothing in the purpose or context of the statute to detract aught from the significance that fairly may be attributed to the words used. They are broad enough to include all pecuniary liabilities and obligations of the bank. Indeed, that is a well-recognized meaning of the word "engagement." Plaintiff's claim is for the money the bank fraudulently got from him and used in its business. Clearly that liability is covered by the phrase "contracts, debts and engagements." [12] The construction for which the defendant contends cannot be sustained.

4. There remains the question whether plaintiff's judgment is entitled to share equally in the receivership estate with other unsecured creditors' claims.

In 1930 when the bank by false representations sold him the stock and by that means obtained the price out of his deposit it immediately became bound to make res-

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[11] See *Forrest* v. *Jack*, 294 U. S. 158, 162, and cases cited.

[12] See e. g. *Chesapeake & Ohio Canal Co.* v. *Knapp*, 9 Pet. 541, 566. *United States* v. *State Bank*, 96 U. S. 30, 35–36. *Thomas* v. *Matthiessen*, 232 U. S. 221, 235. *Haviland* v. *Chace*, 39 Barb. 283, 287.

titution.[13] The fraudulent sale was subject to rescission by the plaintiff at any time before the bank closed. Neither lapse of time while plaintiff remained ignorant of the fraud nor insolvency of the bank detracted from its liability. We assume that after March 3, 1933, the bank was without means sufficient to meet current demands and that its debts exceeded the value of its assets plus the statutory liability of its stockholders. After the appointment of a conservator, but some months before the comptroller declared the bank insolvent, plaintiff rescinded and brought this suit. He claims no lien, preference, or priority but merely seeks to share in the estate as do other unsecured creditors.

While stockholders' liability may not be enforced before insolvency and assessment by the comptroller, we assume, without deciding, that plaintiff's position is the same as if the bank's insolvency had been declared and a receiver appointed before he rescinded. Plaintiff appeared by the bank's records to be a stockholder and, as against creditors for whose benefit the statutory liability was created, was estopped from denying that status.[14] Recognizing that the bank's fraud and his rescission availed nothing against the comptroller's assessment, plaintiff paid the amount laid against him. The judgment he seeks would establish his right to have the bank pay, because wrongfully obtained from his deposit,

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[13] Cf. *Briggs* v. *Brushaber,* 43 Mich. 330, 332; 5 N. W. 383. *Northrop* v. *Hill,* 57 N. Y. 351, 355. *Trayne* v. *Boardman,* 207 Mass. 581, 582; 93 N. E. 846. *Sollund* v. *Johnson,* 27 Minn. 455, 456; 8 N. W. 271. *Union Central Life Insurance Co.* v. *Schidler,* 130 Ind. 214, 216; 29 N. E. 1071. *Griffin* v. *Lumber Co.,* 140 N. C. 514, 517; 53 S. E. 307. *McKay* v. *McCarthy,* 146 Ia. 546, 550–551; 123 N. W. 755.

[14] *Scott* v. *Deweese,* 181 U. S. 202, 213. *Lantry* v. *Wallace,* 182 U. S. 536, 553.

the amount for which this suit is brought. And, having fully paid his liability to the creditors, there is no reason why his claim should be subordinated to claims of stockholders on account of their deposit balances when the bank failed. The record shows that plaintiff then had a substantial amount on deposit. The bank does not claim that, in respect of deposits or other indebtedness, stockholders are not entitled to distribution on the same basis as are non-stockholding creditors. There is no foundation for any such rule. Subscription price having been fully paid to the bank, the maximum for which stockholders may be held for the benefit of creditors is the par value of their shares. By payment of the comptroller's assessments they fully discharge their liability as stockholders. And as claimants they stand on the same footing as other creditors.[15] Discrimination against their claims is not authorized by the statute. It follows that plaintiff's judgment is entitled to rank on a parity with other unsecured creditors' claims.[16]

The judgment of the Circuit Court of Appeals will be reversed and the case will be remanded to the district court for further proceedings in accordance with this opinion.

Reversed.

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[15] *Richardson* v. *Olivier,* 105 Fed. 277, 280.

[16] *Salters* v. *Williams,* 244 Fed. 126, 129. *Florida Land & Imp. Co.* v. *Merrill,* 52 Fed. 77, 80. *Williams* v. *Green,* 23 F. (2d) 796, 797. *Clark* v. *Boston-Continental Nat. Bank,* 84 F. (2d) 605, 607.

SMITH, EXECUTOR, *v.* HALL ET AL.*

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

No. 35. Argued October 20, 21, 1936. Reargued April 5, 6, 1937.—Decided April 26, 1937.

1. Two suits in which different defendants, charged as infringers, set up the same ground of invalidity against a patent, and which were tried by the court below on a joint record, may be presented to this Court jointly. P. 218.
2. Patent No. 1,262,860, for a method of hatching eggs, *held* invalid because of anticipation. Cf. *Smith* v. *Snow,* 294 U. S. 1; *Waxham* v. *Smith,* 294 U. S. 20. P. 219.
3. Oral evidence *held* insufficient in itself to establish prior use of a patented method, but corroborated sufficiently by documentary evidence. P. 222.
4. Anticipation of a patented method is shown by knowledge of the method, and its use with operative success, although without full and precise knowledge of the scientific principles involved, as outlined in the patent. P. 226.
5. While, in attacking a patent, a Patent Office file on an abandoned application may not be relied on as a prior publication, it may be competent and cogent evidence of the nature and date of an earlier invention reduced to practice. P. 227.
6. The Smith patent was sustained in the *Snow* and *Waxham* cases, *supra,* only by establishing that neither the arrangement of the eggs, nor the particular order in which the propelled air current should reach the eggs, nor the manner in which it was guided or controlled, is part of the patent claimed. P. 231.
7. A patentee who has sought and obtained a broad construction of his claim, cannot narrow it so as to avoid anticipation by showing that the claimed method was used in a particular form of structure not claimed. P. 232.
8. In determining anticipation of a patented method it is immaterial that the structure employed in the earlier use was neither the best possible nor as skilfully designed or used as that later employed by the patentee. P. 232.

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* Together with No. 36, *Smith, Executor,* v. *James Manufacturing Co.,* also on certiorari to the Circuit Court of Appeals for the Second Circuit.

9. Commercial success is not a necessary element of a prior use anticipating and invalidating a patent. P. 233.

83 F. (2d) 217, 221, affirmed.

CERTIORARI, 298 U. S. 652, to review two decrees of the court below holding a patent invalid upon the ground of anticipation, and thereupon reversing decisions of two district courts which had held the patent valid and infringed. No. 35 was brought by Smith in Connecticut for alleged infringement of claim 1 against defendants operating a large commercial hatchery in that State. No. 36 was a like suit by him in New York against a corporation engaged in the business of manufacturing and selling incubators and a commercial hatcheries company which it controlled.

Messrs. Charles Neave and *Albert L. Ely,* with whom *Mr. Dean S. Edmonds* was on the brief, for petitioner.*

Messrs. Thomas G. Haight and *Arthur E. Paige,* with whom *Mr. Frank E. Paige* was on the brief, for respondents in No. 35.*

Mr. H. A. Toulmin, Jr., with whom *Mr. H. A. Toulmin* was on the brief, for respondents in No. 36.*

MR. JUSTICE STONE delivered the opinion of the Court.

These cases involve the validity of the Smith Patent No. 1,262,860, of April 16, 1918, and more particularly the question whether Smith was anticipated by the prior use of the patented invention by Hastings.

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* On reargument, *Messrs. Dean S. Edmonds* and *Albert L. Ely,* with whom *Mr. Charles Neave* was on the brief, for petitioner. *Mr. Thomas G. Haight,* with whom *Messrs. Arthur E. Paige* and *Frank E. Paige* were on the brief, for respondents in No. 35. *Mr. H. A. Toulmin, Jr.,* with whom *Mr. H. A. Toulmin* was on the brief, for respondents in No. 36.

In *Smith* v. *Snow,* 294 U. S. 1 (1935), we held the patent valid and infringed. But in that case the Hastings prior use was not presented or considered. At that time the present infringement suits brought by petitioner against respondents Hall and James were pending in the district courts for Connecticut and for Western New York, respectively. In view of the definition given to the patent by our decision, the Hastings defense assumed an importance in these suits apparently not attributed to it in earlier litigation, and it has been developed in the records now before us more fully than in any earlier case.[1]

The decrees of the district courts rejecting the defense were reversed by the Court of Appeals for the Second Circuit, 83 F. (2d) 217, 221, which found prior use by Hastings. We brought the cases here on certiorari, to resolve the conflict in the result of the decisions below with that of our decision in *Smith* v. *Snow, supra.* The two suits came to the court below, as they do here, upon different records. The court treated the cases as though the two records constituted a joint record applicable to both cases, and petitioner presents the cases here jointly. See *Butler* v. *Eaton,* 141 U. S. 240, 243, 244; *Dimmick* v. *Tompkins,* 194 U. S. 540, 548; *Washington & Idaho R. Co.* v. *Coeur d'Alene Ry. Co.,* 160 U. S. 101, 103; *de-*

[1] Before the decision in *Smith* v. *Snow,* 294 U. S. 1, the Hastings defense had been considered and rejected in *Buckeye Incubator Co.* v. *Wolf,* 291 Fed. 253, aff'd, 296 Fed. 680 (C. C. A. 6th), in *Buckeye Incubator Co.* v. *Cooley,* 17 F. (2d) 453 (C. C. A. 3rd), and in *Buckeye Incubator Co.* v. *Stone,* a suit in the District Court for Oregon, by a special master's report, which does not appear to have been reviewed by the court. In the numerous other litigations of the Smith patent which preceded the decision in *Smith* v. *Snow, supra,* see 294 U. S. at 3, Note 1, the Hastings defense was not urged. Since the decision in the *Snow* case the defense has been interposed in suits in the district courts, *Smith* v. *Street* (Dist. Ct. for Minn.), *Smith* v. *Sims* (Dist. Ct. for Indiana) and it has recently been sustained by the Supreme Court of Canada, in *The King* v. *Smith Incubator Co.* (1937).

Bearn v. *Safe Deposit & Trust Co.*, 233 U. S. 24, 32; *West Ohio Gas Co.* v. *Public Utilities Comm'n*, 294 U. S. 63, 70–71; cf. *Reed* v. *Allen*, 286 U. S. 191, 198, 199.

The Hall suit is for an infringement of Claim 1 of the patent, and the James suit for infringement of Claims 1, 2, 3 and 5. Claims 1, 2 and 3 are claims for a method of incubation of a plurality of eggs. Claim 5 is a claim for an apparatus adapted to the use of the method and is of significance in the present litigation only if a method claim is sustained. Claim 1 may be taken as typical of the other method claims. In *Smith* v. *Snow, supra,* its essential elements were stated to be (p. 8):

"(a) the arrangement of the eggs at different levels in staged incubation in a closed chamber, having restricted openings of sufficient capacity for the escape of foul air without undue loss of moisture; (b) the application to the eggs of heated air in a current created by means other than variation of temperature; and (c), as marking the boundaries of the claim, the current of air is to be of sufficient velocity to circulate, diffuse and maintain the air throughout the chamber at substantially the same temperature whereby the air will be vitalized, moisture conserved, and the units of heat carried from the eggs in the more advanced stage to those in the less advanced."

Staged incubation is the successive setting of eggs in the same incubator at brief intervals. At different stages in the course of the three weeks period of incubation the eggs have different temperatures, those in the earlier having lower temperatures than those in the later stages. When subjected to a temperature approximating that of body heat, the eggs of the earlier stages absorb heat and those of the later stages give off heat. It was pointed out in the opinion in the *Snow* case that a demonstrated advantage of the Smith method over that of the earlier type of incubator, in which there was no propelled current of air, is that it facilitates the continuous operation

of the incubator through staged incubation, and makes it possible in the process of incubation to increase the number of eggs in a single incubator from a few hundred to many thousands.

To avoid infringement, it was insisted in the *Snow* case that the claim was restricted, by the specifications and drawings of the patent, to use of the method in an apparatus by which the propelled current of heated air was first brought in contact with the more advanced eggs. In rejecting that contention the opinion pointed out that neither the claim itself, construed in the light of the specifications, nor the successful operation of the method, required the arrangement of the eggs in any particular order; that the continuous circulation of air of appropriate temperature in a closed chamber, called for by the claim, served to equalize the temperature at the desired degree by carrying heat units from the more advanced eggs of high temperature to the less advanced eggs of lower temperature, regardless of the particular order in which it passed the eggs of different stages. We said (p. 14):

"the claim does not call for a particular order or arrangement of the eggs in staged incubation in the incubator, or that the propelled current should reach them in any particular order, or that it should be guided, controlled or directed by any particular means, or in any particular manner other than that it should be of sufficient velocity to produce the results prescribed by the claim."

Thus construed, infringement of the patented method could not be avoided nor anticipation of it denied by showing that the challenged use was with different arrangements of the eggs or with a different structure, for guiding or controlling the propelled current of air within the closed chamber, from any exhibited in the specifications and drawings of the patent.

To establish the Hastings prior use respondents rely on the proof of his construction of an incubator in Brooklyn, New York, early in 1911, and its use in the hatching season in the early months of that year and of 1912, and on proof of his construction of another in Muskogee, Oklahoma, in 1911, and its use in 1912 and 1913. They offer documentary corroboration in more or less contemporary articles in published journals and in a patent application with its supporting documents, filed in the patent office in 1911.

Without stopping to state the evidence in detail, it is established by the testimony of Hastings, abundantly corroborated, and not seriously denied, that, apart from the setting of eggs in staged incubation, which will be presently discussed, these incubators employed all the elements of the Smith method, and that their operation was successful in the sense that they were each used for hatching eggs for two successive seasons and that the percentage of the hatches was comparable to that of the smaller still air incubators then in use. Hastings' incubators were closed chambers, with restricted openings. A current of heated air was propelled by a motor driven fan in such manner as to come in contact with the eggs placed within the chamber in stacks of trays, and to return to the fan by means of which it was continuously recirculated. See *Smith* v. *Snow, supra,* 19, 20; *Waxham* v. *Smith,* 294 U. S. 20, 22. Both incubators were of large capacity. That in Brooklyn was built for 6,000 eggs, although it does not appear that it ever contained more than 2,000 eggs at any one time, and that in Muskogee was for 30,000 eggs. It is plain that Hastings built and operated incubators suitable for the use of the Smith method, but petitioner sharply challenges the contention that he did use that method in either of them. It is said that there is no convincing proof that eggs were ever placed in the Brooklyn incubator in staged incuba-

tion, and that the structure of the other and the manner of its use were such as to show that the Smith method as we have described it was not employed. These are the crucial issues.

Hastings built and operated the Brooklyn incubator for Davis, who conducted a poultry farm as the means of supplying chickens for a restaurant which he also operated. After Hastings left Davis' employ in May, 1911, the latter operated the incubator during the season of 1912. Subsequently he went out of the poultry business and dismantled the incubator. Hastings testified, specifically and in detail, that the eggs were placed in the Brooklyn incubator in staged incubation. Davis, corroborated to some extent by his wife, testified that the eggs were placed in the incubator at twice a week intervals, when they were delivered, at the rate of one or two crates a week, by the poultryman from whom they were purchased. The eggs were placed in trays in the incubator chamber where they were exposed to a current of heated air under thermostatic control. The air, maintained at a practically uniform temperature, was continuously circulated throughout the chamber by means of an electric fan. This oral testimony, if taken at its face value, would show that the Smith method was used in the Brooklyn incubator with eggs in staged incubation. But without corroboration, it is insufficient to establish prior use, *Barbed Wire Patent,* 143 U. S. 275, 284; *Deering* v. *Winona Harvester Works,* 155 U. S. 286, 300; *Eibel Process Co.* v. *Minnesota & Ontario Paper Co.,* 261 U. S. 45, 60, and we turn to the documentary evidence that Hastings knew the method of the patent and used it in his Brooklyn structure.

Before 1908 Hastings had had an extensive experience in poultry culture. In 1908 and 1909 he was in the service of the Department of Agriculture, and in the

course of his duties he inspected many poultry plants and experimental stations operating incubators. He was the author of a book, "The Dollar Hen," published in 1909, in which he described a procedure for the incubation of eggs. It spoke of an incubator in which "At hatching time the eggs are spread out in trays in a special hatching room, which is only large enough to accommodate chicks to the amount of one-sixth of the incubator capacity, for twice a week deliverings or one-third if weekly deliveries are desired." It also described an incubator in which "All temperature regulation is by means of air heated (or cooled as the case may be) outside of the egg rooms and forced into the egg rooms by a motor driven cone fan, maintaining a steady current of air, the rate of movement of which may be varied at will. The air movement maintained will always be sufficiently brisk, however, to prevent an unevenness of temperature in different parts of the room." The reference to an incubator in continuous operation, for deliveries once or twice a week, and to temperature regulation of the egg chamber by a propelled current of heated air, moving at a velocity sufficient to maintain an even temperature, shows that Hastings had the conception of staged incubation long before he built the Brooklyn incubator.

On May 3, 1911, while he was in Davis' employ, and when the Brooklyn incubator was in operation, Hastings filed an application for a patent, Serial No. 624,885. Documents in support of the application filed as late as July 1911, give Hastings' address as that of Davis in Brooklyn. The application discloses a chamber with restricted openings in which the eggs are placed and through which a steady current of air, heated to a uniform temperature, is propelled by a constantly moving electric fan, so as to circulate throughout the chamber. Although the application taught the use of fabric or per-

forated partitions for the purpose of causing an even distribution of the current of air, it specified that the invention was "not limited to any particular circulation or movement of the air and by the use of the fan the gravity drafts may be overcome and the air caused to move in any desired direction." The application was prepared by Hastings, but upon its rejection by the examiner, he sought the aid of counsel who, on May 24, 1912, amended the claim and filed a statement in explanation of it, stating that they had derived data and information from a practical hatchery of large capacity then being operated by the applicant.

In this statement it was pointed out that "the temperature of the eggs themselves varies in accordance with the stage of their development and the gaseous emanations tend to produce vitiated conditions which exert a marked influence upon the eggs themselves and especially upon adjacent eggs, if the eggs are at different stages of their development"; that "in a large hatchery where many hundreds and even thousands of eggs are being continually advanced in the process of incubation the ordinary means for causing the circulation of air by convexion currents through and in the incubating chamber has been demonstrated as being totally inadequate, and this is believed to be one of the principal reasons why, up to the present time, hatcheries of large capacity have proven to be practical failures." And finally it was stated that Hastings had "discovered that the temperature and gaseous stratification in the incubating chamber must be overcome by a mechanically forced circulation of the air which will insure a correct and uniform influence of the air upon all of the eggs in the incubating chamber, and this forced circulation must be such as to overcome the counteracting influence of the eggs upon the air when said eggs are in the different stages of incubation."

In the brief of counsel on appeal to the Board of Examiners-in-Chief, dated December 30, 1912, these points were elaborated and explained. It was stated: "The problem has been to enable the incubating operations to be carried on continuously, if so desired, with eggs at all stages of development, and with all of a vast number of eggs subjected to the same temperature and atmospheric conditions best adapted for the development of the embryo." It was pointed out that "during the initial stage of incubation the eggs absorb heat whereby their temperature is raised, but during the final stages the vital processes generate heat, and in practice it is found that with vast numbers of eggs assembled in a single compartment and with eggs at all stages of incubation but very little extraneous heat need be supplied, because the eggs in the later stages of development supply the necessary heat for the eggs in the earlier stages of development. In practice, however, a source of heat is always maintained in order to permit of proper regulation."

It was then explained that the "temperature stratification in the egg chamber" is overcome "through the provision of a mechanically operated air forcing means which would force a rapid circulation of air through the whole collection of eggs in the chamber and past the heater. The mechanical air forcing means is an essential factor, if heat is to be conserved and the conditions maintained uniform." And later it was said: "It is through the instrumentality of these elements that the temperature and gaseous stratification of the air in the chamber is overcome and the eggs are uniformly subjected to the influence of air of the same temperature and composition."

The brief also quoted from a statement of Hastings, which, after observing that temperature stratification may be overcome in a hatching chamber holding many

thousands of eggs by applying to them a mechanically impelled blast of air, says:

"In the Hastings hatchery, a current of air is blown past each and every egg at the rate of thirty feet per minute and this rapidly moving air quickly bringing the temperature of the egg to approximately that of the air. This method of heating keeps the temperature of the eggs in the advanced state of incubation down within a few degrees of that of the air, the exact difference being regulated at will by adjusting the speed of the fan. When properly adjusted the same blast of air used to heat fresh eggs does equally well for eggs in the advanced stages just as the same temperature of the body of the hen incubates the eggs at all stages of development, without recourse on the hen's part to the 'hatching fever,' erroneously supposed to explain the high temperature of eggs at a more advanced stage of development. Owing to this fact eggs at all stages may be handled simultaneously with uniformly good results."

He also mentioned the introduction of moisture into the current of air by the use of a spray or the introduction of outside air at the fan.

We think it plain that at the time these documents were filed the essential elements for hatching eggs in staged incubation, as they were later claimed in the Smith patent, were known to Hastings, and that he was familiar with a structure capable of employing that method. They afford convincing corroboration of the oral testimony that the incubator in use in Brooklyn immediately preceding the filing of the application, and both incubators in use during its pendency, employed the method of the Smith claim. Whether Hastings knew fully and precisely the scientific principles involved in the procedure thus outlined is immaterial. It is enough if he knew and used the method with operative

success. *DeForest Radio Co.* v. *General Electric Co.*, 283 U. S. 664, 686. He did know the method of setting eggs in staged incubation in a closed chamber and continuously circulating through them a current of moistened air at an appropriate temperature, and he knew that the advantages of the use of this method over the type of incubator in which there were no mechanically propelled currents of air, were that it facilitated the continuous operation of the incubator and the simultaneous incubation in a single chamber of a greatly increased number of eggs.

The disclosures made in the Hastings brief were so complete that they might well have been used in support of the Smith claim. Pressed to their conclusion, they would have warranted award of the patent later granted to Smith. See *Smith* v. *Snow, supra,* 14–16. While the Patent Office file on the abandoned claim is not relied on as a prior publication, see *The Corn-Planter Patent,* 23 Wall. 181, 210–211; cf. *Alexander Milburn Co.* v. *Davis Co.,* 270 U. S. 390, 400, 402, it is competent and cogent evidence to determine the nature and date of the invention which the inventor claims to have embodied in working form, see *Corn-Planter Patent, supra,* 211; *United States Blind Stitch Machine Corp.* v. *Reliable Machine Works,* 67 F. (2d) 327, 328 (C. C. A. 2d); Walker, Patents (6th ed., 1929), §§ 97, 98.

In 1911, Hastings induced Lieber, a local lawyer and business man of Muskogee, Oklahoma, and another, to organize a corporation for the promotion of the Hastings method of incubation. Under its auspices Hastings constructed there an incubator of 30,000 egg capacity in the latter part of 1911 and directed its operation during the 1912 hatching season. Its operation was continued by an associate in the season of 1913. The general plan of its construction and mechanical operation as testified to by

Hastings is abundantly corroborated by disinterested witnesses and contemporary photographs and publications describing it. The principal witnesses are Lieber, who furnished the money for the enterprise, Peabody, the electrical contractor who installed the fan and other electrical equipment of the incubator, and Hickox, manager of the local electric light company which supplied the current for the incubator. In 1912, Hickox took photographs of the incubator in operation, and prepared a written description of it. These were produced at the trial.

The uncontradicted evidence is that the incubator consisted of a large room in which there were a series of stacks of egg trays with wire mesh bottoms. Each stack, having a capacity of 5,000 eggs, was placed in a separate compartment. There was a corridor in front of the trays giving access to the stacks, which, in operation, were closed on the corridor side by removable shutters. A motor-driven fan, placed at one end of the incubator, propelled a current of air over a moisture pan, thence through a passage at the back of the egg trays into contact with a heating pipe under thermostatic control. From that point it passed into a passageway directly above the stacks of egg trays, thence downward through the trays to a passage beneath them, through which the current was returned to the fan in continuous circulation. A number of other witnesses, having no connection with the Hastings enterprise, including three called by petitioner, saw the incubator in operation and corroborate the testimony as to its main features; the presence within the incubator of thousands of eggs, placed in stacks or trays, hatched by the circulation through them of a fan-propelled heated current of air.

An article giving some account of the Hastings incubator, prepared by an editor of Poultry Culture and published in that journal for February, 1912, mentions the

use of two flumes carrying the current of air from the fan, only one of which brought the air into contact with the heater. It speaks of a use of a means for controlling temperature of the air passing to each egg compartment, by mixing in proper proportions the flow of air from the two flumes. The existence of such a double conduit is not corroborated by any witness or any document, and is explicitly denied by Lieber, testifying in behalf of petitioner in the *Stone* case, made a part of the present record, and by Hastings. Peabody, who installed the electrical equipment, and Hickox, who prepared a contemporary written description of the incubator, make no mention of it. Drawings showing a single passageway carrying the current of air to the egg stacks were identified as accurate by Hastings, Lieber and Peabody. We conclude that, whatever experimental proposals or installations may have been made, the incubator was used with a single air passage above the egg compartments.

All the witnesses agree that the incubator was commercially operated during the hatching seasons of 1912 and 1913, and that it hatched different batches of eggs placed in it, with varying success. The hatches of the eggs furnished by some customers were failures. Others were successful. One of petitioner's witnesses testified that the hatches never exceeded 50%. Lieber estimated that 50% was the average, with some people getting none and others getting 80%. Hastings, who in the Canadian suit testified that the average was 40%, stated that some settings ran up to 70%. There is no testimony of any mechanical failure of the incubator after the initial trials of it, as a result of which an electric blower was substituted for the fan of lesser power. In 1912, Hastings departed for Texas, where he started another incubator. After operating the incubator through another hatching season, Lieber, his financial backer, abandoned the enterprise.

As with the Brooklyn incubator, the critical issue is whether that in Muskogee was used with eggs in staged incubation in the manner of the Smith claim. It is established beyond doubt that eggs in different stages were in process of incubation there at the same time. The incubator was used in large measure for "custom hatching." At frequent intervals, patrons brought their eggs in relatively small quantities to be placed in the incubator for hatching, and received at the end of the hatching period their share of the newly hatched chicks.

The testimony of Hastings that staged incubation was employed in the Muskogee structure is corroborated by this course of business and by the contemporaneous statements and brief filed with his patent application. He testified that eggs of different stages were sometimes, though not always, placed in the same compartment of the incubator. The Poultry Culture article of February, 1912, states, after describing the use of the fan-propelled current of heated air in the incubator: "eggs at all stages can be placed in the same trays of the Hastings hatchery, with little or no injury. Mr. Hastings hatched several thousand eggs under such conditions in his Brooklyn plant last year."

Petitioner stresses the point that in the Muskogee incubator, the stacks of egg trays were concededly placed in separate compartments, with openings at the top having slide doors which could be used like a valve for regulating the volume of air flowing into each compartment. Hastings testified that the slide doors were used to cut down the supply of air when there were few or no eggs in a compartment and that they were left open when the compartment was substantially full of eggs. Petitioner points to this and to some testimony by Hastings and Lieber that the slide doors could be used to regulate the temperature in each compartment through control of the

volume of air passing through them, and to testimony by Lieber that the eggs, as received, were first placed in one compartment and then at intervals, as other eggs came in, were moved from one compartment to another, and that the doors were used to control variations of temperature in the different compartments.

From this the inference is drawn that only eggs of the same stage were placed in any one compartment, and from the inference it is argued that they were not set in staged incubation. But even if the inference is correct, it establishes only that a special method or device to guide and control the air current was used, not that staged incubation was wanting. The presence or absence of a device for controlling the current of air within the incubator is no part of the Smith claim. Our opinions in *Smith* v. *Snow, supra,* and *Waxham* v. *Smith, supra,* were careful to point out that infringement of the method could not be avoided by using it in conjunction with such a device. The presence of the device in the Muskogee incubator did not foreclose anticipation if the method was used. Since the circulating current of air passed repeatedly into the compartments in the Muskogee structure and came in contact with the heating pipe and with the eggs in the several stacks of trays, the tendency of the operation was to equalize the temperature and to carry heat units from the more advanced to the less advanced eggs. This is the method of the patent and it was employed in the Muskogee structure whether the trays of eggs of different stages were placed in the same or different compartments.

The patent was sustained in the *Snow* and *Waxham* cases, *supra,* only by establishing that neither the arrangement of the eggs, nor the particular order in which the propelled current should reach the eggs, nor the manner in which it was guided or controlled, is part of the

patent claimed. It was this construction of the claim which gave a new significance to the Hastings incubators, different from any recognized by previous decisions. The petitioner, having sought and obtained a broad construction of his claim, cannot now narrow it so as to avoid anticipation by showing that the claimed method was used in a particular form of structure not claimed. It was the method thus defined which Hastings used, regardless of the particular structure which he devised to guide and control the current of air in his incubator, or the order in which it came into contact with the heater and eggs of different stages. It is immaterial that his structure for using the method was neither the best possible nor as skilfully designed or used as that later employed by Smith. *Pickering* v. *McCullough,* 104 U. S. 310, 319; cf. *Telephone Cases,* 126 U. S. 1, 531, 536.

In view of this conclusion it is unimportant whether Hastings used the method in his Brooklyn incubator. But we think the testimony of its use there is sufficiently corroborated. His statement in "The Dollar Hen," already quoted, published before the Brooklyn structure was erected, shows clearly that he contemplated the continuous operation of an incubator with the eggs set in staged incubation so that they would be hatched for deliveries once or twice a week, by a procedure substantially that of the Smith claim. The circumstances attending the Brooklyn use, which called for the setting of eggs at frequent intervals in an incubator of large capacity, the structure exhibited in Hastings' patent application, the subsequent course of the application in the Patent Office, and finally the renewed effort at Muskogee embodying the same principles, although with an immaterial variation in structure, and the fact that both incubators functioned, are convincing evidence that Hastings knew and used in appropriate combination, both in

Brooklyn and in Muskogee, the essential elements of the Smith claim. They support the heavy burden of persuasion which rests upon one who seeks to negative novelty in a patent by showing prior use. See *Radio Corporation* v. *Radio Engineering Laboratories,* 293 U. S. 1, 7, and cases cited.

Petitioner urges, and we have considered, numerous other objections to the sufficiency of proof of the Hastings prior use. The only one calling for any comment is the suggestion that the Brooklyn and Muskogee enterprises were not commercially successful. Commercial success may turn the scale when invention is in doubt, *Paramount Publix Corp.* v. *American Tri-Ergon Corp.,* 294 U. S. 464, 474; *DeForest Radio Co.* v. *General Electric Co., supra,* 685, and the want of it may, in some circumstances, be evidence of want of operative success. But here Hastings by the use of a method which we have sustained as an invention, *Smith* v. *Snow, supra,* has attained the particular results described by the patent. He knew the method and used it in a device capable of employing it. In such circumstances want of commercial success, which the record suggests may have been due to lack of technical and business skill, is not an indication that there was no prior use.

Upon the records now before us we must conclude, as did the Supreme Court of Canada upon a similar record (Footnote 1, *supra*), that Hastings antedated Smith. The Smith method was "known or used by others in this country before his invention or discovery thereof." 35 U. S. C., § 31.

Affirmed.

MR. JUSTICE VAN DEVANTER took no part in the consideration or decision of these cases.

FIRST BANK STOCK CORP. *v.* MINNESOTA.

APPEAL FROM THE SUPREME COURT OF MINNESOTA.

No. 647. Argued March 31, 1937.—Decided April 26, 1937.

A Delaware corporation transacted its corporate and fiscal business in Minnesota, maintaining in that State a business office and holding there its meetings of stockholders, directors and executive committee. It owned a controlling interest in the stock of a number of banks of several States. Stock certificates of the subsidiaries were kept in Minnesota and there it received the dividends thereon, and declared and disbursed the dividends upon its own shares. Through a wholly-owned subsidiary corporation, organized and doing business in Minnesota, it maintained a compensated service for the banks which it controlled, offering advice as to their accounting practices, making recommendations concerning loans, commercial paper and interest rates, and making suggestions regarding their purchase and sale of securities. It planned for them advertising campaigns, and supplied advertising material. Thus it maintained within the State an integrated business of protecting its investments in bank shares, and enhancing their value, by the active exercise of its power of control through stock ownership of its subsidiary banks.

Held, that the corporation's commercial domicile was in Minnesota and that its shares of stock in North Dakota and Montana banking corporations were taxable by Minnesota. P. 237.

Whether the same shares could, consistently with the Fourteenth Amendment, be taxed also in North Dakota and Montana, is a question not decided.

197 Minn. 544; 267 N. W. 519, affirmed.

APPEAL from a judgment in favor of the State of Minnesota in proceedings to enforce collections of delinquent taxes.

Mr. Joseph H. Colman, with whom *Messrs. John Junell, Clark R. Fletcher,* and *Leland W. Scott* were on the brief, for appellant.

The appellant contends that only one State can constitutionally impose a property tax on intangibles in the case of state bank shares. It is the State of

incorporation of the bank which can impose the tax and not the State of the domicile of the shareholder or of the business situs of the shares. Appellant further contends that the shares of stock it holds in state banks located without Minnesota have a business situs, if any, at the location of the banks and not in Minnesota.

It is the position of appellant that the Minnesota statute, as construed by the Minnesota Supreme Court to impose a property tax upon appellant's shares of stock in banks organized under the laws of foreign States, is, for the above reasons, unconstitutional under the Fourteenth Amendment. Appellant does not here contend that the Minnesota statute is unconstitutional in any way other than in its application to shares of stock in foreign state banks.

Mr. William S. Ervin, Attorney General of Minnesota, and *Mr. Frank J. Williams,* with whom *Mr. Matthias N. Orfield,* Deputy Attorney General, was on the brief, for appellee.

The right of a State to tax property within its territorial jurisdiction is inherent and an attribute of sovereignty.

This Court, in the process of developing a symmetrical system of preventing multi-state taxation of the same economic interest, has laid down certain rules by which the right of a given State to tax intangibles is to be determined.

The facts in this case bring the property here in question, under the rules as formulated, within the jurisdiction of the State of Minnesota. The owner has a "commercial domicile" in Minnesota; the property is physically present in that State; and the owner has given the property a business situs there by employing it within that State in the conduct of a super banking business, which is a new and important economic unit.

Minnesota has a constitutional right to tax the property in question.

Appellant's position is untenable in the light of recent decisions of this Court.

The right to tax stock in state banks rests on fundamentally different considerations from the right to tax national bank stock.

MR. JUSTICE STONE delivered the opinion of the Court.

This appeal from a judgment of the Supreme Court of Minnesota, Judicial Code, § 237, involves the question whether appellant, a Delaware corporation doing business in Minnesota, may be required, consistently with the due process clause of the Fourteenth Amendment, to pay a property tax laid by Minnesota upon appellant's shares of stock in Montana and North Dakota state banking corporations.

The trial court concluded that, as the shares are lawfully taxed by Montana and North Dakota, it would be a denial of due process to tax them in Minnesota. The Supreme Court of the state reversed, holding that as appellant has acquired a commercial domicil within the state, and as its shares in the Montana and North Dakota banks are assets of the business carried on by appellant in Minnesota, they are rightly taxed there rather than in Montana or North Dakota. 197 Minn. 544; 267 N. W. 519.

Appellant is qualified to do business in Minnesota, and in fact transacts its corporate business and fiscal affairs there. It maintains a business office within the state and holds there its meetings of stockholders, directors and their executive committee. It is the owner of a controlling interest in the stock of a large number of banks, trust companies and other financial institutions, located in the Ninth Federal Reserve District. The stock cer-

tificates are kept in Minnesota, where appellant receives dividends declared by its subsidiaries, and where it declares and disburses dividends upon its own stock.

Through a wholly-owned subsidiary corporation, organized and doing business in Minnesota, it maintains a compensated service for the banks which it controls. It offers advice as to their accounting practices, makes recommendations concerning loans, commercial paper and interest rates, and makes suggestions regarding their purchase and sale of securities. It also plans for them advertising campaigns, and supplies advertising material. Appellant thus maintains within the state an integrated business of protecting its investments in bank shares, and enhancing their value, by the active exercise of its power of control through stock ownership of its subsidiary banks.

Appellant is to be regarded as legally domiciled in Delaware, the place of its organization, and as taxable there upon its intangibles, see *Cream of Wheat Co.* v. *Grand Forks,* 253 U. S. 325, 328; *Johnson Oil Refining Co.* v. *Oklahoma,* 290 U. S. 158, 161; *Virginia* v. *Imperial Coal Sales Co.,* 293 U. S. 15, 19, at least in the absence of activities identifying them with some other place as their "business situs." But it is plain that the business which appellant carries on in Minnesota, or directs from its offices maintained there, is sufficiently identified with Minnesota to establish a "commercial domicil" there, and to give a business situs there, for purposes of taxation, to intangibles which are used in the business or are incidental to it, and have thus "become integral parts of some local business." *Wheeling Steel Corp.* v. *Fox,* 298 U. S. 193, 210; see *Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204, 213; *Beidler* v. *South Carolina Tax Comm'n,* 282 U. S. 1, 8; *First National Bank* v. *Maine,* 284 U. S. 312, 331.

The doctrine that intangibles may be taxed at their business situs, as distinguished from the legal domicil of their owner, has usually been applied to obligations to pay money, acquired in the course of a localized business. *New Orleans* v. *Stempel,* 175 U. S. 309; *Bristol* v. *Washington County,* 177 U. S. 133; *Board of Assessors* v. *Comptoir National,* 191 U. S. 388; *Metropolitan Life Ins. Co.* v. *New Orleans,* 205 U. S. 395; *Wheeling Steel Corp.* v. *Fox, supra,* 212, 213. But it is equally applicable to shares of corporate stock which, because of their use in a business of the owner, may be treated as localized, for purposes of taxation, at the place of the business, see *First National Bank* v. *Maine, supra,* 331; cf. *De Ganay* v. *Lederer,* 250 U. S. 376, 382. Appellant's entire business in Minnesota is founded on its ownership of the shares of stock and their use as instruments of corporate control. They are as much "integral parts" of the local business as accounts receivable in a merchandising business, or the bank accounts in which the proceeds of the accounts receivable are deposited upon collection. Compare *Wheeling Steel Corp.* v. *Fox, supra,* 212–214. Thus identified with the business conducted by appellant in Minnesota, they are as subject to local property taxes as they would be if the owner were a private individual domiciled in the state.

Appellant does not deny that it is subject to taxation in Minnesota on some intangibles. In making its 1934 return of "moneys and credits" for taxation under Minn. Stat. 1927 (Mason) § 2337 *et seq.,* which imposes the present tax, appellant included bank deposits within and without the state, promissory notes, bonds and other evidences of indebtedness. It does not challenge the tax imposed on its shares of stock in corporations organized and doing business without the state, other than those in the Montana and North Dakota banks. It says that

these states have adopted the only feasible scheme of taxation of the shares of state banks which will admit of a state property tax on national bank shares, since R. S. § 5219 (12 U. S. C. § 548), permits shares of national banks to be taxed only by the state where the bank does business, and then only if they are not assessed "at a greater rate than . . . other moneyed capital in the hands of individual citizens . . . coming into competition with the business of national banks." See *First National Bank* v. *Anderson,* 269 U. S. 341, 348; *Minnesota* v. *First National Bank,* 273 U. S. 561. Both states assess for property taxation the shares of national banks doing business within their limits and assess in like manner the shares of state banks, and thus avoid discrimination in taxation between the shares of national and of state banks.

Appellant argues that every state may establish a tax situs within the state for shares of stock in its own banking corporations, and that Montana and North Dakota have done so by providing, in pursuance of their scheme for the local taxation of banking corporations, that the shares shall be taxable there. *Corry* v. *Baltimore,* 196 U. S. 466; see *National Bank* v. *Commonwealth,* 9 Wall. 353; *Tappan* v. *Merchants' National Bank,* 19 Wall. 490; *Rhode Island Trust Co.* v. *Doughton,* 270 U. S. 69, 81. It insists that as the shares are properly taxable by the respective states of their origin, and as due process forbids the imposition of a property tax upon intangibles in more than one state, they cannot be taxed in Minnesota.

The logic is inexorable if the premises are accepted. But we do not find it necessary to decide whether taxation of the shares in Montana or North Dakota is foreclosed by sustaining the Minnesota tax. Nor need we inquire whether a non-resident shareholder, by acquiring

stock in a local corporation, so far subjects his investment to the control and laws of the state which has created the corporation as to preclude any objection, on grounds of due process, to the taxation of the shares there, even though they are subject to taxation elsewhere, at their business situs.[1] We leave those questions open. It is enough for present purposes that this Court has often upheld and never denied the constitutional power to tax shares of stock at the place of the domicil of the owner. *Hawley* v. *Malden,* 232 U. S. 1, 11, 12; *Klein* v. *Board of Tax Supervisors,* 282 U. S. 19, 24; *Wright* v. *Louisville & Nashville R. Co.,* 195 U. S. 219; *Kidd* v. *Alabama,* 188 U. S. 730; *Darnell* v. *Indiana,* 226 U. S. 390. And it has fully recognized that the business situs of an intangible affords an adequate basis for fixing a place of taxation. See *Wheeling Steel Corp.* v. *Fox, supra; De Ganay* v. *Lederer, supra;* cf. *Safe Deposit & Trust Co.* v. *Virginia,* 280 U. S. 83, 91.

The rule that property is subject to taxation at its situs, within the territorial jurisdiction of the taxing state, readily understood and applied with respect to tangibles, is in itself meaningless when applied to intangibles which, since they are without physical characteristics, can have no location in space. See *Wheeling Steel Corp.* v. *Fox, supra,* 209. The resort to a fiction by the attribution of

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[1] See *Corry* v. *Baltimore,* 196 U. S. 466, 476, 477; *Tappan* v. *Merchants' National Bank,* 19 Wall. 490, 499, 500; *Flash* v. *Conn,* 109 U. S. 371, 377; *Whitman* v. *Oxford National Bank,* 176 U. S. 559, 564; *Hancock National Bank* v. *Farnum,* 176 U. S. 640, 643; *Nashua Savings Bank* v. *Anglo-American Co.,* 189 U. S. 221, 230; *Canada Southern Ry. Co.* v. *Gebhard,* 109 U. S. 527, 537; *Relfe* v. *Rundle,* 103 U. S. 222, 226; *Bernheimer* v. *Converse,* 206 U. S. 516, 533; *Converse* v. *Hamilton,* 224 U. S. 243, 260; *Clark* v. *Williard,* 292 U. S. 112, 121; *Royal Arcanum* v. *Green,* 237 U. S. 531, 542; *Modern Woodmen of America* v. *Mixer,* 267 U. S. 544, 551; *Broderick* v. *Rosner,* 294 U. S. 629, 643.

a tax situs to an intangible is only a means of symbolizing, without fully revealing, those considerations which are persuasive grounds for deciding that a particular place is appropriate for the imposition of the tax. *Mobilia sequuntur personam,* which has won unqualified acceptance when applied to the taxation of intangibles, *Blodgett* v. *Silberman,* 277 U. S. 1, 9–10, states a rule without disclosing the reasons for it. But we have recently had occasion to point out that enjoyment by the resident of a state of the protection of its laws is inseparable from responsibility for sharing the costs of its government, and that a tax measured by the value of rights protected is but an equitable method of distributing the burdens of government among those who are privileged to enjoy its benefits. See *New York ex rel. Cohn* v. *Graves,* 300 U. S. 308.

The economic advantages realized through the protection, at the place of domicil, of the ownership of rights in intangibles, the value of which is made the measure of the tax, bear a direct relationship to the distribution of burdens which the tax effects. These considerations support the taxation of intangibles at the place of domicil, at least where they are not shown to have acquired a business situs elsewhere, as a proper exercise of the power of government. Like considerations support their taxation at their business situs, for it is there that the owner in every practical sense invokes and enjoys the protection of the laws, and in consequence realizes the economic advantages of his ownership. We cannot say that there is any want of due process in the taxation of the corporate shares in Minnesota, irrespective of the extent of the control over them which the due process clause may save to the states of incorporation.

Affirmed.

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

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HERNDON *v.* LOWRY, SHERIFF.

APPEALS FROM THE SUPREME COURT OF GEORGIA.

Nos. 474 and 475. Argued February 8, 1937.—Decided April 26, 1937.

1. A federal constitutional question going to the validity of a conviction of crime under a state statute was not decided on an appeal to the state supreme court because not properly raised (See *Herndon* v. *Georgia,* 295 U. S. 441). Afterwards that court considered the question and decided it against the convict, in a *habeas corpus* proceeding. *Held* that the scope of *habeas corpus,* in the circumstances, was a local question and that the ruling on the federal question was open to review by this Court. P. 247.
2. A state statute punishing as a crime the acts of soliciting members for a political party and conducting meetings of a local unit of that party, where one of the doctrines of the party, established by reference to a document not shown to have been exhibited to anyone by the accused, may be said to be ultimate resort to violence in the indefinite future against organized government, unwarrantably invades the liberty of free speech and so violates the Fourteenth Amendment. P. 260.
3. 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 limitation upon individual liberty must have appropriate relation to the safety of the State. Legislation which goes beyond this need violates the Constitution. P. 258.
4. The affirmance by the Supreme Court of a State of a conviction under a statute as having support in the evidence, necessarily construes the statute as authorizing punishment for the act so proven. P. 255.
5. Section 56 of the Penal Code of Georgia, as construed by the Supreme Court of the State, punishes, as an attempt to incite to insurrection, any attempt to induce others to join in any combined resistance to the lawful authority of the State. As an element, the accused must have contemplated resistance by force, but in this respect he may be found guilty if he intended that an insurrection "should happen during any time within which he might reasonably expect his influence to continue to be directly

operative in causing such action by those whom he sought to induce." *Held* that the statute, as construed and applied in this case, is repugnant to the Fourteenth Amendment in that it furnishes no sufficiently ascertainable standard of guilt and interferes unduly with freedom of speech and of assembly. Pp. 253, 261.
182 Ga. 582; 186 S. E. 429, reversed.

APPEALS from judgments, rendered on cross-appeals, in a *habeas corpus* proceeding. The court below sustained the trial court in deciding that the criminal statute involved did not infringe liberty of speech and assembly, but differed with its holding that the statute was too vague and indefinite, and reversed its decision discharging the appellant here.

Mr. Whitney North Seymour, with whom *Messrs. W. A. Sutherland, Herbert T. Wechsler,* and *Carol King* were on the brief, for appellant.

Mr. J. Walter LeCraw, Assistant Solicitor General of Georgia, with whom *Messrs. M. J. Yeomans,* Attorney General, and *John A. Boykin,* Solicitor General, were on the brief, for appellee.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The appellant claims his conviction in a state court deprived him of his liberty contrary to the guarantees of the Fourteenth Amendment. He assigns as error the action of the Supreme Court of Georgia in overruling his claim and refusing him a discharge upon *habeas corpus.* The petition for the writ, presented to the Superior Court of Fulton County, asserted the appellant was unlawfully detained by the appellee as sheriff under the supposed authority of a judgment pronouncing him guilty of attempting to incite insurrection, as defined in § 56 of the Penal Code, and sentencing him to imprisonment

for not less than eighteen nor more than twenty years. Attached were copies of the judgment and the indictment and a statement of the evidence upon which the verdict and judgment were founded. The petition alleged the judgment and sentence were void and appellant's detention illegal because the statute under which he was convicted denies and illegally restrains his freedom of speech and of assembly and is too vague and indefinite to provide a sufficiently ascertainable standard of guilt, and further alleged that there had been no adjudication by any court of the constitutional validity of the statute as applied to appellant's conduct. A writ issued. The appellee answered, demurred specially to, and moved to strike, so much of the petition as incorporated the evidence taken at the trial. At the hearing the statement of the evidence was identified and was conceded by the appellee to be full and accurate. The court denied the motion to strike, overruled the special demurrer and an objection to the admission of the trial record, decided that the statute, as construed and applied in the trial of the appellant, did not infringe his liberty of speech and of assembly but ran afoul of the Fourteenth Amendment because too vague and indefinite to provide a sufficiently ascertainable standard of guilt, and ordered the prisoner's discharge from custody. The appellee took the case to the Supreme Court of Georgia, assigning as error the ruling upon his demurrer, motion, and objection, and the decision against the validity of the statute. The appellant, in accordance with the state practice, also appealed, assigning as error the decision with respect to his right of free speech and of assembly. The two appeals were separately docketed but considered in a single opinion which reversed the judgment on the appellee's appeal and affirmed on that of the appellant,[1] concluding: "Under

[1] 182 Ga. 582; 186 S. E. 429.

the pleadings and the evidence, which embraced the record on the trial that resulted in the conviction, the court erred, in the *habeas corpus* proceeding, in refusing to remand the prisoner to the custody of the officers."

The federal questions presented, and the manner in which they arise, appear from the record of appellant's trial and conviction embodied in the petition, and from the opinions of the State Supreme Court in the criminal proceeding.

At the July Term 1932 of the Superior Court of Fulton County an indictment was returned charging against the appellant an attempt to induce others to join in combined resistance to the lawful authority of the state with intent to deny, to defeat, and to overthrow such authority by open force, violent means, and unlawful acts; alleging that insurrection was intended to be manifested and accomplished by unlawful and violent acts. The indictment specified that the attempt was made by calling and attending public assemblies and by making speeches for the purpose of organizing and establishing groups and combinations of white and colored persons under the name of the Communist Party of Atlanta for the purpose of uniting, combining, and conspiring to incite riots and to embarrass and impede the orderly processes of the courts and offering combined resistance to, and, by force and violence, overthrowing and defeating the authority of the state; that by speech and persuasion, the appellant solicited and attempted to solicit persons to join, confederate with, and become members of the Communist Party and the Young Communist League and introduced into the state and circulated, aided and assisted in introducing and circulating, booklets, papers, and other writings with the same intent and purpose. The charge was founded on § 56 of the Penal Code, one of four related sections. Section 55 defines insurrection, § 56 defines an attempt to incite insurrection, § 57 prescribes the death

penalty for conviction of the offenses described in the two preceding sections unless the jury shall recommend mercy, and § 58 penalizes, by imprisonment, the introduction and circulation of printed matter for the purpose of inciting insurrection, riot, conspiracy, etc. The sections are copied in the margin.[2]

The appellant was brought to trial and convicted. He appealed on the ground that, under the statute as construed by the trial court in its instructions to the jury, there was no evidence to sustain a verdict of guilty. The Supreme Court affirmed the judgment upon a broader and different construction of the Act.[3] The appellant moved for a rehearing, contending, *inter alia*, that, as so construed, the statute violated the Fourteenth Amendment. The court refused to pass upon the constitutional questions thus raised, elaborated and explained its construction of the statute in its original opinion, and de-

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[2] "55. Insurrection shall consist in any combined resistance to the lawful authority of the State, with intent to the denial thereof, when the same is manifested or intended to be manifested by acts of violence.

"56. Any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State shall constitute an attempt to incite insurrection.

"57. Any person convicted of the offense of insurrection, or an attempt to incite insurrection, shall be punished with death; or, if the jury recommend to mercy, confinement in the penitentiary for not less than five nor more than 20 years.

"58. If any person shall bring, introduce, print, or circulate, or cause to be introduced, circulated, or printed, or aid or assist, or be in any manner instrumental in bringing, introducing, circulating, or printing within this State any paper, pamphlet, circular, or any writing, for the purpose of inciting insurrection, riot, conspiracy, or resistance against the lawful authority of the State, or against the lives of the inhabitants thereof, or any part of them, he shall be punished by confinement in the penitentiary for not less than five nor longer than 20 years." (Georgia Code, 1933, §§ 26–901 to 26–904, inclusive.)

[3] *Herndon* v. *State*, 178 Ga. 832; 174 S. E. 597.

nied a rehearing.[4] The appellant perfected an appeal to this court claiming that he had timely raised the federal questions and we, therefore, had jurisdiction to decide them. We held we were without jurisdiction.[5] Upon his commitment to serve his sentence he sought the writ of *habeas corpus*.

In the present proceeding the Superior Court and Supreme Court of Georgia have considered and disposed of the contentions based upon the Federal Constitution. The scope of a *habeas corpus* proceeding in the circumstances disclosed is a state and not a federal question and since the state courts treated the proceeding as properly raising issues of federal constitutional right, we have jurisdiction and all such issues are open here. We must, then, inquire whether the statute as applied in the trial denied appellant rights safeguarded by the Fourteenth Amendment.

The evidence on which the judgment rests consists of appellant's admissions and certain documents found in his possession. The appellant told the state's officers that some time prior to his arrest he joined the Communist Party in Kentucky and later came to Atlanta as a paid organizer for the party, his duties being to call meetings, to educate and disseminate information respecting the party, to distribute literature, to secure members, and to work up an organization of the party in Atlanta; and that he had held or attended three meetings called by him. He made no further admission as to what he did as an organizer, or what he said or did at the meetings. When arrested he carried a box containing documents. After he was arrested he conducted the officers to his room where additional documents and bundles of newspapers and periodicals were found, which

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[4] *Herndon* v. *State,* 179 Ga. 597; 176 S. E. 620.

[5] *Herndon* v. *Georgia,* 295 U. S. 441.

he stated were sent him from the headquarters of the Communist Party in New York. He gave the names of persons who were members of the organization in Atlanta, and stated he had only five or six actual members at the time of his apprehension. The stubs of membership books found in the box indicated he had enrolled more members than he stated. There was no evidence that he had distributed any of the material carried on his person and found in his room, or had taken any of it to meetings, save two circulars or appeals respecting county relief which are confessedly innocuous.

The newspapers, pamphlets, periodicals, and other documents found in his room were, so he stated, intended for distribution at his meetings. These the appellee concedes were not introduced in evidence. Certain documents in his possession when he was arrested were placed in evidence. They fall into five classes: first, receipt books showing receipts of small sums of money, pads containing certificates of contributions to the Communist Party's Presidential Election Campaign Fund, receipts for rent of a post office box, and Communist Party membership books; secondly, printed matter consisting of magazines, pamphlets, and copies of the "Daily Worker," styled the "Central Organ of the Communist Party," and the "Southern Worker," also, apparently, an official newspaper of the party; thirdly, two books, one "Life and Struggles of Negro Toilers," by George Padmore, and the other "Communism and Christianism Analyzed and Contrasted from the Marxian and Darwinian Points of View" by Rt. Rev. William Montgomery Brown, D. D.; fourthly, transcripts of minutes of meetings apparently held in Atlanta; fifthly, two circulars, one of which was prepared by the appellant and both of which had been circulated by him in Fulton County. All of these may be dismissed as irrelevant except those falling within the first and second

groups. No inference can be drawn from the possession of the books mentioned, either that they embodied the doctrines of the Communist Party or that they represented views advocated by the appellant. The minutes of meetings contain nothing indicating the purposes of the organization or any intent to overthrow organized government; on the contrary, they indicate merely discussion of relief for the unemployed. The two circulars, admittedly distributed by the appellant, had nothing to do with the Communist Party, its aims or purposes, and were not appeals to join the party but were concerned with unemployment relief in the county and included appeals to the white and negro unemployed to organize and represent the need for further county aid. They were characterized by the Supreme Court of Georgia as "more or less harmless."

The documents of the first class disclose the activity of the appellant as an organizer but, in this respect, add nothing to his admissions.

The matter appearing upon the membership blanks is innocent upon its face however foolish and pernicious the aims it suggests. Under the heading "What is the Communist Party?" this appears:

"The Party is the vanguard of the working class and consists of the best, most class conscious, most active, the most courageous members of that class. It incorporates the whole body of experience of the proletarian struggle, basing itself upon the revolutionary theory of Marxism and representing the general and lasting interests of the whole of the working class, the Party personifies the unity of proletarian principles, of proletarian will and of proletarian revolutionary action.

"We are the Party of the working class. Consequently, nearly the whole of that class (in time of war and civil war, the whole of that class) should work under the guidance of our Party, should create the closest contacts with our Party."

This vague declaration falls short of an attempt to bring about insurrection either immediately or within a reasonable time but amounts merely to a statement of ultimate ideals. The blanks, however, indicate more specific aims for which members of the Communist Party are to vote. They are to vote Communist for

"1. Unemployment and Social Insurance at the expense of the State and employers.

"2. Against Hoover's wage-cutting policy.

"3. Emergency relief for the poor farmers without restrictions by the government and banks; exemption of poor farmers from taxes and from forced collection of rents or debts.

"4. Equal rights for the Negroes and self-determination for the Black Belt.

"5. Against capitalistic terror: against all forms of suppression of the political rights of the workers.

"6. Against imperialist war; for the defense of the Chinese people and of the Soviet Union."

None of these aims is criminal upon its face. As to one, the 4th, the claim is that criminality may be found because of extrinsic facts. Those facts consist of possession by appellant of booklets and other literature of the second class illustrating the party doctrines. The State contends these show that the purposes of the Communist Party were forcible subversion of the lawful authority of Georgia. They contain, *inter alia,* statements to the effect that the party bases itself upon the revolutionary theory of Marxism, opposes "bosses' wars," approves of the Soviet Union, and desires the "smashing" of the National Guard, the C. M. T. C., and the R. O. T. C. But the State especially relies upon a booklet entitled "The Communist Position on the Negro Question," on the cover of which appears a map of the United States having a dark belt across certain Southern states and the

phrase "Self-Determination for the Black Belt." The booklet affirms that the source of the Communist slogan "Right of Self-Determination of the Negroes in the Black Belt" is a resolution of the Communist International on the Negro question in the United States adopted in 1930, which states that the Communist Party in the United States has been actively attempting to win increasing sympathy among the negro population, that certain things have been advocated for the benefit of the Negroes in the Northern states, but that in the Southern portion of the United States the Communist slogan must be "The Right of Self-Determination of the Negroes in the Black Belt." The resolution defines the meaning of the slogan as

"(a) Confiscation of the landed property of the white landowners and capitalists for the benefit of the negro farmers . . . Without this revolutionary measure, without the agrarian revolution, the right of self-determination of the Negro population would be only a Utopia or, at best, would remain only on paper without changing in any way the actual enslavement."

"(b) Establishment of the State Unity of the Black Belt . . . If the right of self-determination of the Negroes is to be put into force, it is necessary wherever possible to bring together into one governmental unit all districts of the South where the majority of the settled population consists of negroes . . ."

"(c) Right of Self-Determination. This means complete and unlimited right of the negro majority to exercise governmental authority in the entire territory of the Black Belt, as well as to decide upon the relations between their territory and other nations, particularly the United States . . . First of all, true right to self-determination means that the negro majority and not the white minority in the entire territory of the administratively

united Black Belt exercises the right of administering governmental, legislative, and judicial authority. At the present time all this power is concentrated in the hands of the white bourgeoisie and landlords. It is they who appoint all officials, it is they who dispose of public property, it is they who determine the taxes, it is they who govern and make the laws. Therefore, the overthrow of this class rule in the Black Belt is unconditionally necessary in the struggle for the negroes' right to self-determination. This, however, means at the same time the overthrow of the yoke of American imperialism in the Black Belt on which the forces of the local white bourgeoisie depend. Only in this way, only if the negro population of the Black Belt wins its freedom from American imperialism even to the point of deciding itself the relations between its country and other governments, especially the United States, will it win real and complete self-determination. One should demand from the beginning that no armed forces of American imperialism should remain on the territory of the Black Belt."

Further statements appearing in the pamphlet are:

"Even if the situation does not yet warrant the raising of the question of uprising, one should not limit oneself at present to propaganda for the demand, 'Right to Self-Determination,' but should organize mass actions, such as demonstrations, strikes, tax boycott movements, etc."

"One cannot deny that it is just possible for the negro population of the Black Belt to win the right to self-determination during capitalism; but it is perfectly clear and indubitable that this is possible only through successful revolutionary struggle for power against the American bourgeoisie, through wresting the negroes' right of self-determination from American imperialism. Thus, the slogan of right to self-determination is a real slogan of National Rebellion which, to be considered as such, need

not be supplemented by proclaiming struggle for the complete separation of the negro zone, at least not at present."

There is more of the same purport, particularly references to the "revolutionary trade unions in the South," "revolutionary struggle against the ruling white bourgeoisie," and "revolutionary program of the Communist Party."

There is no evidence the appellant distributed any writings or printed matter found in the box he carried when arrested, or any other advocating forcible subversion of governmental authority. There is no evidence the appellant advocated, by speech or written word, at meetings or elsewhere, any doctrine or action implying such forcible subversion. There is evidence tending to prove that the appellant held meetings for the purpose of recruiting members of the Communist Party and solicited contributions for the support of that party and there is proof of the doctrines which that party espouses. Appellant's intent to incite insurrection, if it is to be found, must rest upon his procuring members for the Communist Party and his possession of that party's literature when he was arrested.

Section 55 of the Georgia Penal Code defines insurrection as "combined resistance to the lawful authority of the State, with intent to the denial thereof, when the same is manifested or intended to be manifested by acts of violence." [6] The appellant was not indicted under this section. Section 58 denounces the introduction, printing, or circulation, or assisting to print or circulate any document "for the purpose of inciting insurrection." The appellant was not indicted under this section.

Section 56, under which the indictment is laid, makes no reference to force or violence except by the phrase

[6] Note 2, *supra*.

"combined resistance to the lawful authority of the State." The Supreme Court evidently importing from the similar phraseology in § 55 the additional element contained in that section, namely, "manifested or intended to be manifested by acts of violence," has decided that intended resort to force is an essential element of the offense defined by § 56.

To ascertain how the Act is held to apply to the appellant's conduct we turn to the rulings of the state courts in his case. The trial court instructed the jury: "In order to convict the defendant, . . . it must appear clearly by the evidence that immediate serious violence against the State of Georgia was to be expected or advocated." The jury rendered a verdict of guilty. In the Supreme Court the appellant urged that the evidence was wholly insufficient to sustain the verdict under the law as thus construed. That court sustained the conviction by construing the statute thus:

"Force must have been contemplated, but, as said above, the statute does not include either its occurrence or its imminence as an ingredient of the particular offense charged. . . . Nor would it be necessary to guilt that the alleged offender should have intended that an insurrection should follow instantly or at any given time, but it would be sufficient that he intended it to happen at any time, as a result of his influence, by those whom he sought to incite." [7]

Upon application for rehearing the court further elaborated its views as to the meaning of the statute:

"Force must have been contemplated, but the statute does not include either its occurrence or its imminence as an ingredient of the particular offense charged. Nor would it be necessary to guilt that the alleged offender

[7] 178 Ga. 855, 174 S. E. 597.

should have intended that an insurrection should follow instantly or at any given time, but as to this element it would be sufficient if he intended that it should happen at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce. . . ." [8]

The affirmance of conviction upon the trial record necessarily gives § 56 the construction that one who seeks members for or attempts to organize a local unit of a party which has the purposes and objects disclosed by the documents in evidence may be found guilty of an attempt to incite insurrection.

The questions are whether this construction and application of the statute deprives the accused of the right of freedom of speech and of assembly guaranteed by the Fourteenth Amendment, and whether the statute so construed and applied furnishes a reasonably definite and ascertainable standard of guilt.

The appellant, while admitting that the people may protect themselves against abuses of the freedom of speech safeguarded by the Fourteenth Amendment by prohibiting incitement to violence and crime, insists that legislative regulation may not go beyond measures forefending against "clear and present danger" of the use of force against the state. For this position he relies upon our decisions under the Federal Espionage Acts [9] and cognate state legislation. These made it criminal wilfully to cause or to attempt to cause, or incite or attempt to incite, insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States or wilfully to obstruct or attempt to obstruct the recruiting or enlistment service of the United States or to con-

[8] 179 Ga. 600, 176 S. E. 622.

[9] Act of June 15, 1917, c. 30, 40 Stat. 217, 219; amended by Act of May 16, 1918, c. 75, 40 Stat. 553.

spire for these purposes. We sustained the power of the government or a state to protect the war operations of the United States by punishing intentional interference with them. We recognized, however, that words may be spoken or written for various purposes and that wilful and intentional interference with the described operations of the government might be inferred from the time, place, and circumstances of the act. "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree." [10]

The legislation under review differs radically from the Espionage Acts in that it does not deal with a wilful attempt to obstruct a described and defined activity of the government.

The State, on the other hand, insists that our decisions uphold state statutes making criminal utterances which have a "dangerous tendency" towards the subversion of government. It relies particularly upon *Gitlow* v. *New York,* 268 U. S. 652. There, however, we dealt with a statute which, quite unlike § 56 of the Georgia Criminal Code, denounced as criminal certain acts carefully and adequately described. We said:

"And a State may penalize utterances which openly advocate the overthrow of the representative and constitutional form of government of the United States and the several States, by violence or other unlawful means." (p. 668.)

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[10] See *Schenck* v. *United States,* 249 U. S. 47, 52; *Frohwerk* v. *United States,* 249 U. S. 204; *Debs* v. *United States,* 249 U. S. 211; *Abrams* v. *United States,* 250 U. S. 616; *Schaefer* v. *United States,* 251 U. S. 466; *Pierce* v. *United States,* 252 U. S. 239; *O'Connell* v. *United States,* 253 U. S. 142; *State* v. *Holm,* 139 Minn. 267; 166 N. W. 181; *Gilbert* v. *Minnesota,* 254 U. S. 325.

"By enacting the present statute the State has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute. *Mugler* v. *Kansas,* 123 U. S. 623, 661. And the case is to be considered 'in the light of the principle that the State is primarily the judge of regulations required in the interest of public safety and welfare;' and that its police 'statutes may only be declared unconstitutional where they are arbitrary or unreasonable attempts to exercise authority vested in the State in the public interest.'" (p. 668.)

And it was in connection with the statute there involved that the court quoted language relied upon below and in argument here from *People* v. *Lloyd,* 304 Ill. 23; 136 N. E. 505, to the effect that a state is not compelled to delay adoption of such preventive measures until the apprehended danger becomes certain. Out of excess of caution the distinction was again clearly drawn between acts of the order of the Espionage Act and the New York act under review.

". . . when the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be constitutional and that the use of the language comes within its prohibition.

"It is clear that the question in such cases is entirely different from that involved in those cases where the

statute merely prohibits certain acts involving the danger of substantive evil, without any reference to language itself, and it is sought to apply its provisions to language used by the defendant for the purpose of bringing about the prohibited results. There, if it be contended that the statute cannot be applied to the language used by the defendant because of its protection by the freedom of speech or press, it must necessarily be found, as an original question, without any previous determination by the legislative body, whether the specific language used involved such likelihood of bringing about the substantive evil as to deprive it of the constitutional protection." (pp. 670–671.)

It is evident that the decision sustaining the New York statute furnishes no warrant for the appellee's contention that under a law general in its description of the mischief to be remedied and equally general in respect of the intent of the actor, the standard of guilt may be made the "dangerous tendency" of his words.

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. Legislation which goes beyond this need violates the principle of the Constitution. If, therefore, a state statute penalize innocent participation in a meeting held with an innocent purpose merely because the meeting was held under the auspices of an organization membership in which, or the advocacy of whose principles, is also denounced as criminal, the law, so construed and applied, goes beyond the power to restrict abuses of freedom

of speech and arbitrarily denies that freedom.[11] And, where a statute is so vague and uncertain as to make criminal an utterance or an act which may be innocently said or done with no intent to induce resort to violence or on the other hand may be said or done with a purpose violently to subvert government, a conviction under such a law cannot be sustained. Upon this view we held bad a statute of California providing that "Any person who displays a red flag, . . . in any public place or in any meeting place or public assembly, or from or on any house, building or window as a sign, symbol or emblem of opposition to organized government . . . is guilty of a felony." [12]

After pointing out that peaceful agitation for a change of our form of government is within the guaranteed liberty of speech, we said of the act in question: "A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment." (p. 369.)

1. The appellant had a constitutional right to address meetings and organize parties unless in so doing he violated some prohibition of a valid statute. The only prohibition he is said to have violated is that of § 56 forbidding incitement or attempted incitement to insurrection by violence. If the evidence fails to show that he did so incite, then, as applied to him, the statute unreasonably limits freedom of speech and freedom of assembly and violates the Fourteenth Amendment. We are of opinion that the requisite proof is lacking. From what has been said above with respect to the evidence offered at

[11] *DeJonge* v. *Oregon,* 299 U. S. 353.

[12] *Stromberg* v. *California,* 283 U. S. 359.

the trial it is apparent that the documents found upon the appellant's person were certainly, as to some of the aims stated therein, innocent and consistent with peaceful action for a change in the laws or the constitution. The proof wholly fails to show that the appellant had read these documents; that he had distributed any of them; that he believed and advocated any or all of the principles and aims set forth in them, or that those he had procured to become members of the party knew or approved of any of these documents.

Thus, the crucial question is not the formal interpretation of the statute by the Supreme Court of Georgia but the application given it. In its application the offense made criminal is that of soliciting members for a political party and conducting meetings of a local unit of that party when one of the doctrines of the party, established by reference to a document not shown to have been exhibited to anyone by the accused, may be said to be ultimate resort to violence at some indefinite future time against organized government. It is to be borne in mind that the legislature of Georgia has not made membership in the Communist Party unlawful by reason of its supposed dangerous tendency even in the remote future. The question is not whether Georgia might, in analogy to what other states have done, so declare.[13] The appellant induced others to become members of the Communist Party. Did he thus incite to insurrection by reason of the fact that they agreed to abide by the tenets of the party, some of them lawful, others, as may be assumed, unlawful, in the absence of proof that he brought the unlawful aims to their notice, that he approved them, or that the fantastic program

[13] See the statutes drawn in question in *Gitlow* v. *New York*, 268 U. S. 652, at 654, and in *Whitney* v. *California*, 274 U. S. 357, 359.

they envisaged was conceived of by anyone as more than an ultimate ideal? Doubtless circumstantial evidence might affect the answer to the question if appellant had been shown to have said that the Black Belt should be organized at once as a separate state and that that objective was one of his principal aims. But here circumstantial evidence is all to the opposite effect. The only objectives appellant is proved to have urged are those having to do with unemployment and emergency relief which are void of criminality. His membership in the Communist Party and his solicitation of a few members wholly fails to establish an attempt to incite others to insurrection. Indeed, so far as appears, he had but a single copy of the booklet the State claims to be objectionable; that copy he retained. The same may be said with respect to the other books and pamphlets, some of them of more innocent purport. In these circumstances, to make membership in the party and solicitation of members for that party a criminal offense, punishable by death, in the discretion of a jury, is an unwarranted invasion of the right of freedom of speech.

2. The statute, as construed and applied in the appellant's trial, does not furnish a sufficiently ascertainable standard of guilt. The Act does not prohibit incitement to violent interference with any given activity or operation of the state. By force of it, as construed, the judge and jury trying an alleged offender cannot appraise the circumstances and character of the defendant's utterances or activities as begetting a clear and present danger of forcible obstruction of a particular state function. Nor is any specified conduct or utterance of the accused made an offense.

The test of guilt is thus formulated by the Supreme Court of the state. Forcible action must have been contemplated but it would be sufficient to sustain a con-

viction if the accused intended that an insurrection "should happen at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce." If the jury conclude that the defendant should have contemplated that any act or utterance of his in opposition to the established order or advocating a change in that order, might, in the distant future, eventuate in a combination to offer forcible resistance to the State, or as the State says, if the jury believe he should have known that his words would have "a dangerous tendency" then he may be convicted. To be guilty under the law, as construed, a defendant need not advocate resort to force. He need not teach any particular doctrine to come within its purview. Indeed, he need not be active in the formation of a combination or group if he agitate for a change in the frame of government, however peaceful his own intent. If, by the exercise of prophesy, he can forecast that, as a result of a chain of causation, following his proposed action a group may arise at some future date which will resort to force, he is bound to make the prophesy and abstain, under pain of punishment, possibly of execution. Every person who attacks existing conditions, who agitates for a change in the form of government, must take the risk that if a jury should be of opinion he ought to have foreseen that his utterances might contribute in any measure to some future forcible resistance to the existing government he may be convicted of the offense of inciting insurrection. Proof that the accused in fact believed that his effort would cause a violent assault upon the state would not be necessary to conviction. It would be sufficient if the jury thought he reasonably might foretell that those he persuaded to join the party might, at some time in the indefinite future, resort to forcible resistance of

government. The question thus proposed to a jury involves pure speculation as to future trends of thought and action. Within what time might one reasonably expect that an attempted organization of the Communist Party in the United States would result in violent action by that party? If a jury returned a special verdict saying twenty years or even fifty years the verdict could not be shown to be wrong. The law, as thus construed, licenses the jury to create its own standard in each case. In this aspect what was said in *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, is particularly apposite:

"Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below, in its opinion, to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury . . ." (p. 89.)

The decisions relied on by the State held the Sherman Law furnished a reasonable standard of guilt because it made a standard long recognized by the common law the statutory test.[14]

The statute, as construed and applied, amounts merely to a dragnet which may enmesh anyone who agitates for a change of government if a jury can be persuaded that he ought to have foreseen his words would have some

[14] *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86; *Nash* v. *United States*, 229 U. S. 373.

effect in the future conduct of others. No reasonably ascertainable standard of guilt is prescribed. So vague and indeterminate are the boundaries thus set to the freedom of speech and assembly that the law necessarily violates the guarantees of liberty embodied in the Fourteenth Amendment.

The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE VAN DEVANTER, dissenting.

I am of opinion that the Georgia statute, as construed and applied by the supreme court of the State in Herndon's case, prescribes a reasonably definite and ascertainable standard by which to determine the guilt or innocence of the accused, and does not encroach on his right of freedom of speech or of assembly.

It plainly appears, I think, that the offense defined in the statute, and of which Herndon was convicted, was not that of advocating a change in the state government by lawful means, such as an orderly exertion of the elective franchise or of the power to amend the state constitution, but was that of attempting to induce and incite others to join in combined *forcible* resistance to the lawful authority of the State.

Sections 55, 56 and 57 of the Penal Code of Georgia [1] deal with insurrection, attempts to incite insurrection, and the punishment therefor, and are so closely related that all evidently have a bearing on the scope and meaning of any one of them. Section 55 denounces insurrection and defines it as "any combined resistance to the lawful authority of the State, with intent to the denial thereof, when the same is manifested or intended to be manifested by acts of violence." Section 56 denounces

[1] Georgia Code 1933, §§ 26-901, 26-902, 26-903.

an attempt to incite insurrection and defines it as "any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State." Section 57 prescribes the punishment for each of these offenses.

While § 56 does not in direct terms include force or violence as a feature of the "combined resistance to the lawful authority of the State" the attempt to induce which it denounces, the supreme court of the State has construed the section, doubtless by reason of its relation to the others, as making intended resort to force or violence an essential element of such "combined resistance." [2] Therefore the section must be taken as if expressly embodying this construction. It was under § 56 that Herndon was indicted, tried and convicted.

By the indictment he was charged with attempting to induce others to join in combined resistance to the lawful authority of the State "by open force and by violent means, and by unlawful acts," the modes of attempted inducement being specified. Upon the trial the court instructed the jury that neither "possession of literature insurrectionary in its nature" nor "engaging in academic or philosophical discussion of abstract principles of economics or political or other subjects, however radical or revolutionary in their nature," would warrant a conviction; and that a verdict of guilt could not be given unless it clearly appeared from the evidence that "immediate serious violence against the State" was expected or advocated by the accused.

In affirming the conviction the supreme court of the State held that under the statute "force must have been contemplated," but that it is not necessary to guilt that the accused "should have intended that an insurrection

[2] *Carr* v. *State*, 176 Ga. 747; 169 S. E. 201; *Herndon* v. *State*, 178 Ga. 832, 855; 174 S. E. 597.

should follow instantly or at any given time, but it would be sufficient that he intended it to happen at any time, as a result" of his persuasion—the intent of the statute being "to arrest at its incipiency any effort to overthrow the state government, where it takes the form of an actual attempt to incite others to insurrection."

Then, coming to consider the sufficiency of the evidence, the supreme court stated: "From what has been said, the question here is simply this: did the evidence show that the defendant made any attempt to induce others to come together in any combined *forcible* resistance to the lawful authority of the State?" And the court concluded its consideration of this question by saying, "The jury were amply authorized to infer that *violence* was intended and that the defendant did attempt to induce others to combine in *such* resistance to the lawful authority of the State." (Italics supplied.)[3]

The accused sought a rehearing, largely because of his understanding of what was said in the court's opinion respecting the expected time of the intended resort to force. A rehearing was denied, and in that connection the court said: [4]

"The language used by this court should be considered with the usual reasonable implications. The phrase 'at any time,' as criticized in the motion for rehearing, was not intended to mean at any time in the indefinite future, or at any possible later time, however remote. An activity now could hardly be expected to be the direct producing cause of an insurrection after the lapse of a great period of time, and it was not the purpose of this court to suggest that as to the mental requisite any such intent would be a sufficient ingredient of an attempt to incite an insurrection. On the contrary the phrase 'at

[3] *Herndon* v. *State,* 178 Ga. 832, 855, 867; 174 S. E. 597.

[4] *Herndon* v. *State,* 179 Ga. 597, 599; 176 S. E. 620.

any time' was necessarily intended, and should have been understood, to mean within a reasonable time; that is, within such time as one's persuasion or other adopted means might reasonably be expected to be directly operative in causing an insurrection. Accordingly, the statements by this court as quoted in the motion for rehearing are to be accepted in the following sense: *Force must have been contemplated,* but the statute does not include either its occurrence or its imminence as an ingredient of the particular offense charged. Nor would it be necessary to guilt that the alleged offender should have intended that an insurrection should follow instantly or at any given time, but as to this element it would be sufficient if he intended that it should happen at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce. This statement, considered with what was said in the original decision, represents the view of this court as to the proper construction of the statute under consideration; *and under the statute as thus interpreted, we say, as before, that the evidence was sufficient to authorize the conviction.* In view of what has been said above, it would seem that all contentions made in the motion for rehearing should necessarily fail, based, as they are, upon an erroneous construction of our decision." (Italics supplied.)

It thus is made quite plain that the case proceeded from beginning to end, and in both state courts, upon the theory that the offense denounced by the statute and charged in the indictment was that of attempting to induce and incite others to join in combined *forcible* resistance to the lawful authority of the State; that the jury returned a verdict of guilty upon that theory; and that it was upon the same theory that the supreme court held

the jury's verdict was supported by the evidence, and affirmed the conviction.

The present appeal is not from that judgment of affirmance but from a judgment denying a subsequent petition for *habeas corpus*.[5]

If it be assumed that on this appeal the evidence produced on the trial in the criminal case may be examined to ascertain how the statute was applied, I am of opinion, after such an examination, that the statute was applied as if the words "combined resistance" therein were in letter and meaning "combined forcible resistance."

The evidence, all of which is embodied in the present record, will be here stated in reduced volume without omitting anything material.

Herndon is a negro and a member of the Communist Party of the U. S. A., which is a section of the Communist International. He was sent from Kentucky to Atlanta, Georgia, as a paid organizer for the party. Atlanta is within an area where there is a large negro population, and the Communist Party has been endeavoring to extend its activities and membership to that population among others. Herndon's duties as an organizer were to call and conduct meetings, to disseminate information respecting the party, to distribute its literature, to educate prospects and secure members, to receive dues and contributions, and to work up a subordinate organization of the party. He called and conducted meetings which evidently were secret, solicited and secured members, and received dues and contributions. He and others, when becoming members, subscribed to an obligation saying "The undersigned declares his adherence to the program and statutes of the Communist International and the Communist Party of the

[5] *Lowry* v. *Herndon*, 182 Ga. 582; 186 S. E. 429.

U. S. A., and agrees to submit to the discipline of the party and to engage actively in its work."

When arrested he had under his arm a box in which he was carrying membership and collection books which he had been using and various pamphlets, books and documents, all pertaining to the structure, purposes and activities of the party. Two or three of the papers had been prepared by him and disclosed that he was an active spirit in the "Section Committee" and the "Unemployment Committee," both subordinate local agencies of the party. The membership books, besides showing names of those whom he had induced to become members and dates of their admission, contained extracts from the party statutes, some of which read:

"A member of the Party can be every person from the age of eighteen up who accepts the program and statutes of the Communist International and the Communist Party of the U. S. A., who becomes a member of a basic organization of the Party, who is active in this organization, who subordinates himself to all decisions of the Comintern and of the Party, and regularly pays his membership dues."

"The strictest Party Discipline is the most solemn duty of all Party members and all Party organizations. The decisions of the CI and the Party Convention of the CC and of all leading committees of the Party, must be promptly carried out. Discussion of questions over which there have been differences must not continue after the decision has been made."

"The Party is the vanguard of the working class and consists of the best, most class conscious, most active, the most courageous members of that class. It incorporates the whole body of experience of the proletarian struggle, basing itself upon the *revolutionary theory of Marxism* and representing the general and lasting interests of the

whole of the working class. The Party personifies the unity of proletarian principles, of proletarian will and of proletarian revolutionary action."

The collection books contained the statement "Every dollar collected is a bullet fired into the boss class."

The membership and collection books had been sent to Herndon from the main office of the party in New York for use by him, and he had been using them in securing members and in collecting dues and contributions. With the exception of two or three papers prepared by him and heretofore mentioned, the literature which he was carrying under his arm when arrested had been sent to him from the same office, together with many pamphlets, books and other publications, for use and distribution by him in his work as an organizer. The literature which he had with him when arrested was produced in evidence and will now be described, chiefly by titles and extracts (italics supplied).

"APPEAL TO SOUTHERN YOUNG WORKERS."

"The Young Communist League is the champion not only of the young white workers but especially of the doubly oppressed negro young workers. The Young Communist League fights against the whole system of race discrimination and stands for full racial, political, economic and social equality of all workers. . . .

"The chief aim of the Young Communist League is to organize the young workers for a struggle against the bosses and against the whole profit system.

. . . . . .

"The Young Communist League fights for:

. . . . . .

"Full political, social and racial equality for the negro workers.

"Against bosses' wars! Defend the Soviet Union!

"Smash the National Guard, the C. M. T. C. and R. O. T. C."

"LIFE AND STRUGGLES OF NEGRO TOILERS."

"In no other so-called civilized country in the world are human beings treated as badly as these 15 million negroes [in the United States]. They live under a perpetual regime of white terror. . . . They are absolutely at the mercy of every fiendish mob incited by the white landlords and capitalists."

"COMMUNISM AND CHRISTIANISM."

"Banish the Gods from the Skies and Capitalists from the Earth and make the World safe for Industrial Communism.

. . . . . .

"The trouble with every reformatory socialism of modern times is, that it undertakes the impossibility of changing the fruit of the capitalist state into that of the communistic one, without changing the political organism; but to do that is as impossible as to gather grapes from thorns or figs from thistles. Hence an uprooting and replanting are necessary (*a revolution not a reformation*) which will give the world a new tree of state.

"Capitalism no longer grows the fruits (foods, clothes and houses) which are necessary to the sustenance of all the world. Hence it must be *dug up by the roots* in order that a tree which is so organized that it will bear these necessities for the whole world may be *planted in its place.*

"The people of Russia have accomplished this *uprooting and replanting* (this *revolution*) in the case of their state, and those of every nation are destined to do the same in one way or another, each according to its historical and economic development, *some with much violence, most, I hope, with but little.*"

"COMMUNIST POSITION ON THE NEGRO QUESTION."

This is a booklet of several pages and bears on the front of its cover a map of the United States showing a dark

belt stretching across considerable portions of Georgia and eight other southern states. Parts of the text are here copied.

"The slogan of the right of self-determination occupies the central place in the liberation struggle of the Negro population in the Black Belt against the yoke of American imperialism. But this slogan, as we see it, must be carried out only in connection with two other basic demands. Thus, there are three basic demands to be kept in mind in the Black Belt, namely, the following:

"(a) *Confiscation of the landed property of the white landowners and capitalists for the benefit of the negro farmers.* The land property in the hands of the white American exploiters constitutes the most important material basis of the entire system of national oppression and serfdom of the Negroes in the Black Belt. More than three-quarters of all Negro farmers here are bound in actual serfdom to the farms and plantations of the white exploiters by the feudal system of 'share cropping.'

. . . . . .

"Without this *revolutionary measure,* without the *agrarian revolution,* the right of self-determination of the Negro population would be only a Utopia or, at best, would remain only on paper without changing in any way the actual enslavement.

"(b) Establishment of the State Unity of the Black Belt. At the present time this Negro zone—precisely for the purpose of facilitating national oppression—is artificially split up and divided into a number of various states which include distant localities having a majority of white population. If the right of self-determination of the Negroes is to be put into force, it is necessary wherever possible to bring together into one governmental unit all districts of the South where the majority of the settled population consists of negroes. Within

the limits of this state there will of course remain a fairly significant white minority which must submit to the right of self-determination of the negro majority. . . .

"(c) Right of Self-Determination. This means complete and unlimited right of the negro majority to exercise governmental authority in the entire territory of the Black Belt, as well as to decide upon the relations *between their territory and other nations, particularly the United States.*"

. . . . . .

"Even if the situation does not yet warrant the raising of the question of uprising, one should not limit oneself at present to propaganda for the demand, 'Right to Self-Determination,' but should *organize mass actions, such as demonstrations, strikes, tax boycott movements,* etc."

. . . . . .

"A direct question of power is also the demand of *confiscation* of the land of the white exploiters in the South, as well as the demand of the negroes that the entire Black Belt be amalgamated into a State unit.

"Hereby, every single fundamental demand of the liberation struggle of the negroes in the Black Belt is such that—if once thoroughly understood by the negro masses and adopted as their slogan—it will lead them into the struggle for the overthrow of the power of the ruling bourgeoisie, which is impossible without such revolutionary struggle. One cannot deny that it is just possible for the negro population of the Black Belt to win the right to self-determination during capitalism; but it is perfectly clear and indubitable that this is possible only through *successful revolutionary struggle* for power against the American bourgeoisie, through *wresting* the negroes' right of self-determination *from American imperialism.* Thus, the slogan of right to self-determination is a real slogan of *National Rebellion* which, to be

considered as such, need not be supplemented by proclaiming struggle for the complete separation of the negro zone, at least not at present.

"(d) Communists must fight in the forefront of the national liberation movement and must do their utmost for the progress of this mass movement and its revolutionization. Negro Communists must clearly dissociate themselves from all bourgeois currents in the negro movement, must indefatigably oppose the spread of the influence of the bourgeois groups on the working negroes."

. . . . .

"Their constant call to the negro masses must be: *Revolutionary struggle* against the ruling white bourgeoisie, through a *fighting alliance* with the *revolutionary* white proletariat!

. . . . .

"We are Bolsheviks, members of a fighting Party of the working class, who know that the only road to the *revolutionary overthrow* of capitalism and the establishment of Communism is through welding together the iron unity of class idealogy which penetrates into our ranks, as the prerequisite to the *effective struggle* against the class enemy *physically*."

There was no direct testimony that Herndon distributed the literature just described. No member of the Communist Party came forward to tell what he did in their meetings or in inducing them to become members. Nor does this seem strange when regard is had to the obligation taken by members and to the discipline imposed. Nevertheless there was evidence from which distribution by him reasonably could be inferred. It was shown that he was an active member, was sent to Atlanta as a paid organizer, and was subject to party discipline; also that he received the literature for distribution in the course of his work and had copies of it, together with cur-

rent membership and collection books, under his arm when he was arrested; and further that he had been soliciting and securing members, which was part of the work in which the literature was to be used. He had declared his "adherence to the program and statutes" of the party and had taken like declarations from those whom he secured as members; and this tended strongly to show not only that he understood the party program and statutes as outlined in the literature but also that he brought them to the attention of others whom he secured as members. Besides, at the trial he made an extended statement to the court and jury in his defense,[6] but did not refer in any wise to the literature or deny that he had been using or distributing it. Thus there was in the evidence not merely some but adequate and undisputed basis for inferring that he had been using the literature for the purposes for which he received it. Evidently, and with reason, the jury drew this inference.

It should not be overlooked that Herndon was a negro member and organizer in the Communist Party and was engaged actively in inducing others, chiefly southern negroes, to become members of the party and participate in effecting its purposes and program. The literature placed in his hands by the party for that purpose was particularly adapted to appeal to negroes in that section, for it pictured their condition as an unhappy one resulting from asserted wrongs on the part of white landlords and employers, and sought by alluring statements of resulting advantages to induce them to join in an effort to carry into effect the measures which the literature proposed. These measures included a revolutionary uprooting of the existing capitalist state, as it was termed; confiscation of the landed property of white landowners and capitalists for the benefit of negroes; es-

[6] See Georgia Code 1933, § 38–415.

tablishment in the black belt of an independent State, possibly followed by secession from the United States; organization of mass demonstrations, strikes and tax boycotts in aid of this measure; adoption of a fighting alliance with the revolutionary white proletariat; revolutionary overthrow of capitalism and establishment of Communism through effective physical struggles against the class enemy. Proposing these measures was nothing short of advising a resort to force and violence, for all know that such measures could not be effected otherwise. Not only so, but the literature makes such repelling use of the terms "revolution," "national rebellion," "revolutionary struggle," "revolutionary overthrow," "effective physical struggle," "smash the National Guard," "mass strikes," and "violence," as to leave no doubt that the use of force in an unlawful sense is intended.

The purpose and probable effect of such literature, when under consideration in a prosecution like that against Herndon, are to be tested and determined with appropriate regard to the capacity and circumstances of those who are sought to be influenced.[7] In this instance the literature is largely directed to a people whose past and present circumstances would lead them to give unusual credence to its inflaming and inciting features.

And so it is that examination and consideration of the evidence convince me that the supreme court of the State applied the statute, conformably to its opinion, as making criminal an attempt to induce and incite others to join in combined *forcible* resistance to the lawful authority of the State.

That the constitutional guaranty of freedom of speech and assembly does not shield or afford protection for acts of intentional incitement to forcible resistance to the lawful authority of a State is settled by repeated deci-

[7] *Burns* v. *United States*, 274 U. S. 328, 335.

sions of this Court; [8] and the Georgia decisions are to the same effect.[9]

Under the statute as construed and applied it is essential that the accused intended to induce combined forcible resistance. The presence of the intent aggravates the inducement and brings it more certainly within the power of the State to denounce it as a crime than otherwise it would be. The supreme court of the State in both of its opinions was dealing with a statute and a charge in which the intent of the accused was an element of the offense. In the original opinion the court incautiously said "it would be sufficient that he intended it [the combined and forcible resistance] to happen at any time." In its opinion on rehearing it said the phrase "at any time" had not been intended to mean any time in the indefinite future; and by way of avoiding such a meaning the court changed that part of the original opinion by making it read "at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce." I do not perceive that this puts the standard of guilt at large or renders it inadmissibly vague. The accused must intend that combined *forcible* resistance shall proximately result from his act of inducement. There is no uncertainty in that. The intended point of time must be within the period during which he "might reasonably expect" his inducement to remain *directly* operative in causing the combined forcible resistance. The words "might reasonably expect" have as much precision as is admissible in such a matter, are not

[8] *Gitlow* v. *New York,* 268 U. S. 652, 666, *et seq.; Whitney* v. *California,* 274 U. S. 357, 371; *Fiske* v. *Kansas,* 274 U. S. 380, 385; *Stromberg* v. *California,* 283 U. S. 359, 368; *Near* v. *Minnesota,* 283 U. S. 697, 708.

[9] *Carr* v. *State,* 176 Ga. 55; 166 S. E. 827, 167 S. E. 103; *Carr* v. *State,* 176 Ga. 747; 169 S. E. 201.

difficult to understand, and conform to decisions heretofore given by this Court in respect of related questions.[10] I therefore am of opinion that there is no objectionable uncertainty about the standard of guilt and that the statute does not in that regard infringe the constitutional guaranty of due process of law.

Believing that the statute under which the conviction was had is not subject to the objections leveled against it, I think the judgment of the supreme court of the State denying the petition for *habeas corpus* should be affirmed.

MR. JUSTICE MCREYNOLDS, MR. JUSTICE SUTHERLAND and MR. JUSTICE BUTLER join in this dissent.

STEELMAN, TRUSTEE IN BANKRUPTCY, *v.* ALL CONTINENT CORP.

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

No. 638. Argued March 29, 30, 1937.—Decided April 26, 1937.

1. Jurisdiction of a bankruptcy court to administer a bankrupt estate draws to itself, when once it has attached, an incidental or ancillary jurisdiction to give protection to the estate against waste or disintegration while frauds upon its integrity are in process of discovery. P. 289.
2. Pending bankruptcy proceedings in New Jersey in which examinations were being carried on under § 21 (a) of the Bankruptcy Act at the instance of the trustee for the purpose of exposing the relations of the bankrupt to a corporation formed and controlled by him, to which he had transferred valuable securities and which, there was ground to believe, was a mere instrument for defrauding his creditors, the corporation, having already filed a claim in the bankruptcy case, brought suit in a federal court in Pennsylvania for the alleged purpose of quieting its title to part of

[10] *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, 108–111; *Nash* v. *United States*, 229 U. S. 373, 376–378.

the securities then in custody of brokers in that State, and served the Trustee, under Jud. Code, § 57, as an absent party. There was probable cause to believe that the suit was a step in a fraudulent conspiracy of the bankrupt, his relatives and the corporation, impeding and perhaps frustrating the administration of the assets, and that only by a plenary suit to be brought (and which later was brought) by the Trustee, in New Jersey, could the danger of obstruction be averted and the estate be kept intact, pending inquiry into the alleged fraud. *Held* that the court of bankruptcy had power to enjoin the corporation from prosecuting the suit in Pennsylvania. Pp. 285, 288.

3. Restraint of a plaintiff from prosecuting his case is not restraint of the court. P. 290.

86 F. (2d) 913, reversed.

CERTIORARI, 300 U. S. 648, to review the reversal of a decree of the District Court, in bankruptcy, 16 F. Supp. 949, which restrained the prosecution against the Trustee of a suit in another federal court.

Mr. Wm. D. Whitney, with whom *Messrs. Wm. Elmer Brown, Jr.,* and *C. Brewster Rhoads* were on the brief, for petitioner.

Mr. Murry C. Becker, with whom *Mr. Benjamin Reass* was on the brief, for respondent.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The question is one as to the power of a court of bankruptcy, in the situation developed in the record, to enjoin the prosecution of a suit in another federal court upon the ground that the suit, if pressed to a decree, may thwart an inquiry into frauds charged against the bankrupt, or make relief against them difficult.

William Fox was adjudicated a bankrupt on May 29, 1936, in the United States District Court for the District of New Jersey. On the petition of two creditors an order

was made under § 21a of the Bankruptcy Act (11 U. S. C. § 44a) for the examination of All Continent Corporation (a Delaware corporation), its president Eva Fox, who was also the bankrupt's wife, his daughters, and other witnesses. The wife refused to submit to examination, and was cited for contempt. When this record was made up, the proceeding to punish her was still undetermined. Meanwhile the examination proceeded with the aid of the witnesses responding to the order. After seventeen or more hearings the Referee made an order on August 18, 1936, whereby All Continent Corporation was directed to deliver all its books and records to the trustee in bankruptcy (petitioner in this court) for examination and audit. As a basis for the order, which was confirmed by the court with unimportant changes (*In re Fox,* 16 F. Supp. 950), the Referee certified the facts as they had been developed through the evidence before him. By this it appeared that All Continent Corporation was the creation of the bankrupt himself, who had supplied every dollar of its capital; that in doing this he had divested himself of a substantial portion of his property; that the entire capital stock, then claimed by his wife, had been kept in his name upon the corporate books; that he had retained in his possession and under his control the assets of the corporation, made up of securities, and had dealt with them on many occasions as if they were his own; that he held a power of attorney, broad in its terms, authorizing him to act for the corporation in the transaction of its business; that such books and records as were already in evidence disclosed disbursements for his account, discrepancies between the entries and those in his private books, and also erasures, corrections and interlineations affecting the scrutinized transactions, as well as sales to the corporation on the eve of bankruptcy. In the view of the Referee, this chain of facts, combined

with many others in the testimony before him, was proof "that the affairs of the All Continent Corporation were so related to and intertwined with the property and affairs of the bankrupt" as to show the need for an exhaustive examination and audit of all the documents available.

The enforcement of the order for the production of the books and records was stayed by the District Court until September 9, 1936. On that day the trustee was served in New Jersey with a subpoena and bill of complaint in a suit in the United States District Court for the Eastern District of Pennsylvania. The complainant named in the bill was the All Continent Corporation, which had already filed a proof of claim against Fox in the bankruptcy proceeding; the defendants were the members of the partnership of J. W. Sparks & Company, with whom were joined as absentee defendants, Capital Company, a corporation, and the petitioner in his capacity as trustee of the estate. The suit was brought under § 57 of the Judicial Code (28 U. S. C. § 118) to remove a cloud upon the title to personal property claimed by the complainant. The trustee not being "an inhabitant of or found within" the district of the suit, an order directing him to plead was served upon him in New Jersey after the service of the bill. Judicial Code, § 57; 28 U. S. C. § 118. The cloud to be removed had its origin in a third party subpoena issued out of a federal court in New York in proceedings supplementary to judgment. Capital Company, a corporation, had recovered a judgment against Fox before he became bankrupt. A proceeding supplementary to judgment was begun, and we know from our records that Fox refused to appear and was fined for contempt. *Fox* v. *Capital Co.*, 299 U. S. 105. In aid of the same judgment, a third party subpoena was served upon Sparks & Co., stockbrokers residing in Philadelphia

and there engaged in business. These brokers had upon their books an account in the name of All Continent Corporation, in which Fox was believed to have an interest as owner. The securities held in that account had a value in excess of half a million dollars, subject to a debit balance. To enable the judgment creditor to reach any equity in those securities belonging to the debtor, the subpoena served upon the brokers was accompanied by a notice, which in effect was an injunction (New York Civil Practice Act § 781), restraining them from disposing of the property of William Fox until the further order of the court. The validity of the injunction, though challenged by the brokers, was upheld upon appeal. *Capital Co.* v. *Fox*, 85 F. (2d) 97. Because of that restraint, Sparks & Co. refused to permit any securities to be withdrawn from their custody or otherwise disposed of, having notice of the claim that, irrespective of the form of the account, the securities belonged to Fox. Anxious to resume the control of the securities, All Continent Corporation sued in Pennsylvania to establish title to the *res*. Capital Company was stated in the bill to have created a cloud upon the title by issuing the third party subpoena with the accompanying injunction. The trustee in bankruptcy was stated to have helped to create the cloud by joining with Capital Company in a request that the subpoena be continued after the bankruptcy petition. Relief was demanded decreeing All Continent Corporation to be the owner of the securities and entitled to possession upon payment of the debit balance owing to the brokers.

The trustee in bankruptcy upon service of the bill of complaint petitioned the court of bankruptcy that it stay the prosecution of the suit in Pennsylvania. The petition for a stay was granted. The opinion of the District Judge (16 F. Supp. 949) states that a grave question has arisen as to the ownership of the assets and shares of

All Continent Corporation. Litigation as to such ownership "ought to be conducted by trustee after there has been a full and complete disclosure of the facts in the 21 (a) examinations." "To require the trustee to appear and defend that suit [i. e., the suit in Pennsylvania] . . . would interfere materially with proper administration." Further prosecution against him was accordingly restrained.

From that decree All Continent Corporation appealed to the United States Circuit Court of Appeals for the Third Circuit. By consent of the parties the court made an order including three additional documents in the transcript of the record: (1) the bill of complaint in a suit in the Court of Chancery in New Jersey; (2) an order to show cause for an injunction *pendente lite* and the appointment of a receiver; and (3) the answer of Sparks & Co. in the suit in Pennsylvania. The suit in the New Jersey Chancery was brought by the trustee in bankruptcy against the bankrupt William Fox, his wife, his daughters, his grandchildren, and the All Continent Corporation. The bill was filed within a week from the date of the restraining order. It charges fraud in the transfer of securities and other assets to the corporation at the time of its creation and also at later dates. It charges fraud in the assignment of the shares of the corporation by Fox to his wife, partly for her own benefit and partly for the benefit of children and grandchildren. It charges fraud in the opening of accounts with stockbrokers, ostensibly for the use of the corporation itself, but really for the use of Fox alone. All these transactions are stated to have occurred in execution of a unitary scheme, to which Fox, his wife and children and the corporation were parties in its several manifestations, for the hindrance of creditors in the enforcement of their rights and remedies. A decree is prayed enjoin-

ing the corporation from disposing of its assets, appointing a receiver to manage and preserve them during the pendency of the suit, annulling all the transfers tainted by the fraud, and decreeing a trust for the benefit of the bankrupt and through him for the trustee. Upon the filing of the bill the Chancellor made an order to show cause why a receiver should not be appointed, and he enjoined in the interim any transfer of the assets. One other document, as we have indicated, was added to the transcript. This was the answer of Sparks & Co. in the suit in Pennsylvania. In that answer they state the acceptance of securities from All Continent Corporation without notice that Fox or others had any interest therein; the existence of a debit balance of $308,-764.97; the readiness of the customer to pay the debit balance on the return of the securities; and the hardship to the brokers involved in continuing the account with all the risks incidental to future changes in the market.

Upon the record thus supplemented the Court of Appeals considered the appeal. 86 F. (2d) 913. It said that "the real question in issue here is whether or not the New Jersey court [i. e., the court of bankruptcy in New Jersey] had the power to enjoin the appellant from prosecuting its suit, under the facts in this case, in the Pennsylvania court." It ruled that "the Pennsylvania court, having first acquired jurisdiction of the property and controversy, is entitled to exclusive jurisdiction, and the institution of the suit in chancery was an attempt to oust the Pennsylvania court of the jurisdiction which it had previously and validly acquired." It coupled that ruling with the statement that the corporation would be entitled "upon proper application" to "restrain the trustee from litigating the controversy elsewhere." It found in the suit in the New Jersey Court of Chancery two separable controversies, one between the trustee and All

Continent Corporation, the other between the trustee and the members of the Fox family, the corporation being stated to be the only necessary party defendant to the first controversy and the Fox family the only necessary parties defendant to the other. It concluded that upon the facts exhibited "the District Court of New Jersey did not have the power to restrain the suit which the statute clearly authorized to be brought in the Pennsylvania court." The decree of the court of bankruptcy was accordingly reversed. The question of power being important, we granted certiorari.

All Continent Corporation, if there is truth in the charges made by the trustee, is a party to a conspiracy to cover up the bankrupt's assets and keep them from his creditors. In that view of the facts, the suit in Pennsylvania will be a step in fulfilling the conspiracy, and may even crown it with success. The inquiry into the fraud, an inquiry going forward in orderly fashion under the supervision of the court of bankruptcy, will be transferred to another jurisdiction with the supposed fraudulent grantee as *dominus litis*. In such a suit there is danger that the issues to be tried may be so narrowly restricted as to shut out the light. All Continent Corporation may be shown to have the legal title to the securities in the keeping of its brokers. If so, it may be adjudged in a controversy with the brokers to be entitled to possession, though its own shares are subject to a secret trust for the benefit of the bankrupt. There will be an absence of the parties without whom the adjudication of such a trust will be indecisive and perhaps impossible. If assignments of the shares have been made by the bankrupt to his wife for his own use or for hers or for the use of children and other relatives, the invalidity of such assignments may not be open to decision unless the assignees of the shares are brought before the

court. Choses in action and other equitable assets, even though fraudulently transferred, are not subject at common law to seizure under execution at the instance of a creditor, but the transfer must be avoided by a decree in equity. *Stephens* v. *Cady,* 14 How. 528, 531; *Freedman's Savings & Trust Co.* v. *Earle,* 110 U. S. 710, 712; *Anthony* v. *Wood,* 96 N. Y. 180, 185; *American Surety Co.* v. *Conner,* 251 N. Y. 1, 5, 6; 166 S. E. 783. The need for a decree is no less obvious and settled when title is to be reclaimed at the suit of a trustee. There are times, it is true, when a trustee may have the benefit of a summary order for transfer or surrender, but this will never happen as to property out of his possession unless the adverse claim of title is colorable only. *Taubel Co.* v. *Fox,* 264 U. S. 426, 431, 433, 434; *May* v. *Henderson,* 268 U. S. 111, 115; *Galbraith* v. *Vallely,* 256 U. S. 46, 50; *Taylor* v. *Sternberg,* 293 U. S. 470, 473. Quite as much as any creditor, the trustee may thus be helpless to vindicate his equities in the suit in Pennsylvania, the parties being what they are. Other difficulties will remain if these can be surmounted. The bankrupt's wife may absent herself from the trial, just as she has refused to submit to examination in the bankruptcy proceeding, with the result that the investigation of the equities may be partial or abortive. Other witnesses may do the like. The danger of frustration by such means will be much greater in a suit by All Continent than in one by the trustee, an officer of the court. In the end a fraudulent grantee may gain possession of the securities with power to distribute them among the members of the bankrupt's family, and to do this, moreover, under cover of a decision which will breed confusion and uncertainty in other suits to follow.

All these embarrassments and obstacles will be removed at a single stroke if the bankruptcy court is free from vexatious interference in its task of supervising and

controlling the administration of the assets. The facts may then be uncovered without haste or impediment by continuing the examination under § 21a. A plenary suit may be brought with the trustee in control to ascertain the legal and the equitable interests in All Continent's assets and also in its shares of stock. All persons whose interests will be affected by an appropriate decree, and particularly the members of the bankrupt's family, adverse claimants to the shares, may be joined as defendants, as indeed they have been joined already in the New Jersey Court of Chancery. To avoid the fraudulent or improvident exercise of dominion by the holder of the legal title, an injunction may be granted restraining the transfer of the assets until the issues have been determined. To avoid loss or hardship either to stockbrokers or to others by tying up accounts without opportunity for release a receiver may be appointed with power to manage such accounts and preserve the assets generally. All these forms of relief and others ancillary thereto will be well within the powers of a court of equity if a suit is maintained in the name of the trustee with the corporation, the bankrupt and his family parties to the record. The suggestion will not hold that the controversy between the trustee and the corporation has no connection with the controversy between the trustee, the bankrupt and his relatives. Cf. *Graves* v. *Corbin,* 132 U. S. 571. On the contrary, the remedy against the bankrupt and his relatives is likely to be truncated and inadequate unless accompanied by an injunction and a receivership which will bind the corporation, its officers and agents. The suit in the New Jersey Court of Chancery, which the court below has erroneously characterized as one that should be restrained because brought after notice of the suit in Pennsylvania, will supply an appropriate and convenient medium for the litigation of these issues if it is permitted to go forward.

The decision under review, which gives free rein to the prosecution of the suit in Pennsylvania, is built on the assumption that in the circumstances exhibited there is no power to apply a curb. The court has not found that discretion was abused or improvidently exercised if power was not lacking. This is plain from the opinion. It is made plainer, if that be possible, by the argument of counsel for the corporation, the respondent in this court, disclaiming any effort to uphold the decision in his favor in the absence of defect of power. With the controversy thus narrowed the path is cleared to a conclusion. For reasons already indicated there was probable cause for the belief that the suit in Pennsylvania would be a step in the execution of a fraudulent conspiracy, impeding and perhaps frustrating the administration of the assets. There was probable cause for the belief that only through a suit upon the lines of the one in the New Jersey Chancery could the danger of obstruction be averted and the estate be kept intact until the entry of a decree adjudging the guilt or innocence of the putative conspirators. Whether they are innocent or guilty is a question not before us now. The data for the formation of any opinion on the subject have not yet been supplied. At present our inquiry halts with the discovery of probable cause for preserving the estate from dismemberment or waste through a precipitate decision. If such cause has been made out, we think the court of bankruptcy has been armed with abundant power to preserve the *status quo* until there can be an adequate trial with all the necessary parties and a judgment on the merits.

The Judicial Code provides (§ 262; 28 U. S. C. § 377) that the United States courts "shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law."

The Bankruptcy Act reinforces that authority by providing (§ 2 (15); 11 U. S. C. § 11 (15)) that courts of bankruptcy are invested with jurisdiction "at law and in equity" 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 title." Referring to these statutes, this court has said that "the power to issue an injunction when necessary to prevent the defeat or impairment of its jurisdiction is . . . inherent in a court of bankruptcy, as it is in a duly established court of equity." *Continental Bank* v. *Chicago, R. I. & P. Ry.,* 294 U. S. 648, 675. Cf. *Local Loan Co.* v. *Hunt,* 292 U. S. 234, 240, 241; *Kline* v. *Burke Construction Co.,* 260 U. S. 226, 229; *Looney* v. *Eastern Texas R. Co.,* 247 U. S. 214, 221. Jurisdiction to administer the estate draws to itself, when once it has attached, an incidental or ancillary jurisdiction to give protection to the estate against waste or disintegration while frauds upon its integrity are in process of discovery. This power so obviously necessary to the attainment of the ends of justice has been exercised by the lower federal courts in a great variety of circumstances. There have been orders directing payment of moneys into the registry of the court until a plenary suit can be brought to recover them (*In re Mitchell,* 278 Fed. 707), restraining an adverse claimant from disposing of property in advance of a decree (*In re Norris,* 177 Fed. 598; *Pyle* v. *Texas Transport & Terminal Co.,* 185 Fed. 309), and enjoining possessory actions that might jeopardize relief in equity. *In re Republic Plumbing Supply Corp.,* 295 Fed. 573; cf. *Blake* v. *Nesbet,* 144 Fed. 279; *In re Blake,* 171 Fed. 298; *In re Nathan Turim, Inc.,* 55 F. (2d) 672. If suits can be enjoined when they are found to have a tendency to embarrass administration, *a fortiori* this may be done when there is a basis for the

fear that they will be used as instruments or devices to render fraud triumphant. Not improbably the order in this case might better have imposed a condition that a plenary suit must be brought within a reasonable time. This defect, if it be one, is now of no importance, for by concession such a suit was brought within a week. There will be no occasion for delay if the corporation, the bankrupt and his family will coöperate in working for a quick decision. In such circumstances there can be no wrong or prejudice to All Continent by postponing its suit in Pennsylvania to a more comprehensive and efficient remedy that will put conflicting claims at rest. Cf. *Wehrman* v. *Conklin,* 155 U. S. 314, 329. Delay and expedition will be subject to the control of equity. "In that predicament the malleable processes of courts of bankruptcy give assurance of a remedy that can be moulded and adapted to the needs of the occasion." *Brown* v. *O'Keefe,* 300 U. S. 598.

Much of the argument for the respondent has been directed to a showing that the suit in Pennsylvania is not subject to restraint for defect of jurisdiction, and this for the reason that the *res* to be affected—the securities held by Sparks & Co. in their office in Philadelphia—had not come within the actual or constructive possession of the court of bankruptcy in New Jersey when the suit was begun to remove the cloud upon title. Cf. *Fort Dearborn Trust & Savings Bank* v. *Smalley,* 298 Fed. 45; *Molina* v. *Murphy,* 71 F. (2d) 605; *In re Adolf Gobel, Inc.,* 80 F. (2d) 849. The argument misconceives the grounds upon which the trustee looks to us for aid. The trustee does not challenge the jurisdiction of the federal court in Pennsylvania, if the word jurisdiction be taken in its strict and proper sense. Cf. *Straton* v. *New,* 283 U. S. 318, 321; *Isaacs* v. *Hobbs Tie & Timber Co.,* 282 U. S. 734, 737, 738. He is not seeking a writ of prohibition directed

to the court itself. He is not seeking an injunction to vindicate his exclusive control over a *res* in his possession, or in the possession, actual or constructive, of the court that appointed him. *Isaacs* v. *Hobbs Tie & Timber Co., supra; Murphy* v. *John Hofman Co.,* 211 U. S. 562, 568, 569; *Moran* v. *Sturges,* 154 U. S. 256, 274. What he seeks is an injunction directed to a suitor, and not to any court, upon the ground that the suitor is misusing a jurisdiction which by hypothesis exists, and converting it by such misuse into an instrument of wrong. *Gage* v. *Riverside Trust Co.,* 86 Fed. 984, 998, 999; *Higgins* v. *California Prune & Apricot Growers,* 282 Fed. 550, 557; *Cole* v. *Cunningham,* 133 U. S. 107, 112, 117, 118. Suits as well as transfers may be the protective coverings of fraud. *Shapiro* v. *Wilgus,* 287 U. S. 348, 355. We are unable to yield assent to the statement of the court below that "the restraint of a proper party is legally tantamount to the restraint of the court itself." The reality of the distinction has illustration in a host of cases. 2 Story, Eq. Jur., 14th ed., § 1195; 5 Pomeroy, Eq. Jur., § 2091; *Cole* v. *Cunningham, supra; Madisonville Traction Co.* v. *Mining Co.,* 196 U. S. 239, 245; *Kessler* v. *Eldred,* 206 U. S. 285; *Rickey Land & Cattle Co.* v. *Miller & Lux,* 218 U. S. 258; *Toledo Scale Co.* v. *Computing Scale Co.,* 261 U. S. 399, 426; *Smith* v. *Apple,* 264 U. S. 274, 279. Cf. Judicial Code, § 265; 28 U. S. C. § 379; *Brown* v. *Pacific Mutual Life Ins. Co.,* 62 F. (2d) 711, 713; *Chicago Title & Trust Co.* v. *Fox Theatres Corp.,* 69 F. (2d) 60, 61, 62.

The decree of the Court of Appeals is reversed and that of the District Court affirmed.

Reversed.

OHIO BELL TELEPHONE CO. *v.* PUBLIC UTILITIES COMMISSION OF OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 539. Argued April 6, 7, 1937.—Decided April 26, 1937.

1. As bases for an order requiring a telephone company to refund to its patrons "excess" earnings collected during a series of years, a state commission valued the company's property for each of those years by applying to the value in an earlier year, which it had determined on hearings, price trend percentages said to have been derived from evidence of which the commission took judicial notice but which it withheld from its records and refused to reveal.—*Held* a denial of due process of law. P. 300.
2. A fair hearing is essential to due process; without it, there is condemnation without trial. P. 300.
3. Judicial notice may be taken of the fact that there has been an economic depression, with decline of market values; but judicial notice cannot be taken of the values of land, labor, buildings and equipment, with their yearly fluctuations. P. 300.
4. This distinction is the more important in cases where the extent of the fluctuations is not collaterally involved but is the very point in issue. P. 301.
5. Taking of judicial notice has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence; his opponent is at liberty to dispute the matter by evidence. P. 301.
6. To press the doctrine of judicial notice to the extent attempted in this case and to do that retroactively after the case had been submitted, would be to turn the doctrine into a pretext for dispensing with a trial. P. 302.
7. From the standpoint of due process—the protection of the individual against arbitrary action—a deeper vice than the unreasonable extension of judicial notice is in this case the concealment from the party affected of the particular or evidential facts of which judicial notice was taken by the commission and on which it rested its conclusion. P. 302.
8. Under the statutes of Ohio no provision is made for a review of the order of the Public Utilities Commission by a separate or independent suit. The sole method of review is by petition in error to the Supreme Court of the State, which considers both the

law and the facts upon the record made below, and not upon new evidence. If, as in this case, that court merely accepts findings of the commission attributed to judicial notice and unsupported by any known or knowable evidence, judicial review is denied. P. 303.

9. In view of the power and discretion reposed in regulatory commissions, the inexorable safeguard of a fair and open hearing must be maintained in its integrity in their proceedings. P. 304.
10. The right to such a hearing is one of the rudiments of fair play assured to every litigant by the Fourteenth Amendment as a minimal requirement. There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored. P. 304.
11. The appellant in this case has not estopped itself from objecting to the use of price trends gathered in its absence. P. 306.

131 Oh. St. 539; 3 N. E. (2d) 475, reversed.

Appeal from a judgment sustaining on appeal an order of the Public Utilities Commission of Ohio requiring the Telephone Company to refund "excess earnings" to its patrons.

Messrs. W. H. Thompson and *Karl E. Burr,* with whom *Messrs. W. B. Stewart, Ashley M. Van Duzer, Thomas V. Koykka,* and *Charles M. Bracelen* were on the brief, for appellant.

Mr. Donald C. Power and *Mr. W. W. Metcalf,* Assistant Attorney General of Ohio, with whom *Messrs. Herbert S. Duffy,* Attorney General, and *A. F. O'Neil,* Assistant Attorney General, were on the brief, for appellee.

Mr. Justice Cardozo delivered the opinion of the Court.

The rates chargeable by the appellant, the Ohio Bell Telephone Company, for intrastate telephone service to subscribers and patrons in Ohio are the subject-matter of this controversy.

Appellant was reorganized in September, 1921, by consolidation with the Ohio State Telephone Company, till then a competitor. Soon afterwards it filed with the Public Utilities Commission of the state schedules of new rates to be charged in those communities where an increase was desired for the unified service. Except in the case of toll charges the rates were not state-wide, but were separately stated for each of the company's exchanges, of which there were many. By the statutes then in force (the Robinson law, passed December 19, 1919, 108 Ohio Laws 1094, as amended by the Pence law, passed April 4, 1923, 110 Ohio Laws 366), the operation of an increase might be suspended for 120 days, at the end of which time the rate was to go into effect upon the filing of a bond for the repayment to consumers of such portion of the increased rate as the Commission upon final hearing should determine to have been excessive, with interest thereon. Construing these statutes the Ohio courts have held that a refund must be limited to rates collected under a bond, jurisdiction being disclaimed when that condition was not satisfied. *Lima* v. *Public Utilities Comm'n*, 106 Ohio St. 379, 386; 140 N. E. 147; *Great Miami Valley Taxpayers Assn.* v. *Public Utilities Comm'n*, 131 Ohio St. 285, 286; 2 N. E. (2d) 777. Some of the new exchange schedules were the subject of protests, and in proceedings to revise them (known as Pence Law proceedings) were made effective by bonds, a separate one for each exchange. Protest was also aimed at the new schedule for toll service which was to apply throughout the state. On the other hand, schedules for other exchanges became effective without protest and therefore without bond, and are not now at issue.

By October 1924, thirty-one Pence law proceedings aimed at separate exchanges had been begun, but had not been fully tried. Already several thousand pages of testi-

mony had been taken and many exhibits received in evidence. Soon afterwards, twelve additional proceedings were begun, making the total number forty-three, exclusive of the toll case. Two other proceedings were started later on. While the number stood at forty-three, the Commission of its own motion, by order dated October 14, 1924, directed a company-wide investigation of appellant's property and rates, and consolidated the bond cases therewith. The order recites that in all the pending proceedings the important issues are identical, and that a single consolidated case will enable rates to be determined for all services within the state at a minimum expenditure of time and money. Accordingly, the company was required to file with the Commission on or before December 1, 1924, a complete inventory of all its property, used and useful in its business, and upon the filing of such inventory, the consolidated case was to "proceed to a hearing for the determination of the fair value of said property and of the just and reasonable rates for the service thereby to be furnished by said company to its patrons throughout the state of Ohio." The statewide investigation thus initiated, as distinguished from the Pence Law proceedings consolidated therewith, had its legal basis in provisions of the General Code of Ohio (§ 499–8, 499–9), and its scope was confined to the rates chargeable in the future (§ 614–23), the Pence Law being the basis for any refund of rates collected in the past. The statute (§ 499–9) makes it mandatory that in fixing rates for the future, the Commission shall ascertain the value of the property as "of a date certain" to be named. The date adopted for that purpose was June 30, 1925.

The company filed an inventory as required by the Commission with supplemental inventories every six months thereafter showing additions and retirements. A long investigation followed, the evidence being directed

in the main to the value of the property on the basis of historical cost and cost of reproduction, and to the deductions chargeable to gross revenues for depreciation reserve and operating expenses generally. As early as February, 1927, the case was submitted to the Commission for the fixing of a tentative value as of the date certain, a tentative value being subject under the Ohio Code to protest and readjustment. At the request of the Attorney General, however, the proceeding was reopened and new evidence introduced. At last, on January 10, 1931, the Commission announced its tentative conclusion. The valuation then arrived at was $104,282,735, for all the property within the state, whether used in interstate or in intrastate business. Protests were filed both by the company and by the state and municipalities. They were followed by new hearings. On January 16, 1934, the Commission made its findings and order setting forth what purports to be a final valuation. The intrastate property as of June 30, 1925, was valued at $93,707,488; the total property, interstate and intrastate, at $96,422,-276.

The Commission did not confine itself, however, to a valuation of the property as of the date certain. It undertook also to fix a valuation for each of the years 1926 to 1933 inclusive. For this purpose it took judicial notice of price trends during those years, modifying the value which it had found as of the date certain by the percentage of decline or rise applicable to the years thereafter. The first warning that it would do this came in 1934 with the filing of its report. "The trend of land valuation was ascertained," according to the findings, "from examination of the tax value in communities where the company had its largest real estate holdings." "For building trends resort was had to price indices of the Engineering News Record, a recognized magazine in the field

of engineering construction." "Labor trends were developed from the same sources." Reference was made also to the findings of a federal court in Illinois (*Illinois Bell Telephone Co.* v. *Gilbert,* 3 F. Supp. 595, 603) as to the price levels upon sales of apparatus and equipment by Western Electric, an affiliated corporation. The findings were not in evidence, though much of the testimony and exhibits on which they rested had been received by stipulation for certain limited purposes, and mainly to discover whether the prices paid to the affiliate were swollen beyond reason.* Cf. *Dayton Power & Light Co.* v. *Public Utilities Comm'n,* 292 U. S. 290, 295. The Commission consulted these findings as indicative of market trends and leaned upon them heavily. By resort to these and cognate sources, the value at the beginning of 1926 was fixed at 98.73% of the value at the date certain; the 1927 value at 95.7%; the 1928 value at 95%; the 1929 value at 96.3%; 1930 value at 92.2%; the 1931 value at 86.6%; the 1932 value at 76.8%; the 1933 value at 79.1%. Upon that basis the company was found to have been in receipt of excess earnings of $13,289,172, distributed as follows: for 1925, $1,822,647; for 1926, $2,041,483; for 1927, $1,986,610; for 1928, $1,925,301; for 1929,

*The stipulation states that the testimony and exhibits "shall, however, be considered upon four issues involved in this cause and four only, viz:

"1. The earnings of the Western Electric and the reasonableness of such earnings.

"2. The cost to the American Telephone and Telegraph Company of rendering services under the license contract and the reasonable amount which should be allocated in that respect to The Ohio Bell Telephone Company.

"3. The separation and apportionment of the property, revenues and expenses of The Ohio Bell Telephone Company as between its intrastate and interstate property, revenues and expenses.

"4. Rate of return."

$1,463,347; for 1930, $1,481,689; for 1931, $1,659,760; for 1932, $908,335; for 1933, nothing. The excess was arrived at by figuring a return of 7% upon the value as a reasonable rate for the years 1925 to 1929, inclusive; 6.5% for the years 1930 and 1931; and 5.5% for the years 1932 and 1933. There being no excess revenue for the year 1933, the last year covered by the report, the Commission did not fix any percentage of reduction for the rates in future years. It did, however, prescribe a refund of the full amount of the excess for the years in which excess earnings were found to have been realized. The statewide proceeding to fix rates for the future on the basis of a date certain was thus transformed finally into a refund proceeding, similar in function to proceedings under the Pence law for the refund of charges collected under bonds. The report of the Commission determining the excess was signed by a majority of the members, the Chairman dissenting. It was accompanied by an order similar in tenor.

The company protested and moved for a rehearing. In its protest it stated that the trend percentages accepted in the findings as marking a decline in values did not come from any official sources which the Commission had the right to notice judicially; that they had not been introduced in evidence; that the company had not been given an opportunity to explain or rebut them; and that by their use the Commission had denied a fair hearing in contravention of the requirements of the Fourteenth Amendment. Demand was made that an opportunity be conceded for explanation and rebuttal; demand was made also that the company be permitted to submit evidence showing separately for each year the fair value of its property, its revenues, expenses and net income in each of the several cases wherein rates had been collected under bond. This last was a renewal of a demand which had been made several times in the

course of the inquiry, as the Commission in its report concedes. By order dated March 1, 1934, the protests were overruled, and the demands rejected. By order dated July 5 of the same year the Commission modified to some extent its findings as to the excess income referable to bonded rates, and directed the company to show cause why refunds of the excess should not be made upon that basis. Again there was protest with a renewal of the request that evidence be received along the lines already indicated. Again the Commission reaffirmed its previous position.

The outcome of these manoeuvres was the filing of a final order, dated September 6, 1934, apportioning the excess income between bonded and non-bonded rates by allocating to the former class a total of $11,423,137 for exchange subscribers and $409,127 for toll patrons (in all $11,832,264) and directing payment accordingly. Distribution was to be made among the several exchanges upon the basis of the percentage relation of the gross exchange revenues in the exchanges where bonds were in effect to the total gross exchange revenues, bonded and unbonded. If even a single rate in a particular exchange, e. g., in the city of Cleveland, had been collected under bond, all the revenues of that exchange were included in reckoning the percentage of the total that should go to the Cleveland customers. So much of the excess as was not used up in that way was apportioned to the tolls. This method of allocation was made the subject of another protest, the company insisting that it was arbitrary and unequal and a denial of due process. Petitions in error were filed with the Supreme Court of Ohio in accordance with the state practice (General Code, § 544 *et seq.*) to review the final order of September 6, 1934, and the several intermediate orders supporting it. There was timely and adequate assertion of the infringe-

ment of the petitioner's rights under the Fourteenth Amendment. The Supreme Court of Ohio affirmed with an opinion per curiam. 131 Ohio St. 539; 3 N. E. (2d) 475. The case is here upon appeal. Judicial Code, § 237, 28 U. S. C. § 344.

First: The fundamentals of a trial were denied to the appellant when rates previously collected were ordered to be refunded upon the strength of evidential facts not spread upon the record.

The Commission had given notice that the value of the property would be fixed as of a date certain. Evidence directed to the value at that time had been laid before the triers of the facts in thousands of printed pages. To make the picture more complete, evidence had been given as to the value at cost of additions and retirements. Without warning or even the hint of warning that the case would be considered or determined upon any other basis than the evidence submitted, the Commission cut down the values for the years after the date certain upon the strength of information secretly collected and never yet disclosed. The company protested. It asked disclosure of the documents indicative of price trends, and an opportunity to examine them, to analyze them, to explain and to rebut them. The response was a curt refusal. Upon the strength of these unknown documents refunds have been ordered for sums mounting into millions, the Commission reporting its conclusion, but not the underlying proofs. The putative debtor does not know the proofs today. This is not the fair hearing essential to due process. It is condemnation without trial.

An attempt was made by the Commission and again by the state court to uphold this decision without evidence as an instance of judicial notice. Indeed, decisions of this court were cited (*Atchison, T. & S. F. Ry.*

Co. v. *United States,* 284 U. S. 248, 260; *Dayton Power & Light Co.* v. *Public Utilities Comm'n, supra,* p. 311; *Central Kentucky Natural Gas Co.* v. *Railroad Commission,* 290 U. S. 264, 274, 275) as giving support to the new doctrine that the values of land and labor and buildings and equipment, with all their yearly fluctuations, no longer call for evidence. Our opinions have been much misread if they have been thought to point that way. Courts take judicial notice of matters of common knowledge. 5 Wigmore, Evidence, §§ 2571, 2580, 2583; Thayer, Preliminary Treatise on Evidence, pp. 277, 302. They take judicial notice that there has been a depression, and that a decline of market values is one of its concomitants. *Atchison, T. & S. F. Ry. Co.* v. *United States, supra; Dayton Power & Light Co.* v. *Public Utilities Comm'n, supra; Central Kentucky Natural Gas Co.* v. *Railroad Commission, supra.* How great the decline has been for this industry or that, for one material or another, in this year or the next, can be known only to the experts, who may even differ among themselves. For illustration, a court takes judicial notice of the fact that Confederate money depreciated in value during the war between the states (*Wood* v. *Cooper,* 2 Heisk. (Tenn.) 441, 447; *Hix* v. *Hix,* 25 W. Va. 481, 484, 485), but not of the extent of the depreciation at a given time and place. *Modawell* v. *Holmes,* 40 Ala. 391, 405. Cf. *Feemster* v. *Ringo,* 5 T. B. Munroe (Ky.) 336, 337; *Baxter* v. *McDonnell,* 155 N. Y. 83, 93; 49 N. E. 667. The distinction is the more important in cases where as here the extent of the fluctuations is not collaterally involved but is the very point in issue. Moreover, notice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence. Wigmore, Evidence, § 2567; 1 Greenleaf, Evidence, 16th ed., p. 18. "It does not

mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable." *Ibid.* Cf. *Shapleigh* v. *Mier,* 299 U. S. 468. Such at least is the general rule, to be adhered to in the absence of exceptional conditions. Here the contention would be futile that the precise amount of the decline in values was so determinate or notorious in each and every year between 1925 and 1933 as to be beyond the range of question. So much is indeed conceded on the face of the report itself. No rational concept of notoriety will include these variable elements. True, the category is not a closed one. "The precedents of former judges, in declining to notice or assenting to notice specific facts, do not restrict the present judge from noticing a new fact, provided only that the new fact *is* notorious to the community." 5 Wigmore, Evidence, § 2583. Even so, to press the doctrine of judicial notice to the extent attempted in this case and to do that retroactively after the case had been submitted, would be to turn the doctrine into a pretext for dispensing with a trial.

What was done by the Commission is subject, however, to an objection even deeper. Cf. *Brown* v. *New Jersey,* 175 U. S. 172, 174, 175; *West* v. *Louisiana,* 194 U. S. 258, 262, 263. There has been more than an expansion of the concept of notoriety beyond reasonable limits. From the standpoint of due process—the protection of the individual against arbitrary action—a deeper vice is this, that even now we do not know the particular or evidential facts of which the Commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown; there is no way to find them out. When price lists or trade journals or even government reports are put in evidence upon a trial, the party against whom they are offered may see the evidence or hear it and parry its effect. Even if they are copied in the findings without

preliminary proof, there is at least an opportunity in connection with a judicial review of the decision to challenge the deductions made from them. The opportunity is excluded here. The Commission, withholding from the record the evidential facts that it has gathered here and there, contents itself with saying that in gathering them it went to journals and tax lists, as if a judge were to tell us, "I looked at the statistics in the Library of Congress, and they teach me thus and so." This will never do if hearings and appeals are to be more than empty forms.

We have pointed out elsewhere that under the statutes of Ohio no provision is made for a review of the order of the Commission by a separate or independent suit. *West Ohio Gas Co.* v. *Public Utilities Comm'n (No. 1)*, 294 U. S. 63, 68. A different question would be here if such a suit could be maintained with an intermediate suspension of the administrative ruling. *Porter* v. *Investors Syndicate,* 286 U. S. 461, 470, 471; *United States* v. *Illinois Central R. Co.,* 291 U. S. 457, 463; *Nickey* v. *Mississippi,* 292 U. S. 393, 396; *Wells, Fargo & Co.* v. *Nevada,* 248 U. S. 165, 168. Cf. *Norwegian Nitrogen Co.* v. *United States,* 288 U. S. 294, 318, 319. In Ohio the sole method of review is by petition in error to the Supreme Court of the State, which considers both the law and the facts upon the record made below, and not upon new evidence. In such circumstances judicial review would be no longer a reality if the practice followed in this case were to receive the stamp of regularity. To put the problem more concretely: how was it possible for the appellate court to review the law and the facts and intelligently decide that the findings of the Commission were supported by the evidence when the evidence that it approved was unknown and unknowable? In expressing that approval the court did not mean that, traveling beyond the record, it had consulted price lists for itself and had reached its

own conclusion as to the percentage of decline in value from 1925 onwards. It did not even mean that it had looked at the particular lists made use of by the Commission, for no one knows what they were in any precise or certain way. Nowhere in the opinion is there even the hint of such a search. What the Supreme Court of Ohio did was to take the word of the Commission as to the outcome of a secret investigation, and let it go at that. "A hearing is not judicial, at least in any adequate sense, unless the evidence can be known." *West Ohio Gas Co.* v. *Public Utilities Comm'n (No. 1), supra,* p. 69. Cf. *Interstate Commerce Comm'n* v. *Louisville & N. R. Co.,* 227 U. S. 88, 91; *United States* v. *Abilene & Southern Ry. Co.,* 265 U. S. 274, 288; *Chicago Junction Case,* 264 U. S. 258, 263, 264, 265.

Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from courts when it has been reached with due submission to constitutional restraints. *West Ohio Gas Co.* v. *Public Utilities Comm'n (No. 1), supra,* p. 70; *West Ohio Gas Co.* v. *Public Utilities Comm'n (No. 2),* 294 U. S. 79; *Los Angeles Gas & Electric Corp.* v. *Railroad Commission,* 289 U. S. 287, 304. Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need, when power has been bestowed so freely, that the "inexorable safeguard" (*St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 73) of a fair and open hearing be maintained in its integrity. *Morgan* v. *United States,* 298 U. S. 468, 480, 481; *Interstate Commerce Comm'n* v. *Louisville & N. R. Co., supra.* The right to such a hearing is one of "the rudiments of fair play" (*Chicago, M. & St. P. Ry. Co.* v. *Polt,* 232 U. S.

165, 168) assured to every litigant by the Fourteenth Amendment as a minimal requirement. *West Ohio Gas Co.* v. *Public Utilities Comm'n (No. 1), (No. 2), supra; Brinkerhoff-Faris Co.* v. *Hill,* 281 U. S. 673, 682. Cf. *Norwegian Nitrogen Co.* v. *United States, supra.* There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored.

In an endeavor to sustain the judgment the State shifts its line of argument from the course pursued below, so far, at least, as the course then followed is reflected in the record. Both the Commission and the Supreme Court of Ohio tell us that they have applied the price trends to the value on the day certain by resort to judicial notice. The State now suggests that whatever the court or the Commission may have professed to be doing, there was a basis in the evidence for the conclusion ultimately reached. To give aid to that suggestion reference is made to the findings of a federal court as to the prices charged by Western Electric for telephone equipment, which findings were not in evidence, though they were founded upon evidence received by stipulation for purposes narrowly defined and exclusive of any others. The terms of the stipulation have already been stated in this opinion. Even if we assume in favor of the state that the evidence, when in, could be considered as indicative of the trend of market values generally, the judgment is not helped. The Commission did not take the prices paid by appellant to the affiliated corporation as the only evidence of market trends, but merely as one factor along with many others. What weighting it gave them the record does not disclose, and the Commission denied the appellant an opportunity to inquire. According to appellant's computation, telephone apparatus and equip-

ment make up less than 30% of the value of appellant's plant. Even for that portion of the plant, the Western Electric prices were not accepted as decisive, but were supplemented and corrected from sources *dehors* the record. For the other 70%, they were without probative significance, at all events until supplemented by evidence that the decline in the value of apparatus and equipment was less than that in the value of land or buildings or other components of the plant. To fix the value of these components the Commission had recourse to statistics which it collected for itself. "There was no suitable opportunity through evidence and argument . . . to challenge the result." *West Ohio Gas Co.* v. *Public Utilities Commission (No. 1)*, *supra*, p. 90.

Second: The appellant has not estopped itself from objecting to the use of price trends gathered in its absence.

The company did not oppose the consolidation of the state-wide investigation with the Pence law proceedings. This did not amount, however, to a waiver of its right to have the value of its property determined upon evidence. At no stage of the inquiry was there any suggestion by the Commission that a different course would be pursued. We have no need to consider how the separate proceedings would have been affected by a valuation of the property in the general investigation if the evidence of value had been gathered in the usual way. In the thought of the state such a course would have obviated the necessity for separate evidence of value as to the exchanges under bond, but the company contended otherwise and made offers of proof in support of its contention. The merits of the opposing views in that regard may be put aside as irrelevant upon the record now before us. What is certain in any event is this, that nothing in the course of the trial gave warning

of the purpose of the Commission, while rejecting evidence of value in respect of exchanges under bond, to wander afield and fix the composite value of the system without reference to any evidence, upon proofs drawn from the clouds. As there was no warning of such a course, so also there was no consent to it. We do not presume acquiescence in the loss of fundamental rights.

Third: The allocation of excess income among the subscribers to exchanges and also among toll patrons is challenged by the appellant, the state retorting with the contention that there has been no denial of due process in the manner of partition, whatever may be said as to the possibility of inaccuracy or error.

We find it unnecessary at this time to choose between these two contentions. A court is not required to define the proper method of allocation until there has been a proper ascertainment of the thing to be allocated. When that has been done, there may be agreement or acquiescence in respect of the manner of division. Moreover, upon another hearing the problem may be eliminated if value, revenues and expenses are proved for each exchange.

Fourth: The same reasons that make it unnecessary to fix the method of allocation relieve us of the duty of passing upon other problems, such as those of going concern value and depreciation reserve, which cannot be disposed of adequately until the value of the physical plant has first been ascertained.

The decree is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

CINCINNATI SOAP CO. *v.* UNITED STATES.*

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

No. 659. Argued April 1, 2, 1937.—Decided May 3, 1937.

Section 602½ of the Revenue Act of 1934 imposes a tax of 3 cents per pound upon the first domestic processing of coconut oil, and provides that all such taxes collected with respect to coconut oil wholly of Philippine production, etc., "shall be held as a separate fund and paid to the Treasury of the Philippine Islands, but if at any time the Philippine Government provides by any law for any subsidy to be paid to the producers of copra, coconut oil, or allied products, no further payments to the Philippine Treasury shall be made under this subsection." *Held:*

1. The imposition of the tax in itself is a valid exercise of the taxing power, consistent with the due process clause of the Fifth Amendment. P. 312.

2. A valid tax may be bound to a valid appropriation of the moneys so realized, in the same Act of Congress. P. 313.

3. Whether a tax serves any of the purposes enumerated in the Constitution, Art. I, § 8, cl. 1,—"to pay the debts and provide for the common defence and general welfare of the United States,"—is a practical question addressed to the law-making power, whose conclusion must be accepted by the courts unless plainly without justification. P. 313.

4. Owing to the peculiar relation of dependency of the Philippine Islands and their inhabitants on the United States, it is a moral obligation of the United States to protect, defend and provide for their general welfare. P. 313.

5. The tax and appropriation may be sustained as a discharge of a moral obligation amounting to a "debt" within the meaning of the taxing clause of the Constitution. P. 314.

6. Congress, from the beginning, has acted upon the view that the term "debts" includes moral obligations. *Id.*

7. *Quaere* whether the tax and appropriation in the present instance might not be justified as an exercise of the taxing power

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* Together with No. 687, *Haskins Bros. & Co.* v. *O'Malley, Collector of Internal Revenue.* Certiorari to the Circuit Court of Appeals for the Eighth Circuit.

to provide, in a broad sense, for the public defense or the general welfare of the United States. P. 315.

8. The determination of Congress to recognize the moral obligation of the Nation to make an appropriation as a requirement of justice and honor, is obviously a matter of policy and discretion not open to judicial review, unless in circumstances such as are not present in this case. P. 317.

9. It does not follow that because a federal tax levied for the express purpose of paying the debts or providing for the welfare of a State might be invalid, such a tax for the uses of a territory or dependency, over which the United States has plenary power, would likewise be invalid. P. 317.

10. The passage of the Philippine Independence Act of March 24, 1934, and the adoption and approval of the Constitution of the Commonwealth of the Philippine Islands, did not withdraw the sovereignty of the United States from the Islands, nor make them foreign to the United States. P. 319.

11. Congress has power to levy a tax with the collateral purpose of protecting industries of the United States. P. 320.

12. Assuming the present tax levied for that purpose, it was for Congress to determine whether there was a moral duty to offset the burden of it on the Philippine production by an equivalent appropriation to the Philippine treasury. P. 320.

14. The provision of the Constitution, Art. I, § 9, cl. 7, that "No money shall be drawn from the Treasury but in consequence of appropriations made by law" was intended as a restriction upon the disbursing authority of the Executive Department, and is without significance here. It means simply that no money can be paid out of the Treasury unless it has been appropriated by an Act of Congress. P. 321.

15. The contention of the taxpayers in this case that there has been no constitutional appropriation of the proceeds of the tax, and that any attempted appropriation is bad, because the particular uses to which the appropriated money is to be put have not been specified, is without merit. P. 321.

16. Payment of the proceeds of the tax to the Philippine Government, with no direction as to the expenditure thereof, was not an unconstitutional delegation of legislative power. P. 321.

17. In dealing with the territories, possessions and dependencies of the United States, this Nation has all the powers of other sovereign nations, and Congress in legislating is not subject to the same restrictions which are imposed in respect of laws for the

United States considered as a political body of States in union. P. 323.

Judgments affirmed.

CERTIORARI, 300 U. S. 649, to review two judgments of the District Courts sustaining demurrers to the petitions filed by the Soap Company and another in actions to recover moneys exacted as taxes. The cases had been appealed to the Circuit Courts of Appeals, but had not been heard or submitted when the writs of certiorari issued.

Mr. Alfred Bettman, with whom *Mr. James L. Magrish* was on the brief, for Cincinnati Soap Co., petitioner in No. 659.

Mr. Frederick H. Wood, with whom *Messrs. Alfred C. Munger, William Stanley,* and *Thomas T. Cooke* were on the brief, for Haskin Brothers & Co., Inc., petitioner in No. 687.

Assistant Attorney General Jackson, with whom *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key, F. A. Le Sourd,* and *Charles A. Horsky* were on the brief, for respondents.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Section 602½ of the Revenue Act of 1934, c. 277, 48 Stat. 680, 763, imposes a tax of 3 cents per pound upon the first domestic processing of coconut oil, and provides that all such taxes collected with respect to coconut oil wholly of Philippine production, etc., "shall be held as a separate fund and paid to the Treasury of the Philippine Islands, but if at any time the Philippine Government provides by any law for any subsidy to be paid to the pro-

ducers of copra, coconut oil, or allied products, no further payments to the Philippine Treasury shall be made under this subsection."

Both petitioners are engaged in manufacturing soap and, at times stated in their petitions, used in its manufacture large quantities of coconut oil wholly the product of the Philippine Islands. In pursuance of § 602½, they made returns and paid the amount of the tax as required by that section. Subsequently, each of them filed with the Bureau of Internal Revenue a claim for the refund of the tax, on the ground that the imposition was not within the constitutional power of Congress. Both claims were denied, and petitions at law were filed in federal district courts to recover the sums paid. Demurrers were interposed attacking the sufficiency of the petitions, and these demurrers were sustained by the trial courts. Appeals were taken to the respective circuit courts of appeal named in the title; and we granted writs of certiorari before a hearing or submission in those courts, because of the importance to the Philippine Islands of an early final decision of the question.

The validity of the tax is assailed by petitioners upon a variety of grounds, developed at length in their respective briefs and by the oral arguments at the bar. So far as we find it necessary to consider the various contentions, they may be stated in general terms as follows: that the tax is not imposed for any purpose contemplated by the taxing clause of § 8, Art. I, of the Federal Constitution—that is to say, it is not imposed to pay the debts or provide for the common defense or general welfare of the United States; that, on the contrary, it is imposed for a purely local purpose, in violation of the Tenth Amendment; that the exaction violates the due process clause of the Fifth Amendment, because it is an arbitrary exaction from one group of persons for the exclusive benefit

of another; that the act does not impose a true tax, but is a regulatory measure outside the field of federal power; that it violates clause 7, § 9, of Art. I of the Constitution, which provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law"; that the payment in bulk of the entire proceeds of the tax to the Philippines, with no direction as to the expenditure thereof, constitutes an unlawful delegation of legislative power. In dealing with these contentions, we find it convenient to do so without following the precise order in which they have just been stated. And certain of them are so interrelated that they may be joined for consideration in the same subdivision of the opinion which follows.

First. Plainly, the imposition of the tax in itself is a valid exercise of the taxing power of the federal government. It is purely an excise tax upon a manufacturing process for revenue purposes, and in no sense a regulation of the process itself. The Tenth Amendment is without application, since the powers of the several states over local affairs are not invaded or involved. This is disclosed upon the face of the act so clearly that discussion could not make it plainer. *United States* v. *Butler,* 297 U. S. 1, relied upon by petitioner, is not in point. There, we held that the sole aim of the statute, as shown by its terms, was to regulate a local situation, a matter wholly within the reserved powers of the states; and moreover that it amounted to a naked taking of the property of one group of persons for bestowal upon another group. The *Child Labor Tax Case,* 259 U. S. 20, and other cases cited, bear still more remotely upon the contention. It is enough to say that the feature of the present case which differentiates it from all those cited is that the exaction here, both in form and substance, is a true tax, imposed, as we presently shall show, for a

federal constitutional purpose. In that view the due process clause of the Fifth Amendment is not involved.

Second. Standing apart, therefore, the tax is unassailable. It is said to be bad because it is earmarked and devoted from its inception to a specific purpose. But if the tax, *qua* tax, be good, as we hold it is, and the purpose specified be one which would sustain a subsequent and separate appropriation made out of the general funds of the Treasury, neither is made invalid by being bound to the other in the same act of legislation. The only concern which we have in that aspect of the matter is to determine whether the purpose specified is one for which Congress can make an appropriation without violating the fundamental law. If Congress, for reasons deemed by it to be satisfactory, chose to adopt the quantum of receipts from this particular tax as the measure of the appropriation, we perceive no valid basis for challenging its power to do so.

We inquire first—Is the proposed *appropriation* to the Philippine Treasury for a constitutional purpose? since an affirmative answer to that question will establish the constitutional purpose of the *tax*. The pertinent taxing clause provides in general terms (Art. I, § 8, cl. 1) that taxes may be laid "to pay the Debts and provide for the common Defence and general Welfare of the United States." Primarily, and in a very high degree, whether a tax serves any of these purposes is a practical question addressed to the law-making department. And it will require a very plain case to warrant the courts in setting aside the conclusion of Congress in that regard. Compare *Nicol* v. *Ames,* 173 U. S. 509, 514–516. Nevertheless, such plain cases may exist; and the question is whether this is one of them.

The Philippine Islands and their inhabitants, from the beginning of our occupation, have borne a peculiar

relation to the United States. The Islands constitute a dependency over which the United States, for more than a generation, has had and exercised supreme power of legislation and administration, *Posadas* v. *National City Bank,* 296 U. S. 497, 502, a power limited only by the terms of the treaty of cession and those principles of the Constitution which by their nature are inherently inviolable. The possession of this well-nigh absolute power over a dependent people carries with it great obligations, as was pointed out by Mr. Root as Secretary of War in 1899. After referring to the practically unlimited power which we had over the Philippines, he said: "I assume, also, that the obligations correlative to this great power are of the highest character, and that it is our unquestioned duty to make the interests of the people over whom we assert sovereignty the first and controlling consideration in all legislation and administration which concerns them, and to give them, to the greatest possible extent, individual freedom, self-government in accordance with their capacity, just and equal laws, and opportunity for education, for profitable industry, and for development in civilization." Military and Colonial Policy of the United States, 161–162.

Among these correlative duties is the moral obligation to protect, defend, and provide for the general welfare of, the inhabitants. And such an obligation well may require the appropriation and expenditure of money from the national purse—in which case the obligation fairly comes within the term "debts" as used in the taxing clause. *United States* v. *Realty Co.,* 163 U. S. 427, 440–441. Congress, from the beginning of its existence, has accepted and legislated upon that view of the broad meaning of the term. In innumerable instances, it has made appropriations to relieve needs caused by earthquakes, fire, and other events, not only in localities

within or possessed by the United States, but in foreign countries as well. Government counsel has furnished us an impressive list of appropriations of this character; and in addition has called attention to the many instances of appropriations for the support and welfare of the Indians, and for the uses of the territories. Legislation of this character has been so long continued and its validity so long unquestioned that, as we said in *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 322, 327–328, "A legislative practice such as we have here, evidenced not by only occasional instances, but marked by the movement of a steady stream for a century and a half of time, goes a long way in the direction of proving the presence of unassailable ground for the constitutionality of the practice, to be found in the origin and history of the power involved, or in its nature, or in both combined."

It may be that the tax and the appropriation of the proceeds therefrom in the present instance could be justified as an exercise of the taxing power to provide, in a broad sense, for the public defense or the general welfare of the United States. We do not pause to consider that view; for plainly, we think, the law may be sustained as an act in discharge of a high moral obligation, amounting to a "debt" within the meaning of the Constitution as it always has been practically construed. The justification for that conclusion has been so fully stated by this court in the case of *United States* v. *Realty Co., supra,* that further citation becomes unnecessary. "Under the provisions of the Constitution, (article 1, section 8)," we there said, "Congress has power to lay and collect taxes, etc., 'to pay the debts' of the United States. Having power to raise money for that purpose, it of course follows that it has power when the money is raised to appropriate it to the same object. What are the debts of the United

States within the meaning of this constitutional provision? It is conceded and indeed it cannot be questioned that the debts are not limited to those which are evidenced by some written obligation or to those which are otherwise of a strictly legal character. The term 'debts' includes those debts or claims which rest upon a merely equitable or honorary obligation, and which would not be recoverable in a court of law if existing against an individual. The nation, speaking broadly, owes a 'debt' to an individual when his claim grows out of general principles of right and justice; when, in other words, it is based upon considerations of a moral or merely honorary nature, such as are binding on the conscience or the honor of an individual, although the debt could obtain no recognition in a court of law. The power of Congress extends at least as far as the recognition and payment of claims against the government which are thus founded. To no other branch of the government than Congress could any application be successfully made on the part of the owners of such claims or debts for the payment thereof. Their recognition depends solely upon Congress, and whether it will recognize claims thus founded must be left to the discretion of that body. Payments to individuals, not of right or of a merely legal claim, but payments in the nature of a gratuity, yet having some feature of moral obligation to support them, have been made by the government by virtue of acts of Congress, appropriating the public money, ever since its foundation. Some of the acts were based upon considerations of pure charity. A long list of acts directing payments of the above general character is appended to the brief of one of the counsel for the defendants in error. The acts are referred to not for the purpose of asserting their validity in all cases, but as evidence of what has been the practice of Congress since the adoption of the Constitution. See, also, among

other cases in this court, *Emerson* v. *Hall,* 13 Pet. 409; *United States* v. *Price,* 116 U. S. 43; *Williams* v. *Heard,* 140 U. S. 529. The last cited case arose under an act of Congress in relation to the Alabama claims."

Later decisions of this court have followed that view. *United States* v. *Cook,* 257 U. S. 523; *Marion & R. V. Ry. Co.* v. *United States,* 270 U. S. 280, 284. The determination of Congress to recognize the moral obligation of the nation to make an appropriation as a requirement of justice and honor, is obviously a matter of policy and discretion not open to judicial review unless in circumstances which here we are not able to find. *United States* v. *Realty Co., supra,* p. 444.

It does not follow that because a federal tax levied for the express purpose of paying the debts or providing for the welfare of a state might be invalid (*Passenger Cases,* 7 How. 283, 446) that such a tax for the uses of a territory or dependency would likewise be invalid. A state, except as the Federal Constitution otherwise requires, is supreme and independent. It has its own government, with full powers of taxation and full power to appropriate the revenues derived therefrom. A dependency has no government but that of the United States, except in so far as the United States may permit. The national government may do for one of its dependencies whatever a state might do for itself or one of its political subdivisions, since over such a dependency the nation possesses the sovereign powers of the general government plus the powers of a local or a state government in all cases where legislation is possible. Compare *Stoutenburgh* v. *Hennick,* 129 U. S. 141, 147; *National Bank* v. *County of Yankton,* 101 U. S. 129, 133; *Mormon Church* v. *United States,* 136 U. S. 1, 42; *Utter* v. *Franklin,* 172 U. S. 416, 423. To say that the federal government, with such practically unlimited powers of legislation in respect of a dependency, is yet

powerless to appropriate money for its needs, is to deny—what the foregoing considerations forbid us to deny—that the United States has, in that regard, the equivalent power of a state in comparable circumstances.

Third. In the exercise of its plenary powers, the United States began by governing the Philippine Islands under the war power. Following the Treaty of Paris, a condition of armed insurrection persisted for some time. In 1900, military government was succeeded by a species of executive government. The Spooner Amendment to the Army Appropriation Bill of March 2, 1901, c. 803, 31 Stat. 895, 910, provided that "All military, civil, and judicial powers necessary to govern the Philippine Islands . . . shall, until otherwise provided by Congress, be vested in such person and persons and shall be exercised in such manner as the President of the United States shall direct, for the establishment of civil government and for maintaining and protecting the inhabitants of said islands in the free enjoyment of their liberty, property, and religion."

This was followed, March 5, 1901, by a cable from the Secretary of War to the Philippine Commission containing the following laconic order, "Until further orders government will continue under existing instructions and orders." Report, Secretary of War, 1901, p. 54. The comprehensive Spooner Amendment, and these instructions and orders, virtually constituted for many months the charter of government for the Philippine Islands. In 1902, Congress provided for a complete system of civil government under the original Philippine Organic Act. By degrees, the active powers of the dependency have been enlarged, and those of the federal government decreased. But the authority which conferred additional power might at any time have withdrawn it. This brief résumé demonstrates both the completeness and flexibil-

ity of the national power over the Philippines, and the high character of the moral obligations which the possession of such power correlatively imposes. With the extension of power to the islands, our moral obligations may have grown less; but whether, or to what extent, this has been the case is a question for the determination of the political departments of the government.

But it is contended that the passage of the Philippine Independence Act of March 24, 1934, c. 84, 48 Stat. 456, and the adoption and approval of a constitution for the Commonwealth of the Philippine Islands have created a different situation; and that since then, whatever may have been the case before, the United States has been under no duty to make any financial contribution to the islands. Undoubtedly, these acts have brought about a profound change in the status of the islands and in their relations to the United States; but the sovereignty of the United States has not been, and, for a long time, may not be, finally withdrawn. So far as the United States is concerned, the Philippine Islands are not yet foreign territory. By express provision of the Independence Act, we still retain powers with respect to our trade relations with the islands, with certain exceptions set forth particularly in the act. We retain powers with respect to their financial operations and their currency; and we continue to control their foreign relations. The power of review by this court over Philippine cases, as now provided by law, is not only continued, but is extended to all cases involving the Constitution of the Commonwealth of the Philippine Islands.

Thus, while the power of the United States has been modified, it has not been abolished. Moral responsibilities well may accompany the process of separation from this country; and, indeed, they may have been intensified by the new and perplexing problems which the Phil-

ippine people now will be called upon to meet as one of its results. The existence and character of the consequent obligations and the extent of the relief, if any, which should be afforded by the United States in respect of them, are matters, not for judicial but for Congressional consideration and determination.

It is not improbable that a failure to exercise control over imports from the Philippines would injuriously affect the industries of this country; and, on the other hand, an exercise of the power to tax imports might prove injurious to the people of the islands. Congress, in passing the legislation here under consideration, is not forbidden to balance these respective probabilities. The tax itself, it is said, was imposed for the purpose of protecting certain industries in this country; and it is challenged on that ground. That Congress has power to levy a tax with the collateral purpose of thereby protecting the industries of the United States is no longer open to doubt. *Hampton & Co.* v. *United States,* 276 U. S. 394, 411. But, in exercising the power here with that purpose, Congress may have concluded that it would thereby impose a hardship upon the Philippines which it was the moral duty of Congress to redress so far as possible. In that situation, we see no constitutional objection to a discharge of the duty by the appropriation of an amount equivalent to the tax in order to offset the anticipated burden. Certainly, this court cannot judicially declare that justice and fair dealing in respect of a people, not yet completely independent of our authority, does not warrant such action.

Nor do we see any objection to the plan because the payment of the funds is subject to the condition that the Philippine Government shall not provide for any subsidy to be paid to the Philippine producers of coconut oil and the other products named in § 602½ of the act.

It is perfectly plain that since Congress may levy the tax with the collateral purpose of protecting the industries of this country, it may in appropriating the proceeds put such restriction upon their use as will prevent the purpose from being nullified. This, we think, is the aim and the effect of the proviso.

Fourth. The contention that there has been no constitutional appropriation, or that any attempted appropriation is bad, because the particular uses to which the appropriated money is to be put have not been specified, is without merit. The provision of the Constitution (cl. 7, § 9, Art. I) that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law" was intended as a restriction upon the disbursing authority of the Executive department, and is without significance here. It means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress. *Reeside* v. *Walker,* 11 How. 272, 291; 2 Story on the Constitution (4th ed.), §§ 1348, 1349; 1 Willoughby on the Constitution, § 63, p. 105. We deem it unnecessary to elaborate the point. The petitions for certiorari, filed in January of the present year, inform us that none of the proceeds of the tax in question has been transmitted to the Philippine Treasury. Evidently the moneys in the form of a trust fund, as the government asserts, are still in the Treasury of the United States. If Congress has not made an appropriation, it may still do so (*Head Money Cases,* 112 U. S. 580, 599–600); and, all other considerations aside, the interjection of the question into the present cases is premature.

The validity of the act disposing of the tax is also attacked as constituting an unlawful delegation of legislative power. That Congress has wide discretion in the matter of prescribing details of expenditures for which

it appropriates must, of course, be plain. Appropriation and other acts of Congress are replete with instances of general appropriations of large amounts, to be allotted and expended as directed by designated government agencies. A striking and pertinent example is afforded by the Act of June 17, 1902, c. 1093, 32 Stat. 388, where all moneys received from the sale and disposal of public lands in a large number of states and territories are set aside as a special fund to be expended for the reclamation of arid and semi-arid lands within those states and territories. The expenditures are to be made under the direction of the Secretary of the Interior upon such projects as he may determine to be practicable and advisable. The constitutionality of this delegation of authority has never been seriously questioned. See *United States* v. *Hanson,* 167 Fed. 881, 884–885. In the present case, the disposition of the proceeds of the tax finds precedent in many previous acts of Congress providing for payments into the Philippine Treasury.*

But all this aside, the important point is that Congress was here dealing with a dependency for which it had provided a complete system of government to administer the affairs of a population for whose welfare the United States was under a high degree of moral responsibility, as we already have seen. The proceeds of the tax under consideration are to be paid into the treasury of a government which Congress itself thus created, to be expended by that government, except as the act otherwise directs, in accordance with its judgment as to specific necessities. The congressional power of delegation to such a local government is and must be as comprehensive as the

*Act of March 8, 1902, c. 140, 32 Stat. 54; Act of August 5, 1909, c. 6, 36 Stat. 11, 84–85; Act of October 3, 1913, c. 16, 38 Stat. 114, 193; Act of September 21, 1922, c. 356, 42 Stat. 858, 935; Act of June 17, 1930, c. 497, 46 Stat. 590, 686.

needs. Compare *United States* v. *Heinszen & Co.*, 206 U. S. 370, 384–385. In dealing with the territories, possessions and dependencies of the United States, this nation has all the powers of other sovereign nations, and Congress in legislating is not subject to the same restrictions which are imposed in respect of laws for the United States considered as a political body of states in union. *Dorr* v. *United States*, 195 U. S. 138, 140, 142.

Congress has power to create a local legislature for the Philippines; and it has done so. Congress has power to authorize the legislature to impose taxes for all the lawful needs of the islands, and to appropriate the proceeds for such uses and in such amounts as the legislature may determine (compare *Leitensdorfer* v. *Webb*, 20 How. 176, 182); and this it has done. Congress has power to appropriate the moneys here in question, and cause them to be paid from the national treasury into the Treasury of the Philippine Islands; and for this it has provided. It would result in a strange anomaly now to hold that Congress had power to devolve upon the Philippine Government the authority to appropriate revenue derived from local taxation as the government saw fit, but that Congress was without power to confer similar authority in respect of moneys which lawfully will come into the Philippine Treasury from the Treasury of the United States or from other sources apart from taxation. It is true, as already appears, that the uses to which the money is to be put are not specified. But in all instances where funds shall come into the Philippine Treasury, we may indulge the presumption, in favor of a responsible and duly-constituted legislative body, that the funds will be appropriated for public purposes and not for private uses.

Whether the payment to the Philippines of the large sums of money which will flow from this tax is unwarranted in fact; whether the present or prospective needs

of the islands require it; and other queries directly or indirectly challenging the wisdom or necessity of the Congressional action, are all matters, as we repeatedly have pointed out, with which the courts have nothing to do. We find the legislation to be free from constitutional infirmity; and there both our power and responsibility end.

Judgments affirmed.

UNITED STATES *v.* BELMONT ET AL., EXECUTORS.

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

No. 532. Argued March 4, 1937.—Decided May 3, 1937.

1. A decree of the Soviet Government dissolved a Russian corporation and expropriated all of its assets, including a deposit account with a bank in New York. Subsequently the President of the United States recognized, and established diplomatic relations with, the Soviet Government, and for the purpose of bringing about a final settlement of claims and counterclaims between that Government and the United States, it was thereupon agreed, among other things, that the Soviet Government would take no steps to enforce claims against American nationals, but all such claims, including the deposit account, were assigned to the United States with the understanding that the Soviet Government would be notified of all amounts so realized by the United States. *Held* that, as between the United States and the depositary, the deposit, in virtue of the international compact, belonged to the United States, whatever the policy of the State of New York touching the enforcement of acts of confiscation. P. 327.
2. Judicial notice is taken of the facts that coincidentally with the assignment the President recognized the Soviet Government and normal diplomatic relations were established between the two Governments, followed by an exchange of ambassadors. P. 330.
3. The effect of this was to validate, so far as this country is concerned, all acts of the Soviet Government here involved from the commencement of its existence. P. 330.

4. The international compact was within the competency of the President, and participation by the Senate was unnecessary. P. 330.
5. The external powers of the United States are to be exercised without regard to state laws or policies. P. 331.
6. What another country has done in the way of taking over property of its nationals, and especially of its corporations, is not questionable in our courts. P. 332.

85 F. (2d) 542, reversed.

CERTIORARI, 299 U. S. 531, to review the affirmance of a judgment of the District Court dismissing the complaint in an action by the United States to recover from executors a sum of money which had been deposited with their decedent by a Russian corporation and assigned by the Soviet Government, after expropriation, to the United States.

Solicitor General Reed and *Mr. David E. Hudson,* with whom *Messrs. W. W. Scott, A. H. Feller, Albert Levitt,* and *Paul A. Sweeney* were on the brief, for the United States.

Mr. Cornelius W. Wickersham for respondents.

By leave of Court, briefs of *amici curiae* were filed by *Messrs. Samson Selig* and *Joseph Day Lee,* on behalf of John R. Crews, Receiver; *Messrs. Robert J. Sykes* and *William C. Morris,* on behalf of the President and Directors of the Manhattan Co.; and *Mr. Borris M. Komar,* on behalf of the Day-Gormley Leather Co., all urging affirmance of the decree below.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This is an action at law brought by petitioner against respondents in a federal district court to recover a sum of money deposited by a Russian corporation (Petrograd

Metal Works) with August Belmont, a private banker doing business in New York City under the name of August Belmont & Co. August Belmont died in 1924; and respondents are the duly-appointed executors of his will. A motion to dismiss the complaint for failure to state facts sufficient to constitute a cause of action was sustained by the district court, and its judgment was affirmed by the court below. 85 F. (2d) 542. The facts alleged, so far as necessary to be stated, follow.

The corporation had deposited with Belmont, prior to 1918, the sum of money which petitioner seeks to recover. In 1918, the Soviet Government duly enacted a decree by which it dissolved, terminated and liquidated the corporation (together with others), and nationalized and appropriated all of its property and assets of every kind and wherever situated, including the deposit account with Belmont. As a result, the deposit became the property of the Soviet Government, and so remained until November 16, 1933, at which time the Soviet Government released and assigned to petitioner all amounts due to that government from American nationals, including the deposit account of the corporation with Belmont. Respondents failed and refused to pay the amount upon demand duly made by petitioner.

The assignment was effected by an exchange of diplomatic correspondence between the Soviet Government and the United States. The purpose was to bring about a final settlement of the claims and counterclaims between the Soviet Government and the United States; and it was agreed that the Soviet Government would take no steps to enforce claims against American nationals; but all such claims were released and assigned to the United States, with the understanding that the Soviet Government was to be duly notified of all amounts realized by the United States from such release and assignment. The assignment and requirement for notice

are parts of the larger plan to bring about a settlement of the rival claims of the high contracting parties. The continuing and definite interest of the Soviet Government in the collection of assigned claims is evident; and the case, therefore, presents a question of public concern, the determination of which well might involve the good faith of the United States in the eyes of a foreign government. The court below held that the assignment thus effected embraced the claim here in question; and with that we agree.

That court, however, took the view that the situs of the bank deposit was within the State of New York; that in no sense could it be regarded as an intangible property right within Soviet territory; and that the nationalization decree, if enforced, would put into effect an act of confiscation. And it held that a judgment for the United States could not be had, because, in view of that result, it would be contrary to the controlling public policy of the State of New York. The further contention is made by respondents that the public policy of the United States would likewise be infringed by such a judgment. The two questions thus presented are the only ones necessary to be considered.

First. We do not pause to inquire whether in fact there was any policy of the State of New York to be infringed, since we are of opinion that no state policy can prevail against the international compact here involved.

This court has held, *Underhill* v. *Hernandez,* 168 U. S. 250, that every sovereign state must recognize the independence of every other sovereign state; and that the courts of one will not sit in judgment upon the acts of the government of another, done within its own territory.

That general principle was applied in *Oetjen* v. *Central Leather Co.,* 246 U. S. 297, to a case where an action in replevin had been brought in a New Jersey state court to recover a consignment of hides purchased in Mexico from

General Villa. The title of the purchaser was assailed on the ground that Villa had confiscated the hides. Villa, it appeared, had seized the hides while conducting independent operations under the Carranza government, which at the time of the seizure had made much progress in its revolution in Mexico. The government of the United States, after the trial of the case in the state court, had recognized the government of Carranza, first as the *de facto* government of the Republic of Mexico, and later as the government *de jure*. This court held that the conduct of foreign relations was committed by the Constitution to the political departments of the government, and the propriety of what may be done in the exercise of this political power was not subject to judicial inquiry or decision; that who is the sovereign of a territory is not a judicial question, but one the determination of which by the political departments conclusively binds the courts; and that recognition by these departments is retroactive and validates all actions and conduct of the government so recognized from the commencement of its existence. "The principle," we said, p. 303, "that the conduct of one independent government cannot be successfully questioned in the courts of another is as applicable to a case involving the title to property brought within the custody of a court, such as we have here, as it was held to be to the cases cited, in which claims for damages were based upon acts done in a foreign country, for it rests at last upon the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign State to be reëxamined and perhaps condemned by the courts of another would very certainly 'imperil the amicable relations between governments and vex the peace of nations.'" *Ricaud* v. *American Metal Co.*, 246 U. S. 304, 308–309, 310, is to the same effect.

In *A. M. Luther* v. *James Sagor & Co.*, L. R. [1921] 3 K. B. 532, the English Court of Appeal expressly ap-

proved and followed our decision in the *Oetjen* case. The English case involved that part of the same decree of the Soviet Government here under consideration which declared certain private woodworking establishments to be the property of the Republic. Under that decree the Government seized plaintiff's factory in Russia together with a stock of wood therein. Agents of the Republic sold a quantity of the stock so seized to the defendants, who imported it into England. Thereafter, the British Government recognized the Soviet Government as the *de facto* government of Russia. Upon these facts, the court held that, the British Government having thus recognized the Soviet Government, existing at a date before the decree in question, the validity of that decree and the sale of the wood to the defendants could not be impugned, and gave judgment for defendants accordingly. The court regarded the decree as one of confiscation, but was unable to see (Bankes, L. J., p. 546) how the courts could treat the decree "otherwise than as the expression by the de facto government of a civilized country of a policy which it considered to be in the best interest of that country. It must be quite immaterial for present purposes that the same views are not entertained by the Government of this country, are repudiated by the vast majority of its citizens, and are not recognized by our laws." Lord Justice Scrutton, in his opinion, discusses (pp. 557–559) the contention that the courts should refuse to recognize the decree and the titles derived under it as confiscatory and unjust, and concludes that the question is one not for the judges but for the action of the sovereign through his ministers. "I do not feel able," he said, "to come to the conclusion that the legislation of a state recognized by my Sovereign as an independent sovereign state is so contrary to moral principle that the judges ought not to recognize it. The responsibility for recognition or non-recognition with the consequences of each rests on the

political advisers of the Sovereign and not on the judges." Further citation of authority seems unnecessary.

We take judicial notice of the fact that coincident with the assignment set forth in the complaint, the President recognized the Soviet Government, and normal diplomatic relations were established between that government and the Government of the United States, followed by an exchange of ambassadors. The effect of this was to validate, so far as this country is concerned, all acts of the Soviet Government here involved from the commencement of its existence. The recognition, establishment of diplomatic relations, the assignment, and agreements with respect thereto, were all parts of one transaction, resulting in an international compact between the two governments. That the negotiations, acceptance of the assignment and agreements and understandings in respect thereof were within the competence of the President may not be doubted. Governmental power over internal affairs is distributed between the national government and the several states. Governmental power over external affairs is not distributed, but is vested exclusively in the national government. And in respect of what was done here, the Executive had authority to speak as the sole organ of that government. The assignment and the agreements in connection therewith did not, as in the case of treaties, as that term is used in the treaty making clause of the Constitution (Art. II, § 2), require the advice and consent of the Senate.

A treaty signifies "a compact made between two or more independent nations with a view to the public welfare." *Altman & Co.* v. *United States,* 224 U. S. 583, 600. But an international compact, as this was, is not always a treaty which requires the participation of the Senate. There are many such compacts, of which a protocol, a modus vivendi, a postal convention, and agree-

ments like that now under consideration are illustrations. See 5 Moore, Int. Law Digest, 210–221. The distinction was pointed out by this court in the *Altman* case, *supra,* which arose under § 3 of the Tariff Act of 1897, authorizing the President to conclude commercial agreements with foreign countries in certain specified matters. We held that although this might not be a treaty requiring ratification by the Senate, it was a compact negotiated and proclaimed under the authority of the President, and as such was a "treaty" within the meaning of the Circuit Court of Appeals Act, the construction of which might be reviewed upon direct appeal to this court.

Plainly, the external powers of the United States are to be exercised without regard to state laws or policies. The supremacy of a treaty in this respect has been recognized from the beginning. Mr. Madison, in the Virginia Convention, said that if a treaty does not supersede existing state laws, as far as they contravene its operation, the treaty would be ineffective. "To counteract it by the supremacy of the state laws, would bring on the Union the just charge of national perfidy, and involve us in war." 3 Elliot's Debates 515. And see *Ware* v. *Hylton,* 3 Dall. 199, 236–237. And while this rule in respect of treaties is established by the express language of cl. 2, Art. VI, of the Constitution, the same rule would result in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states. Compare *United States* v. *Curtiss-Wright Export Corp.,* 299 U. S. 304, 316, *et seq.* In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist. Within the field of its powers, what-

ever the United States rightfully undertakes, it necessarily has warrant to consummate. And when judicial authority is invoked in aid of such consummation, state constitutions, state laws, and state policies are irrelevant to the inquiry and decision. It is inconceivable that any of them can be interposed as an obstacle to the effective operation of a federal constitutional power. Cf. *Missouri* v. *Holland,* 252 U. S. 416; *Asakura* v. *Seattle,* 265 U. S. 332, 341.

Second. The public policy of the United States relied upon as a bar to the action is that declared by the Constitution, namely, that private property shall not be taken without just compensation. But the answer is that our Constitution, laws and policies have no extraterritorial operation, unless in respect of our own citizens. Compare *United States* v. *Curtiss-Wright Export Corp., supra,* at p. 318. What another country has done in the way of taking over property of its nationals, and especially of its corporations, is not a matter for judicial consideration here. Such nationals must look to their own government for any redress to which they may be entitled. So far as the record shows, only the rights of the Russian corporation have been affected by what has been done; and it will be time enough to consider the rights of our nationals when, if ever, by proper judicial proceeding, it shall be made to appear that they are so affected as to entitle them to judicial relief. The substantive right to the moneys, as now disclosed, became vested in the Soviet Government as the successor to the corporation; and this right that government has passed to the United States. It does not appear that respondents have any interest in the matter beyond that of a custodian. Thus far no question under the Fifth Amendemnt is involved.

It results that the complaint states a cause of action and that the judgment of the court below to the contrary is erroneous. In so holding, we deal only with the case

as now presented and with the parties now before us. We do not consider the status of adverse claims, if there be any, of others not parties to this action. And nothing we have said is to be construed as foreclosing the assertion of any such claim to the fund involved, by intervention or other appropriate proceeding. We decide only that the complaint alleges facts sufficient to constitute a cause of action against the respondents.

Judgment reversed.

MR. JUSTICE STONE, concurring.

I agree with the result, but I am unable to follow the path by which it is reached. Upon the record before us there is, I think, no question of reëxamining the validity of acts of a foreign state, and no question of the United States' declaring and enforcing a policy inconsistent with one that the State of New York might otherwise adopt in conformity to its own laws and the Constitution.

The United States, by agreement with the Soviet government, has acquired an assignment of all the rights of the latter in a chose in action, against an American citizen, formerly belonging to a Russian national, and confiscated by decree of the Soviet government. If the subject of the transfer were a chattel belonging to an American, but located in Russia, we may assume that the validity of the seizure would be recognized here, *Oetjen* v. *Central Leather Co.*, 246 U. S. 297; *Ricaud* v. *American Metal Co.*, 246 U. S. 304, 308–310; *Salimoff & Co.* v. *Standard Oil Co.*, 262 N. Y. 220; 186 N. E. 679. Similarly, the confiscation of the present claim, being lawful where made, is upon familiar principles to be regarded as effective in New York, except in so far as that state, by reason of the presence of the debtor there, may adopt and enforce a policy based upon non-recognition of the transfer.

But this Court has often recognized that a state may refuse to give effect to a transfer, made elsewhere, of property which is within its own territorial limits, if the transfer is in conflict with its public policy. *Green* v. *Van Buskirk,* 5 Wall. 307, 311–312; *Hervey* v. *Rhode Island Locomotive Works,* 93 U. S. 664; *Security Trust Co.* v. *Dodd, Mead & Co.,* 173 U. S. 624; *Clark* v. *Williard,* 292 U. S. 112, 122; *Clark* v. *Williard,* 294 U. S. 211. It is likewise free to disregard the transfer where the subject of it is a chose in action due from a debtor within the state to a foreign creditor, especially where, as in the present case, the debtor's only obligation is to pay within the state, on demand. *Harrison* v. *Sterry,* 5 Cranch 289; *Disconto Gesellschaft* v. *Umbreit,* 208 U. S. 570; *Barth* v. *Backus,* 140 N. Y. 230; 35 N. E. 425; *Vladikavkazsky Ry. Co.* v. *New York Trust Co.,* 263 N. Y. 369, 378–379; 189 N. E. 456. The chose in action is so far within the control of the state as to be regarded as located there for many purposes. *Wyman* v. *Halstead,* 109 U. S. 654, 656; *Chicago, R. I. & P. Ry. Co.* v. *Sturm,* 174 U. S. 710; *Harris* v. *Balk,* 198 U. S. 215; *Pennington* v. *Fourth National Bank,* 243 U. S. 269; *Security Savings Bank* v. *California,* 263 U. S. 282, 285; *Corn Exchange Bank* v. *Coler,* 280 U. S. 218; *In re Russian Bank for Foreign Trade,* L. R. 1933, Ch. Div. 745, 767; American Law Institute, Restatement, Conflict of Laws, §§ 108, 213.

It does not appear that the State of New York, at least since our diplomatic recognition of the Soviet government, has any policy which would permit a New York debtor to question the title of that government to a claim of the creditor acquired by its confiscatory decree, and no reason is apparent for assuming that such is its policy. Payment of the debt to the United States as transferee will discharge the debtor and impose on him no burden which he did not undertake when he assumed the position of debtor. Beyond this he has no interest for the state

to protect. But it is a recognized rule that a state may rightly refuse to give effect to external transfers of property within its borders so far as they would operate to exclude creditors suing in its courts. *Harrison* v. *Sterry, supra; Security Trust Co.* v. *Dodd, Mead & Co., supra; Disconto Gesellschaft* v. *Umbreit, supra; Clark* v. *Williard, supra; Barth* v. *Backus, supra.*

We recently held, in *Clark* v. *Williard, supra,* that the full faith and credit clause does not preclude the attachment of property within the state, by a local creditor of a foreign corporation, all of whose property has been previously transferred, in the state of its incorporation, to a statutory successor for the benefit of creditors. Due process under the Fifth Amendment, the benefits of which extend to alien friends, as well as to citizens, *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481, does not require any different result. *Disconto Gesellschaft* v. *Umbreit, supra,* 579, 580. The Constitution has no different application where the property transferred is a chose in action, later seized by a creditor in the state of the debtor. *Disconto Gesellschaft* v. *Umbreit, supra.* See *Harrison* v. *Sterry, supra.* In conformity to this doctrine, New York would have been free to enforce a local policy, subordinating the Soviet government, as the successor of its national, to local suitors. Its judicial decisions indicate that such may be its policy for the protection of creditors or others claiming an interest in the sum due. *James & Co.* v. *Second Russian Insurance Co.,* 239 N. Y. 248, 257; 146 N. E. 369; *Matter of People* (City Equitable Fire Insurance Co.), 238 N. Y. 147, 152; 144 N. E. 484; *Matter of Waite,* 99 N. Y. 433, 448; 2 N. E. 440. See *Vladikavkazsky Ry. Co.* v. *New York Trust Co., supra.*

It seems plain that, so far as now appears, the United States does not stand in any better position with respect to the assigned claim than did its assignor, or any other

transferee of the Soviet government. We may, for present purposes, assume that the United States, by treaty with a foreign government with respect to a subject in which the foreign government has some interest or concern, could alter the policy which a state might otherwise adopt. It is unnecessary to consider whether the present agreement between the two governments can rightly be given the same effect as a treaty within this rule, for neither the allegations of the bill of complaint, nor the diplomatic exchanges, suggest that the United States has either recognized or declared that any state policy is to be overridden.

So far as now relevant, the document signed by the Soviet government, as preparatory to a more general settlement of claims and counterclaims between the two governments, assigns and releases to the United States all amounts "due or that may be found to be due it" from American nationals, and provides that the Soviet government is "to be duly notified in each case of any amount realized by the Government of the United States from such release and assignment." The relevant portion of the document signed by the President is expressed in the following paragraph:

"I am glad to have these undertakings by your Government and I shall be pleased to notify your Government in each case of any amount realized by the Government of the United States from the release and assignment to it of the amounts admitted to be due or that may be found to be due."

There is nothing in either document to suggest that the United States was to acquire or exert any greater rights than its transferor, or that the President, by mere executive action, purported or intended to alter the laws and policy of any state in which the debtor of an assigned claim might reside, or that the United States, as assignee,

is to do more than the Soviet government could have done after diplomatic recognition—that is, collect the claims in conformity with those laws. Cf. *Todok* v. *Union State Bank,* 281 U. S. 449.

As respondent debtor may not challenge the effect of the assignment to the United States, the judgment is rightly reversed. But as the reversal is without prejudice to the rights of any other parties to intervene, they should be left free to assert, by intervention or other appropriate procedure, such claims with respect to the amount due as are in accordance with the laws and policy of New York. There is no occasion to say anything now which can be taken to foreclose the assertion by such claimants of their rights under New York law.

MR. JUSTICE BRANDEIS and MR. JUSTICE CARDOZO concur in this opinion.

ANNISTON MANUFACTURING CO. *v.* DAVIS, COLLECTOR OF INTERNAL REVENUE.

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

No. 667. Argued April 2, 1937.—Decided May 17, 1937.

1. The right to sue the Collector for recovery of taxes exacted under an unconstitutional statute may, consistently with the Fifth Amendment, be abolished if a fair and adequate remedy directly against the Government be substituted. P. 341.
2. With respect to the refunding of "floor stock taxes" collected under the Agricultural Adjustment Act of 1933, the Revenue Act of 1936, Title VII, § 905, preserves to the taxpayer the remedy by suit against the United States in the District Courts or the Court of Claims. P. 343.
3. With respect to the refunding of processing taxes collected under the Agricultural Adjustment Act of 1933, the Revenue Act of 1936, Title VII, § 906, establishes a special and exclusive administrative procedure before a Board of Review in the Treasury Department,

and provides for a judicial review of the Board's decisions in which may be determined every question of law which the claimant is entitled to raise, whether general, statutory, or constitutional, including questions as to the validity of any part of Title VII itself, and in which the reviewing court is empowered to direct the Board to enter any designated judgment, the Commissioner of Internal Revenue being required to refund any amount which may thus be found due the claimant. P. 343.

4. With respect to the refunding of such processing taxes, the Revenue Act of 1936, *supra,* provides, Title VII, § 902 (2), that no refund shall be allowed unless the claimant establishes to the satisfaction of the Board of Review that he bore the burden of the amount paid as tax and "has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly" through the inclusion of the amount paid in the price of the product, through reduction of the price paid for the raw material, or "in any manner whatsoever." *Held:*

(1) If the taxpayer has thus shifted the burden of the tax, he is no longer in a position to claim an actual injury and the refusal of a refund in such a case cannot be regarded as a denial of constitutional right. P 348.

(2) The fact that the Act makes no provision for refunding to particular persons, to whom the burden of the invalid exaction may be found to have been shifted, is no concern of the taxpayer. P. 350.

(3) The statute should not be construed as denying a refund where, from the nature of the case, proof that the tax burden was not shifted is inherently impossible; but the existence of such impossibility is a question of fact which the claimant may raise before the Board; the claimant is required to present to the Board the facts pertaining to the subject, and thereupon it becomes the duty of the Board, upon findings supported by evidence, to make its determination in accordance with the legal rights of the claimant, subject to modification or reversal by the reviewing court if not in accordance with law. P. 351.

Constitutional questions are not to be decided hypothetically. When particular facts control the decision they must be shown.

(4) Of two possible constructions of a statute, that one should be adopted which will save and not destroy it. An intent to defy the Fifth Amendment or even to come so near to doing so as to raise a serious question of constitutional law cannot be attributed to Congress. P. 351.

(5) Section 902 is not too vague; it lays down the general principle governing the remedy afforded, leaving its applications to be determined by facts as they appear in particular instances. P. 353.

5. Section 907 (a), of Title VII, of the Revenue Act of 1936, provides that, in the administrative proceedings above mentioned, the fact that the average margin per unit of commodity processed was lower during the tax period than the average margin during the period before and after it, shall be *prima facie* evidence that the burden of the processing tax was borne by the claimant taxpayer; and that if the average margin during the tax period was not lower, it shall be *prima facie* evidence that none of the burden of such amount was borne by the claimant but that it was shifted to others. "Tax period" and "period before and after the tax" are defined. Section 907 (e) provides that either the claimant or the Commissioner may rebut the presumptions "by proof of the actual extent to which the claimant shifted to others the burdens of the processing tax." *Held* that the words "*actual* extent" are used in contradistinction to the *presumed* extent, according to the *prima facie* presumption to which the proof in rebuttal is addressed, and that complete opportunity is afforded the claimant to present any evidence which may be pertinent to the questions to be determined by the Board of Review and which may be appropriate to overcome any presumption which might be indulged either under § 907 (a) or otherwise. P. 354.

6. Section 906 (b) of the Act of 1936, Title VII, *supra,* provides that the hearing before the Board is to be conducted by a presiding officer who is either a member of the Board or an officer or employee of the Treasury Department designated by the Secretary of the Treasury, and § 906 (e) that the presiding officer is to recommend to the Board, or a division, findings of fact and a decision; but the Board, or a division of it, is required to consider the evidence and make the findings and administrative decision; and the whole scheme of the administrative proceeding presupposes hearing and determination in accordance with the demands of due process. P. 356.

87 F. (2d) 773, affirmed.

CERTIORARI, 300 U. S. 649, to review the affirmance of a judgment of the District Court, dismissing, on demurrer to the complaint, an action against the Collector

to recover amounts paid as cotton "processing" taxes and as cotton "floor stock" taxes under the Agricultural Adjustment Act of 1933, which was held unconstitutional by this Court in *United States* v. *Butler*, 297 U. S. 1.

Messrs. Joseph B. Brennan and *William A. Sutherland* for petitioner.

Solicitor General Reed and *Assistant Attorney General Morris*, with whom *Messrs. Sewall Key* and *J. Louis Monarch*, and *Miss Helen R. Carloss* were on the brief, for respondent.

By leave of Court, briefs of *amici curiae* were filed by: *Messrs. William B. McIlvaine* and *William B. Hale; Messrs. Toy D. Savage* and *William R. Perkins*, on behalf of Charles W. Priddy & Co.; *Messrs. Edward R. Hale* and *Bennett Sanderson*, on behalf of the Receivers of Hoosac Mills Corp.; *Mr. Bennett E. Siegelstein; Mr. Richard B. Barker; Mr. George T. Buckingham;* and *Messrs. Malcolm Donald* and *Edward E. Elder*, on behalf of Pacific Mills, Inc.,—all challenging the Act.

Mr. Chief Justice Hughes delivered the opinion of the Court.

Petitioner brought this suit on November 22, 1935, against the Collector of Internal Revenue to recover the amounts paid as cotton "processing" taxes (first cause of action) and as cotton "floor stock" taxes (second cause of action) under the Agricultural Adjustment Act of 1933. 48 Stat. 31, 35, 40. Petitioner alleged the unconstitutionality of the statute imposing the tax (*United States* v. *Butler*, 297 U. S. 1) and that claim for refund had been rejected by the Commissioner of Internal Revenue on August 16, 1935. After the enactment of Title VII of the Revenue Act of 1936, §§ 901–917 (49 Stat. 1747), petitioner amended its complaint, asserting the

unconstitutionality of these provisions. Demurrer was sustained by the District Court (15 F. Supp. 257) and its judgment of dismissal was affirmed by the Circuit Court of Appeals upon the ground that the court below was without jurisdiction to entertain the action. 87 F. (2d) 773. In view of the importance of the questions raised, we granted certiorari.

Title VII, §§ 901–917, of the Revenue Act of 1936, provided a new administrative procedure for the recovery of amounts collected under the Agricultural Adjustment Act. Section 901 repealed §§ 21 (d), 21 (e), and 21 (g), of the amendments of 1935 (49 Stat. 771–773). Section 902 prescribed the conditions on which refunds should be made. Section 903 related to the filing of claims. Sections 904 and 905 prescribed periods of limitation and provided for the jurisdiction of the District Courts, concurrent with the Court of Claims, for the recovery of amounts collected as floor stock and compensating taxes. Section 906 prescribed the procedure on claims for refunds of processing taxes. Section 907 established certain rules of evidence or presumptions to be observed in the administrative proceeding. Section 908 related to allowance of interest. Section 909 denied review of the administrative ruling by any other administrative or accounting officer. Section 910 undertook to free the collector from liability for moneys collected by him and paid into the Treasury in performance of his official duties. Section 913 defined various terms employed. Other sections laid down administrative rules not requiring attention in the present discussion.

First. Petitioner contends that at the time it brought this suit it had a vested right of action against the Collector to recover the amounts exacted under statutory provisions held to be invalid; that this right of action could not be destroyed without violating the Fifth Amendment; that the Collector was personally liable for

the amounts collected and that § 910 which attempted to destroy that liability is unconstitutional.

The Government answers that the instant case "does not require a decision as to the power of Congress to withdraw suit entirely, both against the Collector and against the Government"; that Congress "has left a remedy against the Government which is fair and adequate in every respect." We agree with the Government's contention that if the administrative remedy is fair and adequate, other questions with respect to the liability of the Collector and the validity of § 910 need not now be considered. We had occasion to deal with a cognate question in *Burrill* v. *Locomobile Co.,* 258 U. S. 34. That decision was rendered in suits brought by foreign corporations in the federal court to recover taxes alleged to have been paid to the defendant, the Treasurer of Massachusetts, under duress and in obedience to statutes held by this Court to be unconstitutional in *International Paper Co.* v. *Massachusetts,* 246 U. S. 135, and *Locomobile Co.* v. *Massachusetts,* 246 U. S. 146. A statute of Massachusetts provided that any corporation aggrieved by the exaction of the tax could apply by petition to the Supreme Judicial Court and that the remedy so provided should be exclusive. As the statute contained a provision for repayment of any sum adjudged to have been illegally exacted, it was contended that it constituted a bar to a personal suit against the Treasurer who had collected the tax. This Court agreed with the defendant upon that point. The State had substituted an exclusive remedy against itself for the remedy against the Treasurer and had guaranteed payment of the amount found to be due. The validity of the statute was sustained. We said that we did "not perceive why the State may not provide that only the author of the wrong shall be liable for it, at least when, as here, the

remedy offered is adequate and backed by the responsibility of the State."

The same reasoning is applicable here. The Government has not denied its obligation to refund the amounts found in the authorized proceeding to be recoverable, but has recognized that obligation. In such a case, the substitution of an exclusive remedy directly against the Government is not an invasion of constitutional right. Nor does the requirement of recourse to administrative procedure establish invalidity if legal rights are still suitably protected. The immediate question is whether the authorized proceeding affords a fair and adequate remedy. We accordingly inquire whether the prescribed procedure gives an opportunity for a full and fair hearing and determination of all questions of fact and adequately provides for the protection of the legal rights of the claimant, embracing whatever right of refund the claimant is entitled to assert under the Federal Constitution.

Second. With respect to floor stock taxes, no serious question is presented as to the adequacy of the remedy. The remedy by suit is expressly preserved. If the Commissioner refuses refund, suit may be brought against the United States in the Court of Claims or in the District Court for the recovery of the amount claimed to have been illegally exacted. § 905.

Third. With respect to the refunding of processing taxes, a special and exclusive administrative procedure is provided. § 906. Disallowance by the Commissioner of a claim of refund, in whole or part, is made final unless within three months the claimant files a petition for hearing upon the merits by a Board of Review which the Act establishes in the Treasury Department. The Board is composed of nine members who are officers or employees of the Department and are designated by the Secretary of the Treasury. The Board is "to determine the

amount of refund due any claimant with respect to such claim." The Commissioner is required to "make refund of any such amount determined by a decision of the Board which has become final." § 906 (b). The hearing, upon notice, before the Board is to be open to the public and is to be conducted by a presiding officer who is either a member of the Board or an officer or employee of the Treasury Department designated by the Secretary of the Treasury. The proceedings are to be in accordance with the rules of practice and procedure prescribed by the Board with the approval of the Secretary of the Treasury save with respect to rules of evidence, which are to be in accordance with those applicable in courts of equity of the District of Columbia. The claimant and the Commissioner are entitled "to be represented by counsel, to have witnesses subpoenaed, and to examine and cross examine witnesses." Provision is made to compel the attendance and testimony of witnesses and the production of books and papers from any place in the United States and to require the taking of depositions. § 906 (c) (d). The presiding officers are to recommend findings of fact and a decision to the Board or the proper division thereof within six months after the conclusion of the hearing. Briefs with respect to such recommendations may be submitted within a specified time. The Board or a division is to make its findings of fact and decision in writing as quickly as practicable. The findings and decision of a division are to become those of the Board within thirty days unless the Chairman has directed that they be reviewed by the Board. Copies of the findings and decision are to be mailed to the claimant and the Commissioner. § 906 (e). There is a further provision as to costs and fees. § 906 (f). The decision of the Board is to become final in the same manner as decisions of the Board of Tax Appeals under § 1005 of the Revenue Act of 1926 as amended. § 906 (g); 26 U. S. C. 640.

Judicial review of the decision of the Board is provided. That review may be had by a Circuit Court of Appeals or by the United States Court of Appeals for the District of Columbia, according to the residence or place of business of the claimant, or by any such court as may be designated by the Commissioner and the claimant by stipulation. Upon petition for review the Board is to certify and file in the appropriate court a transcript of the record upon which the findings and decision were based. Thereupon, the Court of Appeals is to have "exclusive jurisdiction to affirm the decision of the Board, or to modify or reverse such decision, if it is not in accordance with law, with or without remanding the cause for a rehearing, as justice may require." § 906 (g). If the claimant or the Commissioner applies to the Court of Appeals for leave to adduce additional evidence the court may order it to be taken before the presiding officer if the court is satisfied that the additional evidence is material and that there were reasonable grounds for failure to adduce it at the hearing. The Board may modify its findings and decision by reason of such additional evidence, filing its modified or new determination with the court. The judgment of the Court of Appeals is to be final, subject to review by this Court upon certification or certiorari as provided in §§ 239 and 240 of the Judicial Code.

We think that this plan of procedure provides for the judicial determination of every question of law which the claimant is entitled to raise. We find nothing in the statute which limits the judicial review to questions of statutory construction or of mere regularity of procedure. The "law," with which the decision of the Board may be in conflict, may be the fundamental law. Questions of validity as well as of statutory authority or regularity may be determined. These may relate to due process in the hearing or in the refusal of a refund. The Government does not contest this construction but on the con-

trary affirms it. The Government recognizes and urges that the jurisdiction given to the Court of Appeals "to modify or reverse" the decision of the Board "if it is not in accordance with law" includes the power to review all questions of general and statutory law and all constitutional questions. Thus every constitutional right which the petitioner here is entitled to invoke with respect to the refund of the taxes which it has paid may be heard and determined by the Court of Appeals and ultimately by this Court upon a review of a decision reached in the course of the prescribed administrative procedure. The Government urges, and we think correctly, that if on such a review any part of Title VII were held to be invalid, "the taxpayer may recover all of the taxes to which he is entitled under such a decision." Upon the judicial review of the action of the Board, the Court of Appeals and this Court would have power "to direct the Board to enter any designated judgment" and the Commissioner is required to make refund of any amount which may thus be determined to be due the claimant. [1]

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[1] Upon this point the Government states in its brief (pp. 104, 105):

"The established rule as to the proper scope of constitutional litigation can be applied in this case with no danger of injury to petitioner. If, upon an appropriate record and in the light of an actual attempt by the taxpayer to show the incidence of the processing tax, this Court should hold any part of Title VII invalid, the taxpayer may recover all of the taxes to which he is entitled under such a decision, with interest at 6 per cent per annum (Sec. 908 (a); Sec. 614 (a) of the Revenue Act of 1928, c. 852, 45 Stat. 791). For, whether or not Section 902 and Section 907 be held invalid, the Board of Review would still remain as a mechanical means by which to enforce the decision of a circuit court of appeals or of this Court. Even if Section 902 were held invalid, and recovery allowed on mere proof of payment of Agricultural Adjustment Act taxes, the Board of Review would still have jurisdiction to review the allowance or disallowance of any claim, and the circuit courts of appeals and this Court would still have power to direct the Board to enter any desig-

Fourth. The question then is whether, despite this broad right of judicial review of the action of the Board, the administrative scheme has such inherent constitutional defects that the petitioner should not be remitted to that procedure. The inquiry has particular relation to the provisions (1) as to burden of proof, § 902, (2) as to presumptions, § 907, and (3) as to certain matters of administrative detail.

The burden of proof.—Section 902, the full text of which is set out in the margin,[2] provides that no refund

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nated judgment. And Section 906 (b) provides that 'the Commissioner shall make refund of any such amount determined by a decision of the Board which has become final.'"

[2] SEC. 902. *Conditions on Allowance of Refunds.*

"No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under Section 906, as the case may be—

"(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof, or

"(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or

shall be allowed unless the claimant establishes to the satisfaction of the Commissioner, or of the trial court, or of the Board of Review in cases under § 906, that the claimant bore the burden of the amount paid as tax and "has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly" (1) through the inclusion of the amount paid in the price of the product, (2) through reduction of the price paid for the raw material, or (3) "in any manner whatsoever."

According to the allegations of the complaint, the petitioner initially did bear the burden of the unconstitutional tax, as petitioner paid it. The question for administrative determination is whether the burden of that payment has been shifted. So far as petitioner's contention may be taken to be that it is entitled to recover by reason of the invalidity of the tax, although in fact its burden has been "passed on" to another, the contention cannot be sustained. While the taxpayer was undoubtedly hurt when he paid the tax, if he has obtained relief through the shifting of its burden, he is no longer in a position to claim an actual injury and the refusal of a refund in such a case cannot be regarded as a denial of constitutional right.

That question was decided in *United States* v. *Jefferson Electric Co.*, 291 U. S. 386, and the controlling principle as to burden of proof was declared. There, actions at law had been brought, one against the United States and others against a revenue collector, to recover money alleged to have been illegally exacted as an excise tax. The ground of illegality was that the sales, with respect to which the taxes were laid, were not within the purview of the tax statute. The question concerned the

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indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever."

authority of the court to entertain the actions in view of the provision of § 424 of the Revenue Act of 1928 relating to refunds. Properly construed, that provision was taken "as substantively limiting the right to a refund of taxes of the designated class to instances where the taxpayer either has not directly or indirectly collected the tax from the purchaser or having so collected it has returned it to him." This "substantive limitation" was deemed to be "an element of the right to a refund of such taxes," although they were wholly invalid and not merely laid in excess of what was lawful, and hence the statute required that this element, like others, "be satisfactorily established in any proceedings where an asserted right to a refund is presented for examination and determination." We held that the provision was applicable to judicial as well as to administrative proceedings for refunds under the Act. *Id.*, p. 395. We recognized that, under the system then in force, in view of the illegality of the tax, "there accrued to the taxpayer when he paid the tax a right to have it refunded without any showing as to whether he bore the burden of the tax or shifted it to the purchasers." And it was further conceded that the provision of § 424 of the Revenue Act of 1928 applied "to rights accrued theretofore and still subsisting," and subjected them to the restriction "that the taxpayer (a) must show that he alone has borne the burden of the tax, or (b) if he has shifted the burden to the purchasers, must give a bond promptly to use the refunded sum in reimbursing them." *Id.*, p. 401. But we were unable to conclude that in imposing this restriction the section struck down prior rights or did more "than to require that it be shown or made certain that the money when refunded will go to the one who has borne the burden of the illegal tax, and therefore is entitled in justice and good conscience to such relief." We held that there was no infringement of due process of law in that restriction or

in placing upon the claimant the burden of proof. We said (*id.*, p. 402):

"If the taxpayer has borne the burden of the tax, he readily can show it; and certainly there is nothing arbitrary in requiring that he make such a showing. If he has shifted the burden to the purchasers, they and not he have been the actual sufferers and are the real parties in interest; and in such a situation there is nothing arbitrary in requiring, as a condition to refunding the tax to him, that he give a bond to use the refunded money in reimbursing them."

The opposing contention was found to be particularly faulty in that it overlooked the fact that the statutes providing for refunds proceed on the same equitable principles that underlie an action in assumpsit for money had and received. That action "aims at the abstract justice of the case, and looks solely to the inquiry, whether the defendant holds money, which *ex aequo et bono* belongs to the plaintiff." *Id.*, p. 403.

The circumstance that under Title VII, here involved, there is no provision for making a refund to particular persons, to whom the burden of the invalid exaction may be found to have been shifted, presents no sound distinction so far as the claimant is concerned. The controlling principle is that there is no denial of constitutional right in requiring the claimant to show, where it can be shown, that he alone has borne the burden of the invalid tax and has not shifted it to others.

Apart from this question, the gravamen of petitioner's complaint is that § 902 demands the impossible; that it sets up a condition of recovery which in petitioner's case cannot possibly be met. That is, that the statute not only requires the claimant to show that the burden of the tax has not been shifted, where that can be shown, but bars recovery where in the nature of the case that cannot be shown. Petitioner contends that it is within the

latter class. In its amended complaint, petitioner sets forth at length the features of the operation of a cotton mill such as its own. By reason of the nature of these operations petitioner asserts that there is "an inherent impossibility" of proving whether or to what extent the burden of the taxes paid has been shifted to others.

This allegation is at best but a statement of a legal conclusion which must depend upon the facts as they appear when proof is taken. The question is whether the petitioner is entitled to insist as a matter of constitutional right upon trying out the question of impossibility in this suit rather than in an administrative proceeding where all the pertinent facts as to the course of business may be presented and the conclusions they require both of fact and law may be reached. This assertion of such a constitutional right rests upon a construction of § 902 to the effect that if the facts, fully disclosed, afforded no basis for *any* determination as to the shifting of the burden of the tax, and hence gave no warrant for a finding that the burden had been shifted from the claimant to others, still the statute would require a denial of the right to a refund. The claimant would then stand, by virtue of the injury caused by the payment of the tax, not as one seeking relief when he had not been hurt, but as one who had been hurt by a payment unconstitutionally required and whose proved injury could not be said to have been redressed. It is in that aspect that the statute is assailed as leaving the claimant without remedy for a deprivation of his property without due process of law.

Despite the broad language of § 902, we do not think that it should be construed as intended to deny a refund in any case where a claimant is constitutionally entitled to it. We apply the familiar canon which makes it our duty, of two possible constructions, to adopt the one which will save and not destroy. We cannot attribute to Congress an intent to defy the Fifth Amendment or

"even to come so near to doing so as to raise a serious question of constitutional law." *Federal Trade Comm'n* v. *American Tobacco Co.*, 264 U. S. 298, 307; *Panama R. Co.* v. *Johnson*, 264 U. S. 375, 390; *Blodgett* v. *Holden*, 275 U. S. 142, 148. When the Congress requires the claimant, who has paid the invalid tax, to show that he has not been reimbursed or has not shifted its burden, the provision should not be construed as demanding the performance of a task, if ultimately found to be inherently impossible, as a condition of relief to which the claimant would otherwise be entitled. There is ample room for the play of the statute within the range of possible determinations. Impossibility of proof may not be assumed. It cannot be doubted that the requirement has appropriate and valid effect in placing upon the claimant the duty to present fully all the facts pertaining to the question of the shifting of the burden of the tax and in denying relief where the facts justify a conclusion that the burden has been shifted from the claimant to others. When the facts have been shown it becomes the duty of the Board of Review to make its determination according to the legal rights of the claimant. That is the necessary import of the provision for judicial review, giving authority to the reviewing court to modify or reverse the decision of the Board "if it is not in accordance with law." Findings that can properly be made upon the evidence must thus support a decision according to legal right. And, as we have seen, the reviewing court, and finally this Court, may direct the Board "to enter any designated judgment" [3] to which the claimant is constitutionally entitled and the Commissioner must refund the amount thus determined to be due.

In saying this, we are not passing upon the constitutional right of petitioner to a refund or upon the question

[3] See Note 1.

whether in its case the shifting of the burden of the tax is or is not "susceptible of proof." Constitutional questions are not to be decided hypothetically. When particular facts control the decision they must be shown. *Borden's Farm Products Co.* v. *Baldwin,* 293 U. S. 194, 208–210. Petitioner's contention as to impossibility of proof is premature. Manifestly there is no impossibility so far as the production of proof of petitioner's operations or course of business is concerned. What is meant by impossibility of proof is impossibility of determination after these facts are in. Whether or not any such impossibility of determination will exist is a question which properly should await the ascertainment of the facts. For the present purpose it is sufficient to hold, and we do hold, that the petitioner may constitutionally be required to present all the pertinent facts in the prescribed administrative proceeding and may there raise, and ultimately may present for judicial review, any legal question which may arise as the facts are developed.

These considerations also dispose of the contention that § 902 "is so vague and uncertain that it is meaningless, and therefore affords no remedy." It is not necessary for the Congress, in insisting that a claimant should not recover where it appeared that he had not borne the burden of the tax, to attempt to formulate the conclusions which would be appropriate upon varying states of fact. Petitioner's argument, drawn from the writings of economists, is itself sufficient to show the futility of such an effort. The Congress could, and did, lay down a general principle and leave its application to the facts as they would appear in particular instances in a proceeding adapted to their full disclosure. The general principle thus laid down is no more vague and indefinite than the equitable doctrine which governs the right of recovery in actions for money had and received.

The presumptions under § 907.—Petitioner also contests the validity of the administrative proceeding because of the rules of evidence and presumptions which the statute establishes. Section 907 provides, with respect to processing taxes, that it "shall be *prima facie* evidence that the burden of such amount was borne by the claimant to the extent (not to exceed the amount of the tax) that the average margin per unit of the commodity processed was lower during the tax period than the average margin was during the period before and after the tax"; and that "If the average margin during the tax period was not lower, it shall be *prima facie* evidence that none of the burden of such amount was borne by the claimant but that it was shifted to others."

The "tax period" is defined as the period in which the claimant actually paid the tax to a collector and ends with the last payment. The "period before and after the tax" is defined as "the twenty-four months (except that in the case of tobacco it shall be the twelve months) immediately preceding the effective date of the processing tax, and the six months, February to July, 1936, inclusive." Provision is made for the computation of what is called the "average margin" for the respective periods, the "margin" being determined by deducting from the gross sales value of articles processed the cost of the commodity processed and the processing tax.

Petitioner contends that the presumptions are entirely arbitrary and therefore unconstitutional. There is a general allegation to that effect in petitioner's amended complaint. But it cannot be said that the comparisons set up between the results of operations during the "tax period" and the "period before and after the tax" are wholly irrelevant. Nor can it now be determined what will be the effect of the presumptions. While petitioner assails them, its complaint contains no allegation as to their actual effect in relation to petitioner's operations.

Non constat but that they may work to petitioner's advantage. For all that we know the presumption may establish *prima facie* that petitioner has borne the burden of the tax. Petitioner invites us to enter into a purely speculative inquiry for the purpose of condemning statutory provisions which have not been tried out and the effect of which cannot now be definitely perceived. We must decline that invitation and adhere to the fundamental principle which governs our determination of constitutional questions. *Liverpool, New York & Philadelphia Steamship Co.* v. *Commissioners,* 113 U. S. 33, 39; *Cincinnati* v. *Vester,* 281 U. S. 439, 448, 449; *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 324.

The stated presumptions are rebuttable. If they work adversely to its interests, petitioner will have ample opportunity to prove all the rebutting facts. Section 907 (e) provides that either the claimant or the commissioner may rebut the presumptions "by proof of the actual extent to which the claimant shifted to others the burdens of the processing tax." There follows a detailed provision as to what such proof may include. But that provision is not exclusive. It is expressly stated that the proof in rebuttal shall not be limited to what is thus described. Petitioner urges that the statute requires that this proof shall be of the "actual extent" to which the burden of the tax has been shifted, and recurs to the argument as to the inherent impossibility of producing such proof. What we have already said with respect to that argument is applicable in this connection. We do not think that Congress was attempting to require the impossible. The permissible, and we think the true, construction of § 907 (e) is that the words "*actual* extent" are used in contradistinction to the *presumed* extent, according to the *prima facie* presumption to which the proof in rebuttal is addressed. In the light of the context, and of the entire scheme of the administrative pro-

ceeding, we are of the opinion that the provision was intended to afford, and does afford, full opportunity to the claimant to present any evidence which may be pertinent to the questions to be determined by the Board of Review and which may be appropriate to overcome any presumption which might be indulged either under § 907 (a) or otherwise.

Procedural due process in the conduct of the administrative hearing.—Petitioner also complains that under § 906 (d) the hearing is to be conducted, not by the Board of Review, or a division thereof, but by a "presiding officer" designated by the Secretary of the Treasury; and that under § 906 (e) the presiding officer is to recommend to the Board, or a division, findings of fact and a decision. Petitioner urges that the Board, or its division, is not required by the statute to consider the evidence and hence that the procedure contemplated by § 906 does not meet the requirements of due process. We find no merit in these contentions. There is no provision of the statute which is necessarily inconsistent with the observance of the due process required in hearings by administrative bodies. *Interstate Commerce Comm'n* v. *Louisville & N. R. Co.*, 227 U. S. 88, 91; *United States* v. *Abilene & Southern Ry. Co.*, 265 U. S. 274, 288; *Morgan* v. *United States*, 298 U. S. 468, 480, 481; *Ohio Bell Telephone Co.* v. *Public Utilities Comm'n, ante*, p. 292. "The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it." *Chicago Junction Case*, 264 U. S. 258, 265. Whatever the privilege or duty of the presiding officer, and whatever may be his recommendation, the statute requires that "the Board or a division shall make its findings of fact and decision in writing" and shall certify and file with the court on judicial review a transcript of the record upon which its findings and decision are based.

The court has jurisdiction "to affirm the decision of the Board or to modify or reverse such decision." If additional evidence is taken "the Board may modify its findings of fact and decision" by reason of such evidence. The whole scheme of the administrative proceeding presupposes hearing and determination in accordance with the demands of due process. The Board which makes its findings and renders its decision must consider the evidence and base its findings and decision upon it, and until the contrary appears we must assume that the Board will do so. *Morgan* v. *United States, supra.*

We conclude that the authorized procedure provides for a full and fair hearing and determination of all matters of fact and that, through judicial review, it provides for the protection of all the legal rights of the petitioner including any constitutional right which it may be entitled to invoke with respect to the refund which it seeks. The petitioner may thus obtain through this proceeding whatever judgment its case warrants, a judgment which the Government, by virtue of the requirement that the Commissioner shall make refund accordingly, binds itself to pay.

The judgment of dismissal is affirmed, but upon the grounds stated in this opinion.

Affirmed.

MR. JUSTICE STONE and MR. JUSTICE CARDOZO concur in the opinion save that they reserve their vote as to the constitutional or statutory rights of the taxpayer in the event that it shall be impossible to ascertain whether there has been a shifting of the tax, an examination of those rights, in their judgment, being unnecessary now, since "impossibility of proof," in the language of the opinion, "may not be assumed."

MR. JUSTICE MCREYNOLDS dissents.

CHIPPEWA INDIANS OF MINNESOTA *v.* UNITED STATES ET AL.

APPEAL FROM THE COURT OF CLAIMS.

No. 228. Argued February 2, 1937.—Decided May 17, 1937.

1. In a suit under permissive legislation by the Chippewa Indians of Minnesota against the United States, to recover the value of 663,421 acres of land, comprising the "diminished Red Lake Reservation," alleged to have been ceded to the United States under the Act of January 14, 1889, in trust for the benefit of the plaintiffs and subsequently disposed of or appropriated by the United States in disregard of the trust and of the rights of the plaintiffs, *held:*

(1) That the question who had the Indian title to the lands in the Red Lake Reservation prior to and at the time of the cession was material. P. 372.

(2) The Indian title to the lands in the Red Lake Reservation prior to and at the time of the cession was in the Red Lake bands. A contrary opinion in a report of the Committee of the House of Representatives accompanying the bill which, with amendments, became the Act of January 14, 1889, was based on a misapprehension of the situation. P. 372.

(3) The Act of January 14, 1889, though declaring that as to the Red Lake Reservation the cession should be sufficient if made by "two-thirds of the male adults of all the Chippewa Indians in Minnesota," should be construed, taken as a whole, as requiring in addition the consent of two-thirds of the male adults of the bands occupying that particular Reservation. P. 375.

(4) The cession by the Red Lake bands reserved all of the lands described in their instrument of cession as reserved for allotments, not merely the part of the lands so described which was actually required to make and fill allotments at the time. P. 377.

(5) Lands of the Red Lake Reservation which were intended to be reserved for allotments but by mutual mistake were included in the cession under the Act of 1889 and which were later added to the reserved lands by an Executive Order, are not, in equity, a part of the ceded areas. P. 378.

(6) An Act of February 20, 1904, adopting an agreement between the United States and the Red Lake Indians ceding in trust a portion of their diminished reservation,—*held* of no aid to the plaintiffs' claim in this case. P. 379.

2. The power of the Government to control and manage the property of its Indian wards is subject to constitutional limitations; the lands of one tribe may not be given to another, nor may the Government deal with the lands as its own. P. 375.
3. An Act of Congress should not be so construed as to imperil its validity, if this may reasonably be avoided. P. 376.

80 Ct. Cls. 410, affirmed.

Appeal from a judgment of the Court of Claims dismissing the petition in a suit brought by the Chippewa Indians of Minnesota against the United States to recover the value of lands alleged to have been held in trust for the plaintiffs and to have been disposed of or appropriated in violation of the rights of the Indians. The Red Lake Band of Chippewas intervened in opposition to the plaintiffs' claim.

Messrs. Webster Ballinger and *D. S. Holmes* for appellants.

Assistant Solicitor General Bell argued the cause, and *Solicitor General Reed, Assistant Attorney General Blair,* and *Messrs. George T. Stormont, Walter C. Shoup,* and *Charles A. Horsky* filed a brief, on behalf of the United States, appellee.

Mr. Fred Dennis for the Red Lake Band of Chippewa Indians of Minnesota, intervener-appellees.

Mr. Justice Van Devanter delivered the opinion of the Court.

This was a suit by the Chippewa Indians of Minnesota against the United States to recover the value of 663,421 acres of land alleged to have been ceded to the defendant

under an express trust for the benefit of the plaintiffs and subsequently disposed of or appropriated by the defendant in disregard of the trust and of the rights of the plaintiffs. This 663,421 acres comprised what is hereinafter described as the *diminished* Red Lake Reservation.

The suit was brought and conducted under permissive legislation.[1] The defendant traversed the allegations of the plaintiffs' petition; and by leave of court, and in virtue of authority given in the permissive legislation, the Red Lake Band of Chippewas intervened for the purpose of opposing the plaintiffs' claim and of protecting its own interests. After a full hearing the court made special findings of fact and rendered a judgment for the defendant. 80 Ct. Cls. 410. The plaintiffs were allowed an appeal to this Court under a special supplement to the permissive legislation.

The Chippewa Indians of Minnesota, plaintiffs below and appellants here, comprise those who are designated in the act of January 14, 1889, *infra,* as "all the Chippewa Indians of Minnesota," otherwise described in the permissive legislation already mentioned,[2] as all who are "entitled to share in the final distribution of the permanent fund" provided for in § 7 of the act of 1889.

The findings below are too long to be repeated here and will be much summarized.

About the beginning of the last century the Chippewas constituted one of the larger Indian tribes in the northerly part of the United States. In early treaties they were dealt with as a single tribe and were shown to be occupying a large area reaching from Lake Huron on the east

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[1] Act May 14, 1926, c. 300, 44 Stat. 555, as specially supplemented May 18, 1928, c. 623, 45 Stat. 601; June 18, 1934, c. 568, 48 Stat. 979; June 22, 1936, c. 714, 49 Stat. 1826.

[2] Act June 18, 1934, c. 568, 48 Stat. 979.

to and beyond Lake Superior on the west.[3] In later treaties they were regarded as divided into distinct bands; and particular bands—in some instances a single band and in others a limited plurality of bands—were recognized as occupying separate areas in Michigan, Wisconsin, Minnesota and eastern Dakota, and as entitled to hold or cede the same independently of other bands and of the Chippewas as a whole.[4] Some of the bands became permanently settled in Michigan and Wisconsin. Others—usually as a single band and exceptionally as a group of a few bands—became the recognized occupants and holders of twelve separate reservations in Minnesota. It is to these Minnesota bands and reservations that this suit relates.

One of the bands in Minnesota was the Red Lake which had come to include or be associated with the Pembina band. For a long period these two bands had been the exclusive occupants of the Red Lake Reservation, the largest of all. The next largest reservation was the White Earth. Its occupants were mostly members of the Mississippi bands; but some members of the latter were occupying older reservations which the White Earth had been designed to displace. This reservation contained an unusual proportion of land well suited for individual Indian allotments; and a small part of it had been allotted to individual Indians. The ten smaller

[3] Treaties Aug. 3, 1795, 7 Stat. 49; July 4, 1805, 7 Stat. 87; Nov. 17, 1807, 7 Stat. 105; Sept. 24, 1819, 7 Stat. 203; June 16, 1820, 7 Stat. 206; July 6, 1820, 7 Stat. 207; Aug. 29, 1821, 7 Stat. 218; April 19, 1825, 7 Stat. 272; Aug. 5, 1826, 7 Stat. 290; Aug. 11, 1827, 7 Stat. 303.

[4] Treaties May 9, 1836, 7 Stat. 503; Jan. 14, 1837; 7 Stat. 528; Dec. 20, 1837, 7 Stat. 547; Oct. 4, 1842, 7 Stat. 591; Aug. 2, 1847, 9 Stat. 904; Aug. 21, 1847, 9 Stat. 908; Sept. 30, 1854, 10 Stat. 1109; Feb. 22, 1855, 10 Stat. 1165; Oct. 2, 1863, 13 Stat. 667; April 12, 1864, 13 Stat. 689; May 7, 1864, 13 Stat. 693; April 7, 1866, 14 Stat. 765; Mar. 19, 1867, 16 Stat. 719.

reservations require no other special mention than that some of the Indians belonging to them had received individual allotments in them.

By an act of January 14, 1889, c. 24, 25 Stat. 642, Congress proposed to all bands of Chippewas in Minnesota a plan for their relief and civilization through allotments in severalty, cession and sale of lands not required for allotments, placing the proceeds of sales, less various expenses, in a permanent interest bearing fund as hereinafter stated, using the interest for the support and education of these Indians, and ultimately distributing per capita the principal of the fund.

The act created a commission to negotiate with the different bands for a complete cession to the United States of their title and right to all of each reservation, "except the White Earth and Red Lake reservations, and to all and so much of these two reservations as in the judgment of said commission is not required to make and fill the allotments required by this and existing acts, and shall not have been reserved by the commissioners for said purposes."

The cession was to be made for the purposes and upon the terms stated in the act and was to be sufficient as to each reservation, except the Red Lake, if made in writing by two-thirds of the male adults over eighteen years of age in the band occupying and belonging to such reservation, and as to the Red Lake was to be sufficient if made in like manner "by two-thirds of the male adults of all the Chippewa Indians in Minnesota." All cession agreements were to become effective if and when approved by the President.

For the purpose of ascertaining whether the proper number of Indians joined in the cession, and for the further purpose of making allotments and payments to

individual Indians, the act required the commissioners to make an accurate census of each band, classifying the members as male and female adults and male and female minors, and further classifying the minors into those who were and those who were not orphans.

As soon as the census was taken and the cession obtained and approved, all of the Chippewas in Minnesota, except those on the Red Lake Reservation, were to be removed to the White Earth Reservation; and as soon as practicable allotments in severalty were to be made on the Red Lake Reservation to the Indians belonging to that reservation, and on the White Earth Reservation to all of the other Chippewa Indians in Minnesota—all allotments to be in conformity with the act and with another designated statute.[5] These provisions for allotments were qualified by other provisions to the effect, first, that no existing allotment in any of the reservations should be disturbed, except with the allottee's individual consent; secondly, that existing allotments in the White Earth Reservation were ratified and should be adjusted in tenure, conditions and quantity to the allotments provided for in the act; and, thirdly, that any Indian on any of the reservations might in his discretion take his allotment under the act on the reservation where he was so residing, instead of being removed to and taking an allotment on the White Earth Reservation.

As soon as the cession was obtained and approved the lands ceded to the United States were to be surveyed; and as soon as practicable after the survey the lands so ceded were to be examined and classified as pine lands or agricultural lands, and such as were classified as pine

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[5] For provisions for enlarged allotments on White Earth Reservation see Act of April 28, 1904, c. 1786, 33 Stat. 539, and *Fairbanks* v. *United States*, 223 U. S. 215. And for provision for enlarged allotments on Red Lake Reservation see Act of February 20, 1904, c. 161, 33 Stat. 46, 48, Article IV.

lands were to be appraised with particular regard to the quantity and quality of the pine, and were to be sold by the United States at public auction, for cash, at not less than the appraised value, in forty-acre or smaller parcels.

The agricultural lands "not allotted under this act nor reserved for the future use of said Indians" were to be disposed of by the United States to actual settlers under the homestead law at one dollar and twenty-five cents an acre, to be paid in five equal annual instalments.

As provided in § 7 of the act, all money accruing from the disposal of the ceded lands, after deducting enumerated expenses, was to be placed in the Treasury of the United States to the credit of "all the Chippewa Indians in the State of Minnesota" as a permanent interest bearing fund for the period of fifty years. The interest was to be used for the support and education of such Indians, and at the end of the fifty years the permanent fund was to be divided and paid to "all of said Chippewa Indians and their issue then living" in cash and equal shares, subject to a reserved power in Congress to make limited appropriations from the fund during the fifty year period for the purpose of promoting civilization and self-support among these Indians.

Under the act of 1889 the commission, besides making the required census, conducted separate negotiations with each of the bands with the following results:

1. The Red Lake and Pembina bands (sometimes spoken of collectively as the Red Lake band or Red Lake Indians), occupying and belonging to the Red Lake Reservation, ceded to the United States, for the purposes and upon the terms stated in the act, their title and right to all of that reservation, save a designated tract containing 661,118 acres which the commission "reserved" for the purpose of making and filling allotments to them. The

cession was made by a written instrument showing what lands were reserved, and bearing the assent of more than two-thirds of the male adults over eighteen years of age in those bands.

2. The bands occupying and belonging to the White Earth Reservation, by a like instrument bearing a like assent, ceded to the United States their title and right to all of that reservation, save a specified tract which the commission had reserved for allotments. The instrument making this cession contained a further cession by such bands of their title and right to "all and so much of the Red Lake Reservation as is not required and reserved under the provisions of said act to make and fill the allotments to the Red Lake Indians in quantity and manner as therein provided."

3. As to each of the other ten reservations the band occupying and belonging to it, by a like instrument bearing a like assent, ceded the whole of such reservation to the United States, and included in the instrument a further cession respecting the Red Lake Reservation such as was included in the cession by the Indians of the White Earth Reservation.

4. The cession of so much of the Red Lake Reservation as was not required and reserved for allotments had the written assent not only of two-thirds of the male adults over eighteen years of age in the bands of that reservation, but also of two-thirds of the male adults of such age of all the Chippewas in Minnesota.

After making the census and obtaining the cessions the commission transmitted, through the Commissioner of Indian Affairs, to the Secretary of the Interior a report accompanied by the census, the instruments of cession, and a transcription of the negotiations with the several bands as stenographically reported. In its report the commission stated that the tract reserved by it from the Red Lake Reservation for allotments to the Red Lake In-

dians, of which there were then 1,168, contained 661,118 acres, and that "this is larger than they will eventually require, but as there are swamps and other untillable lands therein, it cannot be reduced until after survey and allotments shall be made."

The Secretary of the Interior transmitted the commission's report and the accompanying papers to the President for consideration by him; and on March 4, 1890, the President approved each instrument of cession and on the same day transmitted to the Congress for its information a statement of his approval, together with a copy of the commission's report and of all accompanying papers except the census rolls.[6]

By an act of August 19, 1890, c. 807, 26 Stat. 336, 357, Congress recognized the cessions, as so approved, by making appropriations to carry out such provisions of the act of 1889 as were to be given effect if and when the cessions were obtained and approved.

In instructions issued to the commission by the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, before the work of the commission was begun, it was said:

"It has not heretofore been claimed by anyone, and so far as the knowledge of this office extends, and certainly not by the Indians themselves, that the Red Lake Reservation is the common property of all the Chippewa Indians in Minnesota. None but the Red Lake and Pembina bands have ever claimed an interest in said reservation, and said bands have always been recognized and regarded as the sole owners by right of original Indian occupancy, the lands having never been ceded to the United States." And the commission was further

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[6] House Ex. Doc. No. 247, 51st Cong., 1st Sess.

instructed that it was "necessary to exercise great care to reserve a sufficient area of land to make the required allotments"; and also that "the boundaries of the tracts so reserved . . . must be definitely determined and fixed and accurately described so that the Indians . . . [will know] just what and how much land they are parting with."

The minutes of the negotiations by the commission with the Indians of the Red Lake Reservation show that the commission assured these Indians that the land which it would reserve out of that reservation would belong to them and their children; that enough land would be reserved for them and their descendants for all purposes; that no other Indians would have any right therein; and that no allotments would be made immediately out of the land reserved. The minutes further show that a line was drawn on paper which the Indians said marked the reservation which they wished to have; that after further consultations between the commissioners and the Indians the line marking the part to be reserved was agreed upon; and one of the commissioners then said there was some doubt whether the Government would approve of their yielding so much, but "we will do the best we can." From the evidence as a whole the court below found that "the statements of the commissioners at the council meeting prior to the execution of the agreement (instrument of cession) were such that the Red Lake Indians would and did understand therefrom that they were not ceding any portion of their lands which in the agreement was specified as reserved."

November 8, 1892, the chairman of the commission, in a letter to the Commissioner of Indian Affairs, stated in substance that the commission had used an unofficial map to guide it and the Indians in bounding and describing

the land which was being reserved from the Red Lake Reservation; that this map was faulty and misleading in respect of the lower Red Lake around which part of the tract intended to be reserved was located; and that to "preserve faith with the Indians" he recommended that certain described lands omitted from the reservation made by the commission "be reserved from sale and added to said reservation." In further support of his recommendation he said "It was with great reluctance that they (the Indians) gave up any part of the upper lake, and if any part of the lower lake shall be taken from them they will think they were deceived or advantage taken of their ignorance." This letter was laid before the President with approving letters from the Commissioner of Indian Affairs and the Secretary of the Interior, and on November 21, 1892, the President made an Executive Order reserving the described lands from sale and adding them to the reservation made by the commission. The added lands comprised 2,303 acres theretofore included, apparently unintentionally, in the cession by the Red Lake Indians.

Continuously since the making of the Executive Order the lands thereby added to the reservation made by the commission have been treated by the United States as a part of that reservation, and the reservation as thus changed or corrected has been known as the diminished Red Lake Reservation.

No allotments in severalty have as yet been made on this diminished reservation, because the Red Lake Indians have thus far opposed the present making of such allotments and the administrative officers have not as yet considered it practicable to make them.

By an act of February 20, 1904, c. 161, 33 Stat. 46, 48, Congress modified and adopted an agreement negotiated

by an United States Indian inspector with the Red Lake Indians whereby the latter ceded to the United States a tract containing 256,152 acres out of the diminished Red Lake Reservation. This cession was in trust that the lands be sold by the United States and the proceeds be placed in the Treasury of the United States in a trust fund to the credit of the Red Lake Indians and be paid to them in stated installments. Articles 4 and 5 of the agreement declared:

"It is further agreed that the said Indians belonging on the said Red Lake Indian Reservation, Minnesota, shall possess their diminished reservation independent of all other bands of the Chippewa Tribe of Indians and shall be entitled to allotments thereon of one hundred and sixty acres each, of either agricultural or pine land, the different classes of land to be apportioned as equitably as possible among the allottees."

"It is understood that nothing in this agreement shall be construed to deprive the said Indians belonging on the Red Lake Indian Reservation, Minnesota, of any benefits to which they are entitled under existing treaties or agreements not inconsistent with the provisions of this agreement. It is the intention of this agreement that the United States shall act as trustee for said Indians to dispose of said land and to expend and pay over the proceeds as received from the sale thereof only as received, as herein provided."

The United States has been holding and now holds the diminished Red Lake Reservation and all monies derived therefrom, for the sole and exclusive benefit of the Red Lake Indians, and not for the benefit of the Chippewa Indians of Minnesota, who brought this suit.

The tract reserved by the commission out of the Red Lake Reservation at the time of the cession under the act

of 1889 contained 661,118 acres. The lands added to this reserved tract by the Executive Order of November 21, 1892, comprised 2,303 acres, making the so-called diminished Red Lake Reservation contain 663,421 acres. The tract ceded from this diminished reservation by the Red Lake Indians in the agreement embodied in the act of February 20, 1904, contained 256,152 acres.

The number of Red Lake Indians belonging to the Red Lake Reservation was, on March 4, 1890, 1,168; on February 20, 1904, 1,418; on February 26, 1927, the date of suit, 1,736; and, in 1932, 1,881.

In many acts passed since March 4, 1890, and cited in Findings 34, 35 and 36 of the court below (80 Ct. Cls. 410, 455–458), Congress has recognized the Red Lake Indians as entitled, exclusive of other Chippewas, to the diminished Red Lake Reservation and to all proceeds therefrom.

Other matters shown in the findings will be mentioned later on.

The claims presented by the plaintiffs' petition and pressed in the court below were overlapping in part and substantially to the effect, first, that the lands reserved by the commission out of the Red Lake Reservation were only temporarily reserved for the purpose of making allotments to the Red Lake Indians at the time, in the quantity and of the character specified in the act of 1889; that subject only to such filling of these allotments the lands reserved were included in the cession and became part of the estate which the United States was to hold in trust for the benefit of all the Chippewa Indians in Minnesota; and that by subsequently failing to make any allotments from the reserved lands and permanently appropriating all of them, through the act of February 20, 1904, to the use and benefit of the Red Lake Indians, to the exclusion

of all other Chippewas, the United States wrongfully disposed of the lands in disregard of its trust obligations and of the rights of the plaintiffs, and thereby became liable to the plaintiffs for the value of the lands, or at least for the value of such of them as were not needed to fill the allotments which were to be made from them; secondly, that by adding to the reserved lands, through the Executive Order, 2,303 acres which had been included in the cession, the United States wrongfully withdrew the added lands from the trust estate and appropriated them to the use and benefit of the Red Lake Indians, to the exclusion of all other Chippewas, thereby becoming liable to the plaintiffs for their value; and, thirdly, that by the act of February 20, 1904, the United States wrongfully took 256,152 acres of the reserved lands from the trust estate and applied them to a new and different trust for the benefit of the Red Lake Indians, to the exclusion of all other Chippewas, and thereby became liable to the plaintiffs for the value of such of them as were not sold and for the proceeds from such as were sold.

From the findings made and from an examination of the instruments of cession and of the treaties, statutes and public documents referred to in the findings, the court below reached the conclusion that up to the time of the cession under the act of 1889 the Red Lake Indians had the full Indian title to the Red Lake Reservation, to the exclusion of all other Chippewas; that the lands reserved by the commission were not included in the cession, but explicitly reserved therefrom, and therefore the Indian title to them remained in the Red Lake Indians; that the lands which the Executive Order added to those which were so reserved were by mutual mistake included in the cession instead of being included in those reserved, and therefore the Executive Order should be regarded as having appropriately corrected that mistake

and made effective the true intention of the parties; and that in these circumstances the plaintiffs were not injured or entitled to recover by reason of any of the matters complained of, and their petition should be dismissed.

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1. Complaint is made of the action of the court in regarding the Indian title to the lands in the Red Lake Reservation prior to and at the time of the cession as material. Plainly the complaint is without merit. Whether the title was in the Red Lake bands alone or in all of the Minnesota bands has a material bearing on the construction and effect of the cession, and also on the question of who, after the cession, had the title to the lands reserved.

2. Complaint is next made of the holding that the Indian title prior to and at the time of the cession was in the Red Lake bands. While there appears to have been some diversity of opinion on this question, we are of opinion that the court's solution of it is right. For a long period the Red Lake bands had been in the exclusive occupancy of the lands in the Red Lake Reservation. None of the other Minnesota Bands disputed this occupancy or the right to it. Some had in treaties relinquished all right to areas which included that reservation,[7] and others had recognized the occupancy and title of the Red Lake bands by both ceding and accepting adjacent lands expressly described as bounded on "the line of the Red Lake Reservation." [8] The officers of the United States charged with the administration of Indian affairs also had recognized, repeatedly and consistently,

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[7] Treaties September 30, 1854, 10 Stat. 1109; February 22, 1855, 10 Stat. 1165; August 7, 1866, 14 Stat. 765.

[8] Treaty May 7, 1864, 13 Stat. 693; Executive Order March 18, 1879, concerning White Earth Reservation. Executive Orders Relating to Indian Reservations (1912), p. 87.

the occupancy and title of the Red Lake bands. Typical of such recognitions is a letter of January 8, 1889, by the Commissioner of Indian Affairs, which was written with the approval of the Secretary of the Interior for the information of the President. In the letter it was said: "None of the Indians in that State, except the Red Lake Indians, have any right, title or interest in the Red Lake Reservation."

The recognition of a Chippewa band as having title to a reservation occupied by it was not confined to the Red Lake bands or to the Red Lake Reservation. On the contrary, it had long been the settled rule in respect of the Chippewa Indians in Minnesota that a band or bands occupying a separate reservation should be regarded and dealt with as having the full Indian title to the lands therein. The Indians both recognized and gave effect to the rule. Many cessions were negotiated and carried out in conformity with it. The band or bands occupying a reservation ceded it in whole or in part without any participation by other bands and received and enjoyed the compensation without sharing it with others. Under the rule each of the bands existing in 1889 had theretofore made cessions and received pay therefor quite independently of the other bands. By a treaty of October 2, 1863, 13 Stat. 667, the United States negotiated a treaty with the Red Lake and Pembina bands whereby these bands ceded to the United States a described part of the lands then "owned and claimed by them," and the United States, in consideration of the cession, agreed to pay "to the said Red Lake and Pembina bands" a stated sum per annum for a limited period. In Article 6 of the treaty the lands not ceded were called "the reservation," and thereafter were regarded by the United States and the Indians as constituting the Red Lake Reservation.[9] The

[9] *Minnesota* v. *Hitchcock*, 185 U. S. 373, 389–390; *United States* v. *Holt State Bank*, 270 U. S. 49, 58.

treaty of 1863 was confirmed, with modifications not material here, by a treaty of April 12, 1864, with the same Indians, 13 Stat. 689. No other band participated in that cession or shared, or sought to share, in the compensation.

This array of matters making strongly for full Indian title in the Red Lake bands prior to and at the time of the cession of 1889 encounters direct contradiction in the report made to the House of Representatives by its committee on Indian affairs when presenting the bill which, after many amendments, became the act of 1889.[10] In that report it was said:

"All of the Indians in Minnesota are members of the great Chippewa family, which has for generations occupied the northern and northeastern half of the State. There are now in all about 7,500 of these Indians, who occupy reservations and unceded lands amounting in the aggregate to about 4,700,000 acres of land.

. . . . . .

"The so-called Red Lake Reservation is simply a remnant of unceded Indian territory occupied at present by the Red Lake band, but really the common property, so far as the Indian title is concerned, of all the Chippewa Indians in Minnesota.

. . . . . .

"All the Chippewas in Minnesota really belong to one family, and this Red Lake Reservation is really a remnant of all that country once occupied by them in common, and thus a sort of common property."

In so far as the committee report states that the title to the lands in the Red Lake Reservation was held in common by all of the Chippewa Indians in Minnesota, rather than by the Red Lake bands, it is at variance with

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[10] House Report No. 789, 50th Congress, 1st Sess.; Cong. Rec., 50th Congress, 1st Sess., Vol. 19, pt. 9, pp. 9130–9131.

what is otherwise indubitably shown, and evidently is based on a serious misapprehension of the real situation. It overlooks treaties wherein most of the other bands relinquished areas which included the lands in the Red Lake Reservation; takes no account of the rule, long applied by the Government and the Chippewa Indians, whereby a band or bands occupying a separate reservation were regarded as having the title to the lands therein and entitled to hold or cede them independently of other bands; puts aside the treaties of 1863 and 1864 which recognized the Red Lake and Pembina bands as owning the lands occupied by them, and also as entitled to make cessions therefrom without consulting other bands; fails to consider the absence of any claim by other bands to an interest in the lands of the Red Lake Reservation; and gives no effect to a formidable body of legislative and administrative action and opinion whereby the Red Lake bands, and they alone, were uniformly recognized as both occupying and having the Indian title to the lands in that reservation. It therefore is plain that the report cannot be taken as overcoming the facts otherwise indubitably shown.

3. Next it is insisted that even though the Indian title was in the Red Lake bands, Congress in § 1 of the act of 1889, declared that as to the Red Lake Reservation the cession should be sufficient if made by "two-thirds of the male adults of all the Chippewa Indians in Minnesota," and thereby enabled the Chippewas as a whole to cede that reservation, even over the objection of the Red Lake bands. To this we do not agree. Our decisions, while recognizing that the government has power to control and manage the property and affairs of its Indian wards in good faith for their welfare, show that this power is subject to constitutional limitations and does not enable the government to give the lands of one tribe or band

to another, or to deal with them as its own.[11] And, of course, an act of Congress should not be given a construction which will imperil its validity where it is reasonably open to a construction free from such peril.[12] The provision in § 1 of the act of 1889, on which the appellants rely, is, in our opinion, reasonably open to a construction certainly consistent with its validity. The section directs the commission to negotiate with "all the different bands" for a cession of all of the reservations, except parts of two, and then provides that the cession shall be sufficient "as to each and all of said several reservations, except as to the Red Lake Reservation," if made by two-thirds of the male adults of the band occupying and belonging to such reservation, and "as to the Red Lake Reservation" shall be sufficient if made "by two-thirds of the male adults of all the Chippewa Indians in Minnesota." A fairly admissible meaning of this is that negotiations were to be had with each and all of the bands, including those occupying the Red Lake Reservation; that the cession as to each reservation was to be by at least two-thirds of the male adults of the band occupying the same; and that as to the Red Lake Reservation the cession was to be not only by two-thirds of the male adults of the bands occupying that reservation but also by two-thirds of the male adults of all the Chippewa Indians in Minnesota. To save the section from questionable validity, this meaning should be preferred to one involving a purpose to authorize a cession as to that reservation without the assent of the bands occupying it. The additional requirement as to it that the cession have the assent of two-thirds of the male adults

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[11] *Lane* v. *Santa Rosa,* 249 U. S. 110, 113; *United States* v. *Creek Nation,* 295 U. S. 103, 109–110; *Shoshone Tribe v. United States,* 299 U. S. 476, 497.

[12] *Panama R. Co.* v. *Johnson,* 264 U. S. 375, 390; *Anniston Mfg. Co.* v. *Davis,* (this day decided), *ante,* p. 337.

of all the Chippewa Indians of Minnesota may well be regarded as precautionary and intended, in view of the statements in the committee's report, to accomplish a cession which would be effective whether the title was in the Red Lake bands, as the administrative officers were holding, or was held in common by all the Minnesota Chippewas, as the committee stated. In this view of the section—which we think the right one—the act cannot be held to evince a purpose to take from one band without its assent and give to others. The commission evidently understood the provision as we do, for they went first to the Red Lake bands and there announced that the negotiations, if not resulting in the requisite assent of those bands, would be abandoned.

4. It is further insisted that the court erred in holding that none of the lands described in the instrument of cession as reserved by the commission for allotments was ceded, instead of holding that all were ceded, save those actually required to make and fill allotments at the time, in the quantity and of the character described in the act of 1889. We regard the holding as right. The act was not intended to secure a cession of all of the Red Lake Reservation, but only of so much of it as "in the *judgment of said commission*" was not required to make and fill the intended allotments, and was not "reserved *by the commissioners*" for that purpose. And the allotments were to be made, not within any definite period, but "as soon as practicable." The instrument of cession declared that the Red Lake bands ceded all of their reservation not included within designated boundaries and that the lands embraced within those boundaries had been reserved by the commissioners for the purpose of making and filling allotments. Thus it showed what lands were ceded and what were reserved. The act committed to the "judgment of the commission" the determination of how much and what would be required for allotments, and

laid on the commissioners the duty of reserving lands accordingly. The instrument of cession shows that the commission attended to these tasks. Whether the tasks were performed with appropriate wisdom is not open to inquiry in this suit. The instrument of cession, showing the lands ceded and the lands reserved, was examined by the Commissioner of Indian Affairs and the Secretary of the Interior and was then submitted to and approved by the President. With that approval it became effective. The lands which were reserved were not ceded, either by the terms of the instrument of cession or through the operation of the act. The Indian title to them remained after the cession, as before, in the Red Lake bands. The act contemplated their use in making allotments to members of those bands; but, as they were not ceded but reserved from the cession, the matter of whether and when they shall be allotted rests with the government and those bands and is not of any concern, in the sense of the law, to the other bands.

The cession of the Red Lake Reservation by the Indians of the other reservations differs in words from that by the Red Lake bands, but we regard them as in substance identical and as conforming to the act.

5. Error is also assigned on the court's ruling respecting the Executive Order of November 21, 1892, whereby 2,303 acres of the lands ceded under the act of 1889 were added to the lands reserved for allotments. The basis for this order, shortly stated, is that the lands so added were intended by the commission and the Indians to be included in the lands reserved and were by mutual mistake, incident to the use of an unofficial and faulty map, included among those ceded. Evidently the Red Lake bands were equitably entitled to have the mistake corrected. No intervening right stood in the way. The mistaken cession was to the United States, in trust for the ultimate benefit of Indian wards. In this situation we should hesitate a good deal before holding that the Presi-

dent's authority over Indian affairs is not broad enough to warrant a correction of the mistake by an Executive Order.[13] But, this aside, the appellants are without right to recover in respect of the lands which were the subject of the mistake. Save for it the lands would have been reserved, not included in the cession. Therefore, the appellants' interest in them through the cession and trust was colorable only, and in an appropriate proceeding, brought with the consent of the United States, the mistake could and doubtless would have been corrected. So, in no admissible view of the Executive Order can it be said to have worked any real injury to the appellants.

6. So much of the appellants' claim as is grounded on what was done by and under the act of February 20, 1904, is disposed of adversely to them by what already has been said respecting the title to the lands reserved from the cession of 1889.

It results that the judgment must stand.

Judgment affirmed.

OLD COLONY TRUST CO. *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 703. Argued April 29, 30, 1937.—Decided May 17, 1937.

1. In the computation of the net income of a trust, § 162 of the Revenue Act of 1928 allows deduction of any part of the gross income, without limitation, which "pursuant to" the terms of the deed creating the trust is during the tax year paid to charities, etc. *Held* that payments are "pursuant to" the deed when authorized, though not imperatively directed, by it. P. 383.
2. "Pursuant to" is defined. P. 383.

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[13] Rev. Stats. §§ 463, 465; *West* v. *Hitchcock*, 205 U. S. 80, 84–85; *Williams* v. *United States*, 138 U. S. 514, 524; *Knight* v. *U. S. Land Assn.*, 142 U. S. 161, 177, *et seq.*; *United States* v. *Mid West Oil Co.*, 236 U. S. 459, 469, *et seq.*

3. In order that deduction may be allowed, the trust need not show affirmatively that charitable contributions from gross income were actually paid out of income of the year in which they were made. P. 384.
4. It is the policy of Congress to encourage charitable contributions. P. 384.

87 F. (2d) 131, reversed.

CERTIORARI, 300 U. S. 650, to review a judgment reversing, upon appeal, a decision (33 B. T. A. 311) which had in part sustained, and in part overruled, a deficiency income tax assessment.

Mr. Harold S. Davis for petitioner.

Mr. A. F. Prescott, with whom *Solicitor General Reed*, *Assistant Attorney General Morris*, and *Messrs. Sewall Key*, *J. Louis Monarch*, and *F. E. Youngman* were on the brief, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Under trust deed of July 19, 1922, the Old Colony Trust Company came into possession of valuable income producing property from which to pay certain sums and satisfy specified annuities. The deed continues:

"13. I authorize my said trustees to pay to charities as hereinafter described such sums as in their judgment may be paid without jeopardizing the annuities herein provided for, whenever for a period of one year the trust fund held by them as then invested shall have yielded a net income equal to twice the amount of the annuities which they are then required to pay, and upon the death of the survivor of those persons, who under the terms of this instrument are to receive annual incomes under the trust hereby created, I direct my said trustees to distribute the rest and residue remaining in their hands among corporations and trustees organized, operating and holding exclusively for religious, charitable, scientific, literary or educational purposes, including the encouragement of art

and the prevention of cruelty to children or animals, the sum paid over by said trustees to such corporations or boards of trustees to be held by such corporations and boards of trustees in trust, and the income thereof to be expended for the general purposes for which such corporations and boards of trustees are organized, and I request that said funds be designated by each corporation or board of trustees as the Henry Clay Jackson Fund."

Each year after 1923 the estate's income was more than twice the amount necessary for the annuities. The trustee has kept separate principal and income accounts. From 1925 to 1933 all annuities were duly paid and considerable sums went to charities; none of these payments was charged to the principal account. Tax returns have been based upon actual receipts and disbursements.

January 1, 1931, the income account showed unexpended balance of $187,999.43. During that year the income received amounted to $164,339.39; the trustee expended and charged against income account $212,862.80, of which $190,000.00 went to charities. The 1931 tax return claimed deductions for charity payments up to the amount of the year's income. The Commissioner disallowed this because "it is not disclosed that payments were made out of income of the taxable year to the charities nor that any portion of the income was credited to any charity."

The Board of Tax Appeals held the trustee must affirmatively prove the payments in question were from income received during 1931; also, that except as to a small sum, it had not sustained the necessary burden of proof.

The Circuit Court of Appeals ruled that none of the contributions was deductible because not imperatively directed by the trust deed. It took the view that as the trustee exercised discretion as to payment they were not made "pursuant to the terms of the . . . deed creating the trust." Accordingly, it approved the Commissioner's assessment and remanded the cause to the Board.

The matter is here by certiorari. Annuity payments are not now in controversy. Two questions are presented and both must be answered in the negative.

I. Under § 162, Revenue Act, 1928, 45 Stat. 838, copied in the margin, is it necessary that the will or deed creating a trust definitely direct the charitable contributions which are claimed as deductions? [1]

Section 23n of the 1928 Act which authorizes certain deductions for charitable contributions by individuals does not confine them to payments actually made from income, but does limit their amount to 15% of the net received during the year.[2] In lieu of these deductions,

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[1] Revenue Act, 1928, § 162, 45 Stat. 838.

"SEC. 162. *Net Income.*

"The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

"(a) There shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by section 23 (n)) any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23 (n), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance or operation of a public cemetery not operated for profit; . . . (b) and (c)."

[2] Revenue Act, 1928, § 23, 45 Stat. 799.

"SEC. 23. *Deductions from Gross Income.*

In computing net income there shall be allowed as deductions: . . . (a), (b), etc.

(n) Charitable and other contributions.—In the case of an individual, contributions or gifts made within the taxable year to or for the use of:

(1) the United States, any State, Territory, or any political subdivision thereof, or the District of Columbia, for exclusively public purposes;

(2) any corporation, or trust, or community chest, fund, or foundation, organized and operated exclusively for religious, charitable,

§ 162a permits trust estates to deduct charitable contributions to the full extent of gross income when made pursuant to the trust deed.

We are asked to hold that the words "pursuant to" mean directed or definitely enjoined. And this notwithstanding the admission that Congress intended to encourage charitable contributions by relieving them from taxation. *Lederer* v. *Stockton,* 260 U. S. 3; *United States* v. *Provident Trust Co.,* 291 U. S. 272, 285.

"Pursuant to" is defined as "acting or done in consequence or in prosecution (of anything); hence, agreeable; conformable; following; according." [3]

The words of the statute are plain and should be accorded their usual significance in the absence of some dominant reason to the contrary. We find nothing in the regulations or practice of the Treasury Department

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scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual;

(3) the special fund for vocational rehabilitation authorized by section 7 of the Vocational Rehabilitation Act;

(4) posts or organizations of war veterans, or auxiliary units or societies of any such posts or organizations, if such posts, organizations, units, or societies are organized in the United States or any of its possessions, and if no part of their net earnings inures to the benefit of any private shareholder or individual; or

(5) a fraternal society, order, or association, operating under the lodge system, but only if such contributions or gifts are to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals;

to an amount which in all the above cases combined does not exceed 15 per centum of the taxpayer's net income as computed without the benefit of this subsection. Such contributions or gifts shall be allowable as deductions only if verified under rules and regulations prescribed by the Commissioner, with the approval of the Secretary. (For unlimited deduction if contributions and gifts exceed 90 per centum of the net income, see section 120.)"

[3] Webster's New International Dictionary, Unabridged, 2nd ed., 1935.

or in the general purpose of the statute which requires the narrow meaning advocated by respondent. Neither the Commissioner nor the Board of Tax Appeals accepted or mentioned with favor the interpretation which his counsel now advance; and this is hardly compatible with the theory of controlling rulings or practice by the Bureau.

The questioned donations were made by the petitioners in pursuance of the trust deed.

II. In order that they may be allowed as deductions is it necessary affirmatively to show that charitable contributions by a trust estate were actually paid out of income received during the year in which they were made?

Section 23n limits deductible contributions to 15% of net income. Section 162a permits them to the full extent of gross income. This language should be construed with the view of carrying out the purpose of Congress—evidently the encouragement of donations by trust estates. There are no words limiting these to something actually paid from the year's income. And so to interpret the Act could seriously interfere with the beneficent purpose. One creating a trust might be unwilling to bind it absolutely to pay something to charity but would authorize his trustee so to do after considering then existing circumstances.

Capital and income accounts in the conduct of the business of estates are well understood. Congress sought to encourage donations out of gross income, and we find no reason for saying that it intended to limit the exemption to sums which the trust could show were actually paid out of receipts during a particular tax year. The design was to forego some possible revenue in order to promote aid to charity. Here the trustee responded to an implied invitation and the estate ought not to be burdened in consequence.

The judgment of the court below must be reversed and the cause returned there for further proceedings in harmony with this opinion.

Reversed.

A. A. LEWIS & CO. ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 743. Argued April 30, 1937.—Decided May 17, 1937.

A landowner made a declaration placing title in a trustee for the benefit of herself and an agent empowered by her to subdivide and sell the land, whose compensation was to be a fixed percentage of payments made by purchasers. The function of the trustee was to hold the title, execute contracts and conveyances at the direction of the agent, and to make collections. *Held* that the trust was not an "association" within the meaning of § 701 (a) (2) of the Revenue Act of 1928, and therefore not taxable as a corporation. Pp. 386, 389.

87 F. (2d) 1000, reversed.

CERTIORARI, 300 U. S. 651, to review the reversal of a decision of the Board of Tax Appeals disapproving an income tax deficiency assessment.

Mr. Franz W. Castle, with whom *Messrs. Emmett J. McCarthy, Howard R. Brintlinger,* and *Robert F. Carey,* were on the brief, for petitioners.

Mr. Andrew D. Sharpe, with whom *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Ellis N. Slack* were on the brief, for respondent.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

On January 3, 1934, the Commissioner of Internal Revenue assessed a deficiency of income taxes for the year

1931 against petitioners in the sum of $512.30. The Board of Tax Appeals, upon petition and after hearing, determined that there was no deficiency. Upon review, the court below, without opinion, reversed the decision of the Board of Tax Appeals.

The case involves the relations of petitioners under a declaration of trust and an agreement attached thereto. And the question for decision is whether the trust constitutes an association, to be taxed as a corporation, within the meaning of § 701 (a) (2) of the Revenue Act of 1928, which provides that, when used in the act, "The term 'corporation' includes associations, joint-stock companies, and insurance companies." The commissioner, whose action was affirmed by the lower court, ruled that upon the facts stated below there was a taxable "association" within the reach of this statutory provision. The Board of Tax Appeals held to the contrary.

Minerva S. Melidones, hereafter called the grantor, in 1925, in order to subdivide and sell a tract of land which she owned, made the declaration of trust here in question, placing the title in the predecessor of the Central Republic Trust Company, as trustee for the use and benefit of herself and A. A. Lewis, both of whom signed the instrument as beneficiaries. The trustee was given power to deal with the real estate so far as the public was concerned, but was to do so only in accordance with the agreement attached to the trust instrument. That agreement, bearing the same date as the declaration of trust, was executed by the grantor, Lewis and the trustee. The grantor, by the agreement, appointed Lewis, an experienced real-estate operator, as exclusive selling agent and as "manager of the trust created by said deed in trust and trust agreement aforesaid"; and he was given "such powers and duties in connection with the administration of the trust as may be necessary to facilitate the sale of the said land." He was authorized to exercise management and control of the property for the purposes of sale;

at his own expense to employ a sales organization; to enter into contracts with purchasers as manager of the trust; and to request the trustee to execute deeds and other necessary instruments. Contracts were to be made, and title was to be conveyed by the trustee to purchasers, upon Lewis' written directions. He was to receive as sole compensation for his services commissions based upon the price for which the lots in the subdivision were sold. The trustee was to collect and distribute payments after the initial payment; but was to have nothing to do with the sales of lots or negotiations relating thereto.

The grantor subsequently assigned her beneficial interest in the trust to Benjamin Schwartz, to which his estate has succeeded as sole beneficiary. The trust instrument provides that transferrable certificates may be issued by the trustee; but none was ever issued.

If it were not for the declaration of trust, we should have here the simple case of an appointment by a land owner of an agent to subdivide the land and sell it, receiving as compensation for his services a fixed percentage of the payments made by the purchasers. It is quite evident that such an arrangement has no element of substance or method which would warrant its designation as an association under the statutory provision in question. Nor can we see that the intervention of a trustee to hold title, execute contracts and conveyances at the direction of the real-estate agent and make collections alters the situation.

The question recently has received full consideration in *Morrissey* v. *Commissioner,* 296 U. S. 344, and three other cases which immediately follow in the same volume.* The trust reviewed in the *Morrissey* case was essentially unlike that now under consideration. There,

* *Swanson* v. *Commissioner,* 296 U. S. 362; *Helvering* v. *Combs,* 296 U. S. 365; *Helvering* v. *Coleman-Gilbert Associates,* 296 U. S. 369.

the trust was a medium for the carrying on of a business enterprise by the trustees and participation in the profits by numerous beneficiaries whose interests were represented by transferrable share certificates, thus permitting the introduction of new participants without affecting the continuity of the plan. The certificates represented both preferred and common shares. We pointed out that the corporate analogy was evidenced by centralized control, continuity and limited liability, as well as by the issue of transferrable certificates; and we said (p. 356) that the word "association" implies associates. "It implies the entering into a joint enterprise, and, as the applicable [departmental] regulation imports, an enterprise for the transaction of business. This is not the characteristic of an ordinary trust—whether created by will, deed, or declaration—by which particular property is conveyed to a trustee or is to be held by the settlor, on specified trusts, for the benefit of named or described persons. Such beneficiaries do not ordinarily, and as mere *cestuis que trustent,* plan a common effort or enter into a combination for the conduct of a business enterprise."

The arrangement here answers the foregoing description of an ordinary trust—that is, it was created in virtue of a declaration by which a designated piece of real property was conveyed to the trustee on specified trusts, for the benefit of definitely named persons, one of whom was the grantor of the land and the other an agent of the grantor for the sole purpose of subdividing and selling the land. The agent was designated by name, and his powers definitely fixed in advance of their exercise. He possessed no authority beyond that expressly delegated by his principal. The trust was adopted merely as a convenient means of making effective the sales of the agent under the contract. The duties of the trustee were purely ministerial, with no power to control, direct, or

participate in, the conduct of the selling enterprise contemplated by the contract. There is to be found in the operation of the business no essential characteristic of corporate control—nothing analogous to a board of directors or shareholders, no exemption from personal liability, no issue of transferrable certificates of interest. There is simply the common relation of principal and agent, coupled with the collateral incidents of an ordinary trust. We are not able to find in the situation an "association" within the meaning of the statute under consideration, because there are no associates and no feature "making [the trust] analogous to a corporate organization." 296 U. S. at p. 359.

Judgment reversed.

AETNA INSURANCE CO. *v.* KENNEDY TO THE USE OF BOGASH.*

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

No. 753. Argued April 30, 1937.—Decided May 17, 1937.

1. Every reasonable presumption is indulged against waiver of the right of trial by jury. P. 393.
2. A case is not taken from the jury and submitted to the court for decision of fact as well as of law, if, accompanying the request of the parties for peremptory instructions, there are other requests in which are reasonably to be implied requests to go to the jury if a peremptory instruction be denied. P. 393.
3. Where the District Court denied the parties' motions for directed verdicts without reserving any question of law, and unconditional verdicts were returned for defendants, *held* that neither that court nor the Circuit Court of Appeals had jurisdiction to find or

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* Together with No. 754, *Springfield Fire & Marine Insurance Co.* v. *Kennedy to the use of Bogash;* and No. 755, *Liverpool & London & Globe Insurance Co.* v. *Kennedy to the use of Bogash.* On writs of Certiorari to the Circuit Court of Appeals for the Third Circuit.

adjudge that notwithstanding the verdicts plaintiff was entitled to recover. *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364, 387. *Baltimore & C. Line* v. *Redman*, 295 U. S. 364, distinguished. P. 394.

4. Under the Conformity Act, the District Courts follow the practice authorized by state statutes if there be nothing in them that is incongruous with the organization or the fundamental procedure of those courts, or in conflict with Congressional enactment. P. 394.
5. The Conformity Act does not extend to the Circuit Court of Appeals. P. 395.
6. In Pennsylvania, a party who would invoke the power of the trial court to enter judgment *non obstante veredicto* under Act of April 22, 1905, P. L. 286, should move for such a judgment, not merely for a new trial. P. 394.
7. A mortgagee clause in a fire policy creates a contract of insurance between the mortgagee and the insurer upon the mortgagee's separate interest. P. 395.
8. Policies of fire insurance, taken out by a second mortgagee but insuring also the first mortgagee, were surrendered by the former, and canceled without notice to the latter. Evidence held insufficient to prove that this was done with the latter's consent. P. 396.

87 F. (2d) 684, modified.

CERTIORARI, 300 U. S. 651, to review judgments of the Circuit Court of Appeals which reversed judgments of the District Court for the insurers in actions on policies of fire insurance, and which remanded the cases to the District Court with instructions to enter judgments for the insured. See also 87 F. (2d) 683.

Mr. Horace M. Schell, with whom *Messrs. Harry S. Ambler, Jr.,* and *Robert T. McCracken* were on the brief, for petitioners.

Mr. Harry Shapiro for respondent.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Kennedy had a first mortgage, and a bank a second mortgage, on old brewery property in Pennsylvania owned

by a distilling company. The bank procured from petitioners fire insurance policies covering the building. Each policy states it is understood that the insured building is under foreclosure by the bank; the premium being paid by the bank, it is agreed that, in event of loss, same will be adjusted with the bank and paid to it and Kennedy, mortgagee, as interest may appear. Each provides for cancelation upon request of the insured and that the company may cancel by giving insured five days' written notice. It includes the standard mortgagee clause which provides: Loss or damage shall be payable to Kennedy as mortgagee as interest may appear; insurance as to the interest of the mortgagee shall not be invalidated by any act of the mortgagor or owner; in case the mortgagor or owner shall neglect to pay premium the mortgagee shall, on demand, pay the same. The company reserves the right to cancel the policy at any time as provided by its terms, but in such case the policy is to continue in force for the benefit of the mortgagee for ten days after notice to him.

After the bid at sheriff's sale in the foreclosure proceedings, the bank abandoned its interest in the property as worthless, notified Kennedy that it intended to cancel the policies and suggested that he buy them. He declined to do so or to pay the bank any part of the premiums and expressed intention not to advance any money in respect of the insured building. The bank surrendered the policies for cancelation; petitioners paid it the unearned premiums. Later, and within the period for which petitioners had insured it, the building burned. Bogash acquired Kennedy's interest and, to recover on the policies, brought these suits. Upon the statements of claim and affidavits of defense, there arose questions whether Kennedy consented to or acquiesced in the surrender and cancelation of the policies and whether they were in force when the loss occurred or had been surrendered and canceled before that time.

The parties, having introduced their evidence and agreed that the amount of the loss was $11,000, submitted their points for charge to the jury. Plaintiff requested the court to instruct the jury in respect of notice to Kennedy of cancelation and surrender of the policies, and consent by him that they be canceled, and to direct verdicts in favor of plaintiff for the agreed amount. Defendants requested the court to instruct the jury in respect of the right of cancelation under the policies; that, if the jury should find facts specified in the proposed instructions, its verdicts should be for defendants, and to direct the jury that, upon the pleadings and evidence, the verdicts must be for defendants. The court refused to direct for plaintiff or defendants and, without reserving for later consideration the requests for directed verdicts or any question of law, submitted the cases to the jury. It found for defendants. Plaintiff filed motions for new trial but did not move for judgments *non obstante veredicto*. The court denied the motions and entered judgments for defendants.

Plaintiff appealed; the Circuit Court of Appeals held the trial court erred in refusing to charge on points concerning notice of cancelation to Kennedy, reversed the judgments of the district court and ordered new trials. 87 F. (2d) 683. But on plaintiff's application for rehearing it held that, by their requests for peremptory instructions, plaintiff and defendants assumed the facts to be undisputed and submitted to the trial judge the determination of the inferences to be drawn from the evidence and so took the cases from the jury. The court also held that the evidence was not sufficient to sustain verdicts for defendants, denied the petition for rehearing and remanded the cases to the district court with directions to give plaintiff judgments for the agreed amount of the loss. 87 F. (2d) 684.

Questions presented are: Whether, by their request for directed verdicts, the parties waived their right to trial

by jury; whether, by reversing the judgments for defendants and directing judgments for plaintiff, the Circuit Court of Appeals deprived defendants of that right; and whether the evidence was sufficient to sustain a finding that Kennedy consented to the cancelation of the policies.

1. The Circuit Court of Appeals erred in holding that, by their requests for peremptory instructions, the parties took the cases from the jury and applied to the judge for decision of the issues of fact as well as of law. The established rule is that where plaintiff and defendant respectively request peremptory instructions, and do nothing more, they thereby assume the facts to be undisputed and in effect submit to the trial judge the determination of the inferences properly to be drawn from them. And upon review a finding of fact by the trial court under such circumstances must stand if the record discloses substantial evidence to support it.[1] But, as the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver.[2] And unquestionably the parties respectively may request a peremptory instruction and, upon refusal of the court to direct a verdict, have submitted to the jury all issues as to which opposing inferences may be drawn from the evidence.[3] Here neither the plaintiff nor the defendants applied for directed verdicts without more. With their requests for peremptory instructions they submitted other requests that reason-

[1] *Beutell* v. *Magone,* 157 U. S. 154, 157. *Sena* v. *America Turquoise Co.,* 220 U. S. 497, 501. *American Nat. Bank* v. *Miller,* 229 U. S. 517, 520. *Williams* v. *Vreeland,* 250 U. S. 295, 298. *Oppenheimer* v. *Harriman Nat. Bank, ante,* pp. 206, 208.

[2] *Hodges* v. *Easton,* 106 U. S. 408, 412. *Slocum* v. *New York Life Ins. Co.,* 228 U. S. 364, 385. *Patton* v. *United States,* 281 U. S. 276, 312. *Dimick* v. *Schiedt,* 293 U. S. 474, 486. *Foust* v. *Munson S. S. Line,* 299 U. S. 77, 84.

[3] *Empire State Cattle Co.* v. *Atchison, T. & S. F. Ry. Co.,* 210 U. S. 1, 8. *Sampliner* v. *Motion Picture Patents Co.,* 254 U. S. 233, 239.

ably may be held to amount to applications that, if a peremptory instruction were not given, the cases be submitted to the jury. Indeed, we find nothing in the record to support the view that the parties waived their right of trial by jury or authorized the judge to decide any issue of fact.

2. The verdicts were taken unconditionally. Plaintiff moved for new trials but not for judgments. The court denied her motions and entered judgments for defendants. The Circuit Court of Appeals had jurisdiction to reverse and remand for new trials but was without power, consistently with the Seventh Amendment, to direct the trial court to give judgments for plaintiff. And, as before submission of the case to the jury the trial court denied plaintiff's motion for directed verdicts without reserving any question of law, neither that court nor the Circuit Court of Appeals had jurisdiction to find or adjudge that notwithstanding the verdicts plaintiff was entitled to recover. *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364, 387. Our decision in *Baltimore & Carolina Line* v. *Redman*, 295 U. S. 654, is not applicable.

There is another reason why the direction of judgments for plaintiff cannot stand. Under the Conformity Act, 28 U. S. C., § 724, federal courts follow the practice authorized by state statutes if there be nothing in them that is incongruous with their organization or their fundamental procedure or in conflict with congressional enactment.[4] The applicable Pennsylvania statute provides that whenever, upon the trial of any cause, a point requesting binding instructions has been reserved or de-

[4] *Henderson* v. *Louisville & N. R. Co.*, 123 U. S. 61, 64. *Amy* v. *Watertown, No. 1.*, 130 U. S. 301, 304. *Barrett* v. *Virginian Ry. Co.*, 250 U. S. 473, 475. *Baltimore & Carolina Line* v. *Redman*, 295 U. S. 654, 658. Cf. *Nudd* v. *Burrows*, 91 U. S. 426, 441. *Indianapolis & St. L. R. Co.* v. *Horst*, 93 U. S. 291, 300.

clined, the party presenting the point may move the court for judgment *non obstante veredicto;* whereupon it shall be the duty of the court, if it does not grant a new trial, to enter such judgment as should have been entered upon the evidence. From the judgment thus entered either party may appeal to the supreme or superior court, which shall review the action of the court below, and enter such judgment as shall be warranted by the evidence taken in that court.[5] As plaintiff failed to make appropriate motions in accordance with Pennsylvania practice, the district court did not err in failing to give plaintiff judgments notwithstanding the verdicts.[6] The Conformity Act does not extend to the Circuit Court of Appeals.[7] In the absence of motions for judgments notwithstanding the verdict in the lower court, the appellate court was without authority to direct entry of judgments for plaintiff.

3. Was the evidence sufficient to sustain a finding that, as to Kennedy's interest, the insurance terminated before the fire? As the period for which the policies were written had not expired when the loss occurred, defendants had the burden to show that the insurance was not in force at that time. Kennedy was not merely a designated beneficiary to whom was payable, as specified, insurance obtained by the bank. The mortgagee clause created a contract of insurance between him and the company and effected separate insurance upon his interest.[8]

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[5] Act of April 22, 1905, P. L. 286; 12 Purdon's Penna. Statutes Annotated, § 681. Quoted in *Slocum* v. *New York Life Ins. Co.,* 228 U. S. 364, 375–376.

[6] *West* v. *Manatawny Mut. F. & S. Ins. Co.,* 277 Pa. 102; 120 Atl. 763. *Cox* v. *Roehler,* 316 Pa. 417, 419–420; 175 Atl. 417.

[7] *Camp* v. *Gress,* 250 U. S. 308, 318.

[8] *Syndicate Ins. Co.* v. *Bohn,* 65 Fed. 165, 178. *Insurance Co.* v. *International Trust Co.,* 71 Fed. 88, 91. *Newark Fire Ins. Co.* v. *Turk,* 6 F. (2d) 533, 535. *Westchester Fire Ins. Co.* v. *Norfolk*

Defendants do not claim that they gave Kennedy any notice of intention to cancel his insurance or that the policies had been surrendered by the bank in accordance with their terms or otherwise.

The evidence shows: After bids were received at foreclosure sale the bank's attorney asked Kennedy to take over the policies and, upon his refusal so to do or to pay the bank anything on account of unearned premiums, informed him that the bank intended to surrender the policies. He expressed no objection, authorization or consent. There is no evidence that before the fire Kennedy had been notified by the bank or by the defendants, or knew, that the bank had surrendered the policies or received return premiums or that defendants attempted to cancel his insurance. The evidence is not enough to support a finding that he intended the building to become or remain uninsured or authorize the bank to act for him in respect of his insurance, or that he consented to, acquiesced in or ratified the surrender or cancelation of the policies. Defendants do not claim that they canceled Kennedy's insurance by giving him notice in accordance with the policies. The Circuit Court of Appeals rightly reversed the judgments of the district court but erroneously directed judgments for plaintiff.

The judgments of the Circuit Court of Appeals are accordingly modified by eliminating the directions to enter judgments for plaintiff and by substituting orders for new trials.

Judgments modified.

Building & Loan Assn., 14 F. (2d) 524, 526. *Queen Ins. Co.* v. *People's Union Sav. Bank*, 50 F. (2d) 63, 64. *Kimberley & Carpenter* v. *Fireman's Fund Ins. Co.*, 78 F. (2d) 62, 64. 4 Joyce, Law of Insurance, 2nd ed., § 2795, p. 4776. Richards, Law of Insurance, 4th ed., § 279, p. 478. Vance on Insurance, 2nd ed., § 170, p. 657.

LINDSEY ET AL. *v.* WASHINGTON.

CERTIORARI TO THE SUPREME COURT OF WASHINGTON.

No. 660. Argued May 3, 1937.—Decided May 17, 1937.

A state statute making more onerous the standard of punishment is *ex post facto* and void as applied to a crime committed before its enactment. P. 401.

Under the law of the State of Washington at the time of the alleged offense, imprisonment of the accused could have been fixed by the judge at less than the maximum of 15 years. By the law as amended and applied (c. 114, L. Wash., 1935), sentence for 15 years was made mandatory; a parole board was empowered to fix the duration of confinement within that period and to fix it anew within that period for infractions of the rules; even if paroled, the prisoner would remain subject to surveillance and until the expiration of the 15 years his parole would be subject to revocation at the discretion of the board or the Governor.

187 Wash. 364; 61 P. (2d) 293, reversed.

CERTIORARI, 300 U. S. 652, to review the affirmance of a conviction of grand larceny.

Mr. Spencer Gordon for petitioners.

Messrs. C. C. Quackenbush and *Ralph E. Foley,* with whom *Mr. A. O. Colburn* was on the brief, for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

In this case certiorari was granted to review a decision of the Supreme Court of Washington, 187 Wash. 346; 61 P. (2d) 293, that Chapter 114 of the Laws of Washington, 1935, under which petitioners were sentenced to terms of imprisonment, is not an *ex post facto* law prohibited by Article I, § 10, of the Federal Constitution.

Petitioners were convicted in the state court of the crime of grand larceny, made a felony by state law,

§ 2601 (2), Remington Rev. Stat., and sentenced to be punished by confinement in the state penitentiary and reformatory respectively for terms of not more than fifteen years. On April 15, 1935, the date of the commission of the offense, the prescribed penalty for grand larceny was imprisonment "for not more than fifteen years." No minimum term was prescribed. Remington Rev. Stat., § 2605. On that date, the statutes also provided, Remington Rev. Stat., § 2281, for indeterminate sentences for any felony "for which no fixed period of confinement is imposed by law." All such sentences were required to be "for a term not less than the minimum nor greater than the maximum term of imprisonment prescribed by law for the offense . . . and where no minimum term of imprisonment is prescribed by law, the court shall fix the same in his discretion at not less than six months nor more than five years; . . ." Section 2282, as modified by § 10803, provided for a parole board which could "at any time after the expiration of the minimum term of imprisonment . . . direct that any prisoner . . . shall be released on parole. . . ."

The Act of June 12, 1935, enacted after petitioners' commission of the offense and before sentence, modifies the sections relating to indeterminate sentences and paroles and provides, so far as now relevant, § 2, paragraph 1, that upon conviction of a felony "the court . . . shall fix the maximum term of such person's sentence only. The maximum term to be fixed by the court shall be the maximum provided by law for the crime of which such person was convicted, if the law provides for a maximum term." It also provides, § 2, paragraph 4, that within six months after the admission of a convicted person to the place of confinement, the board of prison, terms and paroles ". . . shall fix the duration of his or her confinement. The term of imprisonment so fixed shall not exceed the maximum provided by law for the

offense for which he or she was convicted or the maximum fixed by the court, where the law does not provide for a maximum term."

By § 2, paragraph 6, if the person undergoing sentence commits any infraction of the rules and regulations of the place of confinement, the board ". . . may revoke any order theretofore made determining the length of the time such convicted person shall be imprisoned and make a new order determining the length of time he or she shall serve, not exceeding the maximum penalty provided by law for the crime for which he or she was convicted." It is provided, § 4, that a convicted person may be released on parole by the board after he has served the period of confinement fixed by the board, less time credits for good behavior and diligence which may not exceed "one-third of his sentence as fixed by the board," and that the board shall have power ". . . to return such person to the confines of the institution from which he or she was paroled, at its discretion." The governor is authorized to cancel and revoke paroles granted by the board, and the period following cancellation or revocation of parole, and prior to the convicted person's return to custody, is not a "part of his term."

The sentences of not more than fifteen years imposed on petitioners were the maximum provided by law, and were made mandatory by the Act of 1935. In obedience to its command the court fixed no minimum. It does not appear from the record whether the board of prison, terms and paroles has fixed the "duration" of petitioners' "confinement." Numerous grounds are urged by petitioners in support of their contention that the sentence authorized by the later statute is *ex post facto* as applied to their offense, committed before its enactment. We find it necessary to consider only one.

In sustaining the sentence the Supreme Court of Washington, without analysis or comparison of the prac-

tical operation of the two statutes, declared "The amending act does not change or inflict a greater punishment than the law in force when the alleged crime was committed for the court could under the law in force at that time pronounce a maximum sentence of not more than fifteen years. The minimum and maximum punishments remain the same as before the enactment of the act of 1935." This Court, in applying the *ex post facto* prohibition of the Federal Constitution to state laws, accepts the meaning ascribed to them by the highest court of the state. But when their meaning is thus established, whether the standards of punishment set up before and after the commission of an offense differ, and whether the later standard is more onerous than the earlier within the meaning of the constitutional prohibition, are federal questions which this Court will determine for itself. *Cummings* v. *Missouri,* 4 Wall. 277, 320, rev'g, *State* v. *Cummings,* 36 Mo. 263, 273; *Kring* v. *Missouri,* 107 U. S. 221, 223-224, 231-232. To answer them we compare the practical operation of the two statutes as applied to petitioners' offense.

Under the earlier § 2281, as the state concedes, the prisoners could have been sentenced for a maximum term less than the fifteen year penalty authorized by the statute. Under the later statute, the sentence by the court, as commanded by § 2, was for fifteen years, and the "duration of confinement" to be fixed by the board of prison, terms and paroles may be for any number of years not exceeding fifteen.

The effect of the new statute is to make mandatory what was before only the maximum sentence. Under it the prisoners may be held to confinement during the entire fifteen year period. Even if they are admitted to parole, to which they become eligible after the expiration of the terms fixed by the board, they remain subject to its surveillance and the parole may, until the expira-

tion of the fifteen years, be revoked at the discretion of the board or cancelled at the will of the governor. It is true that petitioners might have been sentenced to fifteen years under the old statute. But the *ex post facto* clause looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed. The Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer. *Kring* v. *Missouri, supra,* 228-229; *In re Medley,* 134 U. S. 160, 171; *Thompson* v. *Utah,* 170 U. S. 343, 351. It is for this reason that an increase in the possible penalty is *ex post facto, Calder* v. *Bull,* 3 Dall. 386, 390; *Cummings* v. *Missouri, supra,* 326; *Malloy* v. *South Carolina,* 237 U. S. 180, 184, regardless of the length of the sentence actually imposed, since the measure of punishment prescribed by the later statute is more severe than that of the earlier, *State* v. *Callahan,* 109 La. 946; 33 So. 931; *State* v. *Smith,* 56 Ore. 21; 107 Pac. 980.

Removal of the possibility of a sentence of less than fifteen years, at the end of which petitioners would be freed from further confinement and the tutelage of a parole revocable at will, operates to their detriment in the sense that the standard of punishment adopted by the new statute is more onerous than that of the old. It could hardly be thought that, if a punishment for murder of life imprisonment or death were changed to death alone, the latter penalty could be applied to homicide committed before the change. *Marion* v. *State,* 16 Neb. 349; 20 N. W. 289. Yet this is only a more striking instance of the detriment which ensues from the revision of a statute providing for a maximum and minimum punishment by making the maximum compulsory. We need not inquire whether this is technically an increase in the punishment annexed to the crime, see *Calder* v. *Bull, supra,* 390. It is plainly to the substantial disadvantage

of petitioners to be deprived of all opportunity to receive a sentence which would give them freedom from custody and control prior to the expiration of the 15-year term.

Petitioners were wrongly sentenced under the Act of 1935. Whether, in consequence of the invalidity of the later act, as applied to petitioners, they may be sentenced under the earlier, is a question for the state court.

The cause will be reversed and remanded for further proceedings, not inconsistent with this opinion.

Reversed.

UNITED STATES ET AL. *v.* AMERICAN SHEET & TIN PLATE CO. ET AL.

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

No. 734. Argued April 9, 12, 1937.—Decided May 17, 1937.

1. Orders of the Interstate Commerce Commission requiring carriers to desist from spotting cars on industrial plant tracks as part of the service rendered under interstate line-haul rates and from granting allowances out of the line-haul rates to industries doing such spotting, *held* adequately supported by the Commission's findings in each case that the interchange tracks of the respective industries are reasonably convenient points for the receipt and delivery of interstate shipments and that the industry performs no service beyond those points of interchange for which the carrier is compensated under its interstate line-haul rates. P. 406.

   These findings are an adjudication by the Commission that the spotting service within the plants is not transportation service which the carriers are bound to render in respect of receipt and delivery of freight.
2. The Commission is not foreclosed by its earlier decisions from investigating the varied practice of making allowances for plant switching and from making proper orders to regulate the practice and prevent performance of a service not within the carriers' transportation obligation. P. 407.
3. Upon finding that the carriers' service of transportation is complete upon delivery to the industries' interchange tracks, and that

spotting within the plants is not included in the service for which the line-haul rates were fixed, there is power in the Commission to enjoin the performance of that additional service or the making an allowance to the industry which performs it. P. 408.

4. The Commission's findings are sustained by the evidence. P. 409.

15 F. Supp. 711, reversed.

APPEAL from a decree of the District Court, of three judges, setting aside orders of the Interstate Commerce Commission concerning the spotting of cars. The case was a consolidation of several cases, each brought by a different industrial corporation, which were tried together and disposed of by one decree.

Mr. Daniel W. Knowlton, with whom *Solicitor General Reed, Assistant Attorney General Jackson,* and *Messrs. Elmer B. Collins* and *Edward M. Reidy* were on the brief, for the United States and Interstate Commerce Commission, appellants.

Messrs. David A. Reed and *John S. Burchmore,* with whom *Messrs. Arthur B. Van Buskirk, Robert L. Kirkpatrick,* and *Luther M. Walter* were on the brief, for appellees.

By leave of Court, *Messrs. Thomas P. Healy, Guernsey Orcutt, Andrew P. Martin, Marion B. Pierce, Charles R. Webber, M. Carter Hall,* and *Jervis Langdon, Jr.,* filed a brief, as *amici curiae,* on behalf of certain Railroad Companies, urging affirmance of the decree below.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This is an appeal from decrees of a specially constituted District Court [1] of three judges enjoining and setting aside orders of the Interstate Commerce Commission

[1] 15 F. Supp. 711.

which required certain carriers to cease and desist from spotting cars on industrial plant tracks as part of the service rendered under interstate line-haul rates and from granting allowances out of the line-haul rates to industries doing such spotting. The appellees are five industrial concerns affected by the orders. They contend that the spotting service in question is transportation within the meaning of the Interstate Commerce Act; that the performance of the service, or the payment of an allowance to an industry which itself performs it, is sanctioned by custom and practice and by previous adjudications of the Commission; and that line-haul rates were fixed in contemplation of the rendition of such service. They further charge the orders are void because not supported by the Commission's findings or the evidence.

Upon its own motion the Commission instituted an investigation known as "Ex Parte No. 104, Practices of Carriers affecting Operating Revenues or Expenses." Part II of that proceeding had to do with terminal services.[2] Voluminous evidence was adduced largely consisting of testimony by operating officials of carriers and traffic representatives of shippers touching the service of spotting cars at points upon the systems of plant trackage maintained by large industries. The Commission's report summarized its conclusions based on the evidence as to conditions at approximately two hundred industrial plants where spotting allowances were paid by the carriers and numerous plants where such services were performed by the carrier. The Commission found that line-haul rates had not been fixed to compensate the carriers for the performance of the service in question and that the railroads, after fixing their rates, had assumed a burden not previously borne by them. It found that § 15 (13) of the Act permitting allowances by carriers to those performing a portion of the service of transportation had been made the instrument of abuse by the pay-

[2] 209 I. C. C. 11.

ment of unwarranted allowances and added: "When a carrier is prevented at its ordinary operating convenience from reaching points of loading or unloading within a plant, without interruption or interference by the desires of an industry or the disabilities of its plant, such as the manner in which the industrial operations are conducted, the arrangement or condition of its tracks, weighing service, or similar circumstances, . . . the service beyond the point of interruption or interference is in excess of that performed in simple switching or team-track delivery." In conclusion, the report states that payment for or exemption of the cost of service performed beyond such points of interruption or interference is in violation of § 6, provides the means by which the industry enjoys a preferential service not accorded to shippers generally, dissipates the carrier's funds and revenues, is not in conformity with the efficient or economical management contemplated by the Interstate Commerce Act and is not in the public interest. No orders were made upon the footing of the main report, but thereafter, Division 6 promulgated supplemental reports recapitulating the testimony touching particular plants and making findings with respect to each and the service rendered thereat. Upon the basis of these supplementary proceedings orders to cease and desist were entered.[3] The carriers thereupon gave notice of a revision of the applicable tariffs, cancelling allowances or withdrawing the spotting service. Each appellee filed a bill praying that the order affecting it be set aside and enforcement be restrained. The causes

[3] The reports and orders affecting the appellees are the following: American Sheet & Tin Plate Company Terminal Allowance, 209 I. C. C. 719; Allegheny Steel Company Terminal Allowance, 209 I. C. C. 273; Pittsburgh Plate Glass Company Terminal Allowance, 209 I. C. C. 467; Weirton Steel Company Terminal Allowance, 209 I. C. C. 445; West Leechburg Steel Company Terminal Allowance, 210 I. C. C. 213; Pittsburgh Plate Glass Company Terminal Allowance, 210 I. C. C. 527.

were consolidated for hearing and were disposed of upon a single record in one opinion. Separate decrees were entered in the respective causes granting the requested relief. The appellants took a single appeal from all the decrees. We hold the Commission's orders were lawful and should not have been set aside.

First. The appellees urge that the orders are fatally defective because the Commission failed to make the necessary quasi-judicial findings. They point out that the Commission held that an allowance furnished a means whereby an industry enjoyed a preferential service not accorded to shippers generally, and constituted a refund or remission of a portion of the rate for transportation in violation of § 6 (7) of the Interstate Commerce Act. They assert these conclusions are insufficient to support a cease and desist order because the Commission has not found, as it must to bottom an order on §§ 2, 3 and 15 (1) of the Act,[4] that the practice was unreasonable, unjustly preferential, unduly discriminatory, or otherwise unlawful. Respecting § 6 (7)[5] they say that as, by that section and § 15 (13),[6] allowances to shippers who perform a part of the service of transportation are permissible if tariffs setting forth the nature and amount of the allowance are duly filed, as they were in the present instance, it cannot be an unlawful refund or rebate for the carriers to make the allowances which the tariffs specify. If the findings were limited to the practices specified in the sections mentioned the position of the appellees would no doubt be sound, but the Commission has, in each case, found that the interchange tracks of the respective industries are reasonably convenient points for the receipt and delivery of interstate shipments and that the industry performs no service beyond those points of interchange

[4] 49 U. S. C. §§ 2, 3 (1), 15 (1).

[5] 49 U. S. C. § 6 (7).

[6] 49 U. S. C. § 15 (13).

for which the carrier is compensated under its interstate line-haul rates. These findings are an adjudication by the Commission that the spotting service within the appellees' plants is not transportation service which the carriers are bound to render in respect of receipt and delivery of freight. The statute contains this definition: "The term 'transportation' shall include . . . all services in connection with the receipt, delivery, elevation, and transfer in transit . . . of property transported." [7] The Interstate Commerce Commission is authorized and required to enforce the provisions of the Act [8] and, after hearing, if it be of opinion that any regulation or practice of a carrier be unjust or unreasonable, or unjustly discriminatory, "or otherwise in violation of the provisions of this act," to determine what practice is or will be just, fair and reasonable to be thereafter followed and to make an order that the carrier cease and desist from violation to the extent that the Commission finds violation does or will exist.[9]

Second. The Commission, so it is said, has approved allowances in instances such as those under review and by a long course of decision has sanctioned the practice; and the claim is that the carriers have relied upon the Commission's action in doing plant spotting or making allowance for the performance of that service by industries. We cannot agree either that the Commission has so decided or that if it had it would be concluded from re-examining the question in the light of existing conditions. The Commission has repeatedly dealt with the matter.[10] In numerous instances, upon application of

[7] Act of June 29, 1906, c. 3591, § 1, 34 Stat. 584; 49 U. S. C. § 1 (3).

[8] 49 U. S. C., § 12 (1).

[9] 49 U. S. C., § 15 (1).

[10] Associated Jobbers of Los Angeles *v.* A. T. & S. F. Ry. Co., 18 I. C. C. 310; Car Spotting Charges, 34 I. C. C. 609; National Malle-

an industry for the performance of spotting service on its plant track system, or for an allowance from the carrier for itself performing the service, the Commission, in the view that like service was performed or an allowance paid for it at other similar plants, has ordered the removal of discrimination as between shippers. On the other hand, in some cases the Commission has held that the service demanded was not a service of transportation and has refused to order the carrier to perform it.[11] But whatever may have been decided in the past, it is evident that the growth of the practice of making allowances for plant switching and the lack of uniformity in the practice of the carriers with respect to this service properly called for an investigation of the entire situation and the promulgation of appropriate orders to regulate the practice and prevent performance of a service not within the carrier's transportation obligation. The investigation and the consequent orders of the Commission were not foreclosed by its earlier decisions. The Commission is clearly empowered to determine what is embraced within the service of transportation and what lies outside that service.[12] Since the Commission finds that the carriers' service of transportation is complete upon delivery to the industries' interchange tracks, and that spotting within the plants is not included in the service for which the line-haul rates were fixed, there is power to enjoin the performance of that additional service or the making of an allowance to the industry which performs it.

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able Castings Co. *v.* Pittsburgh & L. E. R. Co., 51 I. C. C. 537, and many others.

[11] General Electric Case, 14 I. C. C. 237; Crane Iron Works Case, 17 I. C. C. 514, 209 Fed. 238. Compare *N. Y. C. & H. R. R. Co.* v. *General Electric Co.*, 219 N. Y. 227, 114 N. E. 115.

[12] *Los Angeles Switching Case*, 234 U. S. 294, 311; *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501, 508.

Third. What has been said makes it unnecessary further to discuss the question of the adequacy of the Commission's findings. If supported, they are sufficient to sustain the orders made.

Fourth. The cases were heard by the District Court on the record made before the Commission. The appellees challenge the orders as without support in the evidence. Examination of the record discloses that there is substantial evidence to sustain the Commission's findings.

It is conceded that the line-haul rate covers delivery. Such rates are usually made to or from an area, sometimes designated a "switching district" or "switching limits." Within that area the carrier holds itself out as agreeing to deliver freight in its freight depot or at team tracks or on sidings or spur-tracks owned by an industry. The practice has come to be uniform that in delivering a car on a team track the carrier will spot the car at a point where merchandise of the class contained in the car is usually and most conveniently unloaded; thus there are particular team tracks or points where fruit and vegetables, furniture, etc., etc., are constantly loaded and unloaded and cars are spotted accordingly. In the analogous situation where an industry's warehouses or other facilities are located at given points on a spur or side-track, the carrier holds itself out to spot the car at the point where it is needed for loading or unloading, as a warehouse door, a scrap pile, etc., etc.

In the case of a large industry having many points of loading and unloading throughout its plant, the usual arrangement is to have lead tracks or interchange tracks on which the cars are, in the first instance, shifted; thence they are taken over plant tracks to various buildings and points and are spotted in accordance with the needs and convenience of the industry. It is asserted by the appellees that it has become customary to do this spotting

on plant tracks as part of the delivery service which the carrier holds itself out as agreeing to perform without a charge additional to the line-haul rate. The record fails to establish any such custom. Carriers in official territory have, for perhaps thirty years, made allowances to certain industries for doing spotting within their plants. No uniform rule as to when such an allowance would be made has been adopted although there have been efforts to agree upon a rule. Apparently the plants most favored have been steel plants and some carriers have refused to extend the system of allowances to other than steel plants. It appears from the record that the making of allowances has not been governed by any principle and the cases fall into three general classes: (1) Where the plant does its own spotting and receives an allowance; (2) where the railroad does plant spotting; (3) where the industry does its own spotting and receives no allowance.

No allowances have been granted in New England territory, in the Southeast, or in the extreme Southwest. The practice of granting allowances has spread, to some extent, from official territory across the Mississippi and to the Northwest but here again there is no uniform rule about the matter. There is no custom or practice which has the force of a rule of law that the line-haul rate includes plant spotting service.

The testimony of operating officials of the carriers and transportation officers of industries was not entirely consistent. Some took the position that it is the obligation of a carrier to spot a car on plant tracks if the spotting involves but a single uninterrupted movement which can be made at the carrier's convenience. Many took a broader view and indicated that in consideration of the large amount of traffic emanating from and terminating at a given plant the spotting of cars, in coöperation with the needs of the plant, would not involve a burden greater than the delivery of similar cars on team tracks.

There was much opinion evidence to the effect that the cost of spotting a car on plant tracks is no greater than that of placing a car on team tracks. There was, however, opinion evidence to the contrary, and facts were developed with respect to the amount of engine time involved in some of the operations under examination from which it may fairly be deduced that the industry switching involved greater expense than team track switching.

The Commission properly held that each case must be decided upon the circumstances disclosed. It accordingly examined the evidence respecting the operations at the plant of each of the appellees and made its findings with respect to each upon the evidence in the record. We find it unnecessary to detail that evidence since it is summarized in the Commission's reports. It is sufficient now to say that in every case the Commission found, upon sufficient evidence, that the cars were, in the first instance, placed upon lead tracks, interchange tracks or sidings and subsequently spotted from these tracks; in each instance the spotting service involved one or more operations in addition to the placing of the car on interchange tracks, such as moving it to plant scales for weighing, or some additional burden, such as conformance to the convenience of the plant, supply of special motive power required by the plant's layout or trackage or some other element which called for excessive service greater than that involved in team track spotting or spotting on an ordinary industrial siding or spur. We are unable to say that the findings in respect of the individual plants lacked support in the evidence. We are, therefore, bound to accept them and to hold the orders lawful.

The decrees will be reversed and the causes remanded for further proceedings in conformity with this opinion.

Reversed.

MR. JUSTICE BUTLER is of opinion that the commission's ruling that the carriers' service of transportation is

complete upon delivery to the industries' interchange tracks is not supported by the circumstantial facts found or by the evidence; that the orders here involved are based upon a misconstruction of the Act, and that the decrees of the district court should be affirmed.

GREAT ATLANTIC & PACIFIC TEA CO. ET AL. *v.* GROSJEAN, SUPERVISOR OF PUBLIC ACCOUNTS, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 652. Argued March 30, 31, 1937.—Decided May 17, 1937.

1. Without contravening the equal protection clause of the Fourteenth Amendment, a State may separately classify for taxation the conduct of a chain store, and may increase the rate in proportion to the increase in the number of stores within the State, since the opportunities and powers of a chain store operator become greater with the growth of the number of units maintained. *Fox* v. *Standard Oil Co.*, 294 U. S. 87, 100. P. 419.
2. In adjusting the rate for a chain store within the State, the legislature may take into account the size of the chain to which the store belongs, by counting the total number of its units wherever located. P. 419.
3. Act No. 51, of Louisiana, 1934, which lays a progressively increasing rate of taxation on the operation of chain stores within the State, taking into account all the stores in the chain, whether within the State or outside, does not arbitrarily discriminate against sectional or national chains in favor of intrastate chains. P. 421.

   The findings on evidence showed that the competitive advantage of chains increased with the number of component links, and that the addition of units to a chain increased the competitive advantage of each store in the chain.
4. That the statute, by taking into account all units indiscriminately in fixing the rate, may fail accurately to adjust the fee charged to the value of the local privilege taxed, is not a good reason for adjudging it arbitrary. P. 423.
5. The subject of the Louisiana tax is the prosecution of a defined business activity within that State, viz., the conduct of a retail

store which is part of a chain under a single management, ownership or control; the measure of the tax is the number of units of the chain within the State; the fact that the rate of tax for each such unit is fixed by reference to all the units of the chain, including those operated elsewhere, does not, in legal effect, result in taxation of property or privileges enjoyed by the taxpayer beyond the borders of the State. P. 424.

6. The Louisiana tax, *supra*, may be further upheld as taxation in aid of a policy of the State to mitigate evils of competition as between single stores and chains, or a policy to neutralize disadvantages of small chains in their competition with larger ones, or to discourage merchandising within the State by chains grown so large as to become a menace to the general welfare. P. 425.
7. Within its police power, the State may forbid the prosecution of a particular type of business inimical to the public welfare, or regulate such business to abate evils arising from its pursuit. P. 425.
8. Whatever a State may forbid or regulate it may permit upon condition that a fee be paid in return for the privilege, and such a fee may be exacted to discourage the prosecution of a business or to adjust competitive or economic inequalities. P. 426.
9. The policy a State is free to adopt with respect to the business activities of her own citizens she may apply to the citizens of other States who conduct the same business within her borders, and this irrespective of whether the evils requiring regulation arise solely from operations in the State or are in part the result of extra-state transactions. P. 427.
10. A party subjected to a state tax only in respect of local activities cannot have an advisory decree against a possible administration of the taxing Act which would burden or regulate his related activities in interstate commerce. Pp. 427, 429.

16 F. Supp. 499, affirmed.

APPEAL from a decree of the District Court, of three judges, dismissing a bill to enjoin the enforcement of a tax on chain stores. The Atlantic & Pacific Tea Company was the original plaintiff. Other chain store operators intervened.

Messrs. Monte M. Lemann and *Robert L. Wright*, with whom *Messrs. Joseph G. Gamble* and *J. Blanc Monroe* were on the brief, for appellants.

The Louisiana statute taxes operations outside of the State.

The Fourteenth Amendment precludes the State from imposing a tax on operations outside the State. *Safety Deposit Trust Co.* v. *Virginia,* 280 U. S. 83, 92; *Provident Savings Assn.* v. *Kentucky,* 239 U. S. 103, 112; *Louisville Ferry Co.* v. *Kentucky,* 188 U. S. 385, 395, 396; *Delaware, L. & W. R. Co.* v. *Pennsylvania,* 198 U. S. 341, 356; *Union Transit Co.* v. *Kentucky,* 199 U. S. 194, 204; *New York Life Ins. Co.* v. *Head,* 234 U. S. 149, 162, 163.

A State cannot by language or indirection accomplish an unconstitutional purpose. *Fidelity & Deposit Co.* v. *Tafoya,* 270 U. S. 426, 434, 435; *National Life Ins. Co.* v. *United States,* 277 U. S. 508; *Missouri* v. *Gehner,* 281 U. S. 313; *Schuylkill Trust Co.* v. *Pennsylvania,* 296 U. S. 13; *Bethlehem Motors Corp.* v. *Flynt,* 256 U. S. 421; *Colgate* v. *Harvey,* 296 U. S. 404. Distinguishing: *Maxwell* v. *Bugbee,* 250 U. S. 525 and *Frick* v. *Pennsylvania,* 268 U. S. 473.

The statute cannot be supported on the theory that Louisiana taxes only what is in Louisiana by analogy to allocation. *Western Union* v. *Kansas,* 216 U. S. 1; *Ludwig* v. *Western Union,* 216 U. S. 146; *Pullman Co.* v. *Kansas,* 216 U. S. 56; *Atchison, T. & S. F. Ry.* v. *O'Connor,* 223 U. S. 280; *Looney* v. *Crane,* 245 U. S. 178; *International Paper Co.* v. *Massachusetts,* 246 U. S. 135, 142; *Airway Corp.* v. *Day,* 266 U. S. 71; *Cudahy Packing Co.* v. *Hinkle,* 278 U. S. 400; *Hans Rees' Sons* v. *North Carolina,* 283 U. S. 123. Distinguishing: *Wallace* v. *Hines,* 253 U. S. 66; *Baltic Mining Co.* v. *Massachusetts,* 231 U. S. 68.

The statute increases the Louisiana tax when Louisiana operations decrease if outside operations increase. This could never happen under an allocation statute.

Cf. *Fargo* v. *Hart,* 193 U. S. 490; *Union Tank Line* v. *Wright,* 249 U. S. 275.

The statute places all stores everywhere in the highest applicable bracket. If Louisiana has a right to do this, then every State has a similar right, and although a corporation owned only one store in every State, that store would be in the highest bracket everywhere.

The statute denies the equal protection of the laws to chains operating both within and without Louisiana. It was not designed to, and does not, protect independents against chains, but discriminates among chains. But the State cannot consistently with the Constitution undertake to benefit or give advantage to its citizens or those doing business only within its borders by discriminating against those who also do business elsewhere. *Ward* v. *Maryland,* 12 Wall. 418, 430; *Colgate* v. *Harvey,* 296 U. S. 404.

If this statute is upheld, a State may make its tax rates applicable to income and operations within the State depend upon factors outside the State. The result would be to permit the State, in effect, to exclude from the State persons or corporations operating outside the State, and to convert the Union into a Confederation of States. See *Baldwin* v. *G. A. F. Seelig, Inc.,* 294 U. S. 511. A tax based upon size alone, as e. g. a graduated tax upon gross sales, is arbitrary and invalid. See *Stewart Dry Goods Co.* v. *Lewis,* 294 U. S. 550, 560.

The right of Louisiana to exclude a foreign corporation cannot be used as a basis for taxing it upon property that, by established principles, the State has no power to tax. *Fidelity & Deposit Co.* v. *Tafoya,* 270 U. S. 426; *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389.

Prohibition of size extending to operations outside the State may properly be accomplished only by national legislation. *United States* v. *Bennett,* 232 U. S. 299, 306.

If the statute is valid, municipalities may adopt corresponding ordinances based on operations outside the State, further assuring exclusion of foreign chains.

Every legitimate claim of Louisiana to lay tribute upon operations within its borders is attained under the state income and franchise tax laws, the 1932 Chain Store Act, and the general license tax laws.

The invalidity of the 1934 statute will leave the 1932 statute in effect.

Messrs. Martin A. Schenck and *William J. Carr* filed a brief on behalf of F. W. Woolworth Co., appellant.

Mr. Robert L. Wright also filed a brief on behalf of Montgomery Ward & Co., Inc., appellant.

Mr. E. Leland Richardson, Assistant Attorney General of Louisiana, with whom *Messrs. Gaston L. Porterie,* Attorney General, and *J. C. Daspit* and *F. A. Blanche,* Assistant Attorneys General, were on the brief, for appellees.

Act 51 of 1934 levies a license or privilege tax on the privilege of operating retail stores in multiple form in Louisiana, and is clearly within the authority of the Louisiana Legislature. La. Const., 1921, Art. 10, § 8.

The statute classifies businesses according to type of business done and the value of the privilege to do business in Louisiana; the measure of the tax is the number of retail stores in the State; the type of business transacted in Louisiana and the value of the privilege to do business in Louisiana are determined by the number of retail stores under the same general management, supervision, ownership or control; the greater the number of retail units in a chain, the greater the many advantages accruing to the operators of the chain, and the greater the advantages accruing to each retail unit in the chain, thereby determining the type of business the retail unit or units are engaged in, and the value of the privilege of doing business in Louisiana.

The testimony, documentary evidence and offerings in this case include practically the same proof found in *State Board of Tax Comm'rs* v. *Jackson,* 283 U. S. 527. See also *Liggett Co.* v. *Lee,* 288 U. S. 517, and *Fox* v. *Standard Oil Co.,* 294 U. S. 87.

The statute involved treats all similarly situated alike. That is all that is required by the equal protection clauses of the Federal and State Constitutions. *Ohio Oil Co.* v. *Conway,* 281 U. S. 146.

Under Act 51 of 1934, the rate of tax alone is affected by the total number of retail stores in a chain. Cf. *Maxwell* v. *Bugbee,* 250 U. S. 525; *Frick* v. *Pennsylvania,* 268 U. S. 473.

The State can look beyond its borders to determine true value of properties within the State when all are part of a system. *Wallace* v. *Hines,* 253 U. S. 66; 61 C. J., p. 694; *Union Tank Line* v. *Wright,* 249 U. S. 275; *Western Union* v. *Taggart,* 163 U. S. 1; *Fargo* v. *Hart,* 193 U. S. 490; *Educational Films Corp.* v. *Ward,* 282 U. S. 379; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107; *Baltic Mining Co.* v. *Massachusetts,* 231 U. S. 68.

The statute should be sustained on the further ground that all appellants are foreign corporations doing intrastate business in Louisiana, *Liggett Co.* v. *Lee,* 288 U. S. 517.

The privilege of engaging in intrastate commerce in Louisiana in corporate form is one which the State may confer or withhold as it sees fit. *Railway Express Agency* v. *Virginia,* 282 U. S. 440.

In the alternative, the statute, in effect, classifies chain operators in Louisiana as local, sectional and national. See *Liggett Co.* v. *Lee, supra.*

Mr. JUSTICE ROBERTS delivered the opinion of the Court.

This cause presents the questions whether the method prescribed by a chain store tax act for ascertaining the

rate of taxation offends the Fourteenth Amendment and the commerce clause of the Federal Constitution.

In 1932 the legislature of Louisiana adopted an act levying an occupation or license tax upon chain stores,[1] under which the exaction was fifteen dollars upon each of two or more stores, not in excess of five; upon each store in excess of five, but not exceeding ten, twenty-five dollars; and the amount increased in brackets for additional stores, the last bracket embracing stores in excess of fifty upon each of which the tax was two hundred dollars.

By Act 51 of 1934 [2] the earlier law was amended to lay the tax on "persons, firms, partnerships, corporations or associations of persons engaged in the business of operating two or more stores or mercantile establishments, one or more of which is located in this state . . . under the same general management, supervision, ownership or control . . ." Section 3 provides that the tax "shall be based on the number of stores or mercantile establishments included under the same general management, supervision, ownership or control, whether operated in this State or not, and shall be fixed and graded as follows to wit: (1) Upon stores or mercantile establishments operated in this State and belonging to a chain or group having a total of not more than ten stores, the annual license shall be Ten ($10.00) Dollars for each such store operated in this State." There are fifteen additional paragraphs progressively increasing the rate per store in Louisiana of larger chains, the last fixing the rate for a store belonging to a chain of more than five hundred at $550.

The Great Atlantic & Pacific Tea Company, an Arizona corporation, owning, operating or controlling 15,082 stores in the United States, Canada, and elsewhere, 106 of which are in Louisiana, filed its bill in the District

[1] No. 19 of 1932; Acts of Louisiana, 1932, p. 125.

[2] Acts of Louisiana 1934, p. 251.

Court to restrain the appellees, state officers, from enforcing the statute. Other corporations operating chains, some units of which are located in Louisiana, intervened as plaintiffs. A temporary restraining order issued, the appellees answered the bill, and the case was heard upon pleadings and proofs by a specially constituted court of three judges, which upheld the statute and dismissed the bill.[3]

The constitutional infirmity of the Act is said to consist in arbitrary discrimination in favor of local as against national chains, in the attempt to tax property and activities which are beyond the state's jurisdiction, and in burdening interstate commerce. We hold the legislation impregnable to attack on these grounds.

First. The exaction is an occupation or license tax. The subject is the conduct of a business within Louisiana. Without contravening the equal protection clause of the Fourteenth Amendment a state may separately classify for taxation the conduct of a chain store,[4] and may increase the rate in proportion to the increase in the number of stores within the state, since the opportunities and powers of a chain store operator become greater with the growth of the number of units maintained.[5] The appellants assert that in adjusting the rate for a chain store in Louisiana the legislature may not take into account the size of the chain to which the store belongs, by counting the total number of its units wherever located. So to do, it is claimed, is arbitrarily to discriminate against sectional or national chains in favor of intrastate chains.

The District Court found that the testimony offered by the State was similar to that in *Tax Commissioners* v. *Jackson, supra;* established the difference in type of opera-

[3] 16 F. Supp. 499.

[4] *Tax Commissioners* v. *Jackson,* 283 U. S. 527; *Liggett Co.* v. *Lee,* 288 U. S. 517.

[5] *Fox* v. *Standard Oil Co.,* 294 U. S. 87, 100.

tion between the operator of one store and the operator of many, and the variance in advantage and mode of operation with the number of units in the chain. In addition, the court found that all the stores of a retail chain contribute to the central purchasing power of the chain irrespective of state lines and location of stores, and increase the per unit multiple advantage enjoyed by the operator of the system; that the greater the number of units the greater the purchasing power of the chain, the greater the rebates and allowances, the greater the advantages in advertising, the greater the capital employed, the greater the social and economic consequences, and the lower the cost of distribution and overhead. "In fine, the record in this case shows the contribution to the advantages made by each unit in the chain, and the per unit advantage made possible by the whole system, and in that respect only does it differ materially from the proof which was before the court in the *Jackson* case." These findings are assigned as error, but they have substantial support in the record and we therefore accept them.

If the competitive advantages of a chain increase with the number of its component links, it is hard to see how these advantages cease at the state boundary. Under the findings a store belonging to a chain of one hundred, all located in Louisiana, has not the same competitive advantages as one of one hundred Louisiana stores belonging to a national chain of one thousand. The appellants lean heavily on the findings of the court respecting the relative business in New Orleans of the Great Atlantic and Pacific Company and the H. G. Hill Stores, Inc., a Louisiana corporation. The court found that the operations of the two are generally of the same character; the former conducts one hundred and six stores in the state, sixty-two of which are in the city of New Orleans; the latter ninety-two in the state, of which eighty-seven are in the city. Each concern conducts grocery and meat stores with substan-

tially the same line of merchandise and their sales methods are practically the same. The gross volume of sales of Hill in New Orleans is much greater; it has more stores, and does more business per store in that city than the Atlantic and Pacific. The court further found, however, that the total purchasing power of the Atlantic and Pacific is much greater than that of Hill; that Atlantic and Pacific has field offices located at primary markets, which are in charge of specialists and supervised by central purchasing offices in New York, and maintains divisional warehouses throughout the country, whereas the operations of Hill are confined to Louisiana, and chiefly to New Orleans. Under the statute Hill is taxable at the rate of $30 per store as against $550 assessable against Atlantic and Pacific. These facts are said to demonstrate that the Act denies the appellant and other intervenors the equal protection of the laws by arbitrarily discriminating against national in favor of local chains. But the contention is answered not only by the specific finding respecting the difference between the two companies' methods but by the general finding that addition of units to a chain increases the competitive advantage of each store in the chain.

The court's findings are supported by evidence bearing upon a variety of advantages enjoyed by large chains which are unavailable to smaller chains. One striking illustration is furnished by the uncontradicted proof that the Atlantic and Pacific Company received, in the year 1934, from its vendors, secret rebates, allowances, and brokerage fees amounting to $8,105,000 which were demanded by the company as a condition of purchasing from the vendors in question. The leverage which accomplished this was the enormous purchasing power of the company. The amount thus obtained equals $530 for each of the Atlantic and Pacific Company's stores or nearly the amount of the tax exacted by the statute. The

appellants insist that these facts are not significant because there is testimony that, in the drug trade, quantity discounts usually do not increase after a certain volume of purchases is reached, but the testimony does not specify the point where quantity discounts cease to grow. The record discloses what would be plain enough without evidence, that generally volume of purchasing power spells lower prices, special terms, and other advantages. It is unnecessary to discuss the evidence supporting the findings with respect to other facilities enjoyed only, or in increased measure, by the larger chains.

The appellants urge that the Act arbitrarily discriminates in favor of local chains because it is inconceivable that a chain operating wholly within the state would have five hundred stores, not to mention upwards of fifteen thousand, the number maintained by the Atlantic and Pacific. The argument is inconsistent with the finding that additional units, wherever situate, increase the advantages and economic effects of the chain as a whole and of each unit; and ignores the possibility that a chain-store company of national scope might well be incorporated in Louisiana, whose stores in that state would be rated for taxation according to its total stores within and without the state.

Other instances of the working of the Act are cited to show that it arbitrarily discriminates against national chains and in favor of local ones solely because they are such. Thus, it is said, if a national chain owning 501 stores in other states, establishes a single store in a Louisiana city where there is a local chain of two or three like establishments, the national concern must pay a license of $550 for its one store while the stores of the local chain are taxed but $10 each. The appellees retort that since the earlier law imposed a tax of $15 on each store in the local chain and none upon the one Louisiana store of the national chain it was more vulnerable to the

charge of arbitrariness than the Act under review. Whatever the pertinence of the reply, the facts found respecting the advantages of a larger chain as compared with a smaller justify as not unreasonable or arbitrary the imposition of a higher license tax on the units of the former which are maintained within the state. Even one unit of such a national chain located in Louisiana enjoys competitive advantages over the stores of the local proprietor consequent upon its relation to the far-flung activities and facilities of the chain.

The act under review is to be distinguished from the Florida statute considered in *Liggett Co.* v. *Lee, supra,* which increased the tax if the chain happened to have stores in two counties of the state rather than in one. The increase of rate was held arbitrary because it was unrelated to the size or character of the chain and was conditioned solely upon the location of one or more of its units. The Louisiana act adopts no such basis of classification. A small chain of three stores, one of which is in Louisiana and two in Mississippi, will pay exactly the same tax as a similar organization having the same number of stores all in Louisiana. A concern having ninety-two stores scattered over ten states, seven of which are in Louisiana, will pay exactly the same tax per Louisiana store as the H. G. Hill Stores, Inc., all of whose ninety-two stores are in Louisiana. Thus it appears that the classification is not based upon the location of the stores within or without the state but upon the type of business conducted, the scale of that business, its accompanying competitive advantages and economic results.

Finally, since the court below found that the sales and earnings of the individual stores of a chain differ in various portions of the country and those of the Louisiana stores have been below the average for all stores of many of the appellants, the claim is that the statute, by taking into account all units indiscriminately in fixing the rate,

arbitrarily disregards the value of the local privilege for which the license fee is charged. We cannot say that classification of chains according to the number of units must be condemned because another method more nicely adjusted to represent the differences in earning power of the individual stores might have been chosen, for the legislature is not required to make meticulous adjustments in an effort to avoid incidental hardships.[6] It is enough that the classification has reasonable relation to the differences in the practices of small and large chains. The statute bears equally upon all who fall into the same class, and this satisfies the guaranty of equal protection.[7]

Second. The appellants contend the Act deprives them of property without due process of law because the tax is imposed, at least in part, upon things which are beyond the jurisdiction of Louisiana. The state may not tax real property or tangible personal property lying outside her borders; [8] nor may she lay an excise or privilege tax upon the exercise or enjoyment of a right or privilege in another state derived from the laws of that state and therein exercised and enjoyed.[9] But, as we have seen, the subject of the tax in question is the prosecution of a defined business activity within the State of Louisiana,—the conduct of a retail store which is a part of a chain under a single management, ownership or control,—a legitimate subject of a license or occupation tax. The measure of the exaction is the number of units of the chain within the

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[6] Compare *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78; *Chesapeake & Ohio Ry.* v. *Conley*, 230 U. S. 513, 522; *Continental Baking Co.* v. *Woodring*, 286 U. S. 352, 371; *Fox* v. *Standard Oil Co.*, *supra*, 101, 102.

[7] *Tax Commissioners* v. *Jackson*, *supra*, p. 542; *Fox* v. *Standard Oil Co.*, *supra*, 101.

[8] *Louisville & J. Ferry Co.* v. *Kentucky*, 188 U. S. 385; *Delaware L. & W. R. Co.* v. *Pennsylvania*, 198 U. S. 341; *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194.

[9] *Frick* v. *Pennsylvania*, 268 U. S. 473.

state,—a measure sanctioned by our decisions. The rate of tax for each such unit is fixed by reference to the size of the entire chain. In legal contemplation the state does not lay a tax upon property lying beyond her borders nor does she tax any privilege exercised and enjoyed by the taxpayer in other states. The law rates the privilege enjoyed in Louisiana according to the nature and extent of that privilege in the light of the advantages, the capacity, and the competitive ability of the chain's stores in Louisiana considered not by themselves, as if they constituted the whole organization, but in their setting as integral parts of a much larger organization. We cannot hold that this privilege is unaffected by the status of the Louisiana stores as members of such a chain or that recognition of the advantages and capacities enjoyed by them as a result of that membership is forbidden in classifying them for progressive increase of rate. Such classification is not in legal effect the taxation of property or privileges possessed or enjoyed by the taxpayer beyond the borders of the state.

Maxwell v. *Bugbee,* 250 U. S. 525, goes far to sustain the validity of the Act.[10] The exaction in the present case is even less open to the accusation of extra-territoriality than the one there under consideration, because here it cannot be claimed, as it was there, that not alone the rate, but to some extent, the measure of the tax, is affected by the enjoyment of extra-state privileges.

Our decision need not, however, rest on conceptions of subject, measure and rate of tax. Much broader considerations touching the state's internal policy of police sustain the exaction. The tax is laid solely upon intrastate commerce.[11] In the exercise of its police power

[10] See the comment on *Maxwell* v. *Bugbee* in *Frick* v. *Pennsylvania,* 268 U. S. at p. 495.

[11] *Nathan* v. *Louisiana,* 8 How. 73, 80–81; *Rast* v. *Van Deman & Lewis Co.,* 240 U. S. 342, 360.

the state may forbid, as inimical to the public welfare, the prosecution of a particular type of business,[12] or regulate a business in such manner as to abate evils deemed to arise from its pursuit.[13] Whatever a state may forbid or regulate it may permit upon condition that a fee be paid in return for the privilege,[14] and such a fee may be exacted to discourage the prosecution of a business or to adjust competitive or economic inequalities.[15] Taxation may be made the implement of the exercise of the state's police power;[16] and proper and reasonable discrimination between classes to promote fair competitive conditions and to equalize economic advantages is therefore lawful.[17]

If, in the interest of the people of the state, the legislature deemed it necessary either to mitigate evils of com-

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[12] *License Cases,* 5 How. 504; *Mugler* v. *Kansas,* 123 U. S. 623, 662–663; *Williams* v. *Arkansas,* 217 U. S. 79; *Central Lumber Co.* v. *South Dakota,* 226 U. S. 157, 162.

[13] *Ozan Lumber Co.* v. *Union County Bank,* 207 U. S. 251; *Engel* v. *O'Malley,* 219 U. S. 128, 137.

[14] *Wiggins Ferry Co.* v. *East St. Louis,* 107 U. S. 365, 373, 374–376.

[15] *American Sugar Refining Co.* v. *Louisiana,* 179 U. S. 89, 92–95; *Reymann Brewing Co.* v. *Brister,* 179 U. S. 445, 453; *Williams* v. *Fears,* 179 U. S. 270, 276; *W. W. Cargill Co.* v. *Minnesota,* 180 U. S. 452, 469; *McCray* v. *United States,* 195 U. S. 27, 60; *Brown-Forman Co.* v. *Kentucky,* 217 U. S. 563, 573; *Quong Wing* v. *Kirkendall,* 223 U. S. 59, 62; *Brazee* v. *Michigan,* 241 U. S. 340, 342; *Alaska Fish Co.* v. *Smith,* 255 U. S. 44; *Liberty Warehouse Company* v. *Tobacco Growers Assn.,* 276 U. S. 71, 96; *Sproles* v. *Binford,* 286 U. S. 374, 394; *Magnano Co.* v. *Hamilton,* 292 U. S. 40, 43, 44; *Fox* v. *Standard Oil Co.,* 294 U. S. 87, 100; *Sonzinsky* v. *United States,* 300 U. S. 506.

[16] *Gundling* v. *Chicago,* 177 U. S. 183, 188, 189; *Rast* v. *Van Deman & Lewis Co., supra,* 368; *Compañia General* v. *Collector,* 275 U. S. 87, 95, 96; *Sonzinsky* v. *United States, supra.*

[17] *Bradley* v. *Richmond,* 227 U. S. 477, 480, 484; *Hammond Packing Co.* v. *Montana,* 233 U. S. 331, 333–334; *Rast* v. *Van Deman & Lewis Co., supra;* p. 368; *Tanner* v. *Little,* 240 U. S. 369, 382–383; *St. Louis Poster Advertising Co.* v. *St. Louis,* 249 U. S. 269, 274.

petition as between single stores and chains or to neutralize disadvantages of small chains in their competition with larger ones, or to discourage merchandising within the state by chains grown so large as to become a menace to the general welfare, it was at liberty to regulate the matter directly or to resort to the type of taxation evidenced by the Act of 1934 as a means of regulation. The appellants, by incorporating in some other state, or by spreading their business and activities over other states, cannot set at naught the public policy of Louisiana. The claim is, essentially, that even if local evils flow from the appellant's methods the state cannot control those evils because its power is limited to conditions created by the members of the chain found within the state. The conclusion is that the state must treat these stores as if they were something different from what they really are, since to do otherwise would be to reach beyond the borders of Louisiana for the measure of the tax. The argument answers itself. The policy Louisiana is free to adopt with respect to the business activities of her own citizens she may apply to the citizens of other states who conduct the same business within her borders, and this irrespective of whether the evils requiring regulation arise solely from operations in Louisiana or are in part the result of extra-state transactions. It is not a denial of due process to adjust such license taxes as are here involved to meet the local evil resulting from business practices and superior economic power even though those advantages and that power are largely due to the fact that the taxpayer does business not only in Louisiana but in other states.

Third. Montgomery Ward & Company, one of the appellants, filed a bill of intervention. In addition to the objections already considered it contends that, as applied to its business, the act of 1934 constitutes an interference with and a regulation of interstate commerce forbidden by Art. I, § 8 of the Constitution. The allegation is that

this appellant owns and operates five stores in Louisiana and four hundred and eighty-six others spread over forty-five states; owns and operates nine mail order houses located in states other than Louisiana and nineteen so-called order stations located at various points outside Louisiana, the mail order houses and order stations all being exclusively engaged in interstate commerce. The order stations are installed in rented spaces with one regular employe at each and with a stock of samples, the only business transacted in them being the taking of orders which are transmitted to, and filled by, the mail order houses. With respect to the operation of the act the bill states: "Intervenor alleges that while the present administrative interpretation of said Act 51 of the Louisiana Legislature of 1934 apparently limits the operation of said Act to the intervenor's retail stores, the words 'mercantile establishments' used in said Act apparently include the aforesaid mail order houses and order stations owned and operated by the intervenor. Said Act does not by its terms exclude from its operation said establishments engaged in interstate commerce, and, therefore, violates the Commerce Clause of the United States Constitution . . ."

The trial court found the facts as follows:

"Montgomery Ward & Company, an Illinois corporation, operates 9 mail order establishments engaged in filling orders received from points in the United States and foreign countries through the mail. None of these mail order establishments are situated in Louisiana. The Company also has 19 mail order offices, none of which are situated in Louisiana; 17 Class A department stores carrying a complete line of general merchandise, none of which are situated in Louisiana; 456 Class B retail stores of limited size and carrying a limited line of merchandise, of which 5 are located in Louisiana; and 16 Class C stores

devoted exclusively to the sale of hardware, household appliances, automobile tires and tubes, of which none are located in Louisiana. The 5 Louisiana Class B stores take orders to be filled by mail from the Company's mail order establishment located at Forth Worth, in addition to selling merchandise at retail at its place of business to the public."

As a conclusion of law the court held "The claim [of the intervenor] does not merit serious consideration. The statute by its express terms applies only 'where goods, wares, merchandise or commodities of every description whatsoever are sold or offered for sale at retail.' "

Error is assigned to the District Court's conclusion and the appellant insists that the statute is bad because it imposes a single and indivisible tax for the privilege of conducting a business both interstate and intrastate, partly measured by interstate operations wholly extrastate.

As respects the regulation of interstate commerce the intervenor's bill is premature and without equity. The statute was approved July 12, 1934, and became effective for the calendar year 1935 and subsequent years. February 27, 1935, both the bill of the Great Atlantic & Pacific Tea Company and Montgomery Ward & Company's intervening bill were filed. The record discloses no rules or regulations promulgated by the appellee Supervisor of Public Accounts and no ruling by any responsible state official as to which of Montgomery Ward & Company's establishments are to be included in reckoning the total of its retail stores. For all that appears neither its mail order houses, nor its order stations, nor its department stores, will be included in the computation.

It is manifest that Montgomery Ward & Company cannot upon mere supposition that the Act will be unconstitutionally construed and applied in respect of its five stores in Louisiana obtain an advisory decree that the

Act must not be so administered as to burden or regulate interstate commerce.[18]

The judgment of the District Court is

Affirmed.

MR. JUSTICE VAN DEVANTER and MR. JUSTICE STONE took no part in the consideration or decision of this case.

MR. JUSTICE SUTHERLAND, dissenting.

MR. JUSTICE MCREYNOLDS, MR. JUSTICE BUTLER and I are of opinion that the statute here involved is invalid as constituting a denial of the equal protection of the laws and an attempted exertion of the legislative power of the state with respect to properties and businesses located beyond its teritorial borders.

In *Tax Commissioners* v. *Jackson*, 283 U. S. 527, this court sustained the validity of an Indiana statute imposing a chain-store tax graduated according to the number of stores under the same general management. But there, the amount of the tax in respect of each store was graduated according to the whole number of stores *within the State*. Here, the amount of the tax is not limited by the number of stores operated within the state, but is increased by including stores operated in other states and foreign countries. If, for example, the owner of a single store in Louisiana has fewer than ten stores outside the state, he pays a tax of $10; but if he operates as many as ten stores in other states or in Canada, he is required to pay upon his store in Louisiana $15 annually. And as the stores outside the state further increase in number, the tax upon the single store in Louisiana rises by successive steps until it reaches, in the highest bracket, where the

[18] Compare *Hodge Co.* v. *Cincinnati*, 284 U. S. 335, 338; *Continental Baking Co.* v. *Woodring*, 286 U. S. 352, 369; *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 324.

stores outside exceed 500 in number, the sum of $550 upon the single Louisiana store.

We thought the classification in the *Jackson* case, although confined to stores within the state, was so arbitrary as to render the tax invalid under the equal protection clause of the Fourteenth Amendment, and, together with MR. JUSTICE VAN DEVANTER, who takes no part in this case, set forth our views at length in a dissenting opinion. 283 U. S. 543 *et seq.* We rest upon what was there said, without repeating it, not for the purpose of again challenging the decision in the *Jackson* case, but because what we said applies more plainly to the variant facts of the case now under consideration. We thought then that the *Jackson* case was wrongly decided, but, accepting it as authoritative, it seems to us certain that it goes to the extreme verge of the law, and, for the reasons given in our dissenting opinion, equally certain that the present decision goes far beyond the verge. We add a few words in support of that view.

The Indiana law effected a discrimination between two classes—namely, operators of chain stores and operators of independent stores within the boundaries of the state, without reference to any stores outside. The Louisiana law effects a discrimination between two members of the same class—namely, chain-store operators within the state, where the only difference between them is that one also operates stores in other states and in Canada, while the other does not. Thus, for illustration, if A operates eleven stores in Louisiana, doing a business of $10,000,000 per year, and has none outside, he pays $15 for each store, or a total of $165, while if B operates eleven stores in Louisiana, and happens to have 490 stores distributed among the remaining 47 states of the Union and foreign countries, doing a total business of $5,000,000 per year, he is compelled to pay $550 upon

each of his eleven stores, or a total of $6,050—36 times the amount of the tax paid by A. This enormous difference is based upon a state of affairs wholly external to the State of Louisiana, the effect of which upon the Louisiana business is a matter of bald conjecture, varying widely, as it must, with the localities in which the foreign stores are to be found and the local circumstances by which their operations are affected.

Moreover, if the Louisiana statute be valid, other states in the Union may pass similar acts; and it is not improbable that they will. And if they do so, a remarkable situation will be brought about. Let us suppose, for example, that ten additional states, ranging from Maine to California, adopt the Louisiana form of legislation. In each of the states, including Louisiana, a given operator has ten stores, making 110 in all. In that case he will pay in each state a tax based not upon the operation of ten stores, but on the operation of 110. Instead, therefore, of paying in each state $100 upon the basis of $10 for each of the ten stores, he will pay $500 upon the basis of $50 for each of the ten stores. If he should then put into operation sixteen additional stores, let us say in Canada or Norway, he would immediately bring himself into the bracket where the tax upon each store is fixed at $100—thus increasing his total taxation in the eleven states from $5,500 to $11,000, in virtue of these comparatively small operations in a foreign country, the effect of which, if any, in respect of competitive advantages in any one of the eleven states could hardly be described otherwise than as purely speculative.

The exaction here involved is not a tax upon Louisiana property or business, but is essentially a penalty imposed upon an operator of business wholly beyond the reach of the law of that state. We are not able to concede that it lies within the province of one state to thus indirectly

penalize a method of doing business in another state, which it may be the policy of the latter to permit or, indeed, encourage. Compare *Baldwin* v. *G. A. F. Seelig*, 294 U. S. 511, 521–524. The foregoing illustrations, and others which might be supplied, in our opinion expose the arbitrary character of the classification and the consequent invalidity of the exaction imposed in virtue of it.

The sole fact that a Louisiana operator has opened additional stores in other states or in Canada or Norway, affords, we think, no valid basis for imposing upon him an enormously-increased tax from which his competitors, similarly circumstanced in all other respects, are exempt. The claim that thereby the balance of competitive advantage has been disturbed, is so fanciful as to furnish no basis for such legislation grounded in any policy or object of state taxation. The court below thought that to consider the number of stores outside the state was competent for the purpose of determining the value of the privilege of operating each store within the state. But the fallacy of that view as applied to the present case is demonstrated by the facts as found by that court—namely, that operations of chain stores "vary greatly from section to section and from state to state because of differences in local conditions, economic and otherwise, freight rates added to cost, remoteness from headquarters and executive management, increase in difficulty of supervision, local competition and other factors. Conditions as to sales and profits vary greatly in all classes of stores according to the section of the country in which they are located." An attempt to fix the extent of the competitive advantage which will inure in favor of a business in Louisiana or the value of the privilege of operating it upon a basis so shifting and uncertain, seems to us an utterly futile undertaking. It is nothing more than an effort to reach a conclusion upon an assumed major premise, where the minor premise is unknown.

In *Stewart Dry Goods Co.* v. *Lewis,* 294 U. S. 550, this court held invalid a state act imposing a graduated tax measured by the amount of gross sales. We held that it could not be sustained as an excise on the privilege of merchandising, because there was no reasonable relation between the amount of the tax and the value of the privilege, and no such relation between gross sales and net profits as would justify the classification. The tax was denounced (p. 557) as being "whimsical and arbitrary, as much so as would be a tax on tangible personal property, say cattle, stepped up in rate on each additional animal owned by the taxpayer, or a tax on land similarly graduated according to the number of parcels owned." We said (pp. 558–559) "that the gross sales of a merchant do not bear a constant relation to his net profits; that net profits vary from year to year in the same enterprise; that diverse kinds of merchandise yield differing ratios of profit; and that gross and net profits vary with the character of the business as well as its volume." It appeared from the testimony that great variations existed within each class selected for comparison; that in some classes, representing a greater amount of sales, there was a smaller net profit than in others having less aggregate sales. To the contention that the tax was a rough and ready method of taxing gains, less complicated and more convenient of administration than an income tax, we answered (p. 560), "The argument is in essence that it is difficult to be just, and easy to be arbitrary. If the Commonwealth desires to tax incomes it must take the trouble equitably to distribute the burden of the impost."

These observations apply to the case in hand; for although the taxes imposed by the statutes involved are different, the vices are the same.

FIRST NATIONAL BANK & TRUST CO., TRUSTEE, *v.* BEACH.

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

No. 621. Argued April 27, 28, 1937.—Decided May 17, 1937.

1. Section 75 of the Bankruptcy Act defined a "farmer" as any individual who is personally *bona fide* "engaged primarily in farming operations," or "the principal part of whose income is derived from farming operations." *Held* that these two branches of the definition are not equivalents but are used in contrast, and neither is a term of art, but in their application the question of farmer *vel non* must be determined by considering and appraising all the facts. P. 438.
2. Respondent owned a farm, of which he occupied a part, living there and devoting most of his time to cultivation and other farm activities, the products of which were the food for himself and his dependants; the remainder and greater portion of the farm he let out to tenants, who put it to grazing and cultivation, yielding him rentals which constituted the greater part of his income. *Held* a "farmer" within the meaning of § 75 of the Bankruptcy Act. P. 439.

86 F. (2d) 88, affirmed.

CERTIORARI, 300 U. S. 650, to review the reversal of a petition by the present respondent for relief under § 75 of the Bankruptcy Act, which was opposed by the present petitioner, a bank holding a mortgage on his farm.

Mr. Arthur B. Weiss for petitioner.

Mr. Sydney P. Simons for respondent.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The question is whether respondent, who has filed a petition under § 75 of the Bankruptcy Act (11 U. S. C.

§ 203) for the composition or extension of his debts, is a farmer as there defined.

The facts are stipulated as follows: Beach was the owner of a farm with five houses and a barn on it where he had lived from his birth, occupying one of the houses with his wife and children as his homestead. The farm had been in the ownership of his family for two centuries and over. For a time he had been engaged in mercantile pursuits, but in 1930 owing to heavy financial losses he began working on the farm again, and has given most of his time to it ever since. The land had an apple orchard of two hundred trees which gave him 1500 bushels of choice apples in 1931. He got little out of the orchard from 1933 to 1935, the trees during those years being affected by a blight. He sold pears from a few pear trees, and cultivated a large garden of about one acre, planting and raising all kinds of vegetables, fruits and flowers, more than enough to provide for his family. He raised hay and sold it, repaired the houses, cleaned out one of the wells, laid several miles of stone walls and two miles of barbed wire fence, carted stone from time to time to enable him to rebuild his fences, and raised and sold potatoes. He was occupied principally in raising poultry and eggs, having two hundred chickens in 1933, and about fifty from 1935 to the time of the trial. He kept three sheep for food; one horse for carting and hauling; and a miscellaneous assortment of farm tools, none purchased since 1921. His total income per annum from 1930 to 1935 was $4,000, of which $2200 was derived from renting three-quarters of the farm to various persons for grazing and cultivation. One of these tenants conducted a dairy, and bred, grazed and milked a herd of cows. The earnings from the sale of poultry and eggs were $200, from the sale of hay $75, and $25 from the sale of vegetables and flowers. Rentals from other real estate, not claimed to be farm property, made up the remainder of

his income, $1500. The farm in its entirety was subject to a mortgage of $100,000, held by a bank, and now under foreclosure.

When § 75 of the Bankruptcy Act was adopted in March, 1933, subsection (r) defined a farmer as follows: "For the purpose of this section and section 74, the term 'farmer' means any individual who is personally bona fide engaged primarily in farming operations or the principal part of whose income is derived from farming operations, and includes the personal representative of a deceased farmer; and a farmer shall be deemed a resident of any county in which such farming operations occur." Act of March 3, 1933, c. 204, 47 Stat. 1467, 1470, 1473; 11 U. S. C. § 203 (r).

The definition was amplified on May 15, 1935 by the following amendment: "For the purposes of this section, section 4 (b), and section 74, the term 'farmer' includes not only an individual who is primarily bona fide personally engaged in producing products of the soil, but also any individual who is primarily bona fide personally engaged in dairy farming, the production of poultry or livestock, or the production of poultry products or livestock products in their unmanufactured state, or the principal part of whose income is derived from any one or more of the foregoing operations, and includes the personal representative of a deceased farmer; and a farmer shall be deemed a resident of any county in which such operations occur." Act of May 15, 1935, c. 114, § 3, 49 Stat. 246; 11 U. S. C. § 203 (r).

A petition for relief under the section as thus amended was filed by the debtor on November 14, 1935, and was opposed by the mortgagee, the petitioner here. The District Court held that the debtor was not a farmer within the meaning of the statute, and so dismissed the proceeding. An appeal was allowed by the Court of Appeals for the Second Circuit, which reversed the judgment of dis-

missal, one judge dissenting. 86 F. (2d) 88. The reversal went upon the ground that the principal income of the debtor was derived from farming operations, if rents from the farm tenants ($2200) were included in the reckoning, as the court held that they should be. We granted certiorari, an important question being involved as to the meaning of an act of Congress.

The only effect of the 1935 amendments of the statute, in so far as they have to do with the definition of a farmer, was to make it clear that farming operations include dairy farming and the production of poultry and livestock products in their unmanufactured state as well as the cultivation of the products of the soil. There had been decisions to the contrary. *In re Palma Bros.*, 8 F. Supp. 920; *In re Stubbs*, 281 Fed. 568; House Report, No. 455, 74th Congress, 1st session, p. 2; Senate Report, No. 498, 74th Congress, 1st session, p. 4. For the purpose of the case at hand the amendments may be laid aside and the simpler phraseology of the section as it stood at the beginning may be accepted as the test. Was respondent a farmer because "personally bona fide engaged primarily in farming operations" or because "the principal part of his income was derived from farming operations"?

We do not try to fix the meaning of either of the two branches of this definition, considered in the abstract. The two are not equivalents. They were used by way of contrast. Occasions must have been in view when the receipt of income derived from farming operations would make a farmer out of some one who personally or primarily was engaged in different activities. A catalogue of such occasions might err for excess or for defect if made up in advance. Hypothetical situations are laid before us, and the argument is pressed that the definition will breed absurdity if applied to this one of them or that. We refuse to be led away from the limitations of the concrete case. The words "primarily engaged," as we find

them in the first branch of the definition, do not constitute a term of art. The words "income derived from farming operations" do not constitute such a term. In every case the totality of the facts is to be considered and appraised. We pass to that appraisal here.

1. Beach, the respondent, must be held, when the facts are viewed in combination, to have been "personally" and "primarily" engaged in farming operations.

He was in that business or in none. He was either a farmer or a man of leisure. Cf. *In re Glick,* 26 F. (2d) 398, 400. But the stipulation makes it clear that this last he certainly was not. He was in direct or personal possession of forty-eight acres, one-fourth of the large farm which had been in his family for years. A substantial part of this acreage he cultivated with his own labor, or applied, again with his own labor, to other agricultural uses. He did this, not for diversion or only in spare hours, but as an engrossing occupation, consuming, in the words of the stipulation, "the major portion of his time." The products of his toil were food for him and his dependents, and the farmhouse was a home. True, the money returns were scanty. To some extent this was so because of the blight which fell upon his apple orchard in 1932 or later, cutting down the revenues yielded from that source. The scantiness of the yield may have turned him into a bankrupt, but it did not change his occupation. One does not cease to be a farmer because drought or wind or pest may have rendered the farm barren. The critical fact is that the debtor worked an acreage large enough to count, that he did not work at anything else, and that he gave to this work, whether profitable or unprofitable, "the major portion of his time."

2. If Beach was a farmer because he cultivated a substantial farm, he did not step into another business by leasing other acres of the tract to tenants who were to use what they hired for grazing or cultivation and other

farming operations. We shall point out in a moment that the acres personally cultivated and those occupied by tenants are phases and aspects of a unitary calling. The result will be the same, however, though the farming and the leasing be viewed as disconnected, and not as parts of a composite whole. In that view, the farming is still the business; the leases are then investments, more profitable than the business, but leaving it unchanged. A farmer remains a farmer, just as a lawyer remains a lawyer, though the returns on his investments, while not enough to keep him going, are larger, none the less, than the profits of his labor.

3. The picture, however, is distorted if Beach is looked upon as a landlord with rentals unrelated to his primary vocation. His rentals like his labor smacked of the soil, and made him not less, but more a farmer than he would have been without them. How the case would stand if he had been a merchant or a doctor and had leased a tract of farming land to tenants, we do not have to say. What has happened here is different. The farming and the leasing must be viewed in combination if we are to gain a true perspective, the two tied together as principal and incident. A single tract of land belonging to the debtor has been worked by him in part, and in part worked by others to whom a section of the tract has been let for cultivation. Far from stepping into another business, he has been faithful to the old one in thus dividing up the tillage. To get a living out of the land in one way or another is the thread of common purpose that binds the labor and the leases, and enables us to find in them the tokens of the same vocation. In brief the man is seen to be a farmer by every test of common speech, though his income has been garnered in rents as well as products. We emphasize the fact afresh that the words of the statute to which meaning is to be given are not phrases of art with a changeless connotation. They have a color and a

content that may vary with the setting. Cf. *Surace* v. *Danna,* 248 N. Y. 18, 21; 161 N. E. 315; *Towne* v. *Eisner,* 245 U. S. 418, 425; *International Stevedoring Co.* v. *Haverty,* 272 U. S. 50. In the setting of this enterprise, the totality of its circumstances, the roots of the respondent's income go down into the soil.

4. Cases in other courts relied upon by the petitioner as excluding the respondent from the category of farmers are consistent for the most part with the ruling now made when the opinions are read with due relation to the facts.

Either the debtor posing as a farmer was engaged at the same time in some other line of business or the plots in cultivation were too small to make a farm. *Swift* v. *Mobley,* 28 F. (2d) 610; *In re Spengler,* 238 Fed. 862; *In re McMurray,* 8 F. Supp. 449; *In re Weis,* 10 F. Supp. 227.

The judgment is

Affirmed.

TOWNSEND ET AL. *v.* YEOMANS, ATTORNEY GENERAL OF GEORGIA, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF GEORGIA.

No. 781. Argued May 3, 4, 1937.—Decided May 24, 1937.

1. The business of tobacco warehouses in Georgia is affected with a public interest and their charges to growers for handling and selling leaf tobacco are subject to reasonable regulation by the State. P. 449.
2. Statutory rates or charges are presumed to be reasonable; he who attacks them as confiscatory has the burden of proving them so. P. 450.
3. A legislature, acting within its sphere, is presumed to know the needs of the people of its State. P. 451.

   The existence of the tobacco industry in Georgia, the transactions of the tobacco markets, and the necessity of protecting the growers from exorbitant warehouse charges, must be presumed

to have been fully known to the members of the legislature, and this presumption cannot be overthrown by testimony of individual legislators.

4. Practically all the tobacco grown in Georgia is shipped out of the State in foreign or interstate commerce; the purchasers at the "markets" in Georgia for the most part are manufacturers of cigarettes who immediately have the tobacco transported to their plants outside the State; other purchases made by speculators and warehousemen are for the purpose of resale as soon as possible to the cigarette manufacturers; and thus the tobacco so bought, as well as the rest, is destined for interstate or foreign shipment. *Held* that, if it be assumed that Congress has authority to regulate charges of the warehousemen, such authority has not been exercised by the Tobacco Inspection Act of August 23, 1935. P. 452.
5. Congress may circumscribe its regulation of interstate commerce and occupy a limited field; and the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be implied unless the latter, fairly interpreted, is in actual conflict with the state law. P. 454.
6. The Georgia statute here in question, fixing reasonable maximum charges for the services of warehousemen, in aid of the tobacco growers but not attempting to fix the prices for which the tobacco is sold at auction in Georgia or to regulate the activities of purchasers, lays no actual burden upon interstate or foreign commerce in the tobacco. P. 455.
7. Federal power over a field of interstate commerce may be exclusive, though unexercised, when the subject is such as to demand uniformity of regulation; but in matters admitting of diversity of local treatment according to local requirements, the States, in the absence of congressional regulation, are at liberty to act. P. 455.

Affirmed.

APPEAL from a decree of the District Court, of three judges, dismissing a bill in a suit to restrain the enforcement of a statute fixing maximum charges for handling and selling leaf tobacco.

Messrs. Wm. Hart Sibley and *Robert C. Alston,* with whom *Mr. E. K. Wilcox* was on the brief, for appellants.

Messrs. O. H. Dukes, Assistant Attorney General of Georgia, and *L. W. Branch,* with whom *Mr. M. J. Yeomans,* Attorney General, was on the brief, for appellees.

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

This suit was brought by tobacco warehousemen to restrain the enforcement of a statute of Georgia, approved March 28, 1935, fixing maximum charges for handling and selling leaf tobacco. Ga. L. 1935, pp. 476–8.

The statute was assailed as an arbitrary and capricious exercise of state power, repugnant to the Fourteenth Amendment of the Federal Constitution, and as placing a direct burden upon interstate commerce in violation of the commerce clause. The hearing in the District Court was by three judges (28 U. S. C. 380) and, upon findings of fact and conclusions of law, a final decree was entered dismissing the bill of complaint, one judge dissenting. The case comes here on appeal.

The facts found by the District Court with respect to the tobacco industry in Georgia and the nature of the transactions at the warehouses are not in dispute. It appears that this industry is relatively new, beginning in 1917, but by the year 1925 it was becoming well established. The type of tobacco grown in Georgia is the "bright leaf" which is almost exclusively used in the manufacture of cigarettes. This variety is grown extensively in North Carolina, to a much less extent in South Carolina and Georgia, and to some extent in Virginia, Kentucky and Tennessee. The acreage planted by the individual farmer in Georgia is comparatively small but the aggregate acreage is now not only very considerable but is widely distributed over a large area in the southern portion of the State.

The necessity for markets and the early maturity of the tobacco in Georgia presented an opportunity which

was early recognized by experienced and skilled warehousemen who were operating in the tobacco belts of North Carolina and other States, where selling seasons begin sometime after the termination of the selling season in Georgia. With few exceptions, competent warehousemen, and experienced and skilled auctioneers and helpers in handling and selling tobacco are not found in Georgia and must be obtained from other States. There were forty-five warehouses operated in 1935, thirty-nine of which were connected in some capacity with warehouses in North Carolina, Kentucky, Virginia or Tennessee.

The principal purchasers of the bright leaf tobacco grown in Georgia and elsewhere are limited to a few large manufacturers of cigarettes. These are called "the Companies." They purchase tobacco only at warehouse auction sales to which they send or furnish "buyers." Each buyer is the representative of one of the competing purchasers and a "set of buyers," usually from eight to twelve in number, is made up of representatives from each of the purchasing cigarette manufacturers. The presence of a "set of buyers" is essential at an auction sale. A town having one or more warehouses is known as a "market." By sending a set of buyers to a new warehouse, the manufacturers may recognize a new market, and by refusing to send one to an old market may cause its abandonment; and by sending either one or two sets of buyers to a given market the manufacturers may determine the rapidity with which the accumulated tobacco may be disposed of. There is another class of purchasers known as "speculators." These on rare occasions buy tobacco from a grower and have it transported to a warehouse for sale. At auction sales speculators to a limited extent, as compared with buyers, purchase tobacco for a later sale. There is strenuous and expensive competition between warehousemen in securing tobacco from growers to be

handled and sold, but in the sale of tobacco there is no competition except such as exists between the respective buyers and speculators at the auction sales, and the bids of the warehousemen themselves.

The tobacco belt in Georgia comprises about twenty counties in the southern part of the State, and in 1935 there were fifteen towns known as "markets." Seven of the markets were supplied with one set of buyers and eight were furnished two sets. The "two set markets" had a total of thirty and the "one set markets" a total of fifteen warehouses in operation. The quantity of tobacco sold in the warehouses and the average prices ranged from 106,483,019 pounds at 9.86 cents per pound in 1930, to 71,826,352 pounds at 18.91 cents per pound in 1935.

After the tobacco has been cured and is ready for the market, the grower grades it as best he can and the resulting "piles" of loose leaves are placed in sheets which are then tied and the tobacco is so transported to the selected warehouse for sale. Auction sales are held daily during five days of the week, and in any particular warehouse as often as sufficient tobacco accumulates. It is essential that there be present the warehouseman, an auctioneer and other skilled help, and one set of buyers. The warehouseman makes the opening bid. If this is not taken or raised by another, the warehouseman generally becomes the purchaser of the tobacco for his own account. If not sold in that fashion the bidding continues until the sale is announced. The grower or other owner may turn down the sale and in such case he may hold the tobacco for a later sale or remove it. After the sale has been completed the tobacco is delivered to the purchaser who removes it from the floor. The purchaser has it reweighed and pays the warehouseman. The warehouseman then pays the seller the purchase price, less warehouse charges. Tobacco purchased by the warehouseman is afterwards sold by him at auction.

The tobacco is ready for the market in the latter part of July or early in August. The exact date for opening the selling season is fixed by the manufacturers, who are the principal buyers, and the warehousemen. The selling season is from three to five weeks in length. The short tobacco season causes growers to rush tobacco to the market and does not give them a fair opportunity "to properly grade, store, bundle, and orderly market their tobacco." The short season is in large part occasioned by the efforts of the manufacturers to transfer their buyers to the North Carolina belts, in some of which the selling seasons begin early in September, and the efforts of the warehousemen to dispose of the tobacco in Georgia so that they and their auctioneers and other skilled employees may proceed to the later and larger seasons of North Carolina and other States.

When the Act in question was passed, the warehouse charges, based upon three elements, the sale value, the number of piles handled and the weight of the quantity sold, were as follows:

Commissions: 2½ per cent. on gross sales.

Auction fees: 25 cents per pile up to 200 pounds; 50 cents per pile above 200 pounds.

Weighing and handling fees: 25 cents per pile up to 100 pounds, and 25 cents for each additional 100 pounds.

The Act of 1935 prescribed the following maximum charges:

Commissions: 2½ per cent. on gross sales.

Auction fees: 15 cents on all piles of 100 pounds or less; 25 cents on all piles over 100 pounds.

Weighing and handling fees: 10 cents per pile of 100 pounds or less, and 10 cents for each additional 100 pounds.

It will be observed that the statutory reduction is confined to the auction fees and the charges for weighing and handling. The percentage reduction is difficult of

exact determination. Complainants say that the gross income of the warehousemen will be reduced about 20 per cent. The difference in dollars between the amount which complainants would have received in 1935 under the former schedule and the amount to which they would be entitled under the Act is found to be $115,920.90, and this amount was paid into the registry of the court. Statutes in North Carolina and South Carolina fix the same scale of charges as those prescribed by the Georgia Act. No attack has been made upon the constitutionality of these statutes. The scale heretofore in effect in Georgia "is not so high as the non-statutory Tennessee or Kentucky charges."

The District Court made additional findings, which appellants challenge, with respect to the control exercised by the warehousemen over the charges made for their services and their common agreement as to the amount of these charges. The court found that by reason of their control of the warehouses "warehousemen have, unless regulated by law, an unduly coercive control over the prices charged the growers for services"; that beginning with the tobacco selling season of 1927 all warehousemen in Georgia have uniformly maintained "a hard and fast schedule of charges"; that, while there have been some exceptions, they are "so insignificant as to be immaterial"; that prior to 1927 the warehousemen in Georgia for many years, if not from the beginning of the industry, "had maintained and exacted from sellers of tobacco a uniform schedule of charges substantially, if not identically, the same as the schedule fixed by the Act of 1935."

The court also found that the propriety of charging more for handling tobacco in Georgia than in the Carolinas had not been established; that it had not been shown that the Georgia Act "was passed without any knowledge on the part of the legislature as to actual con-

ditions under which the business was, and is, being carried on in Georgia"; that it had not been proved "what each or any warehouseman, individual or corporate, lost in revenue by reason of the scale of charges prescribed by the Act"; that it was not denied "that some warehousemen earned a satisfactory profit" and it had not been proved that where a loss occurred it was not due "to excessive competition, ill-advised loans, unnecessary expenses in buying influence or hauling customers' tobacco, or other causes than the reduction in charges." The court observed that the testimony as to the effects of the Act was with respect to the "group of warehousemen who are complainants, rather than to the effect on each one, and even then it was not proven that all the losses are traceable to the reduction in charges rather than to other causes."

The court made findings with regard to the organization known as the "Tobacco Warehousemen's Association" of which all the complainants were members. The court said that the prosecution of the suit was "an organized fight through the Warehousemen's Association"; that the growers are not eligible for membership in that organization; that "the Association and the buyers determine the date the market in Georgia opens and substantially determine the date on which it closes"; that the Association undertakes to deal with such practices as affect the interest of the members and adopts rules which they are to observe. The court quoted from the minutes of meetings certain action tending to support the view that there was a common agreement as to warehouse charges and a concert of action in relation to the present suit. The court concluded that "through the Warehousemen's Association and their common agreement" as to charges the complainants "maintain and enjoy a virtual monopoly in the field covered by their operations"; that the business of tobacco warehousemen in Georgia in 1935,

and for some years prior thereto, was such as to cause it to be "affected with a public interest"; that the scale of charges prescribed by the Act was "not unreasonable, arbitrary, and capricious" but was "reasonably adapted to accomplish the desired result"; and that the fixing of charges for the services rendered by the warehousemen did "not burden or interfere with interstate commerce."

First. Unless there is conflict with the authority of the Congress over interstate commerce, the enactment of the statute was clearly within the competency of the Georgia legislature. While appellants' assignment of errors challenge the conclusion of the District Court that the business of the tobacco warehouses was one "affected with a public interest," their counsel conceded in the argument at bar that the challenge could not be sustained. That concession was appropriate in view of the evidence and the findings. The uncontroverted facts with respect to the nature and extent of the tobacco industry, the establishment of markets for public sales, and the dependence of the industry upon the services of the warehousemen in connection with these sales, show beyond cavil the public interest in these markets and in the maintenance of reasonable charges for the services there rendered.

A similar conception of public interest, reënforced by abundant experience, is reflected in the legislation of other tobacco growing States. In Virginia the sale of tobacco in public warehouses has long been regulated by statute and maximum charges have been fixed. Code of Virginia, 1887, §§ 1819–1825; 1924, §§ 1376–1381. In North Carolina such regulation goes back to an early day. See Consolidated Statutes of North Carolina, §§ 5124 *et seq.* In *Gray* v. *Central Warehouse Co.*, 181 N. C. 166; 106 S. E. 657, the Supreme Court of that State, after summarizing the local legislation upon that subject since 1895, goes on to say:

"Indeed, as far back as the history of the state extends, the business of tobacco warehouses has been, if not a public duty, always 'affected with a public use.' The laws of North Carolina from 1669 to 1790 have been compiled as State Records, vols. 23, 24 and 25, by the writer of this opinion [Chief Justice Clark], and in the index thereto, in the last named volume, it appears that no less than 75 statutes were enacted prior to 1790 in regard to tobacco warehouses requiring inspection, regulation, and fixing charges in such business. To the fullest extent, therefore, their regulation and control by the public has been recognized and enforced in this State.—In fact, there is no subject in which the protection of the producers against extortion and combinations to reduce prices is more important."

In South Carolina maximum charges for selling leaf tobacco upon the floor of tobacco warehouses are fixed. Code, South Carolina, 1932, § 7197, and earlier statutes there cited. The statute of Georgia, here under attack, copies almost exactly the South Carolina statute. See, also, as to the authority of the State, *Nash* v. *Page,* 80 Ky. 539; *Pannell* v. *Louisville Tobacco Warehouse Co.,* 113 Ky. 630.

So far as the present controversy turns upon the power of the State to give this sort of protection to this industry, provided its regulation is not arbitrary or confiscatory and in the absence of conflict with the federal power over commerce, our rulings are decisive in support of the state action. *Munn* v. *Illinois,* 94 U. S. 113; *Budd* v. *New York,* 143 U. S. 517; *Brass* v. *Stoeser,* 153 U. S. 391; *German Alliance Insurance Co.* v. *Lewis,* 233 U. S. 389; *O'Gorman & Young* v. *Hartford Insurance Co.,* 282 U. S. 251; *Nebbia* v. *New York,* 291 U. S. 502.

Confiscation is not shown. The presumption of reasonableness has not been overthrown. *O'Gorman & Young* v. *Hartford Insurance Co., supra.* It is apparent

that the return to the warehousemen will largely be governed by the volume and value of the tobacco crop. The evidence relates chiefly to the years of the great depression and affords no appropriate criterion for a more normal period. Moreover, we find no sufficient ground for disturbing the finding of the District Court that the evidence did not satisfactorily establish what any warehouseman, individual or corporate, lost by reason of the prescribed scale of charge in contradistinction to its effect upon the warehousemen as a group. See *Aetna Insurance Co.* v. *Hyde,* 275 U. S. 440, 447, 448. The burden resting upon appellants to make a convincing showing that the statutory rates would operate so severely as to deprive them, respectively, of their property without due process of law, was not sustained. *Aetna Insurance Co.* v. *Hyde, supra; Los Angeles Gas & Electric Corp.* v. *Railroad Commission,* 289 U. S. 287, 304, 305; *Lindheimer* v. *Illinois Bell Telephone Co.,* 292 U. S. 151, 164; *Dayton Power & Light Co.* v. *Public Utilities Comm'n,* 292 U. S. 290, 298.

Appellants contend that the legislative action was taken without investigation and hence must be considered to be arbitrary and beyond the legislative power. There is no principle of constitutional law which nullifies action taken by a legislature, otherwise competent, in the absence of a special investigation. The result of particular legislative inquiries through commissions or otherwise may be most helpful in portraying the exigencies to which the legislative action has been addressed and in fortifying conclusions as to reasonableness. *Nebbia* v. *New York, supra,* pp. 516 *et seq.* But the legislature, acting within its sphere, is presumed to know the needs of the people of the State. Whether or not special inquiries should be made is a matter for the legislative discretion. Here, the existence of the industry, highly important to the State, the transactions in the tobacco markets, the

necessity of protecting the growers from exorbitant warehouse charges, must be presumed to have been fully known to the members of the legislature and this presumption cannot be overthrown, as it has been sought to be overthrown, by testimony of individual legislators.

Second. The main contention of appellants is that the State had no power to enact the regulation as it attempted to govern transactions in the course of interstate and foreign commerce. Appellants urge that practically all the tobacco grown in Georgia is shipped out of the State, about forty per cent. in foreign, and the remaining sixty per cent. in interstate, commerce; that the purchasers at the "markets" in Georgia for the most part are manufacturers of cigarettes who immediately have the tobacco transported to their plants outside the State; that the purchases made by speculators and warehousemen are for the purpose of resale as soon as possible to the cigarette manufacturers, and thus that the tobacco so bought, as well as the rest, "is destined for interstate or foreign shipment."

We find it unnecessary to pass upon the authority of the Congress to regulate the charges of the warehousemen, for we are of the opinion that, if it be assumed that Congress has that authority, it has not been exercised and in the absence of such exercise the State may impose the regulation in question for the protection of its people.

The federal statute, to which appellants refer, is the "Tobacco Inspection Act" of August 23, 1935. 49 Stat. 731. That statute, while declaring the transactions in tobacco at auction markets to be "affected with a public interest" (§ 2) had a limited objective. It did not undertake to regulate the charges of warehousemen or in any way to derogate from the existing state legislation upon that subject. It sought to aid tobacco growers by establishing and promoting the use of standards of classification and by maintaining an official inspection service.

It was found that the farmer had "no definite system of grades of his own," that the private grading systems used by the buyers were kept "strictly confidential" so that "without Government standards the farmer has no definite guide for sorting his tobacco," and that hence "farmers generally are unable to class their tobacco correctly to meet the trade's demands." [1] To meet this need, the Act authorized the Secretary of Agriculture to make investigations and to establish standards for tobacco "by which its type, grade, size, condition, or other characteristics" might be determined (§ 3). It authorized the Secretary to designate auction markets, on determining "by referendum the desire of tobacco growers," but it was also provided that the Act should not be construed as preventing transactions in tobacco at markets not so designated (§ 5). It authorized the Secretary, independently or in coöperation with other branches of the Government, State agencies, or others, to employ and license competent persons as samplers or weighers but it was added that this provision was "intended merely to provide for the furnishing of services upon request of the owner or other person financially interested in tobacco to be sampled, inspected, or weighed," and should "not be construed otherwise" (§ 6). And the Secretary was further authorized, in order to carry out the purposes of the Act, to "coöperate with any other Department or agency of the Government; any State, territory, district or possession," as well as with purchasing and consuming organizations, boards of trade, etc. (§ 14).

The Congress, as the reports of the committees in both Houses show,[2] was fully conversant with the manner in which the transactions in tobacco were carried on. It

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[1] See Report of the House Committee on Agriculture, H. R. Rep. No. 1102, 74th Cong., 1st sess.; Report of Senate Committee on Agriculture and Forestry, Sen. Rep. No. 1211, 74th Cong., 1st sess.

[2] See Note 1.

cannot be doubted that the Congress was well aware of the long-established legislation in Virginia, North Carolina, South Carolina, and the more recent legislation in Georgia, prescribing maximum charges for the services of warehousemen. We deem it to be highly significant that, in the light of existing practices and statutory regulations, the Congress carefully restricted its own requirements and did not attempt to interfere with the operation of state laws as to the amounts which warehousemen might charge. The purpose and terms of the federal statute negative any such intention. It is inconceivable that the Congress in endeavoring to aid the tobacco growers in sorting or "grading," and thus to facilitate the marketing of their tobacco, intended to deprive them of the protection they already had against extortionate charges of the warehousemen upon whom they depended in making their sales. Instead of frustrating the operation of such state laws, the provisions of the Act expressly afforded and emphasized the opportunity for coöperation with the States in protecting the farmers' interests. In this view we find no ground for the contention that Congress has taken possession of the field of regulation to the exclusion of state laws which do not conflict with its own requirements.

The case calls for the application of the well-established principle that Congress may circumscribe its regulation and occupy a limited field, and that the intent to supersede the exercise by the State of its police power as to matters not covered by the federal legislation is not to be implied unless the latter fairly interpreted is in actual conflict with the state law. *Savage* v. *Jones,* 225 U. S. 501, 533; *Atlantic Coast Line* v. *Georgia,* 234 U. S. 280, 293, 294; *Illinois Central R. Co.* v. *Public Utilities Comm'n,* 245 U. S. 493, 510; *Carey* v. *South Dakota,* 250 U. S. 118, 122; *Lehigh Valley R. Co.* v. *Public Utilities Comm'n,* 278 U. S. 24, 35; *Atchison, T. & S. F. Ry. Co.* v.

Railroad Comm'rs, 283 U. S. 380, 392, 393; *Hartford Indemnity Co.* v. *Illinois,* 298 U. S. 155, 158.

Laying on one side the federal statute, as in no way inconsistent, we find no ground for concluding that the state requirements lay any *actual* burden upon interstate or foreign commerce. The Georgia Act does not attempt to fix the prices at the auction sales or to regulate the activities of the purchasers. The fixing of reasonable maximum charges for the services of the warehousemen in aid of the tobacco growers does not militate against any interest of those who buy. They pay the bid price, as accepted, and the warehouseman pays the seller, deducting from the purchase price the warehouse charges.

We are thus brought to the final contention of appellants that the state law, although not in conflict with any exertion of federal authority, must fall as being repugnant to the existence of an exclusive federal power although unexercised. The contention ignores the principle that this ground of invalidity is to be found only with respect to such matters as demand a general system or uniformity of regulation; that in other matters, admitting of diversity of treatment according to the special requirements of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act. *Cooley* v. *Board of Wardens,* 12 How. 299, 319; *Minnesota Rate Cases,* 230 U. S. 352, 399, 400; *Hendrick* v. *Maryland,* 235 U. S. 610, 622; *Morris* v. *Duby,* 274 U. S. 135, 143; *Sproles* v. *Binford,* 286 U. S. 374, 390.

In the instant case, the Georgia statute deals with a local need, exercising the State's protective power with respect to its own industry. A similar contention to that now advanced was held untenable in *Munn* v. *Illinois,* 94 U. S. 113, where state regulation of charges by the proprietors of grain elevators was sustained despite the fact that the elevators were used as instrumentalities by those

who engaged in interstate commerce. *Id.*, p. 135. The point was again raised and overruled in *Budd* v. *New York*, 143 U. S. 517, in upholding the New York statute regulating charges for "elevating, trimming, receiving, weighing and discharging grain by means of floating and stationary elevators and warehouses." It was recognized that, in the actual state of the business, the passage of the grain to the City of New York and other places on the seaboard without the use of elevators would be practically impossible. The elevator at Buffalo was a link in the chain of transportation of the grain from the places where it was grown to the seaboard, but the Court said: "So far as the statute in question is a regulation of commerce, it is a regulation of commerce only on the waters of the State of New York. It operates only within the limits of that State, and is no more obnoxious as a regulation of interstate commerce than was the statute of Illinois in respect to warehouses, in *Munn* v. *Illinois*. It is of the same character with navigation laws in respect to navigation within the State, and laws regulating wharfage rates within the State, and other kindred laws." *Id.*, pp. 544, 545. Again, in *Brass* v. *North Dakota*, 153 U. S. 391, the statute of that State "regulating grain warehouses and weighing and handling of grain" was held not to amount to a regulation of commerce between the States in the absence of a conflict with federal legislation, upon the authority of the *Munn* and *Budd* cases.

In *Cargill Co.* v. *Minnesota*, 180 U. S. 452, 470, the requirement of a state license for grain warehouses on railroad rights of way was found to be not inconsistent with the power of the Congress, although the warehouse company purchased the grain, handled in or shipped from its warehouse, for the purpose of transporting it as its property to its terminal elevators in Wisconsin and Illinois and thence to other points in the eastern States. *Id.*, p.

462. The Court thus stated the reasons for this conclusion: "The statute puts no obstacle in the way of the purchase by the defendant company of grain in the State or the shipment out of the State of such grain as it purchased. The license has reference only to the business of the defendant at its elevator and warehouse. The statute only requires a license in respect of business conducted at an established warehouse in the State between the defendant and the sellers of grain. . . . In no real or substantial sense is such commerce obstructed by the requirement of a license." See, also, *Merchants Exchange* v. *Missouri,* 248 U. S. 365, 368.

Even where the Federal Government has intervened, as in the United States Warehousing Act of August 11, 1916, 7 U. S. C., c. 10, in providing for licenses for warehouses where agricultural products are "stored for interstate or foreign commerce," we held that the license did not convert the warehouseman into an instrumentality of the Federal Government and, while by means of the licensing provisions a measure of control over those engaged in the business was secured to the national government, still the license did not confer upon the warehouseman immunity from state taxation. *Federal Compress Co.* v. *McLean,* 291 U. S. 17, 22, 23. That case was followed by our decision in *Chassaniol* v. *Greenwood,* 291 U. S. 584, to the effect that the business of buying and selling cotton locally produced, processed and warehoused, was local in character, and that a local occupation tax upon the buyer did not contravene the commerce clause although the course of the business was such that all the cotton so bought was ultimately shipped by the buyer in interstate or foreign commerce. On similar grounds we held in *Minnesota* v. *Blasius,* 290 U. S. 1, 8, that because there was "a flow of interstate commerce" which was subject to the regulating power of the Congress, it did not necessarily follow that, in the absence of a con-

flict with the exercise of that power, a State might not lay a non-discriminatory tax upon property which "although connected with that flow as a general course of business" had come to rest and acquired a situs within the State.

All these decisions but illustrate the principle that the mere existence of the congressional power, no conflict with its exercise being shown, does not deprive the States of their authority to safeguard their local interests by legislation which does not directly burden transactions in interstate or foreign commerce.

The cases upon which appellants rely are distinguishable. In *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282, the statute held to be invalid imposed burdensome conditions upon the enforcement of rights arising from transactions in interstate commerce. In *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50, the North Dakota statute of 1919 disclosed a comprehensive scheme to regulate the buying of grain in the course of interstate commerce. Such purchases could be made only by those who held licenses from the State, paid state charges for the same, and acted under a system of grading, inspecting and weighing fully defined in the Act. The grain could only be purchased subject to the power of the state grain inspector to determine the margin of profit which the buyer could realize upon his purchase. That margin of profit was defined to be the difference between the price paid at the North Dakota elevator and the market price, with an allowance for freight, at the Minnesota points to which the grain was shipped and sold. The state officer was thus authorized to "fix and determine the price" to be paid for grain which was "bought, shipped, and sold in interstate commerce." That the provision was a regulation of interstate commerce was said to be "obvious from its mere statement." *Id.*, pp. 56–58. The later North Dakota statute of 1923 fell under a like condemnation in

Shafer v. *Farmers Grain Co.*, 268 U. S. 189, as the statute subjected the buying for interstate shipment to conditions and a measure of control which caused a direct interference with interstate commerce.

Here, the Georgia Act lays no constraint upon purchases in interstate commerce, does not attempt to fix the prices or conditions of purchases, or the profit of the purchasers. It simply seeks to protect the tobacco growers from unreasonable charges of the warehousemen for their services to the growers in handling and selling the tobacco for their account. Whatever relation these transactions had to interstate and foreign commerce, the effect is merely incidental and imposes no direct burden upon that commerce. The State is entitled to afford its industry this measure of protection until its requirement is superseded by valid federal regulation. The judgment of the District Court is

Affirmed.

HARTFORD STEAM BOILER INSPECTION & INSURANCE CO. ET AL. *v.* HARRISON, INSURANCE COMMISSIONER.

APPEAL FROM THE SUPREME COURT OF GEORGIA.

No. 355. Argued February 2, 1937.—Decided May 24, 1937.

A statutory discrimination between the mutual companies and the stock companies which write fire, casualty, etc., insurance in the State, forbidding stock companies to act through agents who are their salaried employees but permitting this to mutual companies, is repugnant to the equal protection clause of the Fourteenth Amendment. P. 463.

Georgia Ls., 1935, Act of Mar. 28, 1935, § 1, *held* unconstitutional. The discrimination has no reasonable relation to the difference between the two classes of companies. It is arbitrary.

183 Ga. 1; 187 S. E. 648, reversed.

APPEAL from a judgment which reversed a decision of a trial court directing that a writ of mandamus issue re-

quiring the above-named Insurance Commissioner to license one of the appellants as general agent of the other, the Insurance Company.

Mr. Marion Smith, with whom *Mr. Harold Hirsch* was on the brief, for appellants.

Mr. B. D. Murphy, Assistant Attorney General of Georgia, with whom *Mr. M. J. Yeomans,* Attorney General, was on the brief, for appellee.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

The Hartford Steam Boiler Inspection and Insurance Company, a stock corporation organized under the laws of Connecticut, carrying on casualty insurance business in Georgia, and its salaried employee W. M. Francis, citizen of that State, asked the Superior Court, Fulton County, for a mandamus requiring the Insurance Commissioner to license him as resident agent. The Commissioner claimed that while duly qualified in all other respects, the employee could not be so licensed because of the inhibition in § 1, Act of the General Assembly, approved March 28, 1935. Georgia Laws, 1935, p. 140:

"No licensed fire or casualty insurance company or company writing fidelity or surety bonds, shall write or issue any policy or indemnity contract on any risk in this State except through a resident agent licensed by the Insurance Commissioner: Provided . . . The words 'resident agent' as used in this section are deemed to mean resident agents engaged in the solicitation of such business from the public generally and shall not include any salaried employee of any insurance company doing business in this State; but shall include any agents of mutual insurance companies however compensated. . . ."

Appellants claimed that enforcement of the quoted inhibition would deprive them of the equal protection of the laws, contrary to the Fourteenth Amendment.

The trial court ruled "that said act, in discriminating against stock companies and the agents thereof, and in favor of mutual companies and the agents thereof, sets up an arbitrary classification bearing no reasonable relationship to the subject-matter of the legislation, and is discriminatory, depriving both petitioner, The Hartford Steam Boiler Inspection and Insurance Company, as an insurance company, and petitioner, W. M. Francis, as an individual, of their constitutional rights." Accordingly, it directed that mandamus issue.

In the State Supreme Court counsel agreed that the sole question involved was the constitutionality of the statute. That Court, being of opinion that the Act prescribed no undue discrimination and did not otherwise conflict with the Federal Constitution, reversed the trial court. The cause is here by appeal.

The applicable principle in respect of classification has often been announced. It will suffice to quote a paragraph from *Louisville Gas & Electric Co.* v. *Coleman,* 277 U. S. 32, 37, 38.

". . . it may be said generally that the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances, *Kentucky Railroad Tax Cases,* 115 U. S. 321, 337; *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283, 293, and that it applies to the exercise of all the powers of the state which can affect the individual or his property, including the power of taxation. *County of Santa Clara* v. *Southern Pac. R. Co.,* 18 Fed. 385, 388–399; *The Railroad Tax Cases,* 13 Fed. 722, 733. It does not, however, forbid classification; and the power of the state to classify for purposes of taxation is of wide range and flexibility, provided always, that the classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons

similarly circumstanced shall be treated alike.' *Royster Guano Co.* v. *Virginia,* 253 U. S. 412, 415; *Air-way Corp.* v. *Day,* 266 U. S. 71, 85; *Schlesinger* v. *Wisconsin,* 270 U. S. 230, 240. That is to say, *mere* difference is not enough: the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' *Gulf, Colorado & Santa Fe Ry.* v. *Ellis,* 165 U. S. 150, 155. Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision. Compare *Martin* v. *District of Columbia,* 205 U. S. 135, 139; *Bell's Gap R. Co.* v. *Pennsylvania,* 134 U. S. 232, 237."

Despite the broad range of the State's discretion, it has a limit which must be maintained if the constitutional safeguard is not to be overthrown. Discriminations are not to be supported by mere fanciful conjecture. *Borden's Co.* v. *Baldwin,* 293 U. S. 194, 209. They cannot stand as reasonable if they offend the plain standards of common sense. In this instance, the appellant company had been licensed to do business in the State and was entitled to equal protection in conducting that business. The answer of the insurance commissioner admitted that he was "entirely satisfied as to the character, standing, responsibility, ability, and knowledge" of the proposed agent, and that the license was refused solely because he was a "salaried" employee. It is plain that the requirement that the resident agents of stock companies should not work on a salary has no relation to economy or efficiency in management. The answer of the insurance commissioner states that all of the contracts of mutual fire and casualty insurance companies are "negotiated by salaried employees" and that this method of doing busi-

ness was adopted "in order to reduce the expenses of operation and thus benefit the policyholders themselves."

It is idle to elaborate the differences between mutual and stock companies. These are manifest and admitted. But the statutory discrimination has no reasonable relation to these differences. We can discover no reasonable basis for permitting mutual insurance companies to act through salaried resident employees and exclude stock companies from the same privilege. If there were any such basis, it would have been discovered by the state courts. The trial court said there was none. Two Justices of the Supreme Court were of the same opinion. The prevailing opinion in that court fails to disclose any good reason for the discrimination. The diligence of counsel for appellee has not been more successful. Thus the efforts in the state courts, and here, to find support for the statute have conspicuously failed. Statements as to the extent of the business written by stock companies are obviously beside the mark.

For the error indicated, the questioned judgment must be reversed and the cause returned to the Supreme Court for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE ROBERTS, dissenting.

The appellants petitioned the Superior Court of Fulton County, Georgia, for a mandamus directed to the appellee as Insurance Commissioner requiring him to issue a license to Francis, a salaried employe of the Hartford Company, as an insurance agent for the writing of casualty insurance in the State of Georgia pursuant to the Act of the General Assembly of March 28, 1935. The petition alleged that Francis possessed all the statutory qualifications for a license save only that he was a salaried employe of the insurance company and that the pro-

vision of the statute excluding salaried employes of insurance companies from licensure is unconstitutional.

Section 1 of the act of 1935 [1] prohibits licensed fire or casualty insurance companies from writing or issuing any policy or indemnity contract on any risk in the state of Georgia except through a resident agent licensed by the Insurance Commissioner. The section requires the applicant for a license to be a bona fide resident of the state, of good character and competent to perform the duties of an agent. It further provides: "The words 'resident agent' as used in this section are deemed to mean resident agents engaged in the solicitation of such business from the public generally and shall not include any salaried employe of any insurance company doing business in this state; but shall include any agents of mutual insurance companies however compensated."

The ground upon which the act is held invalid is that it unreasonably discriminates between salaried employes of mutual insurance companies and similar employes of stock companies.

The answer alleges that there is a well recognized difference between stock and mutual insurance companies in that, in the case of the former, the relationship between the company and its policy-holders is one of contract merely, they dealing at arm's length, whereas in the latter the policy-holders are the owners of the company and constitute its membership. Other well known differences between mutual and stock insurance are detailed in the answer and will be referred to hereinafter.

The case was heard upon the petition and answer and the trial court, in the view that the act was unconstitutional, ordered that a mandamus issue. Upon appeal the Supreme Court of Georgia reversed the judgment. I

[1] Act of March 28, 1935. Georgia Acts 1935, p. 140.

am of the opinion that its decision was right and should be affirmed.

First. On its face the statute is a proper exercise of the state's police power. The provision for licensing only *bona fide* residents of the state is valid.[2] Regulation of the rates charged for insurance, of the relations of those engaged in the business and of the amount of agents' compensation fall within the exercise of this power.[3] The claim here is that the particular regulation is unreasonable and discriminatory. The presumption of constitutional validity must prevail unless the terms of the statute, or what we judicially know, or facts proved by the appellants, overthrow that presumption. As it is conceivable that conditions existed in Georgia which justified the difference in treatment of the agents of the two sorts of companies, and as no circumstances are alleged or proved or are of judicial knowledge which negative the existence of those conditions the attack upon the statute should fail.[4]

Second. The appellant Francis asserts he is denied equal protection because agents of mutual insurance companies may be licensed even though their compensation consists of a salary rather than commissions. The answer sets up that mutual insurance companies are organized on a different basis from stock companies, do business in a wholly different way and sustain an altogether different relation to their policy-holders than do stock companies. This is matter of common knowledge. Section 56–1401 of the Georgia Code 1933 is: "The contract of insurance is sometimes upon the idea of mu-

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[2] *La Tourette* v. *McMaster,* 248 U. S. 465.

[3] *O'Gorman & Young* v. *Hartford Insurance Co.,* 282 U. S. 251, 257.

[4] *O'Gorman & Young* v. *Hartford Insurance Co., supra,* 257–258; *Borden's Farm Products Co.* v. *Baldwin,* 293 U. S. 194, 208, 209.

tuality, by which each of the insured becomes one of the insurers, thereby becoming interested in the profits and liable for the losses; without a charter, such an organization would be governed by the general law of partnership; when incorporated, they are subject to the terms of their charters." Sections 56-1401 to 56-1433 deal exclusively with the incorporation and government of mutual insurance companies setting up for them a system quite apart from that prescribed for the incorporation and regulation of stock companies. The decision law of the state also recognizes the fundamental difference between the two kinds of company.[5] The Supreme Court of Georgia quoted and relied upon its earlier decision as to the radical difference between stock and mutual companies and their methods of transacting business, and refused to hold the classification of the statute arbitrary or unreasonable.

The literature on the subject shows that at its inception the fire insurance business in the United States was modelled upon the mutual companies of Great Britain.[6] Stock companies, however, were soon organized and rapidly grew to such proportions that to-day they transact about seventy-five per cent of the nation's fire insurance business. Local and state mutual insurance companies now write about ten per cent of the total of fire insurance and are strongest in agricultural districts and the smaller cities; another ten per cent of the total business is written by so-called factory mutuals; the balance is cared for by Lloyd's associations.[7]

The principle of assessment upon which mutual companies proceed is practical only for carrying risks closely uniform in kind and degree, its chief advantage being

[5] *Carlton* v. *Southern Mutual Insurance Co.*, 72 Ga. 371.

[6] Enc. of the Social Sciences, Vol. VI, 255; Yale Readings in Insurance, Property, Chapter IV.

[7] Enc. of the Social Sciences, Vol. VI, 258.

low operating cost due to simplicity of organization, and it is said that the sales staffs of such companies work either "on a salaried basis or on a lower scale of commissions than do the representatives of stock companies." [8] There are approximately twenty-five hundred mutual fire and casualty institutions operating throughout the United States, the vast majority of which concentrate their operations locally within one or more counties or within a single state. "These companies rarely compete with agency represented stock companies and there has been no apparent inclination on their part to alter the scope of activity or plan of operation. Of the many mutual fire insurance companies probably no more than ten per cent extend their fields of operation beyond the boundaries of their home state." [9]

Reference to the report of the Insurance Commissioner of Georgia for 1934, the year preceding the adoption of the statute under review, furnishes interesting data on the relative business of stock and mutual insurance companies in the state of Georgia. For that year the total of risks carried by stock fire insurance companies in the state was $1,512,181,296. Foreign mutual fire insurance companies carried only $82,727,816. Two domestic mutual companies doing a state-wide business carried $73,370,177, and fourteen small local mutuals carried $10,893,603. Thus, mutual companies carried about ten per cent of the total fire insurance business of the state and, of that ten per cent, over one-half was written by Georgia mutual companies.

While Georgia does not exclude foreign mutuals and requires them, like foreign stock companies, to register and comply with certain statutory rules in order to write business within the state, it is evident that the total mutual business written in Georgia is of minor importance

[8] Enc. of the Social Sciences, Vol. VIII, p. 100.

[9] Best's Insurance News, October 1935, p. 314.

when compared with the vast amount written by stock companies. This fact in itself may well be a persuasive reason for not extending to agents of mutual companies the requirement that they shall not work upon a salary.[10] When to this is added the fact that ordinarily such agents work on salary because, in effect, they are the agents of the policy-holders rather than of independent owners of a stock corporation, it is plain that there is reason for classifying them differently from agents of stock companies. In the light of the facts the classification of the agents of the two sorts of company cannot be said to be arbitrary or unreasonable, and so to deny the agents of the stock companies the equal protection of the laws.

MR. JUSTICE BRANDEIS, MR. JUSTICE STONE, and MR. JUSTICE CARDOZO concur in this opinion.

SENN *v.* TILE LAYERS PROTECTIVE UNION ET AL.

APPEAL FROM THE SUPREME COURT OF WISCONSIN.

No. 658. Argued March 31, April 1, 1937.—Decided May 24, 1937.

1. The questions of what constitutes a "labor dispute" within the meaning of Wisconsin Labor Code, § 103.62, and what acts done by a labor union are among those declared lawful by § 103.53, are questions of state law. P. 477.
2. If the end sought by a labor union is not forbidden by the Federal Constitution, the State may authorize the union members to seek to attain it by combining as pickets. P. 478.
3. In its application to this case, Wisconsin Labor Code, § 103.53, making lawful the giving of publicity to the existence and facts of a labor dispute by peaceful picketing in the street, without intimidation or coercion, fraud, violence, breach of the peace, or threat thereof, is consistent with the Fourteenth Amendment. P. 480.

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[10] Compare *Citizens' Telephone Co.* v. *Fuller*, 229 U. S. 322.

4. A contractor who carried on a small business of tile setting, performing his contracts partly by the aid of a few non-union workmen but largely by the labor of his own hands with the tools of his trade, and who, not having served an apprenticeship, was ineligible to become a member of the Tile Layers' Union under its rules, was called upon by the union to unionize his shop and was willing to do so but for a clause in the agreement proffered to him, (found important for the protection of union workmen) which would prevent him as a union employer from participating longer in the manual labor. Upon his refusal to sign the contract with this stipulation, the union sent two men to his home, which was also his place of business, and there they patrolled before it in the street carrying two banners with inscriptions, one of which declared that the contractor was "unfair" to the union, while the other appealed to its readers to let the union install their tile work. *Held* that the rights of the contractor under the Fourteenth Amendment were not infringed by a state law authorizing such picketing. P. 481.

222 Wis. 383, 400; 268 N. W. 270, 872, affirmed.

APPEAL from a decree sustaining the dismissal of the bill in a suit against two labor unions and their agents to restrain picketing, etc.

Mr. Leon B. Lamfrom for appellant.

The Wisconsin Labor Code, in so far as it denies relief against picketing and related activities engaged in for the purpose of compelling an employer to give up his right to work in his own business, contravenes the guaranty of the Fourteenth Amendment against deprivation of property without due process. Such activities, when engaged in by labor unions representing none of the employer's employees, cannot be rendered lawful by any statute.

The statute bears no relation to the public health or to the safety or good order of the public. So far as it has any effect on safety and good order, the tendency is adverse. The welfare served is not that of the public but that of a particular class to the detriment of other classes.

The right of a citizen to work in a lawful business in a lawful manner, the right to follow any of the ordinary

callings of life, is an inalienable right. A state legislature cannot deprive citizens of the United States of this right, and, *a fortiori,* it cannot be taken away by labor unions under color of a statute. It is the bounden duty of courts to protect this right. A man may not barter away his life or freedom, nor be forced by labor unions to relinquish them. *Truax* v. *Corrigan,* 257 U. S. 312; *Butchers' Union* v. *Crescent City Live Stock Co.,* 111 U. S. 746; *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229; *Coppage* v. *Kansas,* 236 U. S. 1; *Truax* v. *Raich,* 239 U. S. 33; *Adair* v. *United States,* 208 U. S. 161.

Appellant was denied a remedy and was refused injunctive relief solely on the ground that the acts which he sought to have restrained were acts carried on in the course of a "labor dispute" within the meaning of the Wisconsin Labor Code. Appellant, under the Constitution of Wisconsin and the statutes promulgated pursuant thereto, but for the Wisconsin Labor Code as construed by the Supreme Court of Wisconsin, would have been accorded the relief that he sought. He is denied that relief because of the fact that appellees happen to be labor unions having in their membership employees of others in the same line of business, and because he happens to be an employer.

Had the appellees not been labor unions representing workers in the industry and had appellant not been an employer, the activities of the appellees would have been restrained.

No dispute was here involved concerning wages, hours or working conditions of any of appellant's employees. The sole dispute was concerning the appellant's right to work in his own business with his own hands.

The classification established by the Labor Code, whereby relief is denied against labor unions which would be granted against others, and whereby relief is denied to an employer which would be granted to an individual

employing no one, is wholly arbitrary, capricious and unreasonable.

No classifications can reasonably be made and sustained which will give any group the right to picket, boycott and molest an individual for the purpose of forcing him, against his will, to agree not to work with his own hands in his own business. No statute sanctioning such activity for such a purpose, by a group neither employees nor former employees of the employer and not representing any of them, can be sustained under any theory of the police power. *Truax* v. *Corrigan,* 257 U. S. 312; *Opinion of the Justices,* 275 Mass. 580; *Opinion of the Justices,* 86 N. H. 597.

Even if the dispute concerned wages, hours and working conditions of appellant's own employees, the statute, as construed, would nevertheless violate the Fourteenth Amendment if it denied relief against such activities, upon the part of persons who were neither the appellant's employees nor his former employees, nor their representatives.

As to there having been a "labor dispute," see *American Furniture Co.* v. *Chauffeurs, Teamsters & Helpers Union,* 222 Wis. 338; *Lauf* v. *Skinner & Co.,* 82 F. (2d) 68; *United Electric Coal Cos.* v. *Rice,* 80 F. (2d) 1; *Safeway Stores, Inc.* v. *Retail Clerk's Union,* 184 Wash. 322; *218–220 Market Street Corp.* v. *Delicatessen Union,* 118 N. J. Eq. 448.

Mr. Joseph A. Padway for appellees.

By leave of Court, *Messrs. Francis Biddle, Osmond K. Fraenkel, Lloyd K. Garrison, Nathan Greene,* and *V. Henry Rothschild, 2nd,* filed a brief on behalf of the American Civil Liberties Union and the International Juridical Assn., as *amici curiae,* urging affirmance of the judgment below.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This case presents the question whether the provisions of the Wisconsin Labor Code which authorize giving publicity to labor disputes, declare peaceful picketing and patrolling lawful and prohibit granting of an injunction against such conduct, violate, as here construed and applied, the due process clause or equal protection clause of the Fourteenth Amendment.

The Labor Code occupies §§ 103.51 to 103.63 of the Wisconsin Statutes, 1935 (Wis. Laws, 1931, c. 376; Laws, 1935, c. 551, § 5). But only the following provisions of § 103.53 are directly involved on this appeal:

"(1) The following acts, whether performed singly or in concert, shall be legal:

. . . . . .

"(e) Giving publicity to and obtaining or communicating information regarding the existence of, or the facts involved in, any dispute, whether by advertising, speaking, patrolling any public street or place where any person or persons may lawfully be, without intimidation or coercion, or by any other method not involving fraud, violence, breach of the peace, or threat thereof."

. . . . . .

"(l) Peaceful picketing or patrolling, whether engaged in singly or in numbers, shall be legal.[1]

"(2) No court, nor any judge or judges thereof, shall have jurisdiction to issue any restraining order or temporary or permanent injunction which, in specific or general terms, prohibits any person or persons from doing, whether singly or in concert, any of the foregoing acts."

[1] Subsections (h), (i) and (k) are likewise relevant to the present issue, as supplementing subsections (e) and (l), but do not require special discussion.

On December 28, 1935, Senn brought this suit in the Circuit Court of Milwaukee County, against Tile Layers Protective Union, Local No. 5, Tile Layers Helpers Union, Local No. 47, and their business agents, seeking an injunction to restrain picketing, and particularly "publishing, stating or proclaiming that the plaintiff is unfair to organized labor or to the defendant unions"; and also to restrain some other acts which have since been discontinued, and are not now material. The defendants answered; and the case was heard upon extensive evidence. The trial court found the following facts.

The journeymen tile layers at Milwaukee were, to a large extent, members of Tile Layers Protective Union, Local No. 5, and the helpers, members of Tile Layers Helpers Union, Local No. 47. Senn was engaged at Milwaukee in the tile contracting business under the name of "Paul Senn & Co., Tile Contracting." His business was a small one, conducted, in the main, from his residence, with a showroom elsewhere. He employed one or two journeymen tile layers and one or two helpers, depending upon the amount of work he had contracted to do at the time. But, working with his own hands with tools of the trade, he performed personally on the jobs much work of a character commonly done by a tile layer or a helper. Neither Senn, nor any of his employees, was at the time this suit was begun a member of either union, and neither had any contractual relations with them. Indeed, Senn could not become a member of the tile layers union, since its constitution and rules require, among other things, that a journeyman tile setter shall have acquired his practical experience through an apprenticeship of not less than three years, and Senn had not served such an apprenticeship.

For some years the tile laying industry had been in a demoralized state because of lack of building operations; and members of the union had been in competition with

non-union tile layers and helpers in their effort to secure work. The tile contractors by whom members of the unions were employed had entered into collective bargaining agreements with the unions governing wages, hours and working conditions. The wages paid by the union contractors had for some time been higher than those paid by Senn to his employees.

Because of the peculiar composition of the industry, which consists of employers with small numbers of employees, the unions had found it necessary for the protection of the individual rights of their members in the prosecution of their trade to require all employers agreeing to conduct a union shop to assent to the following provision:

"Article III. It is definitely understood that no individual, member of a partnership or corporation engaged in the Tile Contracting Business shall work with the tools or act as Helper but that the installation of all materials claimed by the party of the second part as listed under the caption 'Classification of Work' in this agreement, shall be done by journeymen members of Tile Layers Protective Union Local #5."

The unions endeavored to induce Senn to become a union contractor; and requested him to execute an agreement in form substantially identical with that entered into by the Milwaukee contractors who employ union men. Senn expressed a willingness to execute the agreement provided Article III was eliminated. The union declared that this was impossible; that the inclusion of the provision was essential to the unions' interest in maintaining wage standards and spreading work among their members; and, moreover, that to eliminate Article III from the contract with Senn would discriminate against existing union contractors, all of whom had signed agreements containing the Article. As the unions declared its elimination impossible, Senn refused to sign

the agreement and unionize his shop. Because of his refusal, the unions picketed his place of business. The picketing was peaceful, without violence, and without any unlawful act. The evidence was that the pickets carried one banner with the inscription "P. Senn Tile Company is unfair to the Tile Layers Protective Union," another with the inscription "Let the Union tile layer install your tile work." [2]

The trial court denied the injunction and dismissed the bill. On the findings made, it ruled that the controversy was "a labor dispute" within the meaning of § 103.62; that the picketing, done solely in furtherance of the dispute, was "lawful" under § 103.53; that it was not unlawful for the defendants

"to advise, notify or persuade, without fraud, violence or threat thereof, any person or persons, of the existence of said labor dispute; . . .

"That the agreement submitted by the defendants to the plaintiff, setting forth terms and conditions prevailing in that portion of the industry which is unionized, is

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[2] The complaint as to certain action of defendants other than the picketing was disposed of by defendants' agreement to discontinue the same, and is not now in question. It had been shown that, with a view to picketing Senn's jobs, the unions had caused his automobile to be followed from his place of business to the jobs where he and his men were working. It had also been shown that, some months earlier, the unions had sent letters to local architects and contractors requesting them not to patronize Senn because he was conducting a non-union shop and threatening to picket them if they did so; but that there had been no picketing of any architect or contractor and no such steps had been taken by the unions. Through counsel, the unions agreed: (1) that thereafter they would not pursue plaintiff's automobile from his residence to his jobs; and (2) that they would refrain from sending any further letters to architects or contractors, and would not indulge in any acts or conduct referred to in the letters theretofore sent. The court treated this agreement by counsel as disposing of the claim for relief on this ground.

sought by the defendants for the purpose of promoting their welfare and enhancing their own interests in their trade and craft as workers in the industry.

"That Article III of said agreement is a reasonable and lawful rule adopted by the defendants out of the necessities of employment within the industry and for the protection of themselves as workers and craftsmen in the industry."

Senn appealed to the Supreme Court of the State, which affirmed the judgment of the trial court and denied a motion for rehearing, two judges dissenting. (222 Wis. 383, 400; 268 N. W. 270, 872.) The case is here on appeal.

First. The defendants moved to dismiss the appeal for want of jurisdiction. They contend that the federal question presented is not substantial. And friends of the court suggest that the appeal should be dismissed because the decision below was based upon non-federal grounds, or that there was an alternative, independent non-federal ground broad enough to sustain the judgment; that the challenge here is not to a statute, but to a judicial decision based upon principles of general law which have been approved by some judges and disapproved by others; [3] and that there is nothing to show that the provisions of the Wisconsin Labor Code here questioned are not merely declaratory of the common law of Wisconsin as it existed prior to the statute. But it sufficiently appears that the provisions of the Labor Code were relied upon; that their validity under the Fourteenth Amendment was duly challenged below; and that the rulings by the state courts were based ultimately on the Labor Code.

[3] Compare *Zaat* v. *Building Trades Council,* 172 Wash. 445; 20 P. (2d) 589; *Roraback* v. *Motion Picture Operators Union,* 140 Minn. 481; 168 N. W. 766; *Hughes* v. *Motion Picture Operators Union,* 282 Mo. 304; 221 S. W. 95; *Fink* v. *Schwartz,* 28 Ohio (N. P.) 407. See *Thompson* v. *Boekhout,* 249 App. Div. 77; 291 N. Y. Supp. 572.

Whether the statute as construed and applied violates the Fourteenth Amendment presents issues never expressly passed upon by this Court. We deny the motion to dismiss.

Second. The hearings below were concerned mainly with questions of state law. Senn insisted there that the statute was no defense, because the controversy was not a "labor dispute" within the meaning of § 103.62.[4] The courts ruled that the controversy was a "labor dispute"; and that the acts done by the defendant were among those declared "lawful" by § 103.53. See also *American Furniture Co.* v. *Chauffeurs, Teamsters & Helpers Union,* 228 Wis. 338; 268 N. W. 250. Those issues involved the construction and application of the statute and the Constitution of the State. As to them the judgment of its highest court is conclusive. The question for our decision is whether the statute, as applied to the facts found, took Senn's liberty or property or denied him equal protection of the laws in violation of the Fourteenth Amendment. Senn does not claim broadly that the Federal Constitution prohibits a State from authorizing publicity and peaceful picketing. His claim of invalidity is rested on the fact that he refused to unionize his shop solely because the union insisted upon the retention of Article III. He contends that the right to work in his business with his own hands is a right guaranteed by the Fourteenth Amendment and that the State may not authorize unions

[4] That section provides:

"The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, or concerning employment relations, or any other controversy arising out of the respective interests of employer and employe, regardless of whether or not the disputants stand in the proximate relation of employer and employe."

to employ publicity and picketing to induce him to refrain from exercising it.

The unions concede that Senn, so long as he conducts a nonunion shop, has the right to work with his hands and tools. He may do so, as freely as he may work his employees longer hours and at lower wages than the union rules permit. He may bid for contracts at a low figure based upon low wages and long hours. But the unions contend that, since Senn's exercise of the right to do so is harmful to the interests of their members, they may seek by legal means to induce him to agree to unionize his shop and to refrain from exercising his right to work with his own hands. The judgment of the highest court of the state establishes that both the means employed and the end sought by the unions are legal under its law. The question for our determination is whether either the means or the end sought is forbidden by the Federal Constitution.

Third. Clearly the means which the statute authorizes—picketing and publicity—are not prohibited by the Fourteenth Amendment. Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution. The State may, in the exercise of its police power, regulate the methods and means of publicity as well as the use of public streets. If the end sought by the unions is not forbidden by the Federal Constitution the State may authorize working men to seek to attain it by combining as pickets, just as it permits capitalists and employers to combine in other ways to attain their desired economic ends. The Legislature of Wisconsin has declared that "peaceful picketing and patrolling" on the public streets and places shall be permissible "whether engaged in singly or in numbers" provided this is done "without intimidation or coercion" and free from "fraud, violence,

breach of the peace or threat thereof." The statute provides that the picketing must be peaceful; and that term as used implies not only absence of violence but absence of any unlawful act. It precludes the intimidation of customers. It precludes any form of physical obstruction or interference with the plaintiff's business. It authorizes giving publicity to the existence of the dispute "whether by advertising, patrolling any public streets or places where any person or persons may lawfully be"; but precludes misrepresentation of the facts of the controversy. And it declares that "nothing herein shall be construed to legalize a secondary boycott." See *Duplex Printing Co.* v. *Deering,* 254 U. S. 443, 466. Inherently, the means authorized are clearly unobjectionable. In declaring such picketing permissible Wisconsin has put this means of publicity on a par with advertisements in the press.

The state courts found that the unions observed the limitations prescribed by the statute. The conduct complained of is patrol with banners by two or four pickets. Compare *American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U. S. 184, 207. The picketing was peaceful. The publicity did not involve a misrepresentation of fact; nor was any claim made below that relevant facts were suppressed. Senn did not contend that it was untruthful to characterize him as "unfair," if the requirement that he refrain from working with his own hands was a lawful one. He did not ask that the banners be required to carry a fuller statement of the facts. Compare *American Furniture Co.* v. *Chauffeurs, Teamsters & Helpers Union,* 222 Wis. 338, 340, 347; 268 N. W. 250, 251, 255. Moreover, it was confessedly open to Senn to disclose the facts in such manner and in such detail as he deemed desirable, and on the strength of the facts to seek the patronage of the public.

Truax v. *Corrigan,* 257 U. S. 312, is not applicable. The statute there in question was deemed to have been

applied to legalize conduct which was not simply peaceful picketing, not "lawful persuasion or inducing," not "a mere appeal to the sympathetic aid of would-be customers by a simple statement of the fact of the strike and a request to withhold patronage." It consisted of libelous attacks and abusive epithets against the employer and his friends; libelous and disparaging statements against the plaintiff's business; threats and intimidation directed against customers and employees. The means employed, in other words, were deemed to constitute "an admitted tort," conduct unlawful prior to the statute challenged. See pp. 327–8, 337, 346. In the present case the only means authorized by the statute and in fact resorted to by the unions have been peaceful and accompanied by no unlawful act. It follows, that if the end sought is constitutional—if the unions may constitutionally induce Senn to agree to refrain from exercising the right to work in his business with his own hands, their acts were lawful.

Fourth. The end sought by the unions is not unconstitutional. Article III, which the unions seek to have Senn accept, was found by the state courts to be not arbitrary or capricious, but a reasonable rule "adopted by the defendants out of the necessities of employment within the industry and for the protection of themselves as workers and craftsmen in the industry." That finding is amply supported by the evidence. There is no basis for a suggestion that the unions' request that Senn refrain from working with his own hands, or their employment of picketing and publicity, was malicious; or that there was a desire to injure Senn. The sole purpose of the picketing was to acquaint the public with the facts and, by gaining its support, to induce Senn to unionize his shop. There was no effort to induce Senn to do an unlawful thing. There was no violence, no force was applied, no molestation or interference, no coercion. There

was only the persuasion incident to publicity. As the Supreme Court of Wisconsin said:

"Each of the contestants is desirous of the advantage of doing business in the community where he or they operate. He is not obligated to yield to the persuasion exercised upon him by respondents. . . . The respondents do not question that it is appellants' right to own his own business and earn his living in any lawful manner which he chooses to adopt. What they are doing is asserting their rights under the acts of the Legislature for the purpose of enhancing their opportunity to acquire work for themselves and those whom they represent. . . . The respondents' act of peaceful picketing is a lawful form of appeal to the public to turn its patronage from appellant to the concerns in which the welfare of the members of the unions is bound up."

The unions acted, and had the right to act as they did, to protect the interests of their members against the harmful effect upon them of Senn's action. Compare *American Steel Foundries* v. *Tri-City Central Trades Council, supra,* 208, 209. Because his action was harmful, the fact that none of Senn's employees was a union member, or sought the union's aid, is immaterial.

The laws of Wisconsin, as declared by its highest court, permits unions to endeavor to induce an employer, when unionizing his shop, to agree to refrain from working in his business with his own hands—so to endeavor although none of his employees is a member of a union. Whether it was wise for the State to permit the unions to do so is a question of its public policy—not our concern. The Fourteenth Amendment does not prohibit it.

Fifth. There is nothing in the Federal Constitution which forbids unions from competing with non-union concerns for customers by means of picketing as freely as one merchant competes with another by means of advertisements in the press, by circulars, or by his win-

dow display. Each member of the unions, as well as Senn, has the right to strive to earn his living. Senn seeks to do so through exercise of his individual skill and planning. The union members seek to do so through combination. Earning a living is dependent upon securing work; and securing work is dependent upon public favor. To win the patronage of the public each may strive by legal means. Exercising its police power, Wisconsin has declared that in a labor dispute peaceful picketing and truthful publicity are means legal for unions. It is true that disclosure of the facts of the labor dispute may be annoying to Senn even if the method and means employed in giving the publicity are inherently unobjectionable. But such annoyance, like that often suffered from publicity in other connections, is not an invasion of the liberty guaranteed by the Constitution. Compare *Pennsylvania Railroad Co.* v. *United States Railroad Labor Board*, 261 U. S. 72.[5] It is true, also, that disclosure of the facts may prevent Senn from securing jobs which he hoped to get. But a hoped-for job is not property guaranteed by the Constitution. And the diversion of it to a competitor is not an invasion of a constitutional right.

Sixth. It is contended that in prohibiting an injunction the statute denied to Senn equal protection of the laws, and *Truax* v. *Corrigan, supra,* is invoked. But the issue suggested by plaintiff does not arise. For we hold that the provisions of the Wisconsin statute which authorized the conduct of the unions are constitutional.

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[5] The State has, of course, power to afford protection to interests of personality, such as "the right of privacy." The protection by decision or statute of such interests of personality, rests on other considerations than are here involved. See Moreland, *The Right of Privacy Today* (1931) 19 Ky. L. J. 101; Lisle, *The Right of Privacy, id.*, 137; Green, *The Right of Privacy* (1932) 27 Ill. L. Rev. 237, 238.

One has no constitutional right to a "remedy" against the lawful conduct of another.

Affirmed.

MR. JUSTICE BUTLER, dissenting.

Plaintiff is a tile layer and has long been accustomed to work as a helper and mechanic in that trade. The question presented is whether, consistently with the due process and equal protection clauses of the Fourteenth Amendment, the State may by statute authorize or make it lawful for labor unions to adopt and carry into effect measures intended and calculated to prevent him from obtaining or doing that work. The decision just announced answers that question in the affirmative. The facts are not in controversy. Let them disclose the concrete application of the legislation now held valid.

Plaintiff lives and works in Milwaukee. Since the latter part of 1931 he has been engaged in performing small tile laying jobs. He has personally performed almost half the manual labor required. He usually employs a tile setter and helper; occasionally he has more than one of each. He has never been a member of the tile layers union. Though a competent mechanic in that trade, he is excluded from membership because he takes contracts and because he has not served the apprenticeship required by union rules. In 1935 he had about 40 jobs. His net income was $1,500 of which $750 was attributed to his own labor. The balance, constituting his profit as contractor, was not enough to support him and family.

Defendant Local No. 5 is composed of tile layers. Its membership, 112 in 1929, had fallen to 41 at the time of the trial in January, 1936. Early in 1935 it proffered to all local contractors including plaintiff a contract fixing wages, hours and the like. About half of them signed; the others did not. It contained the following: "It is definitely understood that no individual, member of a

partnership or corporation engaged in the Tile Contracting Business shall work with the tools or act as Helper, but that the installation of all materials claimed by the party of the second part [Local No. 5] as listed under the caption 'Classification of Work' in this agreement, shall be done by journeymen members of Tile Layers Protective Union Local #5." Because of that provision plaintiff declined to sign. But repeatedly he declared to representatives of the union that he was willing to employ its members and to comply with its rules as to wages, hours and working conditions; he assured them that, when his business was sufficient to permit, he would refrain from manual labor, and explained that without personally working he could not now continue in business. Conceding the truth of that statement, the union nevertheless persistently declined to modify its demands.

The president of Local No. 5 testified that, if plaintiff did not sign the contract, it would do everything "to harass and put things in his way"; that it intended to announce to the world that he is a non-union contractor and on that account should not be patronized, to picket his place of business, to ascertain where he had jobs and to picket them and in that way bring pressure to bear upon him to become a union contractor, to put him in the category of a non-union contractor unless he agrees to lay aside the tools of the trade. The program so declared corresponds with what the unions had already done against him.

In July, 1935, Local No. 5 sent to all contractors and architects letters stating: "Some time ago we presented to each individual tile contractor in the city a copy of our new agreement [this refers to the one plaintiff was called on to sign] in which we specified what constitutes a bona fide contractor and who should install the work. Not having heard from some of these so called tile contractors in a given time, we beg of you to contact the

list of fair contractors listed below in awarding the tile work in your building operations. If in two weeks time anyone outside this list is awarded tile work we will then picket such jobs, contractors' or architects' offices, or employ other lawful means to help us in our fight to better the conditions of our trade." Plaintiff's name was not on the list approved by the union. Therefore the letter meant that, in order to prevent him from working, the union would apply the described pressure to him, his work, the jobs of which his tile laying was a part, the contractors and the architects from whom he got work.

Commencing December 6, 1935, it put in front of his house two men carrying signs, one being: "P. Senn Tile Company [meaning the plaintiff] is unfair to the Tile Layers Protective Union," and the other: "Let the Union tile layers install your tile work." And regularly from eight in the morning until noon and from one to four in the afternoon it carried on picketing of that sort, sometimes using four men. They refrained from speaking to plaintiff or others and committed no breach of the peace. In that sense they carried on "peaceful picketing." The union sent men in automobiles to follow plaintiff when going from his home to his work, and instructed all its members to discover where he had jobs in order to picket them.

To justify the elimination of plaintiff, counsel told the court that "because of the demoralized condition of the trade, the union decides it does not want a contractor, whether he be skilled in the trade or unskilled, to work with the tools of the trade with the men because there is not enough work to go around." And on the witness stand the president of Local No. 5 expressed the idea that, if the contractors did not work, members of the union would be taken off relief.

The trial court found the picketing peaceful and lawful; it did not pass on other acts constituting pressure

put on plaintiff. But the unions themselves deemed unlawful much that they had threatened and done to coerce him. The findings say that "the defendants, by their counsel, have stated in open court that they will not pursue the automobile of the plaintiff from his place of business to his jobs; that they will refrain from sending any further letters to architects or contractors, and will not indulge in any acts or conduct referred to in said letters towards said contractors and architects." The trial court held plaintiff not entitled to relief. The supreme court affirmed. 222 Wis. 383; 268 N. W. 270. Following its decision in *American Furniture Co.* v. *Chauffeurs, Teamsters & Helpers Union,* 222 Wis. 338; 268 N. W. 250, construing § 103.62, it held that within the meaning of that section a "labor dispute" existed between plaintiff and defendants and that under § 103.53 the picketing was legal.

The clauses of the Fourteenth Amendment invoked by plaintiff are: "No State shall . . . 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." Our decisions have made it everywhere known that these provisions forbid state action which would take from the individual the right to engage in common occupations of life, and that they assure equality of opportunity to all under like circumstances. Lest the importance or wisdom of these great declarations be forgotten or neglected, there should be frequent recurrence to decisions of this court that expound and apply them.

"While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage

in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer* v. *Nebraska,* 262 U. S. 390, 399.

"The right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness.' . . . I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States." Concurring opinion of Mr. Justice Bradley in *Butchers' Union Co.* v. *Crescent City Co.,* 111 U. S. 746, 762, approvingly quoted in *Allgeyer* v. *Louisiana,* 165 U. S. 578, 589.

"Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money." *Coppage* v. *Kansas,* 236 U. S. 1, 14.

"It requires no argument to show that the right to work for a living in the common occupations of the com-

munity is of the very essence of the personal freedom and opportunity that it was the purpose of the amendments to secure." *Truax* v. *Raich,* 239 U. S. 33, 41.

"Under that amendment, nothing is more clearly settled than that it is beyond the power of a state, 'under the guise of protecting the public, arbitrarily [to] interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.' " *New State Ice Co.* v. *Liebmann,* 285 U. S. 262, 278.

"The Fourteenth Amendment . . . undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition. . . ." *Barbier* v. *Connolly,* 113 U. S. 27, 31.

"For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." *Yick Wo* v. *Hopkins,* 118 U. S. 356, 370.

The legislative power of the State can only be exerted in subordination to the fundamental principles of right and justice which the guaranties of the due process and

equal protection clauses of the Fourteenth Amendment are intended to preserve. Arbitrary or capricious exercise of that power whereby a wrongful and highly injurious invasion of rights of liberty and property is sanctioned, stripping one of all remedy, is wholly at variance with those principles. *Truax* v. *Corrigan,* 257 U. S. 312, 327.

It may be assumed that the picketing, upheld in virtue of the challenged statute, lawfully might be employed in a controversy between employer and employees for the purpose of persuading the employer to increase pay, etc., and dissuading non-union workers from displacing union members. The right of workers, parties to a labor dispute, to strike and picket peacefully to better their condition does not infringe any right of the employer. *American Foundries* v. *Tri-City Council,* 257 U. S. 184, 209. *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344, 386. *Wolff Co.* v. *Industrial Court,* 262 U. S. 522, 540, 541. *Dorchy* v. *Kansas,* 264 U. S. 286, 289. But strikes or peaceful picketing for unlawful purposes are beyond any lawful sanction. The object being unlawful, the means and end are alike condemned. *Dorchy* v. *Kansas,* 272 U. S. 306, 311. *Toledo, A. A. & N. M. Ry. Co.* v. *Pennsylvania Co.,* 54 Fed. 730, 737–739. And see *Truax* v. *Corrigan, supra,* 327; *Exchange Bakery & Restaurant* v. *Rifkin,* 245 N. Y. 260, 262–263; 157 N. E. 130.

The object that defendants seek to attain is an unlawful one.

Admittedly, it is to compel plaintiff to quit work as helper or tile layer. Their purpose is not to establish on his jobs better wages, hours, or conditions. If permitted, plaintiff would employ union men and adhere to union requirements as to pay and hours. But, solely because he works, the unions refuse to allow him to unionize and carry on his business. By picketing, the unions would

prevent him working on jobs he obtained from others and so destroy that business. Then, by enforcement of their rules they would prevent him from working as a journeyman for employers approved by the union or upon any job employing union men. Adhering to the thought that there is not enough work to go around, unquestionably the union purpose is to eliminate him from all tile laying work. And highly confirmatory of that purpose is the failure of the contract proposed by the union to permit plaintiff personally to do work in the performance of jobs undertaken by him for prices based upon union rates of pay for all labor, including his own.

The principles governing competition between rival individuals seeking contracts or opportunity to work as journeymen cannot reasonably be applied in this case. Neither the union nor its members take tile laying contracts. Their interests are confined to employment of helpers and layers, their wages, hours of service, etc. The contest is not between unionized and other contractors or between one employer and another. The immediate issue is between the unions and plaintiff in respect of his right to work in the performance of his own jobs. If as to that they shall succeed, then will come the enforcement of their rules which make him ineligible to work as a journeyman. It cannot be said that, if he should be prevented from laboring as helper or layer, the work for union men to do would be increased. The unions exclude their members from jobs taken by non-union employers. About half the tile contractors are not unionized. More than 60 percent of the tile layers are non-union men. The value of plaintiff's labor as helper and tile layer is very small—about $750 per year. Between union members and plaintiff there is no immediate or direct competition. If under existing circumstances there ever can be any, it must come about through a chain of unpredictable events making

its occurrence a mere matter of speculation. The interest of the unions in the manual labor done by plaintiff is so remote, indirect and minute that they have no standing as competitors. *Berry* v. *Donovan,* 188 Mass. 353, 358; 74 N. E. 603. Under the circumstances here disclosed, the conduct of the unions was arbitrary and oppressive. *Roraback* v. *Motion Picture Operators Union,* 140 Minn. 481, 486; 168 N. W. 766. *Hughes* v. *Motion Picture Operators Union,* 282 Mo. 304; 221 S. W. 95.

Moreover, the picketing was unlawful because the signs used constitute a misrepresentation of the facts. One of them declared plaintiff "unfair" to the tile layers union and, upon the basis of that statement, the other sign solicited tile work for union tile layers. There was given neither definition of the word nor any fact on which the accusation was based. By the charge made, there was implied something unjust or inequitable in his attitude toward labor unions. But there was no foundation of fact for any such accusation. There was no warrant for characterizing him as "unfair" or opposed to any legitimate purpose of the tile layers union or as unjust to union men. There is no escape from the conclusion that the unions intended by the picketing they carried on to misrepresent plaintiff in respect of his relation to, or dealing with, the tile layers union and by that means to deprive him of his occupation. The burden may not justly be held to be on him, by counter-picketing or otherwise, to refute or explain the baseless charge.

The judgment of the state court, here affirmed, violates a principle of fundamental law: That no man may be compelled to hold his life or the means of living at the mere will of others. *Yick Wo* v. *Hopkins, ubi supra.* The state statute, construed to make lawful the employment of the means here shown to deprive plaintiff of his right to work or to make lawful the picketing carried on in this case, is repugnant to the due process and equal protection

clauses of the Fourteenth Amendment. *Truax* v. *Corrigan, supra,* 328.

I am of opinion that the judgment should be reversed.

MR. JUSTICE VAN DEVANTER, MR. JUSTICE MCREYNOLDS, and MR. JUSTICE SUTHERLAND join in this dissent.

DUKE *v.* UNITED STATES.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 907. Argued May 4, 1937.—Decided May 24, 1937.

1. A misdemeanor for which the punishment prescribed is not infamous but may exceed $500 fine and six months' imprisonment without hard labor, may be prosecuted by information. P. 493.
2. So *held* of Crim. Code, § 137, prescribing a fine of not more than $1,000, or imprisonment of not more than six months, or both, for the offense of attempting to influence a juror by a written communication. P. 493.
3. The authority to prosecute by information is not limited to offenses punishable as defined in the proviso added to Cr. Code, § 335 by Act of Dec. 16, 1930. P. 494.

Response to questions certified by the court below with respect to a case on appeal from a criminal conviction.

Mr. Jesse C. Duke, pro se.

Mr. William W. Barron, with whom *Solicitor General Reed* and *Assistant Attorney General McMahon* were on the brief, for the United States.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The court below, being divided and in doubt, and desiring the instruction and advice of this court, has certified the following questions of law:

"1. May a misdemeanor, for which no infamous punishment is prescribed, be prosecuted by information, where the punishment therefor may exceed $500 fine or six months' imprisonment, without hard labor, or both?

"2. May an offense under Sec. 137 of the Criminal Code be prosecuted by information?"

The certificate contains the following statement of facts:

"This was a prosecution for violation of Sec. 137 of the Criminal Code, 18 U. S. C. A. 243, which provides:

" 'Whoever shall attempt to influence the action or decision of any grand or petit juror of any court of the United States upon any issue or matter pending before such juror, or before the jury of which he is a member, or pertaining to his duties, by writing or sending to him any letter or any communication, in print or writing, in relation to such issue or matter, shall be fined not more than $1,000, or imprisoned not more than six months, or both.'

"The prosecution was by information filed under oath by the United States Attorney. The appellant was convicted of the offense charged and from judgment and sentence thereon appeals to this court. One of the questions presented by the appeal is whether the offense charged, which is punishable by six months imprisonment or fine of $1,000, or both, may be prosecuted by information, in view of Sec. 335 of the Criminal Code. . . .

"Notwithstanding the decision in *Thorm* v. *United States* (C. C. A. 3d) 59 Fed. (2d) 419, cert. denied 287 U. S. 624, this court is divided and in doubt as to whether a misdemeanor may be prosecuted by information where the punishment therefor, although not infamous, may exceed a fine of five hundred dollars, or six months' imprisonment without hard labor, or both. As there are a large number of such misdemeanors denounced by the

Criminal Code (See Hearings before House Judiciary Committee, Seventieth Congress, First Session, January 17, 1928, on H. R. 5608, H. R. 8230, H. R. 8555, H. R. 8556, Serial 1, Page 31) the court deems the question of sufficient importance to certify to the Supreme Court."

Section 335 of the Criminal Code, c. 321, 35 Stat., 1088, 1152, before its amendment, provided: "All offenses which may be punished by death, or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors."

This section was amended by the Act of December 16, 1930, c. 15, 46 Stat. 1029, 18 U. S. C. § 541, by adding the following proviso: "*Provided,* That all offenses the penalty for which does not exceed confinement in a common jail, without hard labor for a period of six months, or a fine of not more than $500, or both, shall be deemed to be petty offenses; and all such petty offenses may be prosecuted upon information or complaint."

Appellant contends that this language limits the authority to prosecute by information strictly to those offenses punishable as the proviso prescribes. Under the original section, there is no doubt that the offense with which appellant is charged was a misdemeanor which could be prosecuted by information. It will be enough to cite as examples supporting this conclusion *Falconi* v. *United States,* 280 Fed. 766, and *Hunter* v. *United States,* 272 Fed. 235, 238, where other cases are collected. We think the proviso relied upon did not change this rule.

The original section divides crimes into felonies and misdemeanors. The evident object of the proviso was to bring about a subdivision of misdemeanors by creating a class of misdemeanors of minor gravity to be known as petty offenses; to be tried, as proposed by other legislation (which failed), by United States Commissioners. The addition of the words that "such petty offenses may be prosecuted upon information or complaint" did not work a change of the then well-settled rule that any mis-

demeanor not involving infamous punishment might be prosecuted by information instead of by indictment. The quoted words probably were inserted, as the government contends and the legislative history indicates, merely to supplement and aid the other proposed legislation then pending to which we have referred; but, in any event, they are affirmative words and do not in terms or by reasonable implication negative the broader long-standing rule in respect of misdemeanors of the other class. *Thorm* v. *United States,* 59 F. (2d) 419. The offense with which appellant was charged was not a petty offense within the proviso, but it was a misdemeanor of a kind, as the certificate recites, not subject to infamous punishment—therefore open to prosecution by information.

Both interrogatories must be answered in the affirmative.

Question No. 1, Yes.
Question No. 2, Yes.

CARMICHAEL, ATTORNEY GENERAL OF ALABAMA, ET AL. *v.* SOUTHERN COAL & COKE CO.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

No. 724. Argued April 7, 8, 1937.—Decided May 24, 1937.

The Unemployment Compensation Act of Alabama sets up a scheme for providing unemployment benefits for workers employed within the State by designated classes of employers. These include all who employ eight or more persons for twenty or more weeks in the year, except those engaged in certain specified employments. The employers are to pay certain percentages of their total monthly payrolls into the state Unemployment Compensation Fund, and each employee is required to contribute to the fund a

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*Together with No. 797, *Carmichael, Attorney General of Alabama, et al.* v. *Gulf States Paper Corp.* Appeal from the District Court of the United States for the Middle District of Alabama.

percentage of his wages. The fund is to be deposited in the "Unemployment Trust Fund" of the United States Government established by the Federal Social Security Act, and is to be used as requisitioned by the State Commission to pay unemployment benefits prescribed by the statute, but without any liability on the part of the State beyond amounts paid into or earned by the Fund. Benefits are payable from the fund to the employees covered by the Act, in the event of their unemployment, upon prescribed conditions and at prescribed rates. The Act satisfies the criteria which, by § 903 (a) of the Social Security Act, are made prerequisite to its approval by the Social Security Board created by that Act, and it has been approved by the Board as that section directs. By § 902 of the Social Security Act, contributors to the state fund are entitled to credit their contributions in satisfaction of the tax imposed on employers by the Social Security Act, to the extent of 90% of the tax. *Held:*

1. The Act as an Act taxing employers is within the state taxing power. P. 508.

   Taxes are the means of distributing the burden of the cost of government, commonly levied on property or its use, but likewise leviable on the exercise of personal rights and privileges, including the exercise of the right to employ or to be employed.

2. The tax on employers is valid under the Fourteenth Amendment. P. 508.

   (1) Inequalities which result from a singling out of one particular class for taxation or exemption, infringe no constitutional limitation. P. 509.

   (2) A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on such a basis if such would exist under any conceivable state of facts. P. 509.

   (3) Exclusion from the tax of employers of less than eight is a distinction of degree, such as the law is often called upon to make, and is furthermore justified on the ground of administrative convenience and expense. P. 510.

   (4) The exemption of particular classes of employers,—those who employ agricultural laborers, domestic servants, seamen, insurance agents, or close relatives—and the exclusion of charitable institutions, interstate railways, or the government of the United States or of any State or political subdivision, whereby the subject

of the tax is confined to those who employ labor in the processes of industrial production and distribution, is not arbitrary. P. 512.

Where the public interest is served, one business may be left untaxed and another taxed, in order to promote the one or to restrict or suppress the other.

Several of the exemptions may rest upon administrative considerations.

The burden rests upon those who complain, of showing that there are no differences between the exempt employers and the industrial employers who are taxed, sufficient to justify differences in taxation.

(5) The provision for taxing employees is separable and therefore not subject to objection by employers. P. 513.

(6) Distinct taxes imposed by a single statute are not to be deemed inseparable unless that conclusion is unavoidable. P. 513.

(7) Under the Fourteenth Amendment, the state taxing power can be exerted only to effect a public purpose and does not embrace the raising of revenue for private purposes. P. 514.

(8) The requirements of due process leave free scope for the exercise of a wide legislative discretion in determining what expenditures will serve the public interest. P. 514.

(9) The public purposes of a State, for which it may raise funds by taxation, embrace expenditures for its general welfare. P. 514.

(10) Whether the expenditure under the Act serves a public purpose is a practical question addressed to the law-making department, and it would require a plain case of departure from every public purpose which could reasonably be conceived to justify the intervention of a court. P. 515.

(11) Relief of unemployment is a public purpose. P. 515.

(12) When public evils ensue from individual misfortunes or needs, the legislature may strike at the evil at its source. If the purpose is legitimate because public, it will not be defeated because the execution of it involves payments to individuals. P. 518.

(13) The scheme of the Act is not subject to any constitutional infirmity in not being limited to the indigent or because it is extended to some less deserving than others, such as those discharged for misconduct. P. 518.

(14) The fact that the Act restricts its benefits to employees of the class of employers who are subject to the tax does not render it arbitrary or discriminatory in violation of the Fourteenth Amendment. P. 519.

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(15) It is not a valid objection to the tax on employers that the benefits paid and the persons to whom they are paid are unrelated to the persons taxed and the amount of the tax which they pay—in short, that those who pay the tax may not have contributed to the unemployment and may not be benefited by the expenditure. P. 521.

The tax is a means of distributing the burden of the cost of government. This Court has repudiated the suggestion that the Constitution requires the benefits derived from the expenditure of public moneys to be apportioned to the burdens of the taxpayer, or that he can resist the payment of the tax because it is not expended for purposes which are peculiarly beneficial to him. P. 522.

(16) The Act is not the invalid product of the coercive operation of the Federal Social Security Act, and involves no unconstitutional surrender of State power. *Steward Machine Co.* v. *Davis, post,* p. 548. P. 525.

17 F. Supp. 225, reversed.

APPEALS from decrees of the District Court, of three judges, restraining the present petitioners, officials of Alabama, from collecting the money contributions exacted of them by the provisions of the Alabama Unemployment Compensation Act.

Messrs. A. A. Carmichael, Attorney General of Alabama, and *Peyton D. Bibb,* Assistant Attorney General, with whom *Messrs. Charles L. Rowe* and *Thomas S. Lawson,* Assistant Attorneys General, and *Noel T. Downing* were on the brief, for appellants.

Mr. Borden Burr, with whom *Messrs. Niel P. Sterne* and *Marion Rushton* were on the brief, for Southern Coal & Coke Co., appellee in No. 724.

The Alabama Act is dependent upon the validity of Titles IX and III of the federal Social Security Act. These Titles being unconstitutional, the state Act must fall.

The Supreme Court of Alabama has so construed the state Act as to hold that by its terms it is invalid if Title IX or Title III of the federal Act is unconstitutional.

Titles IX and III of the federal Act are beyond the Congressional power; they are invalid because (a) the obvious purpose is to constrain the several States, through coercion and purchase, to enact unemployment compensation laws conformable to the pattern prescribed by Congress; and (b) they constitute an effort on the part of Congress, through the exercise of its spending and its taxing powers, to control the several States in matters expressly reserved to the States and to the people by the Tenth Amendment.

The federal Act is invalid because it contains an illegal delegation of legislative and judicial powers to the Federal Social Security Board.

The exactions imposed on employers by § 4 (a), (b), (c), and (d) of the state Act are in violation of the Fourteenth Amendment.

The state Act takes private property from one class for the use of another; its purpose is not a "public purpose," in the sense in which those words are used as justifying the taking of private property.

The exactions imposed by the state Act are in violation of the Fourteenth Amendment because in their classification and other features they are unreasonable, arbitrary and capricious.

The Act interferes with the right of free contract of both employers and employees.

Mr. Forney Johnston, with whom *Mr. Jos. F. Johnston* was on the brief, for Gulf States Paper Corp., appellee in No. 797.

The exaction takes money from one arbitrarily selected group for the benefit of another.

The doctrine of off-setting benefits does not sustain the exaction levied upon appellee and employers similarly situated or justify their classification for the support of unemployment relief.

Such benefit as will accrue to the taxed employers will be merely the general benefit which may result to the

public at large from general spending by the detached unemployed who draw the money.

The State's argument as to off-setting benefits in a waiting labor pool was not sustained by the Supreme Court of Alabama and is disproven and untenable.

The unavoidable implications of the Alabama exaction prove it untenable. An exact analogy would be a proposal to tax all husbands for a fund out of which to pay alimony to divorced wives, regardless of their need, in order to assure them of spending money during a waiting period, both as an aid to trade and to preserve their social morale. A like analogy would be a widows' fund, levied directly upon husbands over forty-five and disbursed without reference to the need of those who become widowed after 1937.

The scheme is not only revolutionary and arbitrary but denies to the taxed group the equal protection enjoyed by those who pay taxes into the treasury.

The fact cannot be ignored that, as asserted by the Alabama court, this Act is part of a federal enforced plan directly related to and intended to "cushion" a nation-wide economic depression. The conception of the plan, its enactment, promulgation and administration leave no doubt whatever as to its intention. Nor does the opinion of the Alabama court. The Federal Government, or the federal board, can at any time it may see fit withdraw its approval of a state scheme which does not advance its tax upon the selected groups to provide for more extensive unemployment relief benefits, should the federal administration consider that course necessary to deal with continued unemployment.

The state legislature may at will enlarge the tax and the payments. That is precisely what occurred in the administration of the British Act.

The mechanism employed in this Act is intrinsically subject to abuse and withdraws or withholds from the

employer taxed: (1) The safeguard of a judicial hearing as to the amount of the fund actually required, as to the benefit or apportionment of the burden; (2) the safeguards surrounding the levy, budgeting and appropriation of taxes for the public revenue; (3) the community of interest of all who pay taxes into the treasury against arbitrary appropriations of public funds for individual benefit, including all existing practical checks upon public spending.

A novel and dangerous mechanism for direct social taxation, stripped of conventional safeguards by the bypass process here employed, cannot be regarded as constitutional fair play.

It is a revolutionary device under which the employer group taxed is exposed to indefinite exploitation and by which that group will be forced to importune each legislature for protection.

The employer is, in fact, denied the traditional benefits of representative government in that the customary forms of appropriation and expenditure of his funds are denied him.

Again, it must be remembered that the constant threat of the Federal Government standing over this scheme, to withdraw approval, provides a constant "something in the nature of a penalty," to induce the State to allow this scheme, as so approved, to stand unadjusted and the taxed employers unheard.

Due process of law, the equal protection of the law and the equality of privileges and immunities guaranteed by the Fourteenth Amendment require, in favor of those who are compelled to meet public objectives by direct expenditures out of their own pockets, the fair equivalent of those features of taxation necessary to fundamental justice and to free institutions; certainly the equivalent of the safeguards assured to all who pay taxes directly into the treasury.

The State could not, consistently with due process, impose upon individual employers the duty of insuring their own employees against unemployment.

This is a statute dictating an addition to a final wage, reached after negotiation, which must on this record be presumed to be fair and is beyond the power of the legislature to enlarge. We do not understand that *Adair* v. *United States,* 208 U. S. 161, is overruled by the *Virginian Railway Company* case, 300 U. S. 515, or by the *Railway Clerks* case, 281 U. S. 548. See also *Wolff Packing Co.* v. *Industrial Court,* 262 U. S. 522; s. c., 267 U. S. 522. Nor do we understand that the *West Coast Hotel Co.* case, 300 U. S. 379, was intended in any sense to suggest that a state legislature may by statute add an arbitrary exaction to all wages, as this statute, in effect, proposes.

Owing no duty to insure its own employees against unemployment, none can be imposed upon appellee as to employees of others.

The levy of a flat tax for five years without possibility of adjustment to appellee's business is arbitrary.

The proximate and controlling effect of the law is the exaction of money for private donations.

The provision for payment of benefits regardless of need is arbitrary.

The state Act and the Alabama opinion erroneously assume that the right to employ or be employed is a franchise that may be granted on condition that the parties assume extraneous obligations of the State.

The tax upon employees levied by § 4 (d) cannot be sustained as a scheme for compulsory self-insurance.

The tax cannot be sustained as to the employer and is void as to employee, and *vice versa,* since the legislature cannot be presumed to have levied a tax for a supposedly rational objective in double the amount of the public need, which alone is said to justify the classification or benefit.

The number and weeks classification of the state Act, which excludes more than seventy per cent. of the employee population of Alabama, is plainly arbitrary as related to the objective of the Act.

A State may not contract or delegate away its legislative power nor any function of its sovereignty, even to the Federal Government; nor lawfully connive at the assumption of non-federal powers by the latter.

The usurpation of state function intrinsic in the Federal Social Security Act and the illegal acquiescence by the State by the adoption of the state Act are destructive of the federal balance and void.

Titles III and IX of the Federal Social Security Act constitute a scheme for the control of functions beyond the constitutional powers of the Federal Government and are void.

The Social Security Act was conceived and finally drafted and its legislative purpose fully proclaimed before recent controlling decisions of this Court adverse to the use of the tax-credit device to induce local action. *United States* v. *Butler,* 297 U. S. 1; *Carter* v. *Carter Coal Co.,* 298 U. S. 238; *Railroad Retirement Board* v. *Alton R. Co.,* 295 U. S. 330.

The dominant purpose, characteristic and effect of the tax-rebate device of Title IX are manifestly coercive to force the establishment of unemployment insurance systems within all the States, participated in, and in substantial respects controlled by, the Federal Government.

The credits allowable under Title IX for good conduct under a state law are conclusive evidence that the dominant purpose of the title is not revenue but the establishment of unemployment insurance systems within the States.

The report of the President's Committee on Economic Security, which determined the form and substance of

the Act, accompanying the message of January 17, 1936, leaves no doubt as to the dominant purpose and rationale of Title IX, as an unemployment compensation and not a tax measure.

Not only does the federal Act by Title IX coerce, but by Title III it purchases the establishment and maintenance, subject to federal approval, of state compensation systems and the custody and control of state funds.

The objectives of the federal Act, non-compliance with which is penalized by the tax-credit device of Title IX and compliance with which is purchased by the appropriations made pursuant to Title III, are beyond the orbit of federal power.

The tax levied by Title IX is in violation of Art. I, § 9, cl. 4, and Art. I, § 2, cl. 3, of the Constitution, because the tax is a direct tax levied without apportionment upon the basic natural right of having persons in one's employ.

The appropriations made by Title III are directly related to non-federal objectives and are violative of the federal system.

By leave of Court, *Attorney General Cummings, Solicitor General Reed, Assistant Attorney General Jackson,* and *Messrs. Charles E. Wyzanski, Jr., Sewall Key, A. H. Feller, Arnold Raum, F. A. LeSourd, Charles A. Horsky, Thomas H. Eliot,* and *Alanson Willcox* filed a brief on behalf of the United States, as *amicus curiae,* supporting the validity of the Acts.

By leave of Court, *Messrs. John S. Coleman* and *William B. White* filed a brief, as *amici curiae,* challenging the validity of the Acts.

Mr. Justice Stone delivered the opinion of the Court.

The questions for decision are whether the Unemployment Compensation Act of Alabama infringes the due

process and equal protection clauses of the Fourteenth Amendment, and whether it is invalid because its enactment was coerced by the action of the Federal government in adopting the Social Security Act, and because it involves an unconstitutional surrender to the national government of the sovereign power of the state.

Appellee, the Southern Coal & Coke Co., is a Delaware corporation employing more than eight persons in its business of coal mining in Alabama. Appellee, Gulf States Paper Corporation, is a Delaware corporation employing more than eight persons in its business of manufacturing paper within the state. They brought the present suits in the District Court for the Middle District of Alabama, to restrain appellants, the Attorney General and the Unemployment Compensation Commission of Alabama, from collecting the money contributions exacted of them by the provisions of the Alabama Unemployment Compensation Act. From the decrees of the district court, three judges sitting (Jud. Code, § 266, 28 U. S. C. § 380), granting the relief prayed, the case comes here on appeal. Jud. Code, § 238 (3), 28 U. S. C., § 345 (3).

The Unemployment Compensation Act, Ala. Acts 1935, No. 447; Ala. Code of 1928 (1936 Cum. Supp.) §§ 7597 (1) *et seq.*, as amended by Acts of 1936, Nos. 156, 194, 195, and Acts of Feb. 10, 1937, and March 1, 1937, Spec. Sess. 1937, sets up a comprehensive scheme for providing unemployment benefits for workers employed within the state by employers designated by the Act. These employers include all who employ eight or more persons for twenty or more weeks in the year, § 2 (f), except those engaged in certain specified employments.[1] It imposes

[1] See § 2 (g). "Employment" is defined to exclude:

(1) Agricultural labor;

(2) Domestic service in a private home;

(3) Service performed as an officer, bar pilot, or member of the crew of a vessel on the navigable waters of the United States;

on the employers the obligation to pay a certain percentage of their total monthly payrolls into the state Unemployment Compensation Fund, administered by appellants. For 1936 the levy is .9 of 1%; for 1937 it is 1.8% and for 1938 and subsequent years it is 2.7%. § 4 (b). In 1941 and thereafter the rates of contribution by employers are to be revised in accordance with experience, but in no case are they to be less than 1½ or more than 4% of the payroll. § 4 (c). After May 1, 1936, each employee is required to contribute 1% of his wages to the fund. § 4 (d). The fund is to be deposited in the "Unemployment Trust Fund" of the United States Government, § 3 (d), cf. Social Security Act, § 904 (a), and is to be used as requisitioned by the State Commission, to pay unemployment benefits prescribed by the statute, §§ 3 (b), 3 (d), but without any liability on the part of the state beyond amounts paid into or earned by the fund. Benefits are payable from the fund to the employees covered by the Act, in the event of their unem-

(4) Service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age of twenty-one in the employ of his father or mother;

(5) Service performed in the employ of the United States Government or of an instrumentality of the United States;

(6) Service performed in the employ of a carrier engaged in interstate commerce and subject to the Act of Congress known as The Railway Labor Act; as amended or as hereafter amended. Service performed by those engaged as solicitors or agents for Insurance Companies;

(7) Service performed in the employ of a state, or political subdivision thereof, or an instrumentality of one or more states or political subdivisions;

(8) Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

ployment, upon prescribed conditions and at prescribed rates.

The Act satisfies the criteria which, by § 903 (a) of the Social Security Act of August 14, 1935, c. 531, 49 Stat. 620, 640, 42 U. S. C. § 1103 (a), are made prerequisite to its approval by the Social Security Board created by that Act, and it has been approved by the Board as that section directs. By § 902 of the Social Security Act, contributors to the state fund are entitled to credit their contributions in satisfaction of the tax imposed on employers by the Social Security Act, to the extent of 90% of the tax. See *Chas. C. Steward Machine Co.* v. *Davis,* decided this day, *post,* p. 548.

In the court below, the statute was assailed as repugnant to various provisions of the state constitution. These contentions have been put at rest by the decision of the Supreme Court of Alabama in *Beeland Wholesale Co.* v. *Kaufman,* 174 So. 516, holding the state act valid under both the state and federal constitutions. The statute was also attacked on the ground that the Social Security Act is invalid under the Federal Constitution, since the state act declares that it "shall become void" if the Supreme Court of the United States shall hold the Social Security Act invalid. The Alabama court interpreted the statute as having operative effect only if the Social Security Act were constitutional—even in advance of a decision by this Court. We need not decide whether the state court's ruling that the federal statute is valid is conclusive upon us for the purpose of determining whether the state law is presently in force, *Miller's Executors* v. *Swann,* 150 U. S. 132; *Louisville & Nashville R. Co.* v. *Western Union,* 237 U. S. 300, because its conclusion as to the validity of the federal act agrees with our own, announced in *Chas. C. Steward Machine Co.* v. *Davis, supra.*

Attacks were leveled at the statute on numerous other grounds, which are urged here,—as an infringement of

the due process and equal protection clauses of the Fourteenth Amendment, as an unconstitutional surrender to the United States government of the sovereign power of the state, and as a measure owing its passage to the coercive action of Congress in the enactment of the Social Security Act.

In *Beeland Wholesale Co.* v. *Kaufman, supra,* the Supreme Court of Alabama held that the contributions which the statute exacts of employers are excise taxes laid in conformity to the constitution and laws of the state. While the particular name which a state court or legislature may give to a money payment commanded by its statute is not controlling here when its constitutionality is in question, cf. *Educational Films Co.* v. *Ward,* 282 U. S. 379, 387; *Storaasli* v. *Minnesota,* 283 U. S. 57, 62; *Wagner* v. *Covington,* 251 U. S. 95, 102; *Standard Oil Co.* v. *Graves,* 249 U. S. 389, 394, we see no reason to doubt that the present statute is an exertion of the taxing power of the state. Cf. *Carley & Hamilton* v. *Snook,* 281 U. S. 66, 71.

Taxes, which are but the means of distributing the burden of the cost of government, are commonly levied on property or its use, but they may likewise be laid on the exercise of personal rights and privileges. As has been pointed out by the opinion in the *Chas. C. Steward Machine Co.* case, such levies, including taxes on the exercise of the right to employ or to be employed, were known in England and the Colonies before the adoption of the Constitution, and must be taken to be embraced within the wide range of choice of subjects of taxation, which was an attribute of the sovereign power of the states at the time of the adoption of the Constitution, and which was reserved to them by that instrument. As the present levy has all the indicia of a tax, and is of a type traditional in the history of Anglo-American legislation, it is within state taxing power, and it is immaterial whether it is

called an excise or by another name. See *Barwise* v. *Shepard,* 299 U. S. 33, 36. Its validity under the Federal Constitution is to be determined in the light of constitutional principles applicable to state taxation.

Validity of the Tax Under the Fourteenth Amendment.

First. Validity of the Tax Qua *Tax.* It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions. Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation. See *Bell's Gap R. Co.* v. *Pennsylvania,* 134 U. S. 232, 237; *Lawrence* v. *State Tax Comm'n,* 286 U. S. 276, 284. This Court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemption, infringe no constitutional limitation. *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283, 293; *American Sugar Refining Co.* v. *Louisiana,* 179 U. S. 89, 94; *Armour Packing Co.* v. *Lacy,* 200 U. S. 226, 235; *Brown-Forman Co.* v. *Kentucky,* 217 U. S. 563, 573; *Quong Wing* v. *Kirkendall,* 223 U. S. 59, 62, 63; *Armour & Co.* v. *Virginia,* 246 U. S. 1, 6; *Alaska Fish Co.* v. *Smith,* 255 U. S. 44, 48; *State Board of Tax Comm'rs* v. *Jackson,* 283 U. S. 527, 537; *Broad River Power Co.* v. *Query,* 288 U. S. 178, 180; *Fox* v. *Standard Oil Co.,* 294 U. S. 87, 97; *Cincinnati Soap Co.* v. *United States, ante,* p. 308; *Great Atlantic & Pacific Tea Co.* v. *Grosjean, ante,* p. 412.

Like considerations govern exemptions from the operation of a tax imposed on the members of a class. A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it. *Rast* v. *Van Deman & Lewis Co.,* 240 U. S. 342, 357; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245, 255; *Swiss Oil*

Corp. v. *Shanks,* 273 U. S. 407, 413; *Lawrence* v. *State Tax Comm'n, supra;* cf. *Metropolitan Casualty Insurance Co.* v. *Brownell,* 294 U. S. 580, 584.

This restriction upon the judicial function, in passing on the constitutionality of statutes, is not artificial or irrational. A state legislature, in the enactment of laws, has the widest possible latitude within the limits of the Constitution. In the nature of the case it cannot record a complete catalogue of the considerations which move its members to enact laws. In the absence of such a record courts cannot assume that its action is capricious, or that, with its informed acquaintance with local conditions to which the legislation is to be applied, it was not aware of facts which afford reasonable basis for its action. Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.

(a) Exclusion of Employers of Less than Eight. Distinctions in degree, stated in terms of differences in number, have often been the target of attack, see *Booth* v. *Indiana,* 237 U. S. 391, 397. It is argued here, and it was ruled by the court below, that there can be no reason for a distinction, for purposes of taxation, between those who have only seven employees and those who have eight. Yet, this is the type of distinction which the law is often called upon to make.[2] It is only a difference in numbers

[2] *St. Louis Consolidated Coal Co.* v. *Illinois,* 185 U. S. 203, 207 (coal mines employing five or more subject to inspection); *McLean* v. *Arkansas,* 211 U. S. 539, 551 (mines employing ten or more required to measure coal for payment of wages before screening); *Booth* v. *Indiana,* 237 U. S. 391, 397 (mines required to supply wash-houses upon demand of twenty employees); *Jeffrey Mfg. Co.* v. *Blagg,* 235 U. S. 571, 576; *Middleton* v. *Texas Power & L. Co.,* 249 U. S. 152, 159 (employers of five or more included within workmen's compensation act).

which marks the moment when day ends and night begins, when the disabilities of infancy terminate and the status of legal competency is assumed. It separates large incomes which are taxed from the smaller ones which are exempt, as it marks here the difference between the proprietors of larger businesses who are taxed and the proprietors of smaller businesses who are not.

Administrative convenience and expense in the collection or measurement of the tax are alone a sufficient justification for the difference between the treatment of small incomes or small taxpayers and that meted out to others. *Citizens' Telephone Co.* v. *Fuller,* 229 U. S. 322, 332; *Hatch* v. *Reardon,* 204 U. S. 152, 159; *New York* v. *Latrobe,* 279 U. S. 421, 428; *Aero Transit Co.* v. *Georgia Public Service Comm'n,* 295 U. S. 285, 289. Cf. *Florida Central & Peninsular R. Co.* v. *Reynolds,* 183 U. S. 471, 480; *Packer Corp.* v. *Utah,* 285 U. S. 105, 110, footnote 6. We cannot say that the expense and inconvenience of collecting the tax from small employers would not be disproportionate to the revenue obtained. For it cannot be assumed that the legislature could not rightly have concluded that generally the number of employees bears a relationship to the size of the payroll and therefore to the amount of the tax, and that the large number of small employers and the paucity of their records of employment would entail greater inconvenience in the collection and verification of the tax than in the case of larger employers.

It would hardly be contended that the state, in order to tax payrolls, is bound to assume the administrative cost and burden of taxing all employers having a single employee. But if for that or any other reason it may exempt some, whether it should draw the line at one, three, or seven, is peculiarly a question for legislative decision. The decision cannot be said to be arbitrary because it falls in the twilight zone between those members of the class

which plainly can and those which plainly cannot expediently be taxed.

(b) Exemption of Particular Classes of Employers. It is arbitrary, appellees contend, to exempt those who employ agricultural laborers, domestic servants, seamen, insurance agents, or close relatives, or to exclude charitable institutions, interstate railways, or the government of the United States or of any state or political subdivision. A sufficient answer is an appeal to the principle of taxation already stated, that the state is free to select a particular class as a subject for taxation. The character of the exemptions suggests simply that the state has chosen, as the subject of its tax, those who employ labor in the processes of industrial production and distribution.

Reasons for the selections, if desired, readily suggest themselves. Where the public interest is served one business may be left untaxed and another taxed, in order to promote the one, *American Sugar Refining Co.* v. *Louisiana, supra; Heisler* v. *Thomas Colliery Co., supra; Aero Transit Co.* v. *Georgia Public Service Comm'n, supra,* or to restrict or suppress the other, *Magnano Co.* v. *Hamilton,* 292 U. S. 40; *Fox* v. *Standard Oil Co., supra; Quong Wing* v. *Kirkendall, supra; Singer Sewing Machine Co.* v. *Brickell,* 233 U. S. 304; *Alaska Fish Co.* v. *Smith, supra,* 48; *Great Atlantic & Pacific Tea Co.* v. *Grosjean, supra.* The legislature may withhold the burden of the tax in order to foster what it conceives to be a beneficent enterprise. This Court has often sustained the exemption of charitable institutions, *Bell's Gap R. Co.* v. *Pennsylvania, supra,* 237; cf. *Board of Education* v. *Illinois,* 203 U. S. 553, 563, and exemption for the encouragement of agriculture, *American Sugar Refining Co.* v. *Louisiana, supra,* 95; *Aero Transit Co.* v. *Georgia Public Service Comm'n, supra,* 291. Similarly, the legislature is free to aid a depressed industry such as shipping. The exemption of business operating for less than twenty weeks in the year

may rest upon similar reasons, or upon the desire to encourage seasonal or unstable industries.

Administrative considerations may explain several exemptions. Relatively great expense and inconvenience of collection may justify the exemption from taxation of domestic employers, farmers, and family businesses, not likely to maintain adequate employment records, which are an important aid in the collection and verification of the tax. The state may reasonably waive the formality of taxing itself or its political subdivisions. Fear of constitutional restrictions, and a wholesome respect for the proper policy of another sovereign, would explain exemption of the United States, and of the interstate railways, compare *Packer Corp.* v. *Utah, supra,* 109. In no case do appellees sustain the burden which rests upon them of showing that there are no differences, between the exempt employers and the industrial employers who are taxed, sufficient to justify differences in taxation.

(c) Tax on Employees. Appellees extend their attack on the statute from the tax imposed on them as employers to the tax imposed on employees. But they cannot object to a tax which they are not asked to pay, at least if it is separable, as we think it is, from the tax they must pay. The statute contains the usual separability clause. § 19. The taxation of employees is not prerequisite to enjoyment of the benefits of the Social Security Act. The collection and expenditure of the tax on employers do not depend upon taxing the employees, and we find nothing in the language of the statute or its application to suggest that the tax on employees is so essential to the operation of the statute as to restrict the effect of the separability clause. Distinct taxes imposed by a single statute are not to be deemed inseparable unless that conclusion is unavoidable. See *Field* v. *Clark,* 143 U. S. 649, 697; *Sonzinsky* v. *United States,* 300 U. S. 506.

From what has been said, it is plain that the tax *qua* tax conforms to constitutional requirements, and that our inquiry as to its validity would end at this point if the proceeds of the tax were to be covered into the state treasury, and thus made subject to appropriation by the legislature.

Second. Validity of the Tax as Determined by Its Purposes. The devotion of the tax to the purposes specified by the Act requires our consideration of the objections pressed upon us that the tax is invalid because the purposes are invalid, and because the methods chosen for their execution transgress constitutional limitations. It is not denied that since the adoption of the Fourteenth Amendment state taxing power can be exerted only to effect a public purpose and does not embrace the raising of revenue for private purposes. See *Green* v. *Frazier,* 253 U. S. 233, 238; *Milheim* v. *Moffat Tunnel Dist.,* 262 U. S. 710, 717; *Fallbrook Irrigation Dist.* v. *Bradley,* 164 U. S. 112, 158; *Jones* v. *Portland,* 245 U. S. 217, 221. The states, by their constitutions and laws, may set their own limits upon their spending power, see *Loan Association* v. *Topeka,* 20 Wall. 655; cf. *Parkersburg* v. *Brown,* 106 U. S. 487; *Cole* v. *La Grange,* 113 U. S. 1, but the requirements of due process leave free scope for the exercise of a wide legislative discretion in determining what expenditures will serve the public interest.

This Court has long and consistently recognized that the public purposes of a state, for which it may raise funds by taxation, embrace expenditures for its general welfare. *Fallbrook Irrigation Dist.* v. *Bradley, supra,* 161; *Green* v. *Frazier, supra,* 240, 241. The existence of local conditions which, because of their nature and extent, are of concern to the public as a whole, the modes of advancing the public interest by correcting them or avoiding their consequences, are peculiarly within the knowl-

edge of the legislature, and to it, and not to the courts, is committed the duty and responsibility of making choice of the possible methods. See *Fallbrook Irrigation Dist.* v. *Bradley, supra,* 160; *Jones* v. *Portland, supra,* 221, 224, 225; *Green* v. *Frazier, supra,* 239, 240. As with expenditures for the general welfare of the United States, *United States* v. *Butler,* 297 U. S. 1, 67; *Helvering* v. *Davis, post,* p. 619, whether the present expenditure serves a public purpose is a practical question addressed to the law-making department, and it would require a plain case of departure from every public purpose which could reasonably be conceived to justify the intervention of a court. See *Cincinnati Soap Co. v. United States, supra;* cf. *Jones* v. *Portland, supra.* The present case exhibits no such departure.

(a) Relief of Unemployment as a Public Purpose. Support of the poor has long been recognized as a public purpose, see *Kelly* v. *Pittsburgh,* 104 U. S. 78, 81. We need not labor the point that expenditures for the relief of the unemployed, conditioned on unemployment alone, without proof of indigence of recipients of the benefits, is a permissible use of state funds. For the past six years the nation, unhappily, has been placed in a position to learn at first hand the nature and extent of the problem of unemployment, and to appreciate its profound influence upon the public welfare. Detailed accounts of the problem and its social and economic consequences, to be found in public reports of the expenditures of relief funds, and in the studies of many observers, afford a basis for the legislative judgment. It suffices to say that they show that unemployment apparently has become a permanent incident of our industrial system; that it varies, in extent and intensity, with fluctuations in the volume of seasonal businesses and with the business cycle. It is dependent, with special and unpredictable manifestations, upon tech-

nological changes and advances in methods of manufacture, upon changing demands for manufactured products—dictated by changes in fashion or the creation of desirable substitutes, and upon the establishment of new sources of competition.

The evils of the attendant social and economic wastage permeate the entire social structure. Apart from poverty, or a less extreme impairment of the savings which afford the chief protection to the working class against old age and the hazards of illness, a matter of inestimable consequence to society as a whole, and apart from the loss of purchasing power, the legislature could have concluded that unemployment brings in its wake increase in vagrancy and crimes against property,[3] reduction in the number of marriages,[4] deterioration of family life, decline in the birth rate,[5] increase in illegitimate births,[6] impairment of

[3] See, e. g., National Commission on Law Observance and Enforcement (1931), Report on the Causes of Crime, No. 13, especially p. 312.

[4] From 1924 to 1932, inclusive, the marriage rate in Alabama, determined by marriages per 1,000 population, was as follows: 11.4; 11.9; 11.9; 11.6; 11.2; 11.2; 10.4; 9.7; 9.4 [derived from Statistical Abstract of the United States, 1926, Table 90; *id.*, 1928, Table 95; *id.*, 1930, Table 99 *id.*, 1932, Table 80; *id.*, 1936, Table 92]. The first sizeable decline came in 1930.

[5] See State Board of Health, Bureau of Vital Statistics, Report relating to the registration of births and deaths in the State of Alabama for the year ending 31st December, 1935, p. XXXVII: "Between 1910 and 1927, the trend in the birth rate was upward, except in 1918, the year in which the outbreak of influenza occurred and the following year. From 1927 to 1935, the trend has been downward, the rate of decline having been practically constant since 1928 forward, with the single exception in 1934. The rise in 1934 was due to a number of factors, including an increase in birth registration following the registration campaign and marriages."

[6] See Annual Report of the State Board of Health of Alabama, 1933, p. 166, Table XXV. The rate of illegitimate births per 1,000 live births, for the years 1929 through 1933, were 70.4; 74.6; 81.6; 88.7; 95.1.

the health of the unemployed and their families [7] and malnutrition of their children.[8]

Although employment in Alabama is predominantly in agriculture, and the court below found that agricultural unemployment is not an acute problem, the census reports disclose the steadily increasing percentage of those employed in industrial pursuits in Alabama.[9] The total amount spent for emergency relief in Alabama, in the years 1933 to 1935 inclusive, exceeded $47,000,000, of which $312,000 came from state funds, $2,243,000 from local sources, and the balance from relief funds of the federal government.[10] These figures bear eloquent witness to the inability of local agencies to cope with the problem without state action and resort to new taxing legislation. Expenditure of public funds under the present statute, for relief of unemployment, will afford some

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[7] A survey of 4,137 people in Birmingham, Alabama, and covering three months in the spring of 1933, showed that the rate of illness [disabling illness per 1,000 persons] was 165 in families with no employed workers; 148 in families with at least one part-time worker, but no full-time workers; and 140 in families with at least one full-time worker. See Perrott and Collins, Relation of sickness to income and income change in 10 surveyed communities, Public Health Reports (United States Public Health Service), vol. 50, p. 595, at 606, Table 6.

[8] See Eliot, Martha M., Some effects of the depression on the nutrition of children, Hospital Social Service, vol. 28, p. 585; Palmer, Carroll E., Height and weight of children of the depression poor, Public Health Reports, vol. 50, p. 1106.

[9] Of those employed in Alabama the per cent. employed in industry were 19.5% in 1900; 21.4% in 1910; 30.7% in 1920; 33.6% in 1930; 24.3% in 1935. (Last figure estimated at the trial by Gist, formerly statistician of the Department of Agriculture, and since Feb. 1, 1936, economic adviser to the Commissioner of Agriculture of Alabama.) The decline in 1935 may be taken to corroborate the greater susceptibility of employment in industry to the depression.

[10] Figures obtained from Federal Emergency Relief Administration, as stated in Appendix to the Brief of Respondent, No. 837, Chas. C. Steward Machine Co. *v.* Davis, pp. 74–75, Table 17.

protection to a substantial group of employees,[11] and we cannot say that it is not for a public purpose.

The end being legitimate, the means is for the legislature to choose. When public evils ensue from individual misfortunes or needs, the legislature may strike at the evil at its source. If the purpose is legitimate because public, it will not be defeated because the execution of it involves payments to individuals. *Kelly* v. *Pittsburgh, supra; Knights* v. *Jackson,* 260 U. S. 12, 15; cf. *Mountain Timber Co.* v. *Washington,* 243 U. S. 219, 239–240. "Individual interests are aided only as the common interest is safeguarded." See *Cochran* v. *Board of Education,* 281 U. S. 370, 375; cf. *Clark* v. *Nash,* 198 U. S. 361, 367; *Hairston* v. *Danville & Western Ry. Co.,* 208 U. S. 598, 608; *Noble State Bank* v. *Haskell,* 219 U. S. 104, 110.

(b) Extension of Benefits. The present scheme of unemployment relief is not subject to any constitutional infirmity, as respondents argue, because it is not limited to the indigent or because it is extended to some less deserving than others, such as those discharged for misconduct. While we may assume that the state could have limited its award of unemployment benefits to the indigent and to those who had not been rightfully discharged from their employment, it was not bound to do so. Pov-

[11] Appellees point to an estimate that, largely because of the large agricultural population, only 26.81% of those employed in Alabama as of October 14, 1936, were covered by the Act.

But it was estimated at the trial by Gist [formerly statistician of the Department of Agriculture, and since Feb. 1, 1936, economic adviser to the Commissioner of Agriculture of Alabama], that if in 1941 there should be a recurrence of unemployment "somewhat equivalent to the period we have just come through, and employment in the industrial groups under consideration should drop to, say 170,000 [approximately the number employed in 1932], we would find Alabama with something like 64,000 unemployed persons who would be entitled to the benefits of this Act."

erty is one, but not the only evil consequence of unemployment. Among the benefits sought by relief is the avoidance of destitution, and of the gathering cloud of evils which beset the worker, his family and the community after wages cease and before destitution begins. We are not unaware that industrial workers are not an affluent class, and we cannot say that a scheme for the award of unemployment benefits, to be made only after a substantial "waiting period" of unemployment, and then only to the extent of half wages and not more than $15 a week for at most 16 weeks a year, does not effect a public purpose, because it does not also set up an elaborate machinery for excluding those from its benefits who are not indigent. Moreover, the state could rightfully decide not to discourage thrift. *Mountain Timber Co.* v. *Washington, supra,* 240. And as the injurious effects of unemployment are not limited to the unemployed worker, there is scope for legislation to mitigate those effects, even though unemployment results from his discharge for cause.

(c) Restriction of Benefits. Appellees again challenge the tax by attacking as arbitrary the classification adopted by the legislature for the distribution of unemployment benefits. Only the employees of those subject to the tax share in the benefits. Appellees complain that the relief is withheld from many as deserving as those who receive benefits. The choice of beneficiaries, like the selection of the subjects of the tax, is thus said to be so arbitrary and discriminatory as to infringe the Fourteenth Amendment and deprive the statute of any public purpose.

What we have said as to the validity of the choice of the subjects of the tax is applicable in large measure to the choice of beneficiaries of the relief. In establishing a system of unemployment benefits the legislature is not bound to occupy the whole field. It may strike at the

evil where it is most felt, *Otis* v. *Parker,* 187 U. S. 606, 610; *Carroll* v. *Greenwich Insurance Co.,* 199 U. S. 401, 411; *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 81; *Central Lumber Co.* v. *South Dakota,* 226 U. S. 157, 160; *Rosenthal* v. *New York,* 226 U. S. 260, 270; *Patsone* v. *Pennsylvania,* 232 U. S. 138, 144; *Keokee Coke Co.* v. *Taylor,* 234 U. S. 224, 227; *Silver* v. *Silver,* 280 U. S. 117, 123; *Hardware Dealers Mutual Fire Ins. Co.* v. *Glidden Co.,* 284 U. S. 151, 159, or where it is most practicable to deal with it, *Dominion Hotel* v. *Arizona,* 249 U. S. 265, 268–269. It may exclude others whose need is less, *New York, N. H. & H. R. Co.* v. *New York,* 165 U. S. 628, 634; *St. Louis Consolidated Coal Co.* v. *Illinois,* 185 U. S. 203, 208; *Engel* v. *O'Malley,* 219 U. S. 128, 138; *N. Y. Central R. Co.* v. *White,* 243 U. S. 188, 208; *Radice* v. *New York,* 264 U. S. 292, 294; *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379, or whose effective aid is attended by inconvenience which is greater, *Dominion Hotel* v. *Arizona, supra; Atlantic Coast Line R. Co.* v. *State,* 135 Ga. 545, at 555–556; 69 S. E. 725, as affirmed and approved, *Atlantic Coast Line R. Co.* v. *Georgia,* 234 U. S. 280, 289.

As we cannot say that these considerations did not lead to the selection of the classes of employees entitled to unemployment benefits, and as a state of facts may reasonably be conceived which would support the selection, its constitutionality must be sustained. There is a basis, on grounds of administrative convenience and expense, for adopting a classification which would permit the use of records, kept by the taxpayer and open to the tax gatherer, as an aid to the administration of benefit awards, as is the case here, where the recipients of benefits are selected from the employees of those who pay the tax. Special complaint is made of the discrimination against those with only six co-workers, as contrasted with those who have more. We have already shown that a distinction in terms of the number of employees is not on its face in-

valid.[12] Here the legislative choice finds support in the conclusion reached by students of the problem,[13] that unemployment is less likely to occur in businesses having a small number of employees.

Third. Want of Relationship Between the Subjects and Benefits of the Tax. It is not a valid objection to the present tax, conforming in other respects to the Fourteenth Amendment, and devoted to a public purpose, that the benefits paid and the persons to whom they are paid are unrelated to the persons taxed and the amount of the tax which they pay—in short, that those who pay the tax may not have contributed to the unemployment and may not be benefited by the expenditure. Appellees' contention that the statute is arbitrary, in so far as it fails to distinguish between the employer with a low unemployment experience and the employer with a high unemployment experience, rests upon the misconception that there must be such a relationship between the subject of the tax (the exercise of the right to employ) and the evil to be met by the appropriation of the proceeds (unemployment). We have recently stated the applicable doctrine. "But if the tax, *qua* tax, be good, as we hold it is, and the purpose specified be one which would sustain a subsequent and separate appropriation made out of the general funds of the Treasury, neither is made invalid by being bound to the other in the same act of legislation." *Cincinnati Soap Co.* v. *United States, supra.* Nothing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct

[12] See *supra,* footnote 2.

[13] W. I. King, Employment Hours and Earnings in Prosperity and Depression; Hansen, Bjornaraa, and Sogge, Decline of employment in the 1930–1931 depression in St. Paul, Minneapolis and Duluth, U. of Minn., Employment Stabilization Research Institute, vol. 1, No. 5, p. 20–25.

benefit from its expenditure, and who are not responsible for the condition to be remedied.[14]

A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. See *Cincinnati Soap Co.* v. *United States, supra.* Any other view would preclude the levying of taxes except as they are used to compensate for the bur-

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[14] Cigarette and tobacco taxes are earmarked, in some states, for school funds and educational purposes, Ala. Acts 1927, No. 163, §§ 2 (j), (k); Acts 1932, No. 113, § 15; Ark. Acts 1933, Nos. 135, 140, § 2; Tenn. Code (1932), § 1242; Tex. Laws 1935, c. 241, § 3, and in Georgia for pensions for Confederate soldiers, Ga. Laws 1923, pp. 39, 41.

Liquor license fees and taxes are paid into old age pension funds, Colo. Laws 1933, Sp. Sess., c. 12, § 27; police pension funds, N. Y. Tax Law (1934) § 435, subds. 4, 4–a; and school funds, N. M. Laws 1933, c. 159, § 10 (b); Wis. Laws Sp. Sess. 1933–34, chs. 3, 14.

Chain store taxes are sometimes earmarked for school funds, Ala. Acts 1935, No. 194, § 348, schedule 155.9; Fla. Laws 1935, c. 16848, § 15; Idaho Laws 1933, c. 113, § 10.

License and pari-mutuel taxes in states authorizing horse racing are devoted to fairs and agricultural purposes, Cal. Stat. 1933, c. 769, § 13; Ill. Rev. Stat. (Cahill, 1933) c. 38, § 316 (6); Mich. Acts 1933, No. 199, § 10; to highway funds, Nev. Comp. Laws (Hillyer, 1929) § 6223; and to an old age pension fund in Washington, Laws 1933, c. 55, § 9.

Unemployment relief, though financed in most states by special bond issues, has in some instances been financed by Gasoline Taxes, Ohio Laws 1933, File No. 8, §§ 1, 2; File No. 28; Okla. Laws 1931, c. 66, article 10, §§ 2, 3; Sales Taxes, Ill. Laws 1933, pp. 924, 926; Mich. Acts 1933, No. 167, § 25 (b); Utah Laws 1933, c. 63, § 21; Income Taxes, Wis. Laws 1933, c. 363, § 2; Miscellaneous Excise Taxes, Ohio Gen. Code (Page Supp. 1935) § 6212–49 (beer); § 5543–2 (cosmetics); § 5544–2 (admissions); Utah Rev. Stat. § 46–0–47 (beer).

den on those who pay them, and would involve the abandonment of the most fundamental principle of government—that it exists primarily to provide for the common good. A corporation cannot object to the use of the taxes which it pays for the maintenance of schools because it has no children. *Thomas* v. *Gay,* 169 U. S. 264, 280. This Court has repudiated the suggestion, whenever made, that the Constitution requires the benefits derived from the expenditure of public moneys to be apportioned to the burdens of the taxpayer, or that he can resist the payment of the tax because it is not expended for purposes which are peculiarly beneficial to him.[15] *Cincinnati Soap Co.* v. *United States, supra; Carley & Hamilton* v. *Snook, supra,* 72; *Nashville, C. & St. L. Ry. Co.* v. *Wallace,* 288 U. S. 249, 268; see *Union Refrigerator Transit Co.* v. *Kentucky,* 199 U. S. 194, 203.

Even if a legislature should undertake, what the Constitution does not require, to place the burden of a tax for unemployment benefits upon those who cause or contribute to unemployment, it might conclude that the burden cannot justly be apportioned among employers

[15] Similarly, special taxing districts for the maintenance of roads or public improvements within the district have been sustained, without proof of the nature or amount of special benefits. See *St. Louis & S. W. Ry. Co.* v. *Nattin,* 277 U. S. 157, 159; *Memphis & C. Ry. Co.* v. *Pace,* 282 U. S. 241, 248, 249; cf. *Missouri Pacific R. Co.* v. *Road District,* 266 U. S. 187. A different question is presented when a state undertakes to levy local assessments apportioned to local benefits. In that case, if it fails to conform to the standard of apportionment adopted, its action is arbitrary, see *Georgia Ry. & Elec. Co.* v. *Decatur,* 295 U. S. 165, 170, because there is a denial of equal protection. *Road Improvement District* v. *Missouri Pacific R. Co.,* 274 U. S. 188, 191–194; cf. *Georgia Ry. & Elec. Co.* v. *Decatur,* 297 U. S. 620. But if the assessment is apportioned to benefits it is not constitutionally defective because the assessment exceeds the benefits. *Roberts* v. *Richland Irrigation District,* 289 U. S. 71, 75.

according to their unemployment experience. Unemployment in the plant of one employer may be due to competition with another, within or without the state, whose factory is running to capacity; or to tariffs, inventions, changes in fashions or in market or business conditions, for which no employer is responsible, but which may stimulate the business of one and impair or even destroy that of another. Many believe that the responsibility for the business cycle, the chief cause of unemployment, cannot be apportioned to individual employers in accordance with their employment experience; that a business may be least responsible for the depression from which it suffers the most.

The Alabama legislature may have proceeded upon the view, for which there is abundant authority, that the causes of unemployment are too complex to admit of a meticulous appraisal of employer responsibility.[16] It may have concluded that unemployment is an inseparable incident of modern industry, with its most serious manifestations in industrial production; that employees will be best protected, and that the cost of the remedy, at least until more accurate and complete data are available, may best be distributed, by imposing the tax evenly upon all industrial production,[17] and in such form that it will be

[16] Report of President Hoover's Committee on Recent Social Trends (1933) 807 ff; J. M. Clark, Economics of Overhead Costs (1929) pp. 366–367; Douglas, Hitchcock, and Atkins, The Worker in Modern Economic Society (1925) p. 491 *et seq.;* Beveridge, Unemployment, a Problem of Industry (1930) pp. 100–103; W. C. Mitchell, Business Cycles; the problem and its setting (1927) pp. 87, 210, 238.

[17] See E. M. Burns, Toward Social Security (1936) pp. 70–73; P. Douglas, Social Security in the United States (1936) pp. 253–355; A. Epstein, Insecurity—A Challenge to America (3d ed. 1936) pp. 311–312, 317; Hansen, Murray, Stevenson, and Stewart, A Program for Unemployment Insurance and Relief in the United States (1934) pp. 16, 65–73.

added to labor costs which are ultimately absorbed by the public in the prices which it pays for consumable goods.

If the question were ours to decide, we could not say that the legislature, in adopting the present scheme rather than another, had no basis for its choice, or was arbitrary or unreasonable in its action. But, as the state is free to distribute the burden of a tax without regard to the particular purpose for which it is to be used, there is no warrant in the Constitution for setting the tax aside because a court thinks that it could have drawn a better statute or could have distributed the burden more wisely. Those are functions reserved for the legislature.

Since the appellees may not complain if the expenditure has no relation to the taxed class of which they are members, they obviously may not complain because the expenditure has *some* relation to that class, that those benefited are employees of those taxed; or because the legislature has adopted the expedient of spreading the burden of the tax to the consuming public by imposing it upon those who make and sell commodities. It is irrelevant to the permissible exercise of the power to tax that some pay the tax who have not occasioned its expenditure, or that in the course of the use of its proceeds for a public purpose the legislature has benefited individuals, who may or may not be related to those who are taxed.

Relationship of the State and Federal Statutes.

There remain for consideration the contentions that the state act is invalid because its enactment was coerced by the adoption of the Social Security Act, and that it involves an unconstitutional surrender of state power. Even though it be assumed that the exercise of a sovereign power by a state, in other respects valid, may be rendered invalid because of the coercive effect of a federal statute enacted in the exercise of a power granted to the national government, such coercion is lacking here.

It is unnecessary to repeat now those considerations which have led to our decision in the *Chas. C. Steward Machine Co.* case, that the Social Security Act has no such coercive effect. As the Social Security Act is not coercive in its operation, the Unemployment Compensation Act cannot be set aside as an unconstitutional product of coercion. The United States and the State of Alabama are not alien governments. They coexist within the same territory. Unemployment within it is their common concern. Together the two statutes now before us embody a coöperative legislative effort by state and national governments, for carrying out a public purpose common to both, which neither could fully achieve without the coöperation of the other. The Constitution does not prohibit such coöperation.

As the state legislation is not the product of a prohibited coercion, there is little else to which appellees can point as indicating a surrender of state sovereignty. As the opinion in the *Chas. C. Steward Machine Co.* case points out, full liberty of action is secured to the state by both statutes. The unemployment compensation fund is administered in accordance with state law by the state commission. The statute may be repealed at the will of the legislature, and in that case the state will be free to withdraw at any time its unexpended share of the Unemployment Trust Fund from the treasury of the United States, and to use it for any public purpose. And, for the reasons stated in the opinion in the *Chas. C. Steward Machine Co.* case, we conclude that the deposit by the state of its compensation fund in the Unemployment Trust Fund involves no more of a surrender of sovereignty than does the choice of any other depository for state funds. The power to contract and the power to select appropriate agencies and instrumentalities for the execution of state policy are attributes of state sovereignty. They are not lost by their exercise.

Many other arguments are pressed upon us. They require no discussion save as their answer is implicit in what we have said. The state compensation act, on its face, and as applied to appellees, is subject to no constitutional infirmity, and the decree below is

Reversed.

MR. JUSTICE MCREYNOLDS thinks that the decree should be affirmed.

MR. JUSTICE SUTHERLAND, dissenting.

The objective sought by the Alabama statute here in question, namely, the relief of unemployment, I do not doubt is one within the constitutional power of the state. But it is an objective which must be attained by legislation which does not violate the due process or the equal-protection clause of the Fourteenth Amendment. This statute, in my opinion, does both, although it would have been a comparatively simple matter for the legislature to avoid both.

The statute lays a payroll tax upon employers, the proceeds of which go into a common fund to be distributed for the relief of such ex-employees, coming within the provisions of the statute, as shall have lost their employment in any of a designated variety of industries within the state. Some of these employers are engaged in industries where work continues the year round. Others are engaged in seasonal occupations, where the work is discontinued for a part of the year. Some of the employers are engaged in industries where the number of men employed remains stable, or fairly so, while others are engaged in industries where the number of the men employed fluctuates greatly from time to time. Plainly, a disproportionately heavy burden will be imposed by the tax upon those whose operations contribute *least* to the evils of unemployment, and, correspondingly,

the burden will be lessened in respect of those whose operations contribute *most*.

An example will make this clear. Let us suppose that A, an employer of a thousand men, has retained all of his employees. B, an employer of a thousand men, has discharged half of his employees. The tax is upon the payroll of each. A, who has not discharged a single workman, is taxed upon his payroll twice as much as B, although the operation of B's establishment has contributed enormously to the evil of unemployment while that of A has contributed nothing at all. It thus results that the employer who has kept all his men at work pays twice as much toward the relief of the employees discharged by B as B himself pays. Moreover, when we consider the large number and the many kinds of industries, their differing characteristics and the varied circumstances by which their operations are conditioned, the gross unfairness of this unequal burden of the tax becomes plain beyond peradventure. It is the same unfairness, in an aggravated form, as that which we so recently condemned as fatally arbitrary in *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330. That case dealt with a federal statute which established a pension plan requiring payments to be made by all interstate railroad carriers into a pooled fund to be used for the payment of annuities indiscriminately to railroad employees, of whatever company, when they had reached the age of 65 years. This court, because of this pooling feature, among other things, held the act to be bad. We said (p. 357)—

"This court has repeatedly had occasion to say that the railroads, though their property be dedicated to the public use, remain the private property of their owners, and that their assets may not be taken without just compensation. The carriers have not ceased to be privately operated and privately owned, however much subject to

regulation in the interest of interstate commerce. There is no warrant for taking the property or money of one and transferring it to another without compensation, whether the object of the transfer be to build up the equipment of the transferee or to pension its employees. . . . The argument is that since the railroads and the public have a common interest in the efficient performance of the whole transportation chain, it is proper and necessary to require all carriers to contribute to the cost of a plan designed to serve this end. It is said that the pooling principle is desirable because there are many small carriers whose employees are too few to justify maintenance of a separate retirement plan for each." In support of that view, several cases had been cited. Those cases were reviewed and distinguished, and we concluded, p. 360, "that the provisions of the Act which disregard the private and separate ownership of the several respondents, treat them all as a single employer, and pool all their assets regardless of their individual obligations and the varying conditions found in their respective enterprises, cannot be justified as consistent with due process."

Cases which are relied upon here to sustain the Alabama statute were relied upon there to sustain the Retirement Act, *Mountain Timber Co.* v. *Washington,* 243 U. S. 219, among others. That case dealt with the State of Washington workmen's compensation act, requiring designated payments to be made by employers into a state fund for compensating injured workmen. But we pointed out (295 U. S. 359) that although the payments were made into a common fund, accounts were to be kept with each industry in accordance with the classification, and no class was to be liable for the depletion of the fund by reason of accidents happening in another class. And we said, "The Railroad Retirement Act, on the contrary, makes no classification, but, as above said, treats all the carriers as a single employer, irrespective of their several conditions."

If the Alabama act had followed the plan of the Washington act in respect of classification, we should have a very different question to consider. The vice of the Alabama act is precisely that which was condemned in the *Railroad Retirement Board* case. Indeed, the vice is more pronounced, since the federal act, relating as it did to railroads only, dealt with a homogeneous group of employers, while the Alabama act seeks to impose the character of "a single employer" upon a large number of employers severally engaged in entirely dissimilar industries.

It must be borne in mind that we are not dealing with a general tax, the proceeds of which are to be appropriated for any public purpose which the legislature thereafter may select, but with a tax expressly levied for a specified purpose. The tax and the use of the tax are inseparably united; and if the proposed use contravenes the Constitution, it necessarily follows that the tax does the same. *Cincinnati Soap Co.* v. *United States, ante,* pp. 308, 313.

Other states have not found it impossible to adjust their unemployment laws to meet the constitutional difficulties thus presented by the Alabama act. The pioneer among these states is Wisconsin. That state provides (Act of January 29, 1932, c. 20, Laws of Wis., Spec. Sess., 1931, p. 57, as amended) that while the proceeds of the tax shall be paid into a common fund, an account shall be kept with each individual employer, to which account his payments are to be credited and against which only the amounts paid to his former employees are to be charged. If he maintains his roll of employees intact, he will be charged nothing, and in any event only to the extent that his employment roll is diminished. When his tax contributions have reached a certain percentage of his payroll, the amount of his tax is reduced, and when they reach 10%, the tax is discontinued as long as that percentage remains. The result is that each employer

bears his own burdens, and not those of his competitor or of other employers. The difference between the Wisconsin and the Alabama acts is thus succinctly stated by the Social Security Board in its Informational Service Circular No. 5, issued November, 1936, pp. 8-9:

"(1) The plan for individual employer accounts provides for employer-reserve accounts in the State fund. Each employer's contributions are credited to his separate account, and benefits are paid from his account only to his former employees. If he is able to build up a specified reserve in his account, his contribution rate is reduced."

Such is the Wisconsin plan; while under the Alabama statute—

"(2) The pooled-fund plan provides for a pooling of all contributions in a single undivided fund from which benefits are paid to eligible employees, irrespective of their former employers."

Which of these plans is more advantageous from a purely economic standpoint does not present a judicial question. But from the constitutional point of view, in so far as it involves the ground upon which I think the Alabama act should be condemned, I entertain no doubt that the Wisconsin plan is so fair, reasonable and just as to make plain its constitutional validity; and that the Alabama statute, like the New York statute involved in *Chamberlin, Inc.* v. *Andrews,* 299 U. S. 515, affirmed by an equally-divided court during the present term, is so arbitrary as to result in a denial both of due process and equal protection of the laws.

I am authorized to say that MR. JUSTICE VAN DEVANTER and MR. JUSTICE BUTLER concur in this opinion.

STONE ET AL., TRUSTEES, *v.* WHITE, FORMER COLLECTOR OF INTERNAL REVENUE.

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

No. 202 (October Term, 1935). Argued April 29, 1937.—Decided May 24, 1937.

1. A statutory action for a refund of taxes erroneously collected is in the nature of a common law action for money had and received and like it is governed by equitable principles. P. 534.
2. Where the income from a trust, belonging to the sole beneficiary, was erroneously taxed to and collected from the trustees when it should have been taxed to the beneficiary, in an action by the trustees for a refund the collector may set up in defense that the Government has the right to retain the money, by way of equitable recoupment, although collection from the beneficiary is barred by the statute of limitations. P. 535.
3. Sections 275 (a), 607 and 609, Revenue Act, 1928, limit the collection of a tax, and prevent the retention of one paid after it is barred by the statute. They preclude, in a suit by the taxpayer against the collector or the Government, reliance on a claim against the taxpayer, barred by statute, as a set-off or counterclaim; but they do not deprive the Government of defenses based on special equities establishing its right to withhold a refund from the demanding taxpayer. P. 538.

78 F. (2d) 136, affirmed.

CERTIORARI, 300 U. S. 643, to review the reversal of a recovery by the present petitioners in their action against the Collector of Internal Revenue.

Mr. Thomas Allen for petitioners.

Mr. J. P. Jackson, with whom *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *F. A. LeSourd* were on the brief, for respondent.

By leave of Court, *Mr. J. M. Richardson Lyeth* filed a brief, as *amicus curiae,* urging reversal of the judgment below.

MR. JUSTICE STONE delivered the opinion of the Court.

The question for decision is whether the petitioners, testamentary trustees, who have paid a tax on the income of the trust estate, which should have been paid by the beneficiary, are entitled to recover the tax, although the government's claim against the beneficiary has been barred by the statute of limitations. The present suit to recover the tax, brought by petitioners against respondent, the Collector, in the District Court for Massachusetts, resulted in a judgment for petitioners, 8 F. Supp. 354, which was reversed by the Court of Appeals for the First Circuit, 78 F. (2d) 136. We granted certiorari because of the conflict of the decision below with that of the Court of Appeals for the Third Circuit, *United States* v. *Arnold,* 89 F. (2d) 246.

Testator, by his will, left property in trust, to pay over the net income to his wife as sole beneficiary, at such times and in such amounts as she should deem best, during her natural life. She elected to take the bequest under the will in lieu of her dower or statutory interest. At that time several circuit courts of appeals had held that in these circumstances, the income payments to the widow are annuities purchased by surrender of the dower interest and not taxable as income to her, until they equal the value of the dower interest. *Warner* v. *Walsh,* 15 F. (2d) 367; *United States* v. *Bolster,* 26 F. (2d) 760; *Allen* v. *Brandeis,* 29 F. (2d) 363. In conformity to the ruling of these decisions, the beneficiary did not include, in her 1928 tax return, any portion of the income received by her from the trust. A deficiency against the trustees was assessed by the Commissioner before, and was paid by them, under protest, from income of the trust, after collection from the beneficiary had been barred by the statute of limitations. After the statute had run, this Court held in *Helvering* v. *Butterworth,* 290 U. S. 365 (interpreting § 219, Revenue Act of 1924, c. 234, 43 Stat.

253, 275, corresponding to §§ 161, 162 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 838, under which the present tax was assessed) that the income was taxable to the beneficiary and not to the trustees.

In the present suit, brought by the trustees to recover the tax as erroneously collected, the Collector interposed the defense, sustained by the court below, that the tax which should have been paid by the beneficiary exceeded that paid by petitioners, and that, as any recovery would inure to the advantage of the beneficiary, the defendant could set off the tax debt due from her. One judge concurred, denying the right of set off in view of the bar of the statute, but holding the petitioners not entitled, in equity and good conscience, to recover.

The action, brought to recover a tax erroneously paid, although an action at law, is equitable in its function. It is the lineal successor of the common count in *indebitatus assumpsit* for money had and received. Originally an action for the recovery of debt, favored because more convenient and flexible than the common law action of debt, it has been gradually expanded as a medium for recovery upon every form of quasi-contractual obligation in which the duty to pay money is imposed by law, independently of contract, express or implied in fact. Ames, The History of Assumpsit, 2 Harv. L. Rev. 53; Woodward, Law of Quasi-Contracts, § 2.

Its use to recover upon rights equitable in nature to avoid unjust enrichment by the defendant at the expense of the plaintiff, and its control in every case by equitable principles, established by Lord Mansfield in *Moses* v. *Macferlan,* 2 Burr. 1005 (K. B. 1750), have long been recognized in this Court. See *Nash* v. *Towne,* 5 Wall. 689, 702; *Gaines* v. *Miller,* 111 U. S. 395, 397; *Atlantic Coast Line R. Co.* v. *Florida,* 295 U. S. 301, 309. It is an appropriate remedy for the recovery of taxes erroneously collected, *Elliott* v. *Swartwout,* 10 Pet. 137, 156; *Cary* v.

Curtis, 3 How. 236, 246–250. The statutes authorizing tax refunds and suits for their recovery are predicated upon the same equitable principles that underlie an action in assumpsit for money had and received. *United States* v. *Jefferson Electric Co.,* 291 U. S. 386, 402. Since, in this type of action, the plaintiff must recover by virtue of a right measured by equitable standards, it follows that it is open to the defendant to show any state of facts which, according to those standards, would deny the right, *Moses* v. *Macferlan, supra,* at 1010; *Myers* v. *Hurley Motor Co.,* 273 U. S. 18, 24; cf. *Winchester* v. *Hackley,* 2 Cranch 342, even without resort to the modern statutory authority for pleading equitable defenses in actions which are more strictly legal, Jud. Code, § 274b; 28 U. S. C. § 398.

In the present case it is evident that but a single tax was due upon the particular income assessed and that petitioners' demand arises from the circumstance that the tax was paid from the income by the trustees when it should have been paid by the beneficiary. If the court may have regard to the fact that so far as the equitable rights of the parties are concerned petitioners, in seeking recovery of the tax, are acting for the account of the beneficiary, it would seem clear that the case is not one in which the petitioners are entitled to recover *ex aequo et bono;* for under the construction of the will by the court below, which we adopt, any recovery in this action will be income to the beneficiary, and will deprive the government of a tax to which it is justly entitled and enable the beneficiary to escape a tax which she should have paid.

It is said that as the revenue laws treat the trustee and the beneficiary as distinct tax-paying entities, a court of equity must shut its eyes to the fact that in the realm of reality it was the beneficiary's money which paid the tax and it is her money which the petitioners ask the government to return. Formerly, trustee and *cestui que trust*

were likewise distinct in the eyes of the law, as they are today for many purposes. But whenever the trustee brings suit in a court which is free to consider equitable rights and duties, his right to maintain the suit may be enlarged or diminished by reference to the fact that the suit, though maintained in the name of the trustee alone, is for the benefit and in the equitable interest of the *cestui.*

He can sue to set aside his own voluntary conveyance and impeach it as a breach of trust known to the transferee, because the action, brought to recover property for the trust estate, will inure to the advantage of the innocent beneficiary. *Wetmore* v. *Porter,* 92 N. Y. 76; *Zimmerman* v. *Kinkle,* 108 N. Y. 282, 15 N. E. 407; *Atwood* v. *Lester,* 20 R. I. 660, 665, particularly at 669; 40 Atl. 866, 868, 870; *Franco* v. *Franco,* 3 Ves. Jr. 75; American Law Institute, Restatement of the Law of Trusts, § 294.[1] His suit to recover a debt due him as trustee, and payable by him over to the *cestui,* is subject to the equitable defense that the *cestui* has discharged the claim, *McBride* v. *Wright,* 46 Mich. 265 (Cooley, J.); 9 N. W. 275; *Smith* v. *Brown,* 5 Rich. Eq. (S. C.) 291; American Law Institute, Restatement of the Law of Trusts, § 328. That the *cestui* owes a like amount can be shown by way of equitable plea in set-off, *Campbell* v. *Hamilton,* Fed. Cas. No. 2,359; *Waddle* v. *Harbeck,* 33 Ind. 231, 234; *Ward* v. *Martin,* 3 T. B. Mon. (19 Ky.) 18; *Driggs* v. *Rockwell,* 11 Wend. (N. Y.) 504, 508; *Wolf* v. *Beales,*

[1] It has been held that in such a suit equity will not permit the grantee to set up the statute of limitations ordinarily applicable to a suit by the trustee if the trustee can show that the beneficiary, because of ignorance of the breach of trust or because of disability, would not have been barred by laches had he brought suit directly. *Bridgman* v. *Gill,* 24 Beav. 302; *Duckett* v. *Mechanics Bank,* 86 Md. 400, 411; 38 Atl. 983.

6 Serg. & R. (Pa.) 242, 243; *Agra & Masterman's Bank* v. *Leighton,* L. R. 2 Ex. 56, 65; American Law Institute, Restatement of the Law of Trusts, § 329. In an action in general assumpsit, this defense may be shown under the plea of non-assumpsit, compare *Winchester* v. *Hackley, supra.*

In such cases equity does not countenance the idle ceremony of allowing recovery by the trustee only to compel him to account to the beneficiary who would then have to pay the proceeds to the original defendant. To avoid this circuity of action a court of equity takes cognizance of the identity in interest of trustee and *cestui que trust.* Likewise here, the fact that the petitioners and their beneficiary must be regarded as distinct legal entities for purposes of the assessment and collection of taxes does not deprive the court of its equity powers or alter the equitable principles which govern the type of action which petitioners have chosen for the assertion of their claim.

Equitable conceptions of justice compel the conclusion that the retention of the tax money would not result in any unjust enrichment of the government. All agree that a tax on the income should be paid, and that if the trustees are permitted to recover no one will pay it. It is in the public interest that no one should be permitted to avoid his just share of the tax burden except by positive command of law, which is lacking here. No injustice is done to the trustees or the beneficiary by withholding from the trustees money which in equity is the beneficiary's, and which the government received in payment of a tax which was hers to pay. A single error on the part of the taxing authorities, excusable in view of persistent judicial declarations, has caused both the underassessment of one taxpayer and the overassessment of the other. But the error has not increased the tax burden of either, for whether the tax is paid by one or the other,

its source is the fund which should pay the tax, and only the equitable owner of the fund is ultimately burdened. Cf. *United States Paper Assn.* v. *Bowers,* 80 F. (2d) 82. Since in equity the one taxpayer represents and acts for the other, it is not for either to complain that the government has taken from one with its right hand, when it has, because of the same error, given to the other with its left.

Petitioners contend that recovery is precluded by § 275 (a) of the Revenue Act of 1928, which bars a "proceeding in court . . . for the collection" of a tax after the prescribed period, and by §§ 607, 609, which are said to prohibit "credit of an overpayment against a barred deficiency." Section 607 provides that any tax assessed or paid after the expiration of the period of limitation shall be considered an overpayment, and § 609 declares that a credit against a liability, in respect of any taxable year, shall be void "if any payment in respect of such liability would be considered an overpayment under section 607."

These provisions limit the collection of a tax, and prevent the retention of one paid after it is barred by the statute. They preclude, in a suit by the taxpayer against the collector or the government, reliance on a claim against the taxpayer, barred by statute, as a set-off, or counterclaim. But the demand made upon the trustees was not barred by limitation and it would be an unreasonable construction of the statute, not called for by its words, to hold that it is intended to deprive the government of defenses based on special equities establishing its right to withhold a refund from the demanding taxpayer. The statute does not override a defense based on the estoppel of the taxpayer. *R. H. Stearns Co.* v. *United States,* 291 U. S. 54, 61, 62. The statutory bar to the right of action for the collection of the tax does not prevent reliance upon a defense which is not a set-off or a counterclaim, but is an equitable reason, growing out of

the circumstances of the erroneous payment, why petitioners ought not to recover.

Here the defense is not a counter demand on petitioners, but a denial of their equitable right to undo a payment which, though effected by an erroneous procedure, has resulted in no unjust enrichment to the government, and in no injury to petitioners or their beneficiary. The government, by retaining the tax paid by the trustees, is not reviving a stale claim. Its defense, which inheres in the cause of action, is comparable to an equitable recoupment or diminution of petitioners' right to recover. "Such a defense is never barred by the statute of limitations so long as the main action itself is timely." *Bull* v. *United States,* 295 U. S. 247, 262; *Williams* v. *Neely,* 134 Fed. 1, 13.[2] Compare *United States* v. *Macdaniel,* 7 Pet. 1, 16, 17; *United States* v. *Ringgold,* 8 Pet. 150, 163, 164, where equitable recoupment against a claim by the government was allowed notwithstanding the immunity of the government from suit.

Affirmed.

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

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[2] " . . . admitting that the statute applies strictly to matters of set-off and counterclaim . . . still, as is well known, it does not affect the merits of the controversy." *Aultman & Taylor Co.* v. *Meade,* 121 Ky. 241, 247; 89 S. W. 137. Accord: *Hart* v. *Church,* 126 Cal. 471, 479; 58 Pac. 910; *Wilhite* v. *Hamrick,* 92 Ind. 594, 599; *Butler* v. *Carpenter,* 163 Mo. 597, 604; 63 S. W. 823; *Evans* v. *Yongue,* 8 Rich. Law (S. C.) 113; *State* v. *Tanner,* 45 Wash. 348; 88 Pac. 321.

REPORTER'S NOTE.—The opinion of the Court in the foregoing case is printed as amended by Order of October 11, 1937.

UNITED STATES EX REL. GIRARD TRUST CO., TRUSTEE, *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE.

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

No. 285. Argued April 29, 1937.—Decided May 24, 1937.

1. The Board of Tax Appeals has no jurisdiction to order a refund or credit of tax overpayments; its jurisdiction is limited to the determination of the amount of deficiency or overpayment. P. 542.
2. In a suit for a tax refund, the Commissioner may secure a final adjudication of his right to withhold the overpayment, determined by the Board of Tax Appeals, on the ground that other taxes are due from the taxpayer, or that the taxpayer is not equitably entitled to a refund. Pp. 542–543.
3. Mandamus will not lie where the right of the petitioner is not clear, and the duty of the officer, performance of which is to be commanded, is not plainly defined and peremptory. P. 543.
4. Mandamus will not lie to compel the Commissioner of Internal Revenue to refund taxes, paid by a testamentary trustee on income of the trust, when the amount refunded would inure to the benefit of the *cestui que trust*, who should have paid the tax, now barred by the statute of limitations. The case is one for an ordinary action for refund. Pp. 543–544.

66 App. D. C. 64; 85 F. (2d) 230, affirmed.

CERTIORARI, 300 U. S. 643, to review the affirmance of a judgment dismissing a petition for mandamus.

Mr. H. Cecil Kilpatrick, with whom *Mr. Charles Myers* was on the brief, for petitioner.

Mr. J. P. Jackson, with whom *Solicitor General Reed*, *Assistant Attorney General Morris*, and *Messrs. Sewall Key* and *F. A. LeSourd* were on the brief, for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

In this case we are asked to determine whether mandamus is the proper remedy to compel the Commissioner

of Internal Revenue to refund taxes, paid by a testamentary trustee on income of the trust when the amount refunded would inure to the benefit of the *cestui que trust,* who should have paid the tax, now barred by the statute of limitations.

The testator by his will created a trust to pay over net income to his widow during her life. She elected to take under the will in lieu of the interest otherwise allowed by Pennsylvania law. The refund demanded is for taxes assessed against petitioner, the trustee, and paid by it upon the net income paid over to the beneficiary for the years 1924 to 1926, inclusive, and for the year 1928.

As a result of deficiency proceedings the Board of Tax Appeals has entered final orders determining that the amounts paid by the trustee as taxes for those years are overpayments. The beneficiary paid taxes on the income paid over to her by the trustee for the years 1924 to 1927 inclusive, but these were afterward refunded to her in recognition of the rule then followed by several courts of appeals that in these circumstances the income payments to the widow are annuities purchased by her surrender of her dower interest which are not taxable as income to her, until they equal the value of the dower interest. *Warner* v. *Walsh,* 15 F. (2d) 367; *United States* v. *Bolster,* 26 F. (2d) 760; *Allen* v. *Brandeis,* 29 F. (2d) 363. See *Stone* v. *White,* decided this day, *ante,* p. 532. She paid no tax on the income for the year 1928.

By our decision in *Helvering* v. *Butterworth,* 290 U. S. 365, it was established that the income paid over to the widow is taxable to her and not to the trustee, and in consequence that the tax, which in this case should have been paid by the beneficiary, had been erroneously collected from the trustee. It appears that the total amount of the taxes which the beneficiary should have paid exceeds the amount of the refund demanded of the Commissioner, and that the refund, if allowed, will become a part of the income of the beneficiary.

The present petition for mandamus to compel respondent, the Commissioner of Internal Revenue, to refund to petitioner the taxes erroneously collected, was dismissed by the Supreme Court of the District. The Court of Appeals affirmed, holding that the petitioner was not equitably entitled to the refund which, if allowed, would inure to the benefit of the widow, whose liability for the tax is barred by the statute of limitations. 66 App. D. C. 64; 85 F. (2d) 230. We granted certiorari, the questions decided by the Court of Appeals being cognate to those considered in *Stone* v. *White, supra.*

The government, while supporting the decision of the court below on the merits, insists that the case is not a proper one for the use of the extraordinary writ of mandamus, and that the suit should have been dismissed on that ground. The petition for mandamus is predicated upon the determination of the Board of Tax Appeals that petitioner has made overpayments of taxes for the specified years. The Board has not ordered a refund. It could not rightly do so, for its jurisdiction is limited to the determination of the amount of deficiency or overpayment, Revenue Act of 1928, §§ 272, 322 (d), 507, upon the petition of the taxpayer to review a deficiency assessment by the Commissioner. The Board is without authority to order a refund or a credit, although its decision is *res adjudicata* as to the questions involved in the computation and assessment of taxes for which a deficiency is claimed. Cf. *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716, 726–727. When the determination of overpayment by the Board becomes final, the statute provides that such amounts shall be refunded or credited, § 322 (d), and upon the Commissioner's failure to comply with the statute, a plenary suit will lie in the district court or the Court of Claims, for the recovery of any refund to which he is entitled. See *National Fire Insurance Co.* v. *United States,* 52 F. (2d) 1011, 1013–1014; *James* v. *United States,* 38 F. (2d) 140, 143; *Ohio Steel Foundry Co.* v.

United States, 38 F. (2d) 144, 148–149. And in such a suit the Commissioner may secure a final adjudication of his right to withhold the overpayment determined by the Board, on the ground that other taxes are due from the taxpayer, or that upon other grounds he is not equitably entitled to the refund. See *Stone* v. *White, supra; Welch* v. *Obispo Oil Co., ante,* p. 190; *Lewis* v. *Reynolds,* 284 U. S. 281; *Crocker* v. *Malley,* 249 U. S. 223.

In view of what we have just decided in *Stone* v. *White, supra,* it is evident that in the circumstances of this case there is no clear duty of the Commissioner to refund the tax without securing a final adjudication of the government's right to retain it, as he may do by interposing an appropriate defense in a suit for the refund. Where the right of the petitioner is not clear, and the duty of the officer, performance of which is to be commanded, is not plainly defined and peremptory, mandamus is not an appropriate remedy. *U. S. ex rel. Great Western R. Co.* v. *Interstate Commerce Comm'n,* 294 U. S. 50, 61; *U. S. ex rel. McLennan* v. *Wilbur,* 283 U. S. 414, 419–420; *Wilbur* v. *U. S. ex rel. Kadrie,* 281 U. S. 206, 218–219; *Interstate Commerce Comm'n* v. *New York, N. H. & H. R. Co.,* 287 U. S. 178, 203; *U. S. ex rel. Redfield* v. *Windom,* 137 U. S. 636, 644. The officer must be left free, in the performance of official duty, to decide whether he will perform the act demanded or secure by appropriate procedure a judicial determination of the extent of his duty. His decision "is regarded as involving the character of judgment or discretion," the exercise of which will not be compelled by mandamus. *Wilbur* v. *U. S. ex rel. Kadrie, supra,* 219. *U. S. ex rel. Hall* v. *Payne,* 254 U. S. 343, 347; *U. S. ex rel. Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316, 324, 325; *Interstate Commerce Comm'n* v. *New York, N. H. & H. R. Co., supra.*

It is true that the right to a writ of mandamus may turn on equitable considerations, as the court below held.

U. S. ex rel. Greathouse v. *Dern,* 289 U. S. 352. But to try petitioner's equitable right to the refund here is to make the writ of mandamus serve the purpose of an ordinary suit and to depart from the settled rule that the writ of mandamus may not be employed to secure the adjudication of a disputed right for which an ordinary suit affords a remedy equally adequate, and complete. See *Ex parte Baldwin,* 291 U. S. 610, 619; *Reeside* v. *Walker,* 11 How. 272, 292; *United States* v. *Duell,* 172 U. S. 576, 582.

As we conclude that the issue is not one which should be adjudicated in a proceeding for mandamus it is unnecessary to consider the merits and the judgment will be affirmed without prejudice to any other appropriate proceeding for the refund of the tax.

Affirmed.

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

MANTLE LAMP CO. *v.* ALUMINUM PRODUCTS CO.

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

No. 765. Argued May 3, 1937.—Decided May 24, 1937.

Patent No. 1,435,199, to Blair, Claim 1, for "A heat-insulated vessel of the non-vacuum type having an outer jacket of non-frangible material, an inner container of frangible material, said inner container being bonded to and pendently supported from said jacket, and heat-insulating and shock-absorbing means surrounding said container for limiting oscillations of said container while permitting expansion thereof by changes of temperature," is void for want of invention. P. 546.

86 F. (2d) 509, affirmed.

CERTIORARI, 300 U. S. 651, to review the affirmance of a decree dismissing a bill in a suit for infringement of a patent.

Mr. George I. Haight, with whom *Messrs. W. H. F. Millar* and *M. K. Hobbs* were on the brief, for petitioner.

Mr. William N. Cromwell for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This is a suit for infringement of Claims 1, 3 to 14, inclusive, 17, 18, and 21 to 24, inclusive, of the Blair Patent No. 1,435,199 for a heat-insulated receptacle. The District Court held all of the claims invalid by reason of lack of invention, prior invention, anticipation, as being for an aggregation and as involving only mechanical skill. That court further limited the claims to the particular structure disclosed in the application, and, so limited, held them not infringed. It also found that unreasonable delay in filing disclaimers voided all the claims. The Circuit Court of Appeals affirmed a decree dismissing the bill.[1] We granted certiorari because of a conflict of decision.

In 1927 the Circuit Court of Appeals for the Seventh Circuit held all of the claims here in suit, except Claim 3, bad for want of invention.[2] In 1931 the Circuit Court of Appeals for the Sixth Circuit held Claim 1 valid and infringed "without prejudice to any rights of the plaintiff under any other claim." [3] Inasmuch as the conflict is limited to Claim 1 we restrict our consideration to that claim. The claim is:

"A heat-insulated vessel of the non-vacuum type having an outer jacket of non-frangible material, an inner container of frangible material, said inner container being bonded to and pendently supported from said jacket, and heat-insulating and shock-absorbing means surrounding said container for limiting oscillations of said container

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[1] 86 F. (2d) 509.

[2] *Macomb Mfg. Co.* v. *Mantle Lamp Co.*, 22 F. (2d) 93; *Monarch Co.* v. *Mantle Lamp Co.*, 22 F. (2d) 95.

[3] *Mantle Lamp Co.* v. *George H. Bowman Co.*, 53 F. (2d) 441.

while permitting expansion thereof by changes of temperature."

Over thirty years ago containers for keeping their contents hot or cold by the use of a vacuum came into general use. It was found impractical to make such containers of a capacity in excess of one quart or perhaps two quarts. For some years thereafter there were no satisfactory insulated containers of larger size. In 1919 Blair filed application for a patent for a heat insulated receptacle of the non-vacuum type, his object being economically to produce relatively large receptacles which would be sanitary and easy to clean, to improve their insulation, to minimize the transmission of shocks to the inner container which was of glass or other fragile substance. As disclosed by the claim in question he proposed to make a jug or pail-like container the outer jacket of which would be of iron or similar rigid material. Within this there was an inner container of glass (or, as in the commercial article, of earthenware) bonded to and pendently supported from the outer jacket. Between the inner and outer members comminuted material, such as ground cork, was to be inserted for insulating the inner container, limiting its oscillations and permitting its expansion due to changes of temperature.

We pass the questions of infringement and failure promptly to disclaim after the Circuit Court of Appeals for the Seventh Circuit had held the claims invalid in 1927, since we hold that the patent does not disclose invention.

We are of opinion that all the elements of the patent were old and aggregation of them did not involve the exercise of inventive genius but of mechanical adaptation Containers comprising an inner receptacle and an outer casing, the interspace filled with comminuted material, were old. The packing of the space had been practiced both to protect the inner container from shock and to insulate it. The pendulant support of the inner member

by the casing was old. Such pendulant support had been supplied by screwing the threaded neck of the glass container into the threaded neck of the casing, by superimposing an annular flange on the one over a corresponding flange on the other, and by other mechanical means. The petitioner says, however, that novelty and invention are found in the use of a bond to unite the inner and outer members. As to this its brief states: "The patentee says in his patent that he prefers to use the adherent bond described but the disclosure of the patent is not so limited and is broad enough to include any bond either a mechanical or an adherent bond." It is also said that the bond shown in the drawings and described in the specifications acts as a seal at the neck of the container to prevent liquids from seeping into the insulating material and impairing its usefulness. Accepting the view that to bond two articles can signify no more than to unite them firmly by any means, we find in the prior art the bonding of container and casing by mechanical means and by the use of cement and plaster of paris. Invention cannot inhere in Blair's employment of either mode of union. The claim says nothing about the sealing effect of the bond, but if interpretation of the claim by reference to the specification might supply this element, the prior art shows instances of such sealing by the use of an impervious binding material such as cement, and earlier patents claim this sealing as an element of the invention described.

In short, anyone familiar with the prior art needed only by exercise of mechanical skill to combine known methods and structures and so attain the combination exhibited in the patent. The judgment is

Affirmed.

STEWARD MACHINE CO. *v.* DAVIS, COLLECTOR OF INTERNAL REVENUE.

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

No. 837. Argued April 8, 9, 1937.—Decided May 24, 1937.

1. The tax imposed by Title IX of the Social Security Act of August 14, 1935, upon the employer of labor, described as "an excise tax with respect to having individuals in his employ," and which is measured by prescribed percentages of the total wages payable by the employer during the calendar year, is either an "excise," a "duty," or an "impost," within the intent of Art. I, Sec. 8, of the Constitution, and complies with the requirement of uniformity throughout the United States. Pp. 578, 583.
2. The enjoyment of common rights, such as the right to employ labor, may constitutionally be taxed. P. 578.

   Such taxation was practiced in England and among the Colonies before the adoption of the Constitution. P. 579.
3. The fact that the Social Security Act, Title IX, *supra*, exempts from the tax employers of less than eight, and does not apply in respect of agricultural labor, domestic service in private homes, and some other classes of employment does not render it obnoxious to the Fifth Amendment. P. 584.

   A classification supported by considerations of public policy and practical convenience, which would be valid under the equal protection clause of the Fourteenth Amendment if adopted by a State, is lawful, *a fortiori*, in the legislation of Congress, since the Fifth Amendment contains no equal protection clause.
4. The proceeds of the tax imposed on employers by Title IX of the Social Security Act, *supra*, go into the Treasury of the United States without earmark, like internal revenue collections generally. The taxpayer is entitled to credit against the federal tax (up to 90% thereof) what he has contributed during the tax year under a state unemployment law, provided that the state law shall have been certified by the Federal Social Security Board to the Secretary of the Treasury as satisfying certain conditions designed to assure that the state law is genuinely an unemployment compensation law and that contributions will

be used solely in the payment of compensation and be protected against loss after the payment to the State. To these ends, Title IX provides, among other things, that, to be approved by the federal Commission, the state law shall direct that all money received in the state unemployment fund shall immediately upon such receipt be paid over to the Secretary of the Treasury to the credit of an "Unemployment Trust Fund," and that all money withdrawn from the Unemployment Trust Fund by the state agency shall be used solely in the payment of compensation, exclusive of expenses of administration. The Secretary is empowered to invest in Government securities any portion of this fund which, in his judgment, is not required to meet current withdrawals; and out of it he is directed to pay to any competent state agency such sums as it may duly requisition from the amount standing to its credit. The taxpayer's credit against the federal tax depends on compliance with these statutory conditions; the State, however, is under no contractual obligation to comply, but at its pleasure may repeal its unemployment law, and withdraw its deposit from the federal Treasury. *Held:*

(1) Assuming that the federal tax cannot be treated as a revenue provision standing apart, but must be tested in combination with the 90% credit provision, the tax is not void as involving an unconstitutional attempt to coerce the States to adopt unemployment compensation legislation approved by the Federal Government. P. 585.

(2) The problem of unemployment is national as well as local; and in promotion of the general welfare moneys of the Nation may be used to relieve the unemployed and their dependents in economic depressions and to guard against such disasters. P. 586.

(3) Title IX may be sustained as a coöperative plan whereby States may be set free to provide unemployment compensation without subjecting themselves to economic disadvantages resulting from the absence of such provision in other States; and whereby, through the assumption of such burdens by the States generally, the financial burden of the Nation due to unemployment may be correspondingly decreased. P. 587.

Duplicated taxes, or burdens that approach them, are hardships that government, state or national, may properly avoid. P. 589.

(4) Every rebate from a tax, when conditioned upon conduct, is in some measure a temptation; but motive or temptation is not equivalent to coercion. P. 589.

(5) If it be true to say that a power akin to undue influence may be exerted by the national Government on the States, the location of the point at which pressure turns into compulsion, and ceases to be inducement, would be a question of degree,—at times, perhaps, of fact. The point had not been reached when Alabama by passing her unemployment compensation law evinced her choice to have relief administered under laws of her own making, by agents of her own selection, instead of under federal laws, administered by federal officers. P. 589.

It is one thing to impose a federal tax dependent upon the conduct of the taxpayers, or of the State in which they live, where the conduct to be stimulated or discouraged is unrelated to the fiscal need subserved by the tax in its normal operation, or to any other end legitimately national. It is quite another thing to say that a tax will be abated upon the doing of an act that will satisfy the fiscal need, the tax and the alternative being approximate equivalents. In such circumstances, if in no others, inducement or persuasion does not go beyond the bounds of power. P. 591.

5. No surrender of powers essential to the quasi-sovereign existence of States is required by § 903 of Title IX of the Social Security Act, which defines the minimum criteria to which a state compensation system is required to conform if it is to be accepted by the Social Security Board as the basis for credits against the taxes laid on employers by that Title; nor by § 904, which deals with the deposit, investment and withdrawal of the moneys credited. P. 593.
6. *Semble* that the States may constitutionally make with Congress such agreements as do not impair the essence of their statehood. P. 597.
7. Title III of the Social Security Act, which appropriates no money but authorizes the making of future appropriations for the purpose of assisting the States in the administration of their unemployment compensation laws, is severable from Title IX and its validity is not in issue. P. 598.

89 F. (2d) 207, affirmed.

This was a review, on certiorari, 300 U. S. 652, of a judgment of the court below affirming the dismissal of the complaint in an action for the recovery of money paid by the plaintiff as a tax under Title IX of the Social Security Act.

Mr. William Logan Martin opened for the petitioner and *Mr. Niel P. Sterne* closed. *Messrs. Borden Burr* and *Walter Bouldin* were on the brief with *Mr. Martin.** Summary from the brief:

The federal Act is so lacking in precedent that our argument is to a large extent devoted to the history of the legislation in order to show that Congress seized on the taxing power merely as a pretext to provide this plan for unemployment. In the history of the Act, from its inception in the President's message to its final passage, no important questions were overlooked.

As a device, the two-way system was adopted. No one could raise the question of the validity of the tax, or challenge an appropriation. And the tax club was sufficient to drive the States into line. The few standards surrounding the grants would be sufficient to assure control of the system. If the federal Act should be held unconstitutional, the state Acts would continue to operate. So the Federal-State system was launched, in preference to the national system by which the Federal Government would administer the entire plan, and in preference to the subsidy plan, by which the Government would collect all the taxes and subsidize the States.

Indeed, argued the proponents of the measure, the Court cannot look into the motive of Congress, provided the power exercised be constitutional. And certainly, the imposition of an excise tax is constitutional. But here the motive is not concealed. It stands out, starkly revealing the taxing power as a mere pretext.

What reasonable relationship to the taxing power of Congress can this measure be said to sustain? It is not intended that one dollar of the payroll taxes shall be used for the general purposes of government. In *Mag-*

* Report of oral arguments may be found in Senate Doc. No. 53, 75th Cong. 1st Sess., p. 61 *et seq.*

nano Co. v. *Hamilton,* 292 U. S. 40, this Court said that the requirement that a tax be for a public purpose "has regard to the use which is to be made of the revenue derived from the tax." The entire tax resulting from the Child Labor Tax Act, which is part of the Revenue Act of 1919 (40 Stat. 1057), found its way to the Treasury to be disbursed for the purposes of government; yet from the opinion of this Court we may well infer that the provisions of the Act were not naturally and reasonably adapted to the collection of the tax, but "solely to the achievement of some other purpose plainly within state power." 259 U. S. 20, 43. Likewise in the Future Trading Act (42 Stat. 187), the tax went into the Treasury. In *Hill* v. *Wallace,* 259 U. S. 44, this Court said that the manifest purpose of the Act was to compel boards of trade to comply with regulations "many of which can have no relevancy to the collection of the tax at all." Cf. *Linder* v. *United States,* 268 U. S. 5, considering the Harrison Narcotic Act as amended by the Revenue Act of 1919 (40 Stat. 1057, 1130). Other cases involving reasonable relationship of Acts to the constitutional power under which they were claimed to arise are: *Newberry* v. *United States,* 256 U. S. 232, 258, regulating primary elections for United States senators; *Howard* v. *Illinois Central R. Co.,* 207 U. S. 463, 502–503, First Employers' Liability Act; *Keller* v. *United States,* 213 U. S. 138, 144, immigration law; and *Child Labor Case,* 247 U. S. 251.

The declaration that invalidity of one part of the Act shall not affect the remainder is an aid in determining the legislative intent, "but is not an inexorable command." *Railroad Retirement Board* v. *Alton R. Co.,* 295 U. S. 330, 362. This Court cannot rewrite the statute and give it an effect altogether different from that sought by the measure viewed as a whole. *Carter* v. *Carter Coal Co.,* 298 U. S. 239.

It is obvious from the history of the Act that Congress was not seeking taxes for the Treasury; it was providing a plan for unemployment. Without the plan the tax would not have been imposed. With the plan the entire Act falls.

Grants to States contained in prior Acts of Congress furnish no precedent for Title III of this Act.

While Congress lately may have spent billions of dollars for relief, which is the primary burden and duty of the States, the question of the constitutionality of which is difficult, if not impossible, to raise in the courts, this spending cannot now be used to arm Congress with the power to impose unlawful burdens on the States, in order to compel them to refill the Federal Treasury and in order to encourage them to assume their proper burdens in the future.

It is undeniable that by this legislation the States were actually compelled to comply with the demands of Congress.

No grant by Congress is justified if its non-acceptance results in a penalty. If the States do not comply, their citizens are compelled to supply millions of dollars to be used for the administration of agencies in other States that submit.

The system denies due process of law to employers of eight or more by requiring the States to impose on this group a tax for the purpose of paying benefits to individuals who are unemployed.

Mr. Charles E. Wyzanski, Jr., and *Assistant Attorney General Jackson*, with whom *Attorney General Cummings, Solicitor General Reed*, and *Messrs. Sewall Key, A. H. Feller, J. P. Jackson, Arnold Raum, F. A. LeSourd, Thomas H. Eliot*, and *Alanson Willcox* were on the brief, for respondent.

Extracts from oral argument of *Mr. Wyzanski:*

The tax is collected in exactly the same way as any other internal revenue tax. It is paid to appropriate Treasury officials, and there are the usual provisions with respect to penalties, refunds, and interest. Against the tax there is allowed a credit for the amount which the taxpayer pays into a fund created under state law.

The state unemployment compensation law, in order to serve as the basis for the credit, must meet certain standards which are enumerated in § 903A.

The standards describe what is an unemployment compensation law. They are definitional standards.

The amounts which are collected by States as unemployment compensation contributions, and which are claimed as deductions from the federal tax, are collected in the first instance by the state collectors, then deposited in the unemployment trust fund in the United States Treasury, and there held separate and apart from the regular funds of the Government. Hence it may be said that none of the money of the Federal Government is utilized for unemployment compensation. The money which the States have left on deposit in a trust fund is utilized for unemployment compensation.

Now, title IX is the only title which impinges on the petitioner in this case. He claims, however, that title III is also involved. That title is not an appropriation statute. It is an authority to appropriate.

The money which is appropriated under that title is utilized for grants in aid or subventions to States for use in connection with administration expenses of their unemployment compensation laws. Again, you will notice that the money is not used directly or indirectly for unemployment-compensation benefits. It is a grant in aid or a subvention for the administration of an unemployment compensation law.

[Followed an exegesis of economic conditions which furnished the occasion for this exercise of Congressional taxing powers.]

No one claims that unemployment compensation is a complete panacea, or will meet all the needs in periods of cyclical depression; but at the same time it is pointed out that if unemployment-compensation systems are set up promptly there will not be the exhaustion of local resources in advance of a cyclical depression. So that when the day of the cyclical depression comes, the individual workers will have funds, States and local governments will have funds, and will not be forced in the face of a resistant bond market, tax delinquency, and other factors which are always present in a depression, to raise the sums which are necessary to take care of the unemployed.

The federal law does not set up unemployment compensation, but it does establish, as a condition for the certification of a state law, that the state law shall provide that benefits shall be paid through public employment exchanges. Now, if a benefit is paid in that way, as it is in all countries abroad where there is unemployment compensation, the consequence is that when the worker comes to the office, he is offered a job. If he turns down the job, he does not get a chance to get his benefit. In other words, you immediately test his willingness to work.

Unemployment compensation is compensation for an industrial accident, just as workmen's compensation is compensation for industrial accidents.

The difficulties with the State's going alone were numerous. In the first place, it was felt that if a State went alone, the economic disadvantage would be material for its own employers. That point was brought out again and again by the manufacturers' associations and by various groups who had the interests of the employers as well as the general public at heart.

Moreover, it was felt that if a State went ahead alone it could not protect itself by an embargo, under the decision of the Court in *Baldwin* v. *Seelig*, 294 U. S. 511, which well illustrates the point. It might not even include within its system, if it were a tax system, employers engaged in interstate commerce, or employees who were engaged in interstate commerce. It was also felt that in this field the technical resources of a single State were so inadequate that it might be dangerous to proceed without the benefit of technical advice furnished by some more wealthy government than the State governments. To solve this dilemma, three different proposals were actually brought forward. One suggested that the relief system of the United States be transmuted into an unemployment-compensation system, and that the Federal Government, instead of giving out money for relief, give out money for unemployment compensation on the basis of the willingness of the worker to take a job.

The second suggestion was that there should be laid a special tax, the funds taken into the Federal Treasury, and then given to the States by subventions or grants-in-aid.

The third suggestion was that a special tax be imposed by the Federal Government with a credit against the tax for the amounts which individual taxpayers had contributed to State unemployment-compensation funds. Now, it is the third method that was adopted by Congress, and that method was chosen for reasons of policy and reasons of law. It was felt that this system gave to the States in a new field an opportunity to decide whether or not they wanted an unemployment compensation system, free from the fear of competitive disadvantage. It was recognized that if the States chose to go ahead they might go ahead in any one of a number of

ways and serve as laboratories for social experimentation. It was further felt that these local systems would promote local initiative, local responsibility, and would result in vigilance with respect to the funds; that is, local people would watch how local money was being spent. Quite apart from those considerations of policy, Congress chose this method, for some reasons of law.

Now, the reason in law why this particular method was chosen was that there was a precedent in the Revenue Act of 1926, dealing with the federal estate tax, considered by this Court in *Florida* v. *Mellon,* 273 U. S. 12. [Counsel then discussed the applicability of that decision.]

The tax is laid upon the privilege of receiving services,—on the "function of employment." Regarded as a tax upon the receipt of services, it is quite analogous to the tax on the receipt of property, considered in *Knowlton* v. *Moore,* 178 U. S. 41. Regarded as a tax on doing business in a certain form, it is quite analogous to the corporate tax sustained in *Flint* v. *Stone Tracy Co.,* 220 U. S. 107.

There is an English precedent for this tax antedating the Constitution of the United States. In 1777 Parliament passed a tax levying upon employers of domestic servants a tax of 21 shillings per domestic servant, as described in certain categories, and that tax of 1777 was reënacted in substantially the same form, in 1803, 1812, 1853, and 1869, and is still on the books in England; and the tax is specifically denominated an excise tax, in some of those statutes.

This tax satisfied the constitutional canon of uniformity as laid down in *Florida* v. *Mellon,* 273 U. S. 12; *Poe* v. *Seaborn,* 282 U. S. 101; and *Knowlton* v. *Moore,* 178 U. S. 41.

The tax on its face has all the indicia of a tax, and as it raises substantial revenue, it should be sustained as a revenue measure without further inquiry. All the cases, from *Veazie Bank* v. *Fenno,* 8 Wall. 533, to the *Sonzinsky* case, 300 U. S. 506, support this position. If an inquiry is made into the policies of this tax, they are reasonable, relate to the power conferred, and have been executed in the manner provided in Art. I, § 8, cl. 1, of the Constitution. Congress had two policies in mind, one of avoiding double taxation in a State which by a law was taxing employers, and this is a policy which is reasonably related to this constitutional provision. Double taxation was indeed referred to by Hamilton, in the thirty-third paper in the Federalist, and also by Edmund Randolph in the Virginia constitutional convention. Each said that they expected the Union would so apply its taxes as not to double up on the same subject which had been selected, or might be selected, by a State. Cf. *Henneford* v. *Silas Mason Co.,* 300 U. S. 577; *Florida* v. *Mellon,* 273 U. S. 12.

The other policy, related to the taxing and spending powers, which supports this legislation, concerns the general welfare. The power granted is the power "to tax for the purpose of providing funds for payment of the Nation's debts and making provision for the general welfare." *Butler* case. "Making provision" means to make a financial provision, and that is what this statute does.

Unemployment compensation will meet the breakdown which takes place in the family of the individual worker who is unemployed, the cumulative effect of unemployment upon his health and upon the health of his family. The effect of unemployment upon crime and vagrancy is obvious; so is the effect upon the taxpayer.

West Coast Hotel Co. v. *Parrish,* 300 U. S. 379, 399. The Federal Government is still spending vast sums for relief, and we say that since this Act will operate to relieve the drain upon the Federal Treasury, and will provide funds for the general welfare, it is reasonably related to the policies and purposes of the taxing clause.

But the question may be raised, Can these policies be carried out by a tax and credit? To that we cite as an answer *Florida* v. *Mellon,* for there the policies which Congress had in mind were carried out by a tax and credit substantially like the one here involved, and a tax and credit which was in the mind of Congress when this legislation was enacted.

When the Constitution was adopted the framers had in mind three different methods of raising revenue for the general welfare of the United States. The first was direct federal taxation collected by federal officers. The second was that the Federal Government lay the tax but the collection be by the state officers. The third method is that the States raise the revenue for the general welfare of the United States. That method is described by Hamilton. Federalist No. 36. Oliver Ellsworth and Roger Sherman pointed out that the collecting authority of the United States need not be exercised if each State will furnish its quota.

This method of which I am speaking was in fact utilized by Congress in the amendment which was passed on May 13, 1862, to the Act of Aug. 5, 1861, providing for direct taxes.

The direct tax is, of course, a tax upon the individual. But the 1862 amendment to the 1861 direct tax provided that the direct tax upon the individual might be assumed by the State in which he lived, and might be paid by the

State, not to the Treasury directly but by payments toward raising troops and supplying troops with their equipment—in other words, as a credit against individual direct taxes, there was allowed the amount which the State expended for the purpose of enrolling and supplying troops. That is very similar to this situation where, as a credit against an individual person's tax, there is allowed the amount which he contributes to the State for unemployment compensation, which takes care of the general welfare of the United States.

We point out that the Constitution does not say who shall provide for the general welfare. Of course, it means that *funds* shall be provided for the general welfare, but it does not say that the United States shall provide the funds, and there is no more reason for reading in the words "United States" in that clause than there was in *Massachusetts* v. *Mellon* for reading in a restriction which would have required the application of the funds to be by the United States.

I turn now from that first major inquiry as to the power here exercised, to the question whether the exercise of the power meets the standards laid down in the Fifth Amendment, and I begin by pointing out that this Court has said, in *Magnano* v. *Hamilton,* 292 U. S. 40, and at other times, that the Fifth Amendment is rarely applied to restrain the exercise of the federal taxing power. It has been suggested that there are three different attacks which might be made upon this tax under the Fifth Amendment. First, it is said it is taking money from one group and giving it to another. As a matter of fact, this tax does not work that way at all. This tax collects money from individuals and puts it into the Federal Treasury, to be used for any purpose whatsoever. Moreover, even if you take into account the 90 per cent. credit, and say that all the money raised is used to pay for those who are out of jobs, to pay benefits to them, we say that that payment is proper under the due process clause.

It is said in the second place that the due process clause of the Fifth Amendment is violated by the selections of the tax. *Flint* v. *Stone Tracy Co.* lays down the familiar rule that the Federal Government has a large measure of choice with respect to selection of taxable subjects. It is said, however, that we had no right to select employers of eight or more, while leaving employers of less than eight untaxed. *Jeffrey Mfg. Co.* v. *Blagg,* 235 U. S. 571, involved the Ohio Workmen's Compensation Act, which applied only to employers of five or more, and *Quong Wing* v. *Kirkendall,* 223 U. S. 59, related to laundry workers where more than two were employed. *St. Louis Consolidated Coal Co.* v. *Illinois,* 185 U. S. 203, related to regulation of mines where more than five were involved. The power of classification which exists with respect to taxes is certainly broader than that which exists with respect to the police power, as Your Honors have pointed out in *Connally* v. *General Construction Co.,* 269 U. S. 385. But quite apart from that general doctrine, I refer to a table which will be found at page 66 of our brief, which shows that unemployment occurs to a greater extent in large than in small establishments. In establishments where 1 to 20 are employed the figures show that the man-hours worked fell off only about 3 per cent.; whereas in those which employed from 20 to 100 workers they fell off some 13.8 per cent. and they fell off even more in establishments larger than 100. Moreover, there are certain administrative reasons which would have justified taxing employers of eight or more and not taxing employers of less than eight. The bookkeeping records and what not would be very expensive both for the Treasury and for the person affected.

The other exemptions from the tax are not really attacked by those who oppose us in the cases at bar. The 90 per cent. credit is a valid classification on several grounds, first, to avoid double taxation; second, valid

classification to distinguish between those who provide funds for the general welfare of the United States and others who leave the Government in the predicament in which it has found itself in the last 3 years.

Extracts from oral argument of *Assistant Attorney General Jackson:*

The challenge of unemployment is being answered at this time by a combination of state and federal power. Under this plan, the State is bringing to the solution of the problem its taxing power and whatever of local regulatory power it may require, subject, of course, to its Constitution and to the Fourteenth Amendment. The Federal Government is bringing to bear upon the same problem its taxing power and its spending power. We do not claim that new powers exist by virtue of the conditions which Mr. Wyzanski has detailed, or that this is an emergency-power matter. We claim that the Federal Government and the state governments are coöperating by each contributing what it may of its own power to the solution of a common problem.

Although the combination in this particular act is new, the devices or methods which are used here are devices and methods which separately have been approved by this Court. The devices used by the Federal Government consist, first, of a grant in aid, to pay the States the cost of administration of unemployment compensation laws. That we think was approved in *Massachusetts* v. *Mellon.* A second device is the tax with a credit, a large credit, a credit designed to enable the States to free themselves of the competition of neighbors, and to go ahead with their own plans; and that device for that purpose we think was approved in *Florida* v. *Mellon.*

The relation of this tax to the appropriation is entirely unestablished, either by the Act itself or by the facts in the case. In the first place, the appropriation under § 301

if it be construed as an appropriation, began before the tax was payable. The appropriation is not measured by the proceeds of the tax. The tax is not earmarked for this purpose. There is no equivalence between the amounts set aside by this section and the proceeds of the tax.

Now, it is apparent on the very face of it that there could not be an equivalence, because the more state laws are enacted the more money would have to be expended under § 301 for aid in their administration. But the more state laws are enacted the less revenue would be produced, because of the effects of the credit. The maximum productivity of the federal tax would be attained if no State enacted a compensation law. The maximum expenditure would be if all States enacted them; so that there is no equivalence and no relationship.

This section is by the provisions of the Act made separable, and we think that the separability presumed from this section of the Act is not overcome, as it was in the *Butler* case, by any relation between the tax and the appropriation objects. So, it is our position that there is no standing to challenge this grant-in-aid, except as the whole operation of the Act including the grant-in-aid may be considered here under the Tenth Amendment.

But, if the complaint be entertained, we think the purpose of spending is clearly within the general welfare, as has been pointed out, and that the form of spending by the grant-in-aid is validated by history, since it has been repeatedly resorted to and resorted to upon condition.

Coming to the tax credit and conditions found in § 902, the credit being the second device in this Act which operates, as it is claimed, on the federal and state relationship.

Unemployment is a concern of the Federal Government, but if Your Honors do not go along with us upon

that argument, there is still a right to give a credit, even though the purpose served by that credit is not a federal purpose. Always there has been the right in the adjustment of a tax structure to recognize equities, to recognize the extent to which the taxpayer has assumed and performed other obligations, the extent to which he has contributed to purposes which were wholly unrelated to the Federal Government. [Instancing the credit considered in *Florida* v. *Mellon,* 273 U. S. 12; and various deductions and exemptions allowed in general tax laws.]

The next question is whether it may lay down conditions upon which that credit will be granted. I take it that if the Government has a right to give a man a credit it has a right to see that that credit is a genuine credit for the purpose intended. This credit goes beyond those credits which serve purely personal purposes. It serves the fiscal purpose of the Treasury of the United States. This person who has contributed 90 per cent. of this tax to the unemployment fund of his State has to that extent relieved the Federal Government of what is assumed to be an obligation to take up certain duties, when unemployment passes the capacity of the State to handle it. And, if it is to serve such a purpose, we clearly have the right to lay down the tests which will see that the unemployment purpose has been honestly served.

Provision 1, which must be contained in the state law, is that all compensation is to be paid through public employment offices in the State, or such other agencies as the board may approve. The purpose of that provision is to stop the "cracker-barrel loafer," who has been referred to here, from getting relief or getting a dole in the form of relief. The purpose of that provision is to assure that when the credit is taken against federal tax the money which the Federal Government loses goes to people who are in good faith out of employment.

It was conceived by Congress that if these unemployment reserves were built up in the separate state treasuries, and we then faced another period of unemployment, and all of those state treasuries were required to rush to liquidation within a short period, it would not only produce great loss to the States, but it would produce also a great dislocation to our entire economy. It was desired to place these reserves in a position where they would always be liquid and available, in a position where the States would suffer no loss through liquidation, and where they could be liquidated in an orderly fashion by the Treasury, with the aid of the Federal Reserve System, and in a way that would not disturb the economy of the United States.

Some of the rights of individuals, or federal Government, or of the state governments, are absolute and precisely measured rights, and as due process is a test by which the individual rights may be measured (*Nebbia* v. *New York,* 291 U. S. 502), so the Tenth Amendment has to be interpreted in the light of a reasonable consideration of those things which the state and federal governments are attempting to do. I address my argument to the reasonableness of the exercise of power undertaken in this particular case, to show that it is not an attempt to invade the powers of the State, to undertake to regulate its industry, or to do those things which have been generally held to be prohibited ends; because if by reasonable examination of the statutes in question the end is found to be prohibited, then it has been held by this Court that all roads to it are closed.

In the first place it should be observed that in this federal Act there is no compulsion upon the State to adopt any kind of legislation whatever. This law does not operate upon the States. This law operates upon the taxpayers who are citizens of the United States and

subject to its taxation. It operates by giving them a credit, provided those taxpayers have paid to the State certain sums of money. It is purely fiscal and not regulatory in its operation. While the operation of the tax may depend upon an employer-employee relationship existing, there are no obligations created as between employer and employee, no rights created and none denied. The scheme sets up no competition with the industry of the State, no regulation of the industry of the State. The State is entirely free to take any of the known types of workable compensation funds, and still obtain its credit. The coverage of the law that the State shall pass is to be determined by itself.

The benefits are entirely within the control of the State, without impairing its credit.

These conditions are entirely separable from the taxing provisions. I shall not go into detail except to point out that the tax and the credit may stand and operate even though these conditions be found to be outside the power of the Government to impose.

Furthermore, any one of these conditions is separable from all of the others, and it is contended in our brief that the tax and the credit may stand even if some of the conditions be found to step beyond the domain properly occupied by the Federal Government.

The question remains whether, in this distribution of activities between the state and the federal Governments, even if we are within the technical word of the Constitution, there has been such a plan attempted as will upset and unbalance our dual form of government. The problem of unemployment faced locally, as well as by the Federal Government, and the distress and commercial demoralization due to it, were not confined to any one of our sovereignties. These two sovereignties, the State and Nation, have sought under this plan, and in the case before Your Honors, to lay their powers together so that

the powers of the two may be equal to the magnitude of this problem. So far as the balance of power between State and Federal Government is concerned, our adversaries would maintain that balance by denying both sovereignties the right to deal with this problem; and we submit that that is not the answer, and that it is unthinkable, in the face of a problem which threatened the peace and solvency of local government, of the state governments, and of national Government, that there is power nowhere in our system to deal with it.

Clearly both sovereignties have an interest in this problem, an overlapping interest perhaps. The Federal Government surely has an interest in maintaining its national economy and its social order. It has the right to take measures to protect its Treasury from unusual drains. It has a right to prepare for the unemployment problem before it occurs, as well as to appropriate money to deal with it afterward.

The Federal Government seeks a solution of the problem of unemployment; and just what the solution shall be is not so material, provided the problem is solved. But the States have separate interests in this problem. Therefore the two sovereignties may concur, as we see it, in reaching a remedy.

But the State and Federal Governments each have their powers and disabilities. The Federal Government is an economic as well as a political unit. It may control its frontiers, and if it burdens an industry it may also protect it against outside competition. It can lay an equal and not discriminatory duty upon all of its citizens, in the form of a tax law, and it may lay such a duty that it may be passed on and ultimately be absorbed by all of the consuming public, as I suspect this tax will be.

The States, on the other hand, have decided limitations upon their competency to deal with this problem. They are political but not economic units. They may

not control their market places against competition from outside their own borders, as this Court has held. They may burden their industries with certain regulations, but they may not protect them against the outside competitor, and the freedom of the States in some of these economic matters is the freedom to commit industrial suicide.

Therefore each of these sovereignties has brought to this problem what it has of power—the State to supply local administration, local control, local burdens and benefits, and local regulations—the Federal Government to lay a uniform tax with a credit which will assure to the citizens of a State that its citizens will not lose their industries by virtue of its effort to meet this problem in a humane and proper way.

Extracts from oral argument of *Mr. Sterne.*

The situation confronting these States is that unless they themselves levy a tax involving large sums of money, and turn those sums over to the unemployed, they see the Federal Government take out of the State the same amount—and I say "the same amount" because I find a compensating equation in the one-tenth.

In realistic terms, in Alabama it means this: In 1929 the pay rolls subject to tax under the federal plan amounted to something over $333,000,000, which means close to $10,000,000 of taxes levied by the Federal Government, with $9,000,000 which we can get back for the unemployed if certain local functions of the State of Alabama are committed to the Government of the United States. Now, in 1929, a period of high return in Alabama, the total revenues of the State were something under $40,000,000, so that the degree and the weight of the compulsion may be evaluated when it is seen that an amount equal to one-fourth of the total revenue of the State of Alabama is taken out of the State

and can be returned to the State not merely for spending, but to the employees if, and only if, certain state functions are abandoned or placed within the control of the Federal Government. And that in the face of repeated adjudications of this Court that in no way can the Federal Government acquire, by treaty, consent, submission, petition, or what not, any function of a State.

Florida v. *Mellon,* 273 U. S. 12, involved only an abandonment by one sovereign of a recognized field of taxation in which the evil of double taxation existed.

In the present situation there is neither historical, nor do I believe real, double taxation, nor threat nor possibility of double taxation. So far as my researches have enabled me to ascertain, there has been no recognized field of taxation as to pay rolls, in the United States, and the situation here presented apparently is that the Federal Government creates the evil in order to cure it, and then claims that it is acting within some constitutional grant of power in curing an evil of duplicity of taxation.

The second distinguishing characteristic, as I see it, is that in *Florida* v. *Mellon* there was a mere exit of the dominant sovereign—that was the end, in itself, its exit. Here, the exit is made the means of a most massive incursion into the state realm. The compulsion of the tax seems manifest. It is suggested that there was an eagerness for this tax on the part of the States, and that that is evidenced by the fact that many bills had been introduced in other States, which failed of passage for fear of economic competitive disadvantage. I do not know what weight can be attached to the fact that many bills were introduced in the legislature, but it seems to me that a countervailing circumstance of no little significance is this: That when these qualifying statutes were enacted, 35 of the 43 enacting States provided an automatic exit.

They enacted provisions that if and when the federal Act failed, instantly the state act should cease to operate.

There can be no such thing as a legitimate compulsion laid upon a State by the Federal Government. The fact that a reasonable end is sought, that a most admirable plan for relieving unemployment may have been evoked, would seem in no way to derogate from the proposition that the Federal Government must be confined to its constitutional bounds and not be permitted to make the taxing power an instrumentality of compulsion against a State.

The argument advanced in behalf of the Government appears to suggest that the moneys raised by the 90 per cent. should really be considered as having their origin in the Federal Government and as being moneys of the Federal Government. That is not our conception of the true situation. But if it be—if that alternative be a correct one—then it would seem that the taxing measure must fail immediately, for the undeniable reason that whatever may be the power of Congress to expropriate from class to class in pursuance of regulatory legislation, the taxing power cannot be so used; and surely it will never be contended by anyone that it was within the purview of congressional power to regulate the relation of employer and employee. Yet only as an incident of regulation, as we see it, can there be a taxation of the employer for the benefit of the employed.

[Counsel then argued that to tax employers for the benefit of unemployed workmen, not indigent, is a taking of private property for a private use—*Loan Ass'n* v. *Topeka,* 20 Wall. 655—saying this "with full recognition of the fact that the problem of unemployment very largely coincides with the problem of indigency, and that the average workman out of employment long enough to qualify for benefits under any system is probably qualified for indigent relief, but the men who have accumu-

lated a sufficient competency to tide over several periods of compensable idleness under any of these plans are not by any means exceptional."]

If, under the guise of forestalling a future demand, the Federal Government may take over any local concerns of the State, I confess I can see no limit.

I do not believe that under our form of government the Federal Government is empowered ever to dispense direct relief, except in the face of an immediately existing, imperious necessity. It is only as the result of a breakdown of all else and a threat to the existence of the Government itself and its people, that that power comes into existence, *ex necessitate rei;* and therefore it cannot be anticipated or provided against further than by the Federal Government, if it sees fit, accumulating a Treasurer's reserve for that purpose.

There is no such thing as a preparedness that in any way extends the power of the Federal Government.

It is not my understanding that the general welfare for which fiscal provision may be made through the taxing power is the general welfare of the inhabitants of the United States. It would seem to me unthinkable that, meaning the inhabitants of the United States, the Founders spoke of the welfare of the United States in the selfsame words in which they spoke of paying the debts of the United States.

We submit that Title IX is unworkable without Title III, and Title III is unworkable without Title IX. Since we are forbidden to use for the purpose of administration any part of the fund which is raised for the relief, IX cannot operate without III, and certainly it was never intended to operate without III, if the statute and the plan are seen as a whole and not merely its severed parts.

Now, there is one question of construction of this statute, wherein we differ with opposing counsel, and that is as to whether, under the statute as drawn, the State has the

right to withdraw the funds and use them for other purposes. It is required as a condition of our receiving administrative expenses and as a condition of our qualifying for the credit that we stipulate in our law that we will withdraw funds only for benefit payments, and while there is a provision that the Federal Government will honor the requisition of the State, it is qualified by saying that it must be duly requisitioned.

The suggestion is made, that as long as they are not regulating anything in Alabama and in the other States, they must not be held to have intruded themselves into State affairs, that the *Butler* case is not applicable, because there the Federal Government regulated the sowing of crops. Here they say there is no regulation—they are just conditioning the grant; but the vice of that and the alternative which confronts them, as we see it, is this: If this is a grant of federal funds, it is an expropriative taxation, and, there being no power of regulation, is void. If it is our own funds, then they have no power to require us to do anything with them.

I would have assumed that workmen's compensation—and by "workmen's compensation" we all mean compensation for injuries—would be as classical an instance of a matter of purely local concern as could be conceived of. But if this is valid legislation, then I see no inhibition against Congress enacting a 3-, 6-, 9-, or 10-per cent. pay-roll tax, or whatever amount it may consider necessary, and confronting us with the alternative of seeing huge sums drained out of Alabama, or installing a system of workmen's compensation devised in Washington, hedged around with such limitations as the authors here may consider necessary to make it what they would call a bona-fide, genuine workmen's compensation system.

I visualize this in the field of minimum wages for women, that the Federal Government need not leave it

to the States to solve that problem, but, by heavy tax and credit provisions, perchance it may require that we in Alabama, as a condition of money remaining in Alabama, shall provide a minimum-wage fund to be administered under such remnants of liberty as the minimum-wage board of the Federal Government may see fit to leave to us.

Messrs. Edward F. McClennen and *Jacob J. Kaplan* filed a brief as *amici curiae,* challenging the validity of the Act.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The validity of the tax imposed by the Social Security Act on employers of eight or more is here to be determined.

Petitioner, an Alabama corporation, paid a tax in accordance with the statute, filed a claim for refund with the Commissioner of Internal Revenue, and sued to recover the payment ($46.14), asserting a conflict between the statute and the Constitution of the United States. Upon demurrer the District Court gave judgment for the defendant dismissing the complaint, and the Circuit Court of Appeals for the Fifth Circuit affirmed. 89 F. (2d) 207. The decision is in accord with judgments of the Supreme Judicial Court of Massachusetts (*Howes Brothers Co.* v. *Massachusetts Unemployment Compensation Comm'n,* December 30, 1936, 5 N. E. (2d) 720), the Supreme Court of California (*Gillum* v. *Johnson,* 7 Cal. (2d) 744; 62 P. (2d) 1037), and the Supreme Court of Alabama (*Beeland Wholesale Co.* v. *Kaufman,* 174 So. 516). It is in conflict with a judgment of the Circuit Court of Appeals for the First Circuit, from which one judge dissented. *Davis* v. *Boston & Maine R. Co.,* 89 F. (2d) 368. An important question of constitutional law being involved, we granted certiorari.

The Social Security Act (Act of August 14, 1935, c. 531, 49 Stat. 620, 42 U. S. C., c. 7 (Supp.)) is divided into eleven separate titles, of which only Titles IX and III are so related to this case as to stand in need of summary.

The caption of Title IX is " Tax on Employers of Eight or More." Every employer (with stated exceptions) is to pay for each calendar year "an excise tax, with respect to having individuals in his employ," the tax to be measured by prescribed percentages of the total wages payable by the employer during the calendar year with respect to such employment. § 901. One is not, however, an "employer" within the meaning of the act unless he employs eight persons or more. § 907 (a). There are also other limitations of minor importance. The term "employment" too has its special definition, excluding agricultural labor, domestic service in a private home and some other smaller classes. § 907 (c). The tax begins with the year 1936, and is payable for the first time on January 31, 1937. During the calendar year 1936 the rate is to be one per cent, during 1937 two per cent, and three per cent thereafter. The proceeds, when collected, go into the Treasury of the United States like internal-revenue collections generally. § 905 (a). They are not earmarked in any way. In certain circumstances, however, credits are allowable. § 902. If the taxpayer has made contributions to an unemployment fund under a state law, he may credit such contributions against the federal tax, provided, however, that the total credit allowed to any taxpayer shall not exceed 90 per centum of the tax against which it is credited, and provided also that the state law shall have been certified to the Secretary of the Treasury by the Social Security Board as satisfying certain minimum criteria. § 902. The provisions of § 903 defining those criteria are stated in the

margin.[1] Some of the conditions thus attached to the allowance of a credit are designed to give assurance that the state unemployment compensation law shall be one in substance as well as name. Others are designed to give assurance that the contributions shall be protected against loss after payment to the state. To this last end there

[1] Sec. 903. (a) The Social Security Board shall approve any State law submitted to it, within thirty days of such submission, which it finds provides that—

(1) All compensation is to be paid through public employment offices in the State or such other agencies as the Board may approve:

(2) No compensation shall be payable with respect to any day of unemployment occurring within two years after the first day of the first period with respect to which contributions are required;

(3) All money received in the unemployment fund shall immediately upon such receipt be paid over to the Secretary of the Treasury to the credit of the Unemployment Trust Fund established by Section 904;

(4) All money withdrawn from the Unemployment Trust Fund by the State agency shall be used solely in the payment of compensation, exclusive of expenses of administration;

(5) Compensation shall not be denied in such State to any otherwise eligible individual for refusing to accept new work under any of the following conditions: (A) If the position offered is vacant due directly to a strike, lockout, or other labor dispute; (B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; (C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization;

(6) All the rights, privileges, or immunities conferred by such law or by acts done pursuant thereto shall exist subject to the power of the legislature to amend or repeal such law at any time.

The Board shall, upon approving such law, notify the Governor of the State of its approval.

(b) On December 31 in each taxable year the Board shall certify to the Secretary of the Treasury each State whose law it has previously approved, except that it shall not certify any State which, after reasonable notice and opportunity for hearing to the State

are provisions that before a state law shall have the approval of the Board it must direct that the contributions to the state fund be paid over immediately to the Secretary of the Treasury to the credit of the "Unemployment Trust Fund." Section 904 establishing this fund is quoted below.[2] For the moment it is enough to say that the Fund is to be held by the Secretary of the Treasury, who is to invest in government securities any portion not required in his judgment to meet current withdrawals. He is authorized and directed to pay out of the Fund to any competent state agency such sums as it may duly requisition from the amount standing to its credit. § 904 (f).

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agency, the Board finds has changed its law so that it no longer contains the provisions specified in subsection (a) or has with respect to such taxable year failed to comply substantially with any such provision.

(c) If, at any time during the taxable year, the Board has reason to believe that a State whose law it has previously approved, may not be certified under subsection (b), it shall promptly so notify the Governor of such State.

[2] Sec. 904. (a) There is hereby established in the Treasury of the United States a trust fund to be known as the "Unemployment Trust Fund," hereinafter in this title called the "Fund." The Secretary of the Treasury is authorized and directed to receive and hold in the Fund all moneys deposited therein by a State agency from a State unemployment fund. Such deposit may be made directly with the Secretary of the Treasury or with any Federal reserve bank or member bank of the Federal Reserve System designated by him for such purpose.

(b) It shall be the duty of the Secretary of the Treasury to invest such portion of the Fund as is not, in his judgment, required to meet current withdrawals. Such investment may be made only in interest-bearing obligations of the United States or in obligations guaranteed as to both principal and interest by the United States. For such purpose such obligations may be acquired (1) on original issue at par, or (2) by purchase of outstanding obligations at the market price. The purposes for which obligations of the United States may be issued under the Second Liberty Bond Act, as amended, are hereby extended to authorize the issuance at par of special obligations exclusively to the Fund. Such special obligations shall bear interest at a

Title III, which is also challenged as invalid, has the caption "Grants to States for Unemployment Compensation Administration." Under this title, certain sums of money are "authorized to be appropriated" for the purpose of assisting the states in the administration of their unemployment compensation laws, the maximum for the fiscal year ending June 30, 1936 to be $4,000,000, and $49,000,000 for each fiscal year thereafter. § 301. No present appropriation is made to the extent of a single dollar. All that the title does is to authorize future appropriations. Actually only $2,250,000 of the $4,000,000 authorized was appropriated for 1936 (Act of Feb. 11,

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rate equal to the average rate of interest, computed as of the end of the calendar month next preceding the date of such issue, borne by all interest-bearing obligations of the United States then forming part of the public debt; except that where such average rate is not a multiple of one-eighth of 1 per centum, the rate of interest of such special obligations shall be the multiple of one-eighth of 1 per centum next lower than such average rate. Obligations other than such special obligations may be acquired for the Fund only on such terms as to provide an investment yield not less than the yield which would be required in the case of special obligations if issued to the Fund upon the date of such acquisition.

(c) Any obligations acquired by the Fund (except special obligations issued exclusively to the Fund) may be sold at the market price, and such special obligations may be redeemed at par plus accrued interest.

(d) The interest on, and the proceeds from the sale or redemption of, any obligations held in the Fund shall be credited to and form a part of the Fund.

(e) The Fund shall be invested as a single fund, but the Secretary of the Treasury shall maintain a separate book account for each State agency and shall credit quarterly on March 31, June 30, September 30, and December 31, of each year, to each account, on the basis of the average daily balance of such account, a proportionate part of the earnings of the Fund for the quarter ending on such date.

(f) The Secretary of the Treasury is authorized and directed to pay out of the Fund to any State agency such amount as it may duly requisition, not exceeding the amount standing to the account of such State agency at the time of such payment.

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1936, c. 49, 49 Stat. 1109, 1113) and only $29,000,000 of the $49,000,000 authorized for the following year. Act of June 22, 1936, c. 689, 49 Stat. 1597, 1605. The appropriations when made were not specifically out of the proceeds of the employment tax, but out of any moneys in the Treasury. Other sections of the title prescribe the method by which the payments are to be made to the state (§ 302) and also certain conditions to be established to the satisfaction of the Social Security Board before certifying the propriety of a payment to the Secretary of the Treasury. § 303. They are designed to give assurance to the Federal Government that the moneys granted by it will not be expended for purposes alien to the grant, and will be used in the administration of genuine unemployment compensation laws.

The assault on the statute proceeds on an extended front. Its assailants take the ground that the tax is not an excise; that it is not uniform throughout the United States as excises are required to be; that its exceptions are so many and arbitrary as to violate the Fifth Amendment; that its purpose was not revenue, but an unlawful invasion of the reserved powers of the states; and that the states in submitting to it have yielded to coercion and have abandoned governmental functions which they are not permitted to surrender.

The objections will be considered seriatim with such further explanation as may be necessary to make their meaning clear.

First. The tax, which is described in the statute as an excise, is laid with uniformity throughout the United States as a duty, an impost or an excise upon the relation of employment.

1. We are told that the relation of employment is one so essential to the pursuit of happiness that it may not be burdened with a tax. Appeal is made to history. From the precedents of colonial days we are supplied with

illustrations of excises common in the colonies. They are said to have been bound up with the enjoyment of particular commodities. Appeal is also made to principle or the analysis of concepts. An excise, we are told, imports a tax upon a privilege; employment, it is said, is a right, not a privilege, from which it follows that employment is not subject to an excise. Neither the one appeal nor the other leads to the desired goal.

As to the argument from history: Doubtless there were many excises in colonial days and later that were associated, more or less intimately, with the enjoyment or the use of property. This would not prove, even if no others were then known, that the forms then accepted were not subject to enlargement. Cf. *Pensacola Telegraph Co.* v. *Western Union,* 96 U. S. 1, 9; *In re Debs,* 158 U. S. 564, 591; *South Carolina* v. *United States,* 199 U. S. 437, 448, 449. But in truth other excises *were* known, and known since early times. Thus in 1695 (6 & 7 Wm. III, c. 6), Parliament passed an act which granted "to His Majesty certain Rates and Duties upon Marriage, Births and Burials," all for the purpose of "carrying on the War against France with Vigour." See *Opinion of the Justices,* 196 Mass. 603, 609; 85 N. E. 545. No commodity was affected there. The industry of counsel has supplied us with an apter illustration where the tax was not different in substance from the one now challenged as invalid. In 1777, before our Constitutional Convention, Parliament laid upon employers an annual "duty" of 21 shillings for "every male Servant" employed in stated forms of work.[3]

[3] The list of services is comprehensive. It included: "Maitre d'Hotel, House-steward, Master of the Horse, Groom of the Chamber, Valet de Chambre, Butler, Under-butler, Clerk of the Kitchen, Confectioner, Cook, House-porter, Footman, Running-footman, Coachman, Groom, Postillion, Stable-boy, and the respective Helpers in the Stables of such Coachman, Groom, or Postillion, or in the Capacity of Gardener (not being a Day-labourer), Park-keeper, Gamekeeper, Huntsman, Whipper-in . . ."

Revenue Act of 1777, 17 George III, c. 39.[4] The point is made as a distinction that a tax upon the use of male servants was thought of as a tax upon a luxury. *Davis* v. *Boston & Maine R. Co., supra.* It did not touch employments in husbandry or business. This is to throw over the argument that historically an excise is a tax upon the enjoyment of commodities. But the attempted distinction, whatever may be thought of its validity, is inapplicable to a statute of Virginia passed in 1780. There a tax of three pounds, six shillings and eight pence was to be paid for every male tithable above the age of twenty-one years (with stated exceptions), and a like tax for "every white servant whatsoever, except apprentices under the age of twenty one years." 10 Hening's Statutes of Virginia, p. 244. Our colonial forbears knew more about ways of taxing than some of their descendants seem to be willing to concede.[5]

The historical prop failing, the prop or fancied prop of principle remains. We learn that employment for lawful gain is a "natural" or "inherent" or "inalienable" right, and not a "privilege" at all. But natural rights, so called, are as much subject to taxation as rights of less importance.[6] An excise is not limited to vocations or activities

[4] The statute, amended from time to time, but with its basic structure unaffected, is on the statute books today. Act of 1803, 43 George III, c. 161; Act of 1812, 52 George III, c. 93; Act of 1853, 16 & 17 Vict., c. 90; Act of 1869, 32 & 33 Vict., c. 14. 24 Halsbury's Laws of England, 1st ed., pp. 692 *et seq.*

[5] See also the following laws imposing occupation taxes: 12 Hening's Statutes of Virginia, p. 285, Act of 1786; Chandler, The Colonial Records of Georgia, vol. 19, Part 2, p. 88, Act of 1778; 1 Potter, Taylor and Yancey, North Carolina Revised Laws, p. 501, Act of 1784.

[6] The cases are brought together by Professor John MacArthur Maguire in an essay, "Taxing the Exercise of Natural Rights" (Harvard Legal Essays, 1934, pp. 273, 322).

The Massachusetts decisions must be read in the light of the particular definitions and restrictions of the Massachusetts Constitution.

that may be prohibited altogether. It is not limited to those that are the outcome of a franchise. It extends to vocations or activities pursued as of common right. What the individual does in the operation of a business is amenable to taxation just as much as what he owns, at all events if the classification is not tyrannical or arbitrary. "Business is as legitimate an object of the taxing powers as property." *Newton* v. *Atchison,* 31 Kan. 151, 154 (per Brewer, J.); 1 Pac. 288. Indeed, ownership itself, as we had occasion to point out the other day, is only a bundle of rights and privileges invested with a single name. *Henneford* v. *Silas Mason Co.,* 300 U. S. 577. "A state is at liberty, if it pleases, to tax them all collectively, or to separate the faggots and lay the charge distributively." *Ibid.* Employment is a business relation, if not itself a business. It is a relation without which business could seldom be carried on effectively. The power to tax the activities and relations that constitute a calling considered as a unit is the power to tax any of them. The whole includes the parts. *Nashville, C. & St. L. Ry. Co.* v. *Wallace,* 288 U. S. 249, 267, 268.

The subject matter of taxation open to the power of the Congress is as comprehensive as that open to the power of the states, though the method of apportionment may at times be different. "The Congress shall have power to lay and collect taxes, duties, imposts and excises." Art. 1, § 8. If the tax is a direct one, it shall be apportioned according to the census or enumeration. If it is a duty, impost, or excise, it shall be uniform throughout the United States. Together, these classes include every form of tax appropriate to sovereignty. Cf. *Burnet* v. *Brooks,* 288 U. S. 378, 403, 405; *Brushaber* v. *Union Pacific R. Co.,* 240 U. S. 1, 12. Whether the tax is to be

Opinion of the Justices, 282 Mass. 619, 622; 186 N. E. 490; 266 Mass. 590, 593; 165 N. E. 904. And see *Howes Brothers Co.* v. *Massachusetts Unemployment Compensation Comm'n, supra,* pp. 730, 731.

classified as an "excise" is in truth not of critical importance. If not that, it is an "impost" (*Pollock* v. *Farmers' Loan & Trust Co.*, 158 U. S. 601, 622, 625; *Pacific Insurance Co.* v. *Soule,* 7 Wall. 433, 445), or a "duty" (*Veazie Bank* v. *Fenno,* 8 Wall. 533, 546, 547; *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429, 570; *Knowlton* v. *Moore,* 178 U. S. 41, 46). A capitation or other "direct" tax it certainly is not. "Although there have been from time to time intimations that there might be some tax which was not a direct tax nor included under the words 'duties, imposts and excises,' such a tax for more than one hundred years of national existence has as yet remained undiscovered, notwithstanding the stress of particular circumstances has invited thorough investigation into sources of powers." *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429, 557. There is no departure from that thought in later cases, but rather a new emphasis of it. Thus, in *Thomas* v. *United States,* 192 U. S. 363, 370, it was said of the words "duties, imposts and excises" that "they were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture and sale of certain commodities, privileges, particular business transactions, vocations, occupations and the like." At times taxpayers have contended that the Congress is without power to lay an excise on the enjoyment of a privilege created by state law. The contention has been put aside as baseless. Congress may tax the transmission of property by inheritance or will, though the states and not Congress have created the privilege of succession. *Knowlton* v. *Moore, supra,* p. 58. Congress may tax the enjoyment of a corporate franchise, though a state and not Congress has brought the franchise into being. *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 155. The statute books of the states are strewn with illustrations of taxes laid on

occupations pursued of common right.[7] We find no basis for a holding that the power in that regard which belongs by accepted practice to the legislatures of the states, has been denied by the Constitution to the Congress of the nation.

2. The tax being an excise, its imposition must conform to the canon of uniformity. There has been no departure from this requirement. According to the settled doctrine the uniformity exacted is geographical, not intrinsic. *Knowlton* v. *Moore, supra,* p. 83; *Flint* v. *Stone Tracy Co., supra,* p. 158; *Billings* v. *United States,* 232 U. S. 261, 282; *Stellwagen* v. *Clum,* 245 U. S. 605, 613; *LaBelle Iron Works* v. *United States,* 256 U. S. 377, 392; *Poe* v. *Seaborn,* 282 U. S. 101, 117; *Wright* v. *Vinton Branch Mountain Trust Bank,* 300 U. S. 440. "The rule of liability shall be the same in all parts of the United States." *Florida* v. *Mellon,* 273 U. S. 12, 17.

Second. The excise is not invalid under the provisions of the Fifth Amendment by force of its exemptions.

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[7] Alabama General Acts, 1935, c. 194, Art. XIII (flat license tax on occupations); Arizona Revised Code, Supplement (1936) § 3138a *et seq.* (general gross receipts tax); Connecticut General Statutes, Supplement (1935) §§ 457c, 458c (gross receipts tax on unincorporated businesses); Revised Code of Delaware (1935) §§ 192–197 (flat license tax on occupations); Compiled Laws of Florida, Permanent Supplement (1936) Vol. I, § 1279 (flat license tax on occupations); Georgia Laws, 1935, p. 11 (flat license tax on occupations); Indiana Statutes Ann. (1933) § 64–2601 *et seq.* (general gross receipts tax); Louisiana Laws, 3rd Extra Session, 1934, Act No. 15, 1st Extra Session, 1935, Acts Nos. 5, 6 (general gross receipts tax); Mississippi Laws, 1934, c. 119 (general gross receipts tax); New Mexico Laws, 1935, c. 73 (general gross receipts tax); South Dakota Laws, 1933, c. 184 (general gross receipts tax, expired June 30, 1935); Washington Laws, 1935, c. 180, Title II (general gross receipts tax); West Virginia Code, Supplement (1935) § 960 (general gross receipts tax).

The statute does not apply, as we have seen, to employers of less than eight. It does not apply to agricultural labor, or domestic service in a private home or to some other classes of less importance. Petitioner contends that the effect of these restrictions is an arbitrary discrimination vitiating the tax.

The Fifth Amendment unlike the Fourteenth has no equal protection clause. *LaBelle Iron Works* v. *United States, supra; Brushaber* v. *Union Pacific R. Co., supra,* p. 24. But even the states, though subject to such a clause, are not confined to a formula of rigid uniformity in framing measures of taxation. *Swiss Oil Corp.* v. *Shanks,* 273 U. S. 407, 413. They may tax some kinds of property at one rate, and others at another, and exempt others altogether. *Bell's Gap R. Co.* v. *Pennsylvania,* 134 U. S. 232; *Stebbins* v. *Riley,* 268 U. S. 137, 142; *Ohio Oil Co.* v. *Conway,* 281 U. S. 146, 150. They may lay an excise on the operations of a particular kind of business, and exempt some other kind of business closely akin thereto. *Quong Wing* v. *Kirkendall,* 223 U. S. 59, 62; *American Sugar Refining Co.* v. *Louisiana,* 179 U. S. 89, 94; *Armour Packing Co.* v. *Lacy,* 200 U. S. 226, 235; *Brown-Forman Co.* v. *Kentucky,* 217 U. S. 563, 573; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245, 255; *State Board of Tax Comm'rs* v. *Jackson,* 283 U. S. 527, 537, 538. If this latitude of judgment is lawful for the states, it is lawful, *a fortiori,* in legislation by the Congress, which is subject to restraints less narrow and confining. *Quong Wing* v. *Kirkendall, supra.*

The classifications and exemptions directed by the statute now in controversy have support in considerations of policy and practical convenience that cannot be condemned as arbitrary. The classifications and exemptions would therefore be upheld if they had been adopted by a state and the provisions of the Fourteenth Amendment were invoked to annul them. This is held in two cases

passed upon today in which precisely the same provisions were the subject of attack, the provisions being contained in the Unemployment Compensation Law of the State of Alabama. *Carmichael* v. *Southern Coal & Coke Co.*, and *Carmichael* v. *Gulf States Paper Corp., ante,* p. 495. The opinion rendered in those cases covers the ground fully. It would be useless to repeat the argument. The act of Congress is therefore valid, so far at least as its system of exemptions is concerned, and this though we assume that discrimination, if gross enough, is equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment.

Third. The excise is not void as involving the coercion of the States in contravention of the Tenth Amendment or of restrictions implicit in our federal form of government.

The proceeds of the excise when collected are paid into the Treasury at Washington, and thereafter are subject to appropriation like public moneys generally. *Cincinnati Soap Co.* v. *United States, ante,* p. 308. No presumption can be indulged that they will be misapplied or wasted.[8] Even if they were collected in the hope or expectation that some other and collateral good would be furthered as an incident, that without more would not make the act invalid. *Sonzinsky* v. *United States,* 300 U. S. 506. This indeed is hardly questioned. The case for the petitioner is built on the contention that here an ulterior aim is wrought into the very structure of the act, and what is

[8] The total estimated receipts without taking into account the 90 per cent deduction, range from $225,000,000 in the first year to over $900,000,000 seven years later. Even if the maximum credits are available to taxpayers in all states, the maximum estimated receipts from Title IX will range between $22,000,000, at one extreme, tc $90,000,000 at the other. If some of the states hold out in their unwillingness to pass statutes of their own, the receipts will be still larger.

even more important that the aim is not only ulterior, but essentially unlawful. In particular, the 90 per cent credit is relied upon as supporting that conclusion. But before the statute succumbs to an assault upon these lines, two propositions must be made out by the assailant. *Cincinnati Soap Co.* v. *United States, supra.* There must be a showing in the first place that separated from the credit the revenue provisions are incapable of standing by themselves. There must be a showing in the second place that the tax and the credit in combination are weapons of coercion, destroying or impairing the autonomy of the states. The truth of each proposition being essential to the success of the assault, we pass for convenience to a consideration of the second, without pausing to inquire whether there has been a demonstration of the first.

To draw the line intelligently between duress and inducement there is need to remind ourselves of facts as to the problem of unemployment that are now matters of common knowledge. *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379. The relevant statistics are gathered in the brief of counsel for the Government. Of the many available figures a few only will be mentioned. During the years 1929 to 1936, when the country was passing through a cyclical depression, the number of the unemployed mounted to unprecedented heights. Often the average was more than 10 million; at times a peak was attained of 16 million or more. Disaster to the breadwinner meant disaster to dependents. Accordingly the roll of the unemployed, itself formidable enough, was only a partial roll of the destitute or needy. The fact developed quickly that the states were unable to give the requisite relief. The problem had become national in area and dimensions. There was need of help from the nation if the people were not to starve. It is too late today for the argument to be heard with tolerance that in a crisis so extreme the use of the moneys of the nation to relieve the unemployed

and their dependents is a use for any purpose narrower than the promotion of the general welfare. Cf. *United States* v. *Butler,* 297 U. S. 1, 65, 66, *Helvering* v. *Davis,* decided herewith, *post,* p. 619. The nation responded to the call of the distressed. Between January 1, 1933 and July 1, 1936, the states (according to statistics submitted by the Government) incurred obligations of $689,291,802 for emergency relief; local subdivisions an additional $775,675,366. In the same period the obligations for emergency relief incurred by the national government were $2,929,307,125, or twice the obligations of states and local agencies combined. According to the President's budget message for the fiscal year 1938, the national government expended for public works and unemployment relief for the three fiscal years 1934, 1935, and 1936, the stupendous total of $8,681,000,000. The *parens patriae* has many reasons—fiscal and economic as well as social and moral—for planning to mitigate disasters that bring these burdens in their train.

In the presence of this urgent need for some remedial expedient, the question is to be answered whether the expedient adopted has overlept the bounds of power. The assailants of the statute say that its dominant end and aim is to drive the state legislatures under the whip of economic pressure into the enactment of unemployment compensation laws at the bidding of the central government. Supporters of the statute say that its operation is not constraint, but the creation of a larger freedom, the states and the nation joining in a coöperative endeavor to avert a common evil. Before Congress acted, unemployment compensation insurance was still, for the most part, a project and no more. Wisconsin was the pioneer. Her statute was adopted in 1931. At times bills for such insurance were introduced elsewhere, but they did not reach the stage of law. In 1935, four states (California, Massachusetts, New Hampshire and New York) passed unem-

ployment laws on the eve of the adoption of the Social Security Act, and two others did likewise after the federal act and later in the year. The statutes differed to some extent in type, but were directed to a common end. In 1936, twenty-eight other states fell in line, and eight more the present year. But if states had been holding back before the passage of the federal law, inaction was not owing, for the most part, to the lack of sympathetic interest. Many held back through alarm lest, in laying such a toll upon their industries, they would place themselves in a position of economic disadvantage as compared with neighbors or competitors. See House Report, No. 615, 74th Congress, 1st session, p. 8; Senate Report, No. 628, 74th Congress, 1st session, p. 11.[9] Two consequences ensued. One was that the freedom of a state to contribute its fair share to the solution of a national problem was paralyzed by fear. The other was that in so far as there was failure by the states to contribute relief according to the measure of their capacity, a disproportionate burden, and a mountainous one, was laid upon the resources of the Government of the nation.

The Social Security Act is an attempt to find a method by which all these public agencies may work together to a common end. Every dollar of the new taxes will continue in all likelihood to be used and needed by the

[9] The attitude of Massachusetts is significant. Her act became a law August 12, 1935, two days before the federal act. Even so, she prescribed that its provisions should not become operative unless the federal bill became a law, or unless eleven of the following states (Alabama, Connecticut, Delaware, Georgia, Illinois, Indiana, Iowa, Maine, Maryland, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New York, North Carolina, Ohio, Rhode Island, South Carolina, Tennessee, Vermont) should impose on their employers burdens substantially equivalent. Acts of 1935, c. 479, p. 655. Her fear of competition is thus forcefully attested. See also California Laws, 1935, c. 352, Art. I, § 2; Idaho Laws, 1936 (Third Extra Session) c. 12, § 26; Mississippi Laws, 1936, c. 176, § 2–a.

nation as long as states are unwilling, whether through timidity or for other motives, to do what can be done at home. At least the inference is permissible that Congress so believed, though retaining undiminished freedom to spend the money as it pleased. On the other hand fulfilment of the home duty will be lightened and encouraged by crediting the taxpayer upon his account with the Treasury of the nation to the extent that his contributions under the laws of the locality have simplified or diminished the problem of relief and the probable demand upon the resources of the fisc. Duplicated taxes, or burdens that approach them, are recognized hardships that government, state or national, may properly avoid. *Henneford* v. *Silas Mason Co., supra; Kidd* v. *Alabama,* 188 U. S. 730, 732; *Watson* v. *State Comptroller,* 254 U. S. 122, 125. If Congress believed that the general welfare would better be promoted by relief through local units than by the system then in vogue, the cöoperating localities ought not in all fairness to pay a second time.

Who then is coerced through the operation of this statute? Not the taxpayer. He pays in fulfilment of the mandate of the local legislature. Not the state. Even now she does not offer a suggestion that in passing the unemployment law she was affected by duress. See *Carmichael* v. *Southern Coal & Coke Co.,* and *Carmichael* v. *Gulf States Paper Corp., supra.* For all that appears she is satisfied with her choice, and would be sorely disappointed if it were now to be annulled. The difficulty with the petitioner's contention is that it confuses motive with coercion. "Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed." *Sonzinsky* v. *United States, supra.* In like manner every rebate from a tax when conditioned upon conduct is in some measure a temptation. But to hold that motive

or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible. Till now the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems. The wisdom of the hypothesis has illustration in this case. Nothing in the case suggests the exertion of a power akin to undue influence, if we assume that such a concept can ever be applied with fitness to the relations between state and nation. Even on that assumption the location of the point at which pressure turns into compulsion, and ceases to be inducement, would be a question of degree,—at times, perhaps, of fact. The point had not been reached when Alabama made her choice. We cannot say that she was acting, not of her unfettered will, but under the strain of a persuasion equivalent to undue influence, when she chose to have relief administered under laws of her own making, by agents of her own selection, instead of under federal laws, administered by federal officers, with all the ensuing evils, at least to many minds, of federal patronage and power. There would be a strange irony, indeed, if her choice were now to be annulled on the basis of an assumed duress in the enactment of a statute which her courts have accepted as a true expression of her will. *Beeland Wholesale Co.* v. *Kaufman, supra.* We think the choice must stand.

In ruling as we do, we leave many questions open. We do not say that a tax is valid, when imposed by act of Congress, if it is laid upon the condition that a state may escape its operation through the adoption of a statute unrelated in subject matter to activities fairly within the scope of national policy and power. No such question is before us. In the tender of this credit Congress does not intrude upon fields foreign to its function. The purpose

of its intervention, as we have shown, is to safeguard its own treasury and as an incident to that protection to place the states upon a footing of equal opportunity. Drains upon its own resources are to be checked; obstructions to the freedom of the states are to be leveled. It is one thing to impose a tax dependent upon the conduct of the taxpayers, or of the state in which they live, where the conduct to be stimulated or discouraged is unrelated to the fiscal need subserved by the tax in its normal operation, or to any other end legitimately national. The *Child Labor Tax Case,* 259 U. S. 20, and *Hill* v. *Wallace,* 259 U. S. 44, were decided in the belief that the statutes there condemned were exposed to that reproach. Cf. *United States* v. *Constantine,* 296 U. S. 287. It is quite another thing to say that a tax will be abated upon the doing of an act that will satisfy the fiscal need, the tax and the alternative being approximate equivalents. In such circumstances, if in no others, inducement or persuasion does not go beyond the bounds of power. We do not fix the outermost line. Enough for present purposes that wherever the line may be, this statute is within it. Definition more precise must abide the wisdom of the future.

Florida v. *Mellon,* 273 U. S. 12, supplies us with a precedent, if precedent be needed. What was in controversy there was § 301 of the Revenue Act of 1926, which imposes a tax upon the transfer of a decedent's estate, while at the same time permitting a credit, not exceeding 80 per cent, for "the amount of any estate, inheritance, legacy, or succession taxes actually paid to any State or Territory." Florida challenged that provision as unlawful. Florida had no inheritance taxes and alleged that under its constitution it could not levy any. 273 U. S. 12, 15. Indeed, by abolishing inheritance taxes, it had hoped to induce wealthy persons to become its citizens. See 67 Cong. Rec., Part 1, pp. 735, 752. It argued at our bar that "the Estate Tax provision was not passed for the purpose

of raising federal revenue" (273 U. S. 12, 14), but rather "to coerce States into adopting estate or inheritance tax laws." 273 U. S. 12, 13. In fact, as a result of the 80 per cent credit, material changes of such laws were made in 36 states.[10] In the face of that attack we upheld the act as valid. Cf. *Massachusetts* v. *Mellon,* 262 U. S. 447, 482; also Act of August 5, 1861, c. 45, 12 Stat. 292; Act of May 13, 1862, c. 66, 12 Stat. 384.

United States v. *Butler, supra,* is cited by petitioner as a decision to the contrary. There a tax was imposed on processors of farm products, the proceeds to be paid to farmers who would reduce their acreage and crops under agreements with the Secretary of Agriculture, the plan of the act being to increase the prices of certain farm products by decreasing the quantities produced. The court held (1) that the so-called tax was not a true one (pp. 56, 61), the proceeds being earmarked for the benefit of farmers complying with the prescribed conditions, (2) that there was an attempt to regulate production without the consent of the state in which production was affected, and (3) that the payments to farmers were coupled with coercive contracts (p. 73), unlawful in their aim and oppressive in their consequences. The decision was by a divided court, a minority taking the view that the objections were untenable. None of them is applicable to the situation here developed.

(a) The proceeds of the tax in controversy are not earmarked for a special group.

(b) The unemployment compensation law which is a condition of the credit has had the approval of the state and could not be a law without it.

(c) The condition is not linked to an irrevocable agreement, for the state at its pleasure may repeal its unemployment law, § 903 (a) (6), terminate the credit,

[10] Perkins, State action under the Federal Estate Tax Credit Clause, 13 North Carolina L. Rev. 271, 280.

and place itself where it was before the credit was accepted.

(d) The condition is not directed to the attainment of an unlawful end, but to an end, the relief of unemployment, for which nation and state may lawfully coöperate.

Fourth. The statute does not call for a surrender by the states of powers essential to their quasi-sovereign existence.

Argument to the contrary has its source in two sections of the act. One section (903 [11]) defines the minimum criteria to which a state compensation system is required to conform if it is to be accepted by the Board as the basis for a credit. The other section (904 [12]) rounds out the requirement with complementary rights and duties. Not all the criteria or their incidents are challenged as unlawful. We will speak of them first generally, and then more specifically in so far as they are questioned.

A credit to taxpayers for payments made to a State under a state unemployment law will be manifestly futile in the absence of some assurance that the law leading to the credit is in truth what it professes to be. An unemployment law framed in such a way that the unemployed who look to it will be deprived of reasonable protection is one in name and nothing more. What is basic and essential may be assured by suitable conditions. The terms embodied in these sections are directed to that end. A wide range of judgment is given to the several states as to the particular type of statute to be spread upon their books. For anything to the contrary in the provisions of this act they may use the pooled unemployment form, which is in effect with variations in Alabama, California, Michigan, New York, and elsewhere. They may establish a system of merit ratings applicable at

[11] See note 1, *supra.*

[12] See note 2, *supra.*

once or to go into effect later on the basis of subsequent experience. Cf. §§ 909, 910. They may provide for employee contributions as in Alabama and California, or put the entire burden upon the employer as in New York. They may choose a system of unemployment reserve accounts by which an employer is permitted after his reserve has accumulated to contribute at a reduced rate or even not at all. This is the system which had its origin in Wisconsin. What they may not do, if they would earn the credit, is to depart from those standards which in the judgment of Congress are to be ranked as fundamental. Even if opinion may differ as to the fundamental quality of one or more of the conditions, the difference will not avail to vitiate the statute. In determining essentials Congress must have the benefit of a fair margin of discretion. One cannot say with reason that this margin has been exceeded, or that the basic standards have been determined in any arbitrary fashion. In the event that some particular condition shall be found to be too uncertain to be capable of enforcement, it may be severed from the others, and what is left will still be valid.

We are to keep in mind steadily that the conditions to be approved by the Board as the basis for a credit are not provisions of a contract, but terms of a statute, which may be altered or repealed. § 903 (a) (6). The state does not bind itself to keep the law in force. It does not even bind itself that the moneys paid into the federal fund will be kept there indefinitely or for any stated time. On the contrary, the Secretary of the Treasury will honor a requisition for the whole or any part of the deposit in the fund whenever one is made by the appropriate officials. The only consequence of the repeal or excessive amendment of the statute, or the expenditure of the money, when requisitioned, for other than compensation uses or administrative expenses, is

that approval of the law will end, and with it the allowance of a credit, upon notice to the state agency and an opportunity for hearing. § 903 (b) (c).

These basic considerations are in truth a solvent of the problem. Subjected to their test, the several objections on the score of abdication are found to be unreal.

Thus, the argument is made that by force of an agreement the moneys when withdrawn must be "paid through public employment offices in the State or through such other agencies as the Board may approve." § 903 (a) (1). But in truth there is no agreement as to the method of disbursement. There is only a condition which the state is free at pleasure to disregard or to fulfill. Moreover, approval is not requisite if public employment offices are made the disbursing instruments. Approval is to be a check upon resort to "other agencies" that may, perchance, be irresponsible. A state looking for a credit must give assurance that her system has been organized upon a base of rationality.

There is argument again that the moneys when withdrawn are to be devoted to specific uses, the relief of unemployment, and that by agreement for such payment the quasi-sovereign position of the state has been impaired, if not abandoned. But again there is confusion between promise and condition. Alabama is still free, without breach of an agreement, to change her system over night. No officer or agency of the national Government can force a compensation law upon her or keep it in existence. No officer or agency of that Government, either by suit or other means, can supervise or control the application of the payments.

Finally and chiefly, abdication is supposed to follow from § 904 of the statute and the parts of § 903 that are complementary thereto. § 903 (a) (3). By these the Secretary of the Treasury is authorized and directed to receive and hold in the Unemployment Trust Fund all

moneys deposited therein by a state agency for a state unemployment fund and to invest in obligations of the United States such portion of the Fund as is not in his judgment required to meet current withdrawals. We are told that Alabama in consenting to that deposit has renounced the plenitude of power inherent in her statehood.

The same pervasive misconception is in evidence again. All that the state has done is to say in effect through the enactment of a statute that her agents shall be authorized to deposit the unemployment tax receipts in the Treasury at Washington. Alabama Unemployment Act of September 14, 1935, § 10 (i). The statute may be repealed. § 903 (a) (6). The consent may be revoked. The deposits may be withdrawn. The moment the state commission gives notice to the depositary that it would like the moneys back, the Treasurer will return them. To find state destruction there is to find it almost anywhere. With nearly as much reason one might say that a state abdicates its functions when it places the state moneys on deposit in a national bank.

There are very good reasons of fiscal and governmental policy why a State should be willing to make the Secretary of the Treasury the custodian of the fund. His possession of the moneys and his control of investments will be an assurance of stability and safety in times of stress and strain. A report of the Ways and Means Committee of the House of Representatives, quoted in the margin, develops the situation clearly.[13] Nor is there risk of loss

[13] "This last provision will not only afford maximum safety for these funds but is very essential to insure that they will operate to promote the stability of business rather than the reverse. Unemployment reserve funds have the peculiarity that the demands upon them fluctuate considerably, being heaviest when business slackens. If, in such times, the securities in which these funds are invested are thrown upon the market for liquidation, the net effect is likely to be increased deflation. Such a result is avoided in this bill through the provision that all reserve funds are to be held by the United States Treasury, to

or waste. The credit of the Treasury is at all times back of the deposit, with the result that the right of withdrawal will be unaffected by the fate of any intermediate investments, just as if a checking account in the usual form had been opened in a bank.

The inference of abdication thus dissolves in thinnest air when the deposit is conceived of as dependent upon a statutory consent, and not upon a contract effective to create a duty. By this we do not intimate that the conclusion would be different if a contract were discovered. Even sovereigns may contract without derogating from their sovereignty. *Perry* v. *United States,* 294 U. S. 330, 353; 1 Oppenheim, International Law, 4th ed., §§ 493, 494; Hall, International Law, 8th ed., § 107; 2 Hyde, International Law, § 489. The states are at liberty, upon obtaining the consent of Congress, to make agreements with one another. Constitution, Art. I, § 10, par. 3. *Poole* v. *Fleeger,* 11 Pet. 185, 209; *Rhode Island* v. *Massachusetts,* 12 Pet. 657, 725. We find no room for doubt that they may do the like with Congress if the essence of their statehood is maintained without impairment.[14] Alabama

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be invested and liquidated by the Secretary of the Treasury in a manner calculated to promote business stability. When business conditions are such that investment in securities purchased on the open market is unwise, the Secretary of the Treasury may issue special nonnegotiable obligations exclusively to the unemployment trust fund. When a reverse situation exists and heavy drains are made upon the fund for payment of unemployment benefits, the Treasury does not have to dispose of the securities belonging to the fund in open market but may assume them itself. With such a method of handling the reserve funds, it is believed that this bill will solve the problem often raised in discussions of unemployment compensation, regarding the possibility of transferring purchasing power from boom periods to depression periods. It will in fact operate to sustain purchasing power at the onset of a depression without having any counteracting deflationary tendencies." House Report, No. 615, 74th Congress, 1st session, p. 9.

[14] Cf. 12 Stat. 503; 26 Stat. 417.

is seeking and obtaining a credit of many millions in favor of her citizens out of the Treasury of the nation. Nowhere in our scheme of government—in the limitations express or implied of our federal constitution—do we find that she is prohibited from assenting to conditions that will assure a fair and just requital for benefits received. But we will not labor the point further. An unreal prohibition directed to an unreal agreement will not vitiate an act of Congress, and cause it to collapse in ruin.

Fifth. Title III of the act is separable from Title IX, and its validity is not at issue.

The essential provisions of that title have been stated in the opinion. As already pointed out, the title does not appropriate a dollar of the public moneys. It does no more than authorize appropriations to be made in the future for the purpose of assisting states in the administration of their laws, if Congress shall decide that appropriations are desirable. The title might be expunged, and Title IX would stand intact. Without a severability clause we should still be led to that conclusion. The presence of such a clause (§ 1103) makes the conclusion even clearer. *Williams* v. *Standard Oil Co.*, 278 U. S. 235, 242; *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165, 184; *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 312.

The judgment is

Affirmed.

Separate opinion of Mr. Justice McReynolds.

That portion of the Social Security legislation here under consideration, I think, exceeds the power granted to Congress. It unduly interferes with the orderly government of the State by her own people and otherwise offends the Federal Constitution.

In *Texas* v. *White*, 7 Wall. 700, 725 (1869), a cause of momentous importance, this Court, through Chief Justice Chase, declared—

"But the perpetuity and indissolubility of the Union, by no means implies the loss of distinct and individual existence, or of the right of self-government, by the States. Under the Articles of Confederation each State retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right not expressly delegated to the United States. Under the Constitution, though the powers of the States were much restricted, still, all powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively, or to the people. And we have already had occasion to remark at this term, that 'the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence,' and that 'without the States in union, there could be no such political body as the United States.' [*Lane County* v. *Oregon*, 7 Wall. 71, 76.] Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."

The doctrine thus announced and often repeated, I had supposed was firmly established. Apparently the States remained really free to exercise governmental powers, not delegated or prohibited, without interference by the Federal Government through threats of punitive measures or offers of seductive favors. Unfortunately, the decision just announced opens the way for practical annihilation of this theory; and no cloud of words or ostentatious parade of irrelevant statistics should be permitted to obscure that fact.

The invalidity, also the destructive tendency, of legislation like the Act before us were forcefully pointed out by President Franklin Pierce in a veto message sent to the Senate May 3, 1854.[1] He was a scholarly lawyer of distinction and enjoyed the advice and counsel of a rarely able Attorney General—Caleb Cushing of Massachusetts. This message considers with unusual lucidity points here specially important. I venture to set out pertinent portions of it which must appeal to all who continue to respect both the letter and spirit of our great charter.

"*To the Senate of the United States:*

"The bill entitled 'An Act making a grant of public lands to the several States for the benefit of indigent insane persons,' which was presented to me on the 27th ultimo, has been maturely considered, and is returned to the Senate, the House in which it originated, with a statement of the objections which have required me to withhold from it my approval.

. . . . . .

"If in presenting my objections to this bill I should say more than strictly belongs to the measure or is required for the discharge of my official obligation, let it be attributed to a sincere desire to justify my act before those whose good opinion I so highly value and to that earnestness which springs from my deliberate conviction that a strict adherence to the terms and purposes of the federal compact offers the best, if not the only, security for the preservation of our blessed inheritance of representative liberty.

"The bill provides in substance:

"First. That 10,000,000 acres of land be granted to the several States, to be apportioned among them in the compound ratio of the geographical area and representation of said States in the House of Representatives.

[1] "Messages and Papers of the President" by James D. Richardson, Vol. V, pp. 247–256.

"Second. That wherever there are public lands in a State subject to sale at the regular price of private entry, the proportion of said 10,000,000 acres falling to such State shall be selected from such lands within it, and that to the States in which there are no such public lands land scrip shall be issued to the amount of their distributive shares, respectively, said scrip not to be entered by said States, but to be sold by them and subject to entry by their assignees: Provided, That none of it shall be sold at less than $1 per acre, under penalty of forfeiture of the same to the United States.

"Third. That the expenses of the management and superintendence of said lands and of the moneys received therefrom shall be paid by the States to which they may belong out of the treasury of said States.

"Fourth. That the gross proceeds of the sales of such lands or land scrip so granted shall be invested by the several States in safe stocks, to constitute a perpetual fund, the principal of which shall remain forever undiminished, and the interest to be appropriated to the maintenance of the indigent insane within the several States.

"Fifth. That annual returns of lands or scrip sold shall be made by the States to the Secretary of the Interior, and the whole grant be subject to certain conditions and limitations prescribed in the bill, to be assented to by legislative acts of said States.

"This bill therefore proposes that the Federal Government shall make provision to the amount of the value of 10,000,000 acres of land for an eleemosynary object within the several States, to be administered by the political authority of the same; and it presents at the threshold the question whether any such act on the part of the Federal Government is warranted and sanctioned by the Constitution, the provisions and principles of which are to be protected and sustained as a first and paramount duty.

"It can not be questioned that if Congress has power to make provision for the indigent insane without the limits of this District it has the same power to provide for the indigent who are not insane, and thus to transfer to the Federal Government the charge of all the poor in all the States. It has the same power to provide hospitals and other local establishments for the care and cure of every species of human infirmity, and thus to assume all that duty of either public philanthropy or public necessity to the dependent, the orphan, the sick, or the needy which is now discharged by the States themselves or by corporate institutions or private endowments existing under the legislation of the States. The whole field of public beneficence is thrown open to the care and culture of the Federal Government. Generous impulses no longer encounter the limitations and control of our imperious fundamental law; for however worthy may be the present object in itself, it is only one of a class. It is not exclusively worthy of benevolent regard. Whatever considerations dictate sympathy for this particular object apply in like manner, if not in the same degree, to idiocy, to physical disease, to extreme destitution. If Congress may and ought to provide for any one of these objects, it may and ought to provide for them all. And if it be done in this case, what answer shall be given when Congress shall be called upon, as it doubtless will be, to pursue a similar course of legislation in the others? It will obviously be vain to reply that the object is worthy, but that the application has taken a wrong direction. The power will have been deliberately assumed, the general obligation will by this act have been acknowledged, and the question of means and expediency will alone be left for consideration. The decision upon the principle in any one case determines it for the whole class. The question presented, therefore, clearly is upon the constitutionality and propriety of the Federal Gov-

ernment assuming to enter into a novel and vast field of legislation, namely, that of providing for the care and support of all those among the people of the United States who by any form of calamity become fit objects of public philanthropy.

"I readily and, I trust, feelingly acknowledge the duty incumbent on us all as men and citizens, and as among the highest and holiest of our duties, to provide for those who, in the mysterious order of Providence, are subject to want and to disease of body or mind; but I can not find any authority in the Constitution for making the Federal Government the great almoner of public charity throughout the United States. To do so would, in my judgment, be contrary to the letter and spirit of the Constitution and subversive of the whole theory upon which the Union of these States is founded. And if it were admissible to contemplate the exercise of this power for any object whatever, I can not avoid the belief that it would in the end be prejudicial rather than beneficial in the noble offices of charity to have the charge of them transferred from the States to the Federal Government. Are we not too prone to forget that the Federal Union is the creature of the States, not they of the Federal Union? We were the inhabitants of colonies distinct in local government one from the other before the revolution. By that Revolution the colonies each became an independent State. They achieved that independence and secured its recognition by the agency of a consulting body, which, from being an assembly of the ministers of distinct sovereignties instructed to agree to no form of government which did not leave the domestic concerns of each State to itself, was appropriately denominated a Congress. When, having tried the experiment of the Confederation, they resolved to change that for the present Federal Union, and thus to confer on the Federal Government more ample authority, they scrupulously measured such of the

functions of their cherished sovereignty as they chose to delegate to the General Government. With this aim and to this end the fathers of the Republic framed the Constitution, in and by which the independent and sovereign States united themselves for certain specified objects and purposes, and for those only, leaving all powers not therein set forth as conferred on one or another of the three great departments—the legislative, the executive, and the judicial—indubitably with the States. And when the people of the several States had in their State conventions, and thus alone, given effect and force to the Constitution, not content that any doubt should in future arise as to the scope and character of this act, they ingrafted thereon the explicit declaration that 'the powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively or to the people.'

"Can it be controverted that the great mass of the business of Government—that involved in the social relations, the internal arrangements of the body politic, the mental and moral culture of men, the development of local resources of wealth, the punishment of crimes in general, the preservation of order, the relief of the needy or otherwise unfortunate members of society—did in practice remain with the States; that none of these objects of local concern are by the Constitution expressly or impliedly prohibited to the States, and that none of them are by any express language of the Constitution transferred to the United States? Can it be claimed that any of these functions of local administration and legislation are vested in the Federal Government by any implication? I have never found anything in the Constitution which is susceptible of such a construction. No one of the enumerated powers touches the subject or has even a remote analogy to it. The powers conferred upon the United States have reference to federal relations, or to the means of accom-

plishing or executing things of federal relation. So also of the same character are the powers taken away from the States by enumeration. In either case the powers granted and the powers restricted were so granted or so restricted only where it was requisite for the maintenance of peace and harmony between the States or for the purpose of protecting their common interests and defending their common sovereignty against aggression from abroad or insurrection at home.

"I shall not discuss at length the question of power sometimes claimed for the General Government under the clause of the eighth section of the Constitution, which gives Congress the power 'to lay and collect taxes, duties, imposts, and excises, to pay debts and provide for the common defense and general welfare of the United States,' because if it has not already been settled upon sound reason and authority it never will be. I take the received and just construction of that article, as if written to lay and collect taxes, duties, imposts, and excises *in order* to pay the debts and *in order* to provide for the common defense and general welfare. It is not a substantive general power to provide for the welfare of the United States, but is a limitation on the grant of power to raise money by taxes, duties, and imposts. If it were otherwise, all the rest of the Constitution, consisting of carefully enumerated and cautiously guarded grants of specific powers, would have been useless, if not delusive. It would be impossible in that view to escape from the conclusion that these were inserted only to mislead for the present, and, instead of enlightening and defining the pathway of the future, to involve its action in the mazes of doubtful construction. Such a conclusion the character of the men who framed that sacred instrument will never permit us to form. Indeed, to suppose it susceptible of any other construction would be to consign all the rights of the States and of the people of the States to the mere discre-

tion of Congress, and thus to clothe the Federal Government with authority to control the sovereign States, by which they would have been dwarfed into provinces or departments and all sovereignty vested in an absolute consolidated central power, against which the spirit of liberty has so often and in so many countries struggled in vain.

"In my judgment you can not by tributes to humanity make any adequate compensation for the wrong you would inflict by removing the sources of power and political action from those who are to be thereby affected. If the time shall ever arrive when, for an object appealing, however strongly, to our sympathies, the dignity of the States shall bow to the dictation of Congress by conforming their legislation thereto, when the power and majesty and honor of those who created shall become subordinate to the thing of their creation, I but feebly utter my apprehensions when I express my firm conviction that we shall see 'the beginning of the end.'

"Fortunately, we are not left in doubt as to the purpose of the Constitution any more than as to its express language, for although the history of its formation, as recorded in the Madison Papers, shows that the Federal Government in its present form emerged from the conflict of opposing influences which have continued to divide statesmen from that day to this, yet the rule of clearly defined powers and of strict construction presided over the actual conclusion and subsequent adoption of the Constitution. President Madison, in the Federalist, says:

" 'The powers delegated by the proposed Constitution are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . Its [the General Government's] jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects.'

"In the same spirit President Jefferson invokes 'the support of the State governments in all their rights as the most competent administrations for our domestic concerns and the surest bulwarks against anti-republican tendencies;' and President Jackson said that our true strength and wisdom are not promoted by invasions of the rights and powers of the several States, but that, on the contrary, they consist 'not in binding the States more closely to the center, but in leaving each more unobstructed in its proper orbit.'

"The framers of the Constitution, in refusing to confer on the Federal Government any jurisdiction over these purely local objects, in my judgment manifested a wise forecast and broad comprehension of the true interests of these objects themselves. It is clear that public charities within the States can be efficiently administered only by their authority. The bill before me concedes this, for it does not commit the funds it provides to the administration of any other authority.

"I can not but repeat what I have before expressed, that if the several States, many of which have already laid the foundation of munificent establishments of local beneficence, and nearly all of which are proceeding to establish them, shall be led to suppose, as, should this bill become a law, they will be, that Congress is to make provision for such objects, the fountains of charity will be dried up at home, and the several States, instead of bestowing their own means on the social wants of their own people, may themselves, through the strong temptation which appeals to states as to individuals, become humble suppliants for the bounty of the Federal Government, reversing their true relations to this Union.

. . . . . .

"I have been unable to discover any distinction on constitutional grounds or grounds of expediency between an appropriation of $10,000,000 directly from the money in

the Treasury for the object contemplated and the appropriation of lands presented for my sanction, and yet I can not doubt that if the bill proposed $10,000,000 from the Treasury of the United States for the support of the indigent insane in the several States that the constitutional question involved in the act would have attracted forcibly the attention of Congress.

"I respectfully submit that in a constitutional point of view it is wholly immaterial whether the appropriation be in money or in land.

. . . . .

"To assume that the public lands are applicable to ordinary State objects, whether of public structures, police, charity, or expenses of State administration, would be to disregard to the amount of the value of the public lands all the limitations of the Constitution and confound to that extent all distinctions between the rights and powers of the States and those of the United States; for if the public lands may be applied to the support of the poor, whether sane or insane, if the disposal of them and their proceeds be not subject to the ordinary limitations of the Constitution, then Congress possesses unqualified power to provide for expenditures in the States by means of the public lands, even to the degree of defraying the salaries of governors, judges, and all other expenses of the government and internal administration within the several States.

"The conclusion from the general survey of the whole subject is to my mind irresistible, and closes the question both of right and of expediency so far as regards the principle of the appropriation proposed in this bill. Would not the admission of such power in Congress to dispose of the public domain work the practical abrogation of some of the most important provisions of the Constitution?

. . . . .

"The general result at which I have arrived is the necessary consequence of those views of the relative rights, powers, and duties of the States and of the Federal Government which I have long entertained and often expressed and in reference to which my convictions do but increase in force with time and experience."

No defense is offered for the legislation under review upon the basis of emergency. The hypothesis is that hereafter it will continuously benefit unemployed members of a class. Forever, so far as we can see, the States are expected to function under federal direction concerning an internal matter. By the sanction of this adventure, the door is open for progressive inauguration of others of like kind under which it can hardly be expected that the States will retain genuine independence of action. And without independent States a Federal Union as contemplated by the Constitution becomes impossible.

At the bar counsel asserted that under the present Act the tax upon residents of Alabama during the first year will total $9,000,000. All would remain in the Federal Treasury but for the adoption by the State of measures agreeable to the National Board. If continued, these will bring relief from the payment of $8,000,000 to the United States.

Ordinarily, I must think, a denial that the challenged action of Congress and what has been done under it amount to coercion and impair freedom of government by the people of the State would be regarded as contrary to practical experience. Unquestionably our federate plan of government confronts an enlarged peril.

Separate opinion of MR. JUSTICE SUTHERLAND.

With most of what is said in the opinion just handed down, I concur. I agree that the payroll tax levied is an excise within the power of Congress; that the devotion of

not more than 90% of it to the credit of employers in states which require the payment of a similar tax under so-called unemployment-tax laws is not an unconstitutional use of the proceeds of the federal tax; that the provision making the adoption by the state of an unemployment law of a specified character a condition precedent to the credit of the tax does not render the law invalid. I agree that the states are not coerced by the federal legislation into adopting unemployment legislation. The provisions of the federal law may operate to induce the state to pass an employment law if it regards such action to be in its interest. But that is not coercion. If the act stopped here, I should accept the conclusion of the court that the legislation is not unconstitutional.

But the question with which I have difficulty is whether the administrative provisions of the act invade the governmental administrative powers of the several states reserved by the Tenth Amendment. A state may enter into contracts; but a state cannot, by contract or statute, surrender the execution, or a share in the execution, of any of its governmental powers either to a sister state or to the federal government, any more than the federal government can surrender the control of any of its governmental powers to a foreign nation. The power to tax is vital and fundamental, and, in the highest degree, governmental in character. Without it, the state could not exist. Fundamental also, and no less important, is the governmental power to expend the moneys realized from taxation, and exclusively to administer the laws in respect of the character of the tax and the methods of laying and collecting it and expending the proceeds.

The people of the United States, by their Constitution, have affirmed a division of internal governmental powers between the federal government and the governments of the several states—committing to the first its powers by express grant and necessary implication; to the latter, or

to the people, by reservation, "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States." The Constitution thus affirms the complete supremacy and independence of the state within the field of its powers. *Carter* v. *Carter Coal Co.,* 298 U. S. 238, 295. The federal government has no more authority to invade that field than the state has to invade the exclusive field of national governmental powers; for, in the oft-repeated words of this court in *Texas* v. *White,* 7 Wall. 700, 725, "the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government." The necessity of preserving each from every form of illegitimate intrusion or interference on the part of the other is so imperative as to require this court, when its judicial power is properly invoked, to view with a careful and discriminating eye any legislation challenged as constituting such an intrusion or interference. See *South Carolina* v. *United States,* 199 U. S. 437, 448.

The precise question, therefore, which we are required to answer by an application of these principles is whether the congressional act contemplates a surrender by the state to the federal government, in whole or in part, of any state governmental power to administer its own unemployment law or the state payroll-tax funds which it has collected for the purposes of that law. An affirmative answer to this question, I think, must be made.

I do not, of course, doubt the power of the state to select and utilize a depository for the safekeeping of its funds; but it is quite another thing to agree with the selected depository that the funds shall be withdrawn for certain stipulated purposes, and for no other. Nor do I doubt the authority of the federal government and a state government to coöperate to a common end, pro-

vided each of them is authorized to reach it. But such coöperation must be effectuated by an exercise of the powers which they severally possess, and not by an exercise, through invasion or surrender, by one of them of the governmental power of the other.

An illustration of what I regard as permissible coöperation is to be found in Title I of the act now under consideration. By that title, federal appropriations for old-age assistance are authorized to be made to any state which shall have adopted a plan for old-age assistance conforming to designated requirements. But the state is not obliged, as a condition of having the federal bounty, to deposit in the federal treasury funds raised by the state. The state keeps its own funds and administers its own law in respect of them, without let or hindrance of any kind on the part of the federal government; so that we have simply the familiar case of federal aid upon conditions which the state, without surrendering any of its powers, may accept or not as it chooses. *Massachusetts* v. *Mellon,* 262 U. S. 447, 480, 482–483.

But this is not the situation with which we are called upon to deal in the present case. For here, the state *must* deposit the proceeds of its taxation in the federal treasury, upon terms which make the deposit suspiciously like a forced loan to be repaid only in accordance with restrictions imposed by federal law. Title IX, §§ 903 (a) (3), 904 (a), (b), (e). All moneys withdrawn from this fund must be used exclusively for the payment of compensation. § 903 (a) (4). And this compensation is to be paid through public employment offices in the state or such other agencies as a *federal board may approve.* § 903 (a) (1). The act, it is true, recognizes [§ 903 (a) (6)] the power of the legislature to amend or repeal its compensation law at any time. But there is nothing in the act, as I read it, which justifies the conclusion that the state may, in that event, unconditionally withdraw its

funds from the federal treasury. Section 903 (b) provides that the board shall certify in each taxable year to the Secretary of the Treasury each state whose law has been approved. But the board is forbidden to certify any state which the board finds has so changed its law that it no longer contains the provisions specified in subsection (a), "or has with respect to such taxable year failed to comply substantially with any such provision." The federal government, therefore, in the person of its agent, the board, sits not only as a perpetual overseer, interpreter and censor of state legislation on the subject, but, as lord paramount, to determine whether the state is faithfully executing its own law—as though the state were a dependency under pupilage * and not to be trusted. The foregoing, taken in connection with the provisions that money withdrawn can be used only in payment of compensation and that it must be paid through an agency approved by the federal board, leaves it, to say the least, highly uncertain whether the right of the state to withdraw any part of its own funds exists, under the act, otherwise than upon these various statutory conditions. It is true also that subsection (f) of § 904 authorizes the Secretary of the Treasury to pay to any state agency "such amount as it may duly requisition, not exceeding the amount standing to the account of such State agency at the time of such payment." But it is to be observed that the payment is to be made to the state *agency,* and only such amount as that agency may *duly* requisition. It is hard to find in this provision any extension of the right of the state to withdraw its funds except in the manner and for the specific purpose prescribed by the act.

By these various provisions of the act, the federal agencies are authorized to supervise and hamper the administrative powers of the state to a degree which not only does not comport with the dignity of a quasi-sov-

* Compare *Snow* v. *United States,* 18 Wall. 317, 319–320.

ereign state—a matter with which we are not judicially concerned—but which denies to it that supremacy and freedom from external interference in respect of its affairs which the Constitution contemplates—a matter of very definite judicial concern. I refer to some, though by no means all, of the cases in point.

In the *License Cases,* 5 How. 504, 588, Mr. Justice McLean said that the federal government was supreme within the scope of its delegated powers, and the state governments equally supreme in the exercise of the powers not delegated by nor inhibited to them; that the states exercise their powers over everything connected with their social and internal condition; and that over these subjects the federal government had no power. "They appertain to the State sovereignty as exclusively as powers exclusively delegated appertain to the general government."

In *Tarble's Case,* 13 Wall. 397, Mr. Justice Field, after pointing out that the general government and the state are separate and distinct sovereignties, acting separately and independently of each other within their respective spheres, said that, except in one particular, they stood in the same independent relation to each other as they would if their authority embraced distinct territories. The one particular referred to is that of the supremacy of the authority of the United States in case of conflict between the two.

In *Farrington* v. *Tennessee,* 95 U. S. 679, 685, this court said, "Yet every State has a sphere of action where the authority of the national government may not intrude. Within that domain the State is as if the union were not. Such are the checks and balances in our complicated but wise system of State and national polity."

"The powers exclusively given to the federal government," it was said in *Worcester* v. *Georgia,* 6 Pet. 515, 570, "are limitations upon the state authorities. But,

with the exception of these limitations, the states are supreme; and their sovereignty can be no more invaded by the action of the general government, than the action of the state governments can arrest or obstruct the course of the national power."

The force of what has been said is not broken by an acceptance of the view that the state is not *coerced* by the federal law. The effect of the dual distribution of powers is completely to deny to the states whatever is granted exclusively to the nation, and, conversely, to deny to the nation whatever is reserved exclusively to the states. "The determination of the Framers Convention and the ratifying conventions to preserve complete and unimpaired state self-government in all matters not committed to the general government is one of the plainest facts which emerge from the history of their deliberations. And adherence to that determination is incumbent equally upon the federal government and the states. State powers can neither be appropriated on the one hand nor abdicated on the other." *Carter* v. *Carter Coal Co., supra,* p. 295. The purpose of the Constitution in that regard does not admit of doubt or qualification; and it can be thwarted no more by voluntary surrender from within than by invasion from without.

Nor may the constitutional objection suggested be overcome by the expectation of public benefit resulting from the federal participation authorized by the act. Such expectation, if voiced in support of a proposed constitutional enactment, would be quite proper for the consideration of the legislative body. But, as we said in the *Carter* case, *supra,* p. 291—"nothing is more certain than that beneficent aims, however great or well directed, can never serve in lieu of constitutional power." Moreover, everything which the act seeks to do for the relief of unemployment might have been accomplished, as is done by this same act for the relief of the misfortunes of old age, with-

out obliging the state to surrender, or share with another government, any of its powers.

If we are to survive as the United *States*, the balance between the powers of the nation and those of the states must be maintained. There is grave danger in permitting it to dip in either direction, danger—if there were no other—in the precedent thereby set for further departures from the equipoise. The threat implicit in the present encroachment upon the administrative functions of the states is that greater encroachments, and encroachments upon other functions, will follow.

For the foregoing reasons, I think the judgment below should be reversed.

MR. JUSTICE VAN DEVANTER joins in this opinion.

MR. JUSTICE BUTLER, dissenting.

I think that the objections to the challenged enactment expressed in the separate opinions of MR. JUSTICE MCREYNOLDS and MR. JUSTICE SUTHERLAND are well taken. I am also of opinion that, in principle and as applied to bring about and to gain control over state unemployment compensation, the statutory scheme is repugnant to the Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Constitution grants to the United States no power to pay unemployed persons or to require the States to enact laws or to raise or disburse money for that purpose. The provisions in question, if not amounting to coercion in a legal sense, are manifestly designed and intended directly to affect state action in the respects specified. And, if valid as so employed, this "tax and credit" device may be made effective to enable federal authorities to induce, if not indeed to compel, state enactments for any purpose within the realm of

state power, and generally to control state administration of state laws.

The Act creates a Social Security Board and imposes upon it the duty of studying and making recommendations as to legislation and as to administrative policies concerning unemployment compensation and related subjects. § 702. It authorizes grants of money by the United States to States for old age assistance, for administration of unemployment compensation, for aid to dependent children, for maternal and child welfare and for public health. Each grant depends upon state compliance with conditions prescribed by federal authority. The amounts given being within the discretion of the Congress, it may at any time make available federal money sufficient effectively to influence state policy, standards and details of administration.

The excise laid by § 901 is limited to specified employers. It is not imposed to raise money to pay unemployment compensation. But it is imposed having regard to that subject; for, upon enactment of state laws for that purpose in conformity with federal requirements specified in the Act, each of the employers subject to the federal tax becomes entitled to credit for the amount he pays into an unemployment fund under a state law up to 90 per cent. of the federal tax. The amounts yielded by the remaining 10 per cent., not assigned to any specific purpose, may be applied to pay the federal contributions and expenses in respect of state unemployment compensation. It is not yet possible to determine more closely the sums that will be needed for these purposes.

When the federal Act was passed Wisconsin was the only State paying unemployment compensation. Though her plan then in force is by students of the subject generally deemed the best yet devised, she found it necessary to change her law in order to secure federal approval. In the absence of that, Wisconsin employers subject to the

federal tax would not have been allowed any deduction on account of their contribution to the state fund. Any State would be moved to conform to federal requirements, not utterly objectionable, in order to save its taxpayers from the federal tax imposed in addition to the contributions under state laws.

Federal agencies prepared and took draft bills to state legislatures to enable and induce them to pass laws providing for unemployment compensation in accordance with federal requirements, and thus to obtain relief for the employers from the impending federal exaction. Obviously the Act creates the peril of federal tax not to raise revenue but to persuade. Of course, each State was free to reject any measure so proposed. But, if it failed to adopt a plan acceptable to federal authority, the full burden of the federal tax would be exacted. And, as federal demands similarly conditioned may be increased from time to time as Congress shall determine, possible federal pressure in that field is without limit. Already at least 43 States, yielding to the inducement resulting immediately from the application of the federal tax and credit device, have provided for unemployment compensation in form to merit approval of the Social Security Board. Presumably the remaining States will comply whenever convenient for their legislatures to pass the necessary laws.

The terms of the measure make it clear that the tax and credit device was intended to enable federal officers virtually to control the exertion of powers of the States in a field in which they alone have jurisdiction and from which the United States is by the Constitution excluded.

I am of opinion that the judgment of the Circuit Court of Appeals should be reversed.

Syllabus.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, ET AL. *v.* DAVIS.

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

No. 910. Argued May 5, 1937.—Decided May 24, 1937.

1. The Court abstains from dismissing, *sua sponte,* as not properly within equity jurisdiction, a bill by a shareholder to restrain his corporation from making the tax payments and the deductions from wages required by Title VIII of the Social Security Act of August 14, 1935, the bill alleging that the exactions are void and that compliance will subject the corporation and its shareholders to irreparable damage. P. 639.

   The corporation acquiesced. The Collector and Commissioner of Internal Revenue intervened in the court below, defended on the merits, brought the case to this Court by certiorari, and here expressly waived a defense under R. S. § 3224 and any objection upon the ground of adequate legal remedy, and urged that the validity of the taxes be determined.
2. The scheme of "Federal Old-Age Benefits" set up by Title II of the Social Security Act does not contravene the limitations of the Tenth Amendment. P. 640.
3. Congress may spend money in aid of the "general welfare." P. 640.
4. In drawing the line between what is "general" welfare, and what is particular, the determination of Congress must be respected by the courts, unless it be plainly arbitrary. P. 640.
5. The concept of "general welfare" is not static but adapts itself to the crises and necessities of the times. P. 641.
6. The problem of security for the aged, like the general problem of unemployment, is national as well as local. Cf. *Steward Machine Co.* v. *Davis, ante* p. 548. P. 644.

   There is ground to believe that laws and resources of the separate States unaided, can not deal with this problem effectively. State governments are reluctant to place such heavy burdens upon their residents lest they incur economic disadvantages as compared with neighbors or competitors; and a system of old age pensions established in one State encourages immigration of needy persons from other States which have rejected such systems. P. 644.

7. When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the States. P. 645.
8. Title II of the Social Security Act provides for "Federal Old-Age Benefits" for persons who have attained the age of 65. It creates an "Old-Age Reserve Account" in the Treasury and authorizes future appropriations to provide for the required old-age payments, but in itself neither appropriates money nor brings any money into the Treasury. Title VIII imposes an "excise" tax on employers, to be paid "with respect to having individuals in their employ," measured on the wages, and an "income tax on employees," measured on their wages, to be collected by their employers by deduction from wages. These taxes are not applicable to certain kinds of employment, including agricultural labor, domestic service, service for the national or state governments, and service performed by persons who have attained the age of 65 years. *Held:*

(1) Title II being valid, there is no occasion to inquire whether Title VIII must fall if Title II were void. P. 645.

(2) The tax upon employers is a valid excise or duty upon the relation of employment. *Steward Machine Co.* v. *Davis, ante* p. 548. P. 645.

(3) The tax is not invalid as a result of its exemptions. *Steward Machine Co.* v. *Davis, ante,* p. 548. P. 646.

89 F. (2d) 393, reversed.

CERTIORARI, *post,* p. 674, to review the reversal of a decree of the District Court denying an injunction and dismissing the bill in a suit by Davis, a shareholder of the Edison Electric Illuminating Company of Boston, to enjoin the corporation from complying with tax requirements of Title VIII of the Social Security Act.

Assistant Attorney General Jackson and *Mr. Charles E. Wyzanski, Jr.,* with whom *Attorney General Cummings, Solicitor General Reed,* and *Messrs. Sewall Key, A. H. Feller, Arnold Raum, Thomas H. Eliot, Alanson Willcox,* and *Robert P. Bingham,* were on the brief, for petitioners.

Since the employer is merely a withholding agent with respect to the employee tax, neither corporation nor stockholder may ask for relief from it.

Both the employee tax (a special income tax, *United States* v. *Hudson,* 299 U. S. 498) and the employer tax (an excise) comply with the requirement of uniformity.

These are true taxes, their purpose being simply to raise revenue. No compliance with any scheme of federal regulation is involved. The proceeds are paid unrestricted into the Treasury as internal revenue collections, available for the general support of the Government. Although Congress may have anticipated that over a period of years the taxes would roughly offset the drain upon the Treasury to be occasioned by the wholly independent appropriations authorized under Title II, such rough budgetary equivalence is not sufficient to deprive Title VIII of its quality as a true taxing measure.

The Circuit Court of Appeals erred in undertaking to pass upon the validity of Title II. *Frothingham* v. *Mellon,* 262 U. S. 447. A taxpayer has no standing to question the propriety of any expenditures from the federal Treasury. That rule has been relaxed only where the tax avails are earmarked for a specific purpose.

The employee tax is a withholding at the source, the employer being a collecting agent or stakeholder. The withholding provisions themselves are not challenged, nor could they be successfully attacked. *Brushaber* v. *Union Pacific R. Co.,* 240 U. S. 1, 21; *Pierce Oil Corp.* v. *Hopkins,* 264 U. S. 137; *Bell's Gap R. Co.* v. *Pennsylvania,* 134 U. S. 232, 239. The employer, as stakeholder, has no *locus standi* to challenge this tax. *United States* v. *American Exchange Co.,* 43 F. (2d) 829; *United States* v. *First Capital Bank,* 98 F. (2d) 116; *Miami Valley Fruit Co.* v. *United States,* 45 F. (2d) 303; *United States* v. *Erb,* 8 F. Supp. 947.

The corporation can complain only of the infringement of its own constitutional immunity. *Virginian Ry. Co.* v. *System Federation,* 300 U. S. 515. No employee is complaining. *Jeffrey Mfg. Co.* v. *Blagg,* 235 U. S. 571, 576. See *Erie R. Co.* v. *Williams,* 233 U. S. 685, 697; *Rail Coal Co.* v. *Ohio Industrial Comm'n,* 236 U. S. 338, 349; *Hawkins* v. *Bleakly,* 243 U. S. 210, 214. The standing of the stockholder cannot be any better than that of his corporation.

The power to appropriate for the general welfare granted by Art. I, § 8, cl. 1, is not limited by or to the other enumerated powers of Congress. *United States* v. *Butler,* 297 U. S. 1. Whether any particular expenditure is for the general welfare is a matter completely within the determination of Congress. *United States* v. *Teller,* 107 U. S. 64, 68. The decision of Congress is not reviewable by the courts if by any "reasonable possibility it is for the general welfare." *United States* v. *Butler,* 297 U. S. 1, 65.

The expenditures in the present case are clearly well within the limits of the power of Congress. The number of aged persons in this country is rapidly increasing; workers in urban industrialized civilization usually arrive at old age without adequate means for self-support, as is demonstrated not only by their earning powers during their working lifetime but by various studies which have been made of the extent of dependency of people over 65 years of age. Those who are able to call upon their children for support only aggravate the evil by depriving the younger members of the family of the resources which they need. Voluntary industrial pension plans cover but a few. Private charity is inadequate to cope with the problem. Even state old age benefit laws present grave administrative and financial problems.

Therefore, the expenditures contemplated by Title II are for the general welfare of the United States. More-

over, the form of the expenditures is soundly designed to promote general welfare. The statute excludes employed aged persons, thereby providing a simple and easily administered means test which is legally sufficient. *Mountain Timber Co.* v. *Washington,* 243 U. S. 219, 230. The payments themselves are graduated both by wages and length of employment, so as to provide an incentive to work and at the same time roughly to relate benefits to past standards of living. The incidental lump sum payments under §§ 203 and 204 accord with the general purpose of the plan and also serve to simplify its administration. The exclusions from benefits are based upon sound administrative and economic reasons.

Since Titles II and VIII severally constitute valid exercises of Congressional power, they cannot be invalid when considered jointly. If it be said that the avails of the taxes are earmarked, that fact does not deprive the taxes of their quality as true taxes, even though the proceeds be earmarked for the payment of benefits to a particular group. If the payment of benefits under Title II is an expenditure for the general welfare, then a levy for the purpose of providing funds for such expenditure must be a tax within the meaning of the Constitution. To determine that the expenditures are for the general welfare is to determine that they are for the benefit of the taxpayers as well as for the benefit of the direct recipients of the expenditures. A tax does not cease to be one for the general welfare because the immediate application of the proceeds is to one group of the population. *Clark* v. *Poor,* 274 U. S. 554; *Gillum* v. *Johnson,* 62 P. (2d) 1037, 1044; *Beeland Wholesale Grocery Co.* v. *Kaufman* (Ala.), 174 So. 516. "The Constitutional power to levy taxes does not depend upon the enjoyment by the taxpayer of any special benefit from the use of the proceeds raised by taxation." *Nashville, C. & St. L.*

Ry. v. *Wallace,* 288 U. S. 249, 268; *Carley & Hamilton* v. *Snook,* 281 U. S. 66; *Knights* v. *Jackson,* 260 U. S. 12, 15.

Titles II and VIII do not, when considered together, constitute a regulatory scheme. The Act does not require retirement from employment and has no tendency to induce it. It does not constitute a plan for compulsory insurance within the accepted meaning of the term "insurance." Cf. *Lynch* v. *United States,* 292 U. S. 571, 576–577. Whether the plan of the Act may properly be designated as old-age insurance is immaterial since it involves only a valid exercise of the taxing power and valid expenditures for the general welfare without regulatory incidents. Cf. *McCulloch* v. *Maryland,* 4 Wheat. 315. There is no enforced addition to wages, and consequently the Act does not constitute a regulation of the wage relationship. The Tenth Amendment has no application, since Congress has only exercised its granted powers. *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 330. The tax and expenditures are not forbidden to the Federal Government merely because the States themselves might legitimately lay similar taxes and make similar expenditures. *Hoke* v. *United States,* 227 U. S. 308, 322. *United States* v. *Butler,* 297 U. S. 1, and *Railroad Retirement Board* v. *Alton R. Co.,* 295 U. S. 330, distinguished.

The taxes do not violate the Fifth Amendment. Not only are the various selections of employments for taxation well within the power of Congress (*Sonzinsky* v. *United States,* 300 U. S. 506), but they are of the type long sanctioned.

The provision limiting the amount of taxable wages to $3,000 is likewise valid. Congress has as full discretion in determining how far it will exercise the taxing power as it has in selecting the subjects for taxation. This provision will be found justified by precedent as well as by its reasonable tendency to avoid double taxation.

Title VIII is a valid exercise of the power "To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States." Const., Art. I, § 8. The authority so conferred "is exhaustive and embraces every conceivable power of taxation." *Brushaber* v. *Union Pac. R. Co.,* 240 U. S. 1, 12.

Mr. Edward F. McClennen, with whom *Mr. Jacob J. Kaplan* was on the brief, for respondent.

1. The title of an Act and its whole content may be examined to see that Congress intended the imposition to be for a particular purpose, and not merely to produce general revenue for the United States. *Hill* v. *Wallace,* 259 U. S. 44; *Child Labor Tax Case,* 259 U. S. 20; *Carter* v. *Carter Coal Co.,* 298 U. S. 238 (semble); *United States* v. *Constantine,* 296 U. S. 287, 294 (semble); *Grosjean* v. *American Press Co.,* 297 U. S. 233; *Trusler* v. *Crooks,* 269 U. S. 475; and *United States* v. *Butler,* 297 U. S. 1.

2. The imposition is not an "excise" within the meaning of that word as used in the only clause of the Constitution which empowers the Congress to levy taxes. See *Davis* v. *Boston & Maine R. R.,* 89 F. (2d) 368.

"Excise," in England and in the Colonies, for at least one hundred and forty years before it was used in the Constitution, meant an inland levy on selected tangible property, or upon the owners of it, because of the activity in which the property was moving, as in the manufacture, in intermediate sale, or in the ultimate sale commonly amounting to consumption. The antithesis was the direct tax upon property in general, certainly land, when taxed on a rate fixed by its static appraised capital value, possibly when measured by its annual unwrought return in rent, income, or products, and, debatably, upon personal property so appraised or judged. Both the direct tax and the excise were preëminently property

taxes,—one regardless of its activity or inactivity, and the other taking that activity into consideration. In 1766 Dr. Johnson defined "excise" as "a hateful tax levied upon commodities, and adjudged not by the common judges of property." Dict. (3d ed., 1766). He defined "commodity" as "interest, advantage, profit, convenience of time or place, wares, merchandise." *Id.* "Commodity" suggests, as the principal thought, merchandise. In 1776 Adam Smith in his "The Wealth of Nations" said, "The duties of excise are imposed chiefly upon goods of home produce destined for home consumption. They are imposed only upon a few sorts of goods of the most general use." In 1780 the Massachusetts constitution indicated direct taxes to be the normal source of revenue, but gave the legislature authority to impose "reasonable duties and excises, upon any produce, goods, wares, merchandise, and commodities, whatsoever." In 1788 the Constitutional Convention of New York urged an amendment to the Constitution "That the Congress do not impose any excise on any article (ardent spirits excepted) of the growth, production, or manufacture of the United States, or any of them." 1 Elliot's Debates 72; Luther Martin said "By the power to lay excises,—a power very odious in its nature, since it authorizes officers to go into your houses, your kitchens, your cellars, and to examine into your private concerns,—the Congress may impose duties on every article of use or consumption, on the food that we eat, on the liquors that we drink, on the clothes that we wear, the glass which enlightens our houses, or the hearths necessary for our warmth and comfort." Cf. Chancellor Livingston in the New York Convention, 2 *id.* 341; Nicholas in the Virginia Convention, 3 *id.* 243; also 5 *id.* 40; Hamilton, Federalist, No. 21, p. 182; Ellsworth, Connecticut Convention, 2 Elliot 192; Writings of Gallatin, p. 73.

See also: Hist. of England, 5 Hume, ed. 1861, p. 269; Clarendon, the Hist. of Rebellion in England, Vol. II, p. 453; 1 Blackstone Comm. 308; and Ency. Brit. Third ed. 1797; British Excise Act, March 28, 1643; January, 1644. The tax laid by the Revenue Act of 1777 (17 Geo. III, c. 39) of one shilling per annum for every male servant of the kinds described was a luxury tax like the window tax.

Excises in New York before 1788: See "The Colonial Laws of New York from the Year 1644 to the Revolution, Transmitted to the Legislature by the Commissioners of Statutory Revision, Pursuant to Chapter 125 of the Laws of 1891," Vol. I, pp. 248, 789; Vol. IV, *id.* 1, 105; Laws of New York, 1775 to 1788, Vol. I, pp. 109, 660. In Pennsylvania: IX Stat. at L. 1776–1799, p. 55. In Massachusetts: 1646, Plymouth Colony Law, 1836, p. 85; June 24, 1692, Acts and Resolves of the Province of Massachusetts Bay, Vol. 1, c. 5, p. 32; I. *Id.* 57, 272, 391, 475, 527, 662, 738; II. *Id.* 203, 849; III. *Id.* 495, 568, 750; IV. *Id.* 219; Acts of Nov. 1, 1781, c. 17, I. Laws of Mass. 60; 1782, 1783; I. *Id.* 62, 78, 85; Laws and Resolves of 1782, c. 33, p. 92.

Historically, an excise was in character an inland duty or impost on a tangible commodity in manufacture or in sale either in the course of trade or for consumption. It was not "cut out" of the activity, but out of the goods.

It is inconceivable that the people of the thirteen States could have understood that the word "excise" included an imposition on the state of being of exercising the universal natural right to employ, for wages, other men who consented to that employment, in a manner not injurious to the public good.

Supporters of this tax have urged that it is a tax upon privilege. There is no privilege. The state of being on which the imposition is made is not derived from gov-

ernment or from public authority in any manner. Privilege contrasts with common natural opportunity. Contrast the privilege to do business without liability for debts, as in corporate form. Any dictionary of the common meanings will show that "privilege" as used in this context means something not of common right.

Undoubtedly properties of modern times—as, for example, automobiles—never thought of in 1788, may come within the meaning of the word "excise" in 1788. But, if the state of being, of having individuals in a man's employ,—a thing of character which existed in 1788,—did not then come within the meaning of the word, it is not there now.

An attempted Act may be clearly without the powers of the Congress, and a particular litigant nevertheless may have no right to invoke the judgment of this Court. *Massachusetts* v. *Mellon,* 262 U. S. 447; *Florida* v. *Mellon,* 273 U. S. 12. Consequently, the fact that the validity of appropriation of the money of the United States in questionable ways has not been questioned before this Court, carries no implication that the appropriations were lawful, or approved by the people.

It is only in the last twenty years that inland taxes of the United States have become so burdensome that it has been worth the extensive effort of many people to prevent unlawful appropriations.

A person in terms obliged by an attempted invalid Act to pay money to go into the Treasury of the United States, has a right to a decision. *United States* v. *Butler,* 297 U. S. 1.

An imposition on a particular class of tangible property, in manufacture, use, gift, bequest, or sale, may be sustained as an excise if it meets the other constitutional requirements, including that the end is to provide revenue for the general welfare of the Federal Government and that the selection is not capricious or violative

of the rule of uniformity. *Magnano* v. *Hamilton,* 292 U. S. 40; *Bromley* v. *McCaughn,* 280 U. S. 124; *N. Y. Trust Co.* v. *Eisner,* 256 U. S. 345; *Billings* v. *United States,* 232 U. S. 261; *McCray* v. *United States,* 195 U. S. 27; *Thomas* v. *United States,* 192 U. S. 363; *Cornell* v. *Coyne,* 192 U. S. 418; *Spreckels Sugar Co.* v. *McClain,* 192 U. S. 397; *Patton* v. *Brady,* 184 U. S. 608; *Treat* v. *White,* 181 U. S. 264; *Knowlton* v. *Moore,* 178 U. S. 41, 84; *Nicol* v. *Ames,* 173 U. S. 609; *Springer* v. *United States,* 102 U. S. 586; *Railroad Co.* v. *Collector,* 100 U. S. 595; *Scholey* v. *Rew,* 23 Wall. 331; *Veazie Bank* v. *Fenno,* 8 Wall. 533; *Pacific Ins. Co.* v. *Soule,* 7 Wall. 433; *License Cases,* 5 Wall. 462; *Hylton* v. *United States,* 3 Dall. 171. Important documents, and paper, particularly commercial paper, are tangible and valuable because of that fact. *Patton* v. *Brady,* 184 U. S. 608, 617; *Cook* v. *Pennsylvania,* 97 U. S. 566. In at least one case this Court has held that a franchise is a sufficiently palpable kind of property to permit an excise in respect of it, *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 155, 162; but it has never held that the natural, harmless, state of being, or natural, harmless conduct privileged or unprivileged, is subject to excise.

See: Opinions of the Justices, 282 Mass. 219; 266 Mass. 592, 595; 196 Mass. 624.

Property may not be taken by government from one for another, even for public advantage or welfare, without just compensation, *Louisville Bank* v. *Radford,* 295 U. S. 555, 601, 602; *United States* v. *Butler,* 297 U. S. 1; *Railroad Retirement Board* v. *Alton R. Co.,* 295 U. S. 330; and it makes no difference that it is done under the guise of a tax or is the product of a tax, *Loan Association* v. *Topeka,* 20 Wall. 655; *Calder* v. *Bull,* 3 Dall. 386; *Miles Planting Co.* v. *Carlisle,* 5 App. D. C. 138, 146.

Even if a tax is levied expressly for the purpose of obtaining general revenue, when it appears, "in the light

of its history and of its present setting," that it is for a purpose which the Constitution does not permit the law-making body to accomplish, the tax is invalid. *Grosjean* v. *American Press Co., Inc.*, 297 U. S. 233, 250. Distinguishing *Spreckels Sugar Ref. Co.* v. *McClain*, 192 U. S. 397.

3. In testing the validity of the levy attempted in §§ 804 and 802, an unchanging decision must be made for all purposes, as to whether the levy is for general revenue only or is for old age benefits such as are described in Title II. The levy should not be deemed to be for such benefits at one stage of argument in order to meet the charge of capriciousness, and for general revenue at another stage in order to meet the charge of absence of federal purpose.

4. Whether for general revenue or not, the attempted levy is so capricious and so lacking in uniformity as not to be in character a tax. If the purpose is general revenue, there is no basis in reason for selecting certain faultless employers to bear the entire burden and thereby relieve wealth generally from taxation to furnish the revenue. If the purpose is old-age benefits, there is no more reason for shifting the burden of a tax on wealth to the shoulders of possibly poor employers who are not the cause of the old age. There is no attempt to cover all in the same class. If men over sixty-five years of age ought to have an annuity or old-age benefit, it should be on account of that fact, not because of the type of employment in which they have been engaged, and if employers ought to pay an excise for the state of being of having employees, they ought to pay it when they have that state of being. It is the known fact that imposition upon non-agricultural labor is equivalent to confining the imposition to certain States to the approximately complete exclusion of other States. It is capricious to deny the "over-sixty-five" benefits to farm laborers, and to relieve their employers from an imposition placed on other employers.

Only 56%, or less, of the gainful workers in the United States are potentially to be benefited. The employers of only this 56%, (or less), are subjected to the imposition.

The employers of the 56% bear not only the burden of caring by so much for the aged among the 56%, but also the burden of their share of taxes to meet the public expense for poor relief and assistance to the remaining 44%, and of the unprovided for balance of the 56%.

Senate Report No. 628, (74th Congress, 1st Sess. 1935) indicates that when the impositions under Titles VIII and IX are in full sway, so that 9% on the pay rolls must be paid, the imposition is equivalent to a general sales tax of 3%. As the tax is on employers in trade as well as in industry, (except in the case of imported merchandise sold), they are taxed twice. The employers in the production and trade in domestic industry in this way pay two taxes inevitably; and where the products pass through both wholesale and retail trade, three taxes. What passes from wholesale trade into the hands of the manufacturers, as the raw material of those manufacturers, calls for another payment. It is beyond the possibility of accurate mathematical statement. In many cases the levy cannot be passed on without the destruction of the trade; and if not passed on, the employer inevitably meets financial ruin when subjected to such a huge tax.

If gainful workers ought to have an annuity after age sixty-five, so should all other persons. There is no reason for favoring those who have been able to get and perform work, to the exclusion of those who have not. The number of workers potentially to benefit and preferentially treated is less than 22% of the population.

Capricious selection of class of property, class of persons, or rate gradation, converts an attempted excise into a nonuniform confiscation, without tax character. *Grosjean* v. *American Press Co.,* 297 U. S. 233, 251;

Colgate v. *Harvey,* 296 U. S. 404, 422, 424; *Concordia Fire Ins. Co.* v. *Illinois,* 292 U. S. 535; *Stebbins* v. *Riley,* 268 U. S. 137; *Louisville Gas Co.* v. *Coleman,* 277 U. S. 32; *Schlesinger* v. *Wisconsin,* 270 U. S. 230; *Bromley* v. *McCaughn,* 280 U. S. 124, 139; *Mayflower Farms* v. *Ten Eyck,* 297 U. S. 266, 272 (semble) of a regulation; *In re Opinion of the Justices,* 85 N. H. 562, (semble). Cf. *Brushaber* v. *Union Pacific R. Co.,* 240 U. S. 1, 24.

5. To provide old age benefits such as are described in Title II is not a purpose for which the Congress has power to tax. Such a purpose is not for the common defense, or to pay the debts of, or to provide for the general welfare of, the Government.

Apart from taxes to pay the debts and provide for the common defense of the Government, no tax by Congress is authorized unless it is to provide for the general welfare of the Government of the United States. The limits upon the taxing power are not set by "welfare" only, but by the limits upon the kind of welfare for which the tax may be levied. It must be the limited kind of welfare which is "general," and it must be the limited kind of welfare which is "of the United States." In this limitation, "of the United States" evidently is used in the sense of Government of the United States. It is not to be supposed that a constitution would grant to Congress a power to tax to provide revenue for the general welfare of the territory of the United States when that Congress had been given no power to legislate for the general welfare of that territory. The words "general" and "of the United States" are words of restriction upon the kind of welfare to provide revenue for which Congress may levy a tax. They stand opposite to the restrictions of "State" or "local" in defining the welfare for which a State may levy a tax.

As far as it may be done by legislation, the control of the relation between employer and employee, the rate

of wages, the withholding of wages to build reserves, the insurance against accidents, the making of reserves for the employee when he no longer, or not for a time, can earn wages, is for the legislature of the State.

The support of men and women who have come to be sixty-five years old in the respective States, or who cannot get employment, is no more for the general welfare of the Government of the United States than is the keeping of the citizenry of the United States from becoming drug addicts, and thereby likely to be unable to earn a living or to fight for the United States, or to vote intelligently for a President or Senators and Representatives. Cf. *Linder* v. *United States,* 268 U. S. 5, 17; *United States* v. *Doremus,* 249 U. S. 86, 95; *United States* v. *Jin Fuey Moy,* 241 U. S. 394, 401. Local commercial activities and employment relations completed wholly within a State, howsoever common they may be in every State, are not a part of the general welfare of the Government of the United States. *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495; *United States* v. *Butler,* 297 U. S. 1; *Railroad Retirement Board* v. *Alton R. Co.,* 295 U. S. 330 (*a fortiori*); *Child Labor Tax Case,* 259 U. S. 20; *Hill* v. *Wallace,* 259 U. S. 44; *Hammer* v. *Dagenhart,* 247 U. S. 251. Cf. remarks of Hughes, C. J., in *Carter* v. *Carter Coal Co.,* 298 U. S. 238, 317.

The State where this local employment occurs may deem it wiser to regulate the relation in a different way, to provide a smaller annuity with a smaller compulsory contribution, or none at all. The same thing cannot be done by Congress and by the state legislature. If it is a subject for legislative regulation at all, the Tenth Amendment says that it is to be regulated by the state legislature, and not by Congress. Cf. *Chamberlin* v. *Andrews,* 299 U. S. 515; *Collector* v. *Day,* 11 Wall. 113.

Impositions for old-age benefits do not differ in this respect from those for unemployment benefits. The par-

ticular limit to "general welfare," as to which Hamilton and Madison differed, and Monroe vacillated, is not involved. None of them suggested that any such regulations of employment obligations and relations within a State come within this phrase. None of them, it seems, would have supported a power in Congress to compel employers and employees in purely local employment to contribute to a fund for old-age annuities for others. Cf. veto messages of Presidents Jackson, May 27, 1830, 2 Richardson, 483, 492, 639; Buchanan, February 24, 1859, 5 *Id.* 547; Cleveland in 1887, 8 *Id.* 557.

6. In fact and in law, in the sections 804 and 802 under consideration, this is not a taxing statute, but an unconstitutional attempt to regulate the wage relation within the several States. *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379; *Attorney-General for Canada* v. *Attorney General for Ontario,* [1937] A. C. 355, affirming [1936] Can. S. C. R. 427.

Mr. Justice Cardozo delivered the opinion of the Court.

The Social Security Act (Act of August 14, 1935, c. 531, 49 Stat. 620, 42 U. S. C., c. 7, (Supp.)) is challenged once again.

In *Steward Machine Co.* v. *Davis,* decided this day, *ante,* p. 548, we have upheld the validity of Title IX of the act, imposing an excise upon employers of eight or more. In this case Titles VIII and II are the subject of attack. Title VIII lays another excise upon employers in addition to the one imposed by Title IX (though with different exemptions). It lays a special income tax upon employees to be deducted from their wages and paid by the employers. Title II provides for the payment of Old Age Benefits, and supplies the motive and occasion, in the view of the assailants of the statute, for

the levy of the taxes imposed by Title VIII. The plan of the two titles will now be summarized more fully.

Title VIII, as we have said, lays two different types of tax, an "income tax on employees," and "an excise tax on employers." The income tax on employees is measured by wages paid during the calendar year. § 801. The excise tax on the employer is to be paid "with respect to having individuals in his employ," and, like the tax on employees, is measured by wages. § 804. Neither tax is applicable to certain types of employment, such as agricultural labor, domestic service, service for the national or state governments, and service performed by persons who have attained the age of 65 years. § 811 (b). The two taxes are at the same rate. §§ 801, 804. For the years 1937 to 1939, inclusive, the rate for each tax is fixed at one per cent. Thereafter the rate increases ½ of 1 per cent every three years, until after December 31, 1948, the rate for each tax reaches 3 per cent. *Ibid.* In the computation of wages all remuneration is to be included except so much as is in excess of $3,000 during the calendar year affected. § 811 (a). The income tax on employees is to be collected by the employer, who is to deduct the amount from the wages "as and when paid." § 802 (a). He is indemnified against claims and demands of any person by reason of such payment. *Ibid.* The proceeds of both taxes are to be paid into the Treasury like internal-revenue taxes generally, and are not earmarked in any way. § 807 (a). There are penalties for non-payment. § 807 (c).

Title II has the caption "Federal Old-Age Benefits." The benefits are of two types, first, monthly pensions, and second, lump sum payments, the payments of the second class being relatively few and unimportant.

The first section of this title creates an account in the United States Treasury to be known as the "Old-Age

Reserve Account." § 201. No present appropriation, however, is made to that account. All that the statute does is to authorize appropriations annually thereafter, beginning with the fiscal year which ends June 30, 1937. How large they shall be is not known in advance. The "amount sufficient as an annual premium" to provide for the required payments is "to be determined on a reserve basis in accordance with accepted actuarial principles, and based upon such tables of mortality as the Secretary of the Treasury shall from time to time adopt, and upon an interest rate of 3 per centum per annum compounded annually." § 201 (a). Not a dollar goes into the Account by force of the challenged act alone, unaided by acts to follow.

Section 202 and later sections prescribe the form of benefits. The principal type is a monthly pension payable to a person after he has attained the age of 65. This benefit is available only to one who has worked for at least one day in each of at least five separate years since December 31, 1936, who has earned at least $2,000 since that date, and who is not then receiving wages "with respect to regular employment." §§ 202 (a), (d), 210 (c). The benefits are not to begin before January 1, 1942. § 202 (a). In no event are they to exceed $85 a month. § 202 (b). They are to be measured (subject to that limit) by a percentage of the wages, the percentage decreasing at stated intervals as the wages become higher. § 202 (a). In addition to the monthly benefits, provision is made in certain contingencies for "lump sum payments" of secondary importance. A summary by the Government of the four situations calling for such payments is printed in the margin.[1]

[1](1) If through an administrative error or delay a person who is receiving a monthly pension dies before he receives the correct amount, the amount which should have been paid to him is paid in a lump sum to his estate [§ 203 (c)].

This suit is brought by a shareholder of the Edison Electric Illuminating Company of Boston, a Massachusetts corporation, to restrain the corporation from making the payments and deductions called for by the act, which is stated to be void under the Constitution of the United States. The bill tells us that the corporation has decided to obey the statute, that it has reached this decision in the face of the complainant's protests, and that it will make the payments and deductions unless restrained by a decree. The expected consequences are indicated substantially as follows: The deductions from the wages of the employees will produce unrest among them, and will be followed, it is predicted, by demands that wages be increased. If the exactions shall ultimately be held void, the company will have parted with moneys which as a practical matter it will be impossible to recover. Nothing is said in the bill about the promise of indemnity. The prediction is made also that serious consequences will en-

(2) If a person who has earned wages in each of at least five separate years since December 31, 1936, and who has earned in that period more than $2,000, dies *after* attaining the age of 65, but before he has received in monthly pensions an amount equal to 3½ percent of the "wages" paid to him between January 1, 1937, and the time he reaches 65, then there is paid in a lump sum to his estate the difference between said 3½ percent and the total amount paid to him during his life as monthly pensions [§ 203 (b)].

(3) If a person who has earned wages since December 31, 1936, dies *before* attaining the age of 65, then there is paid to his estate 3½ percent of the "wages" paid to him between January 1, 1937, and his death [§ 203 (a)].

(4) If a person has, since December 31, 1936, earned wages in employment covered by Title II, but has attained the age of 65 either without working for at least one day in each of 5 separate years since 1936, or without earning at least $2,000 between January 1, 1937, and the time he attains 65, then there is paid to him [or to his estate, § 204 (b)], a lump sum equal to 3½ percent of the "wages" paid to him between January 1, 1937, and the time he attained 65 [§ 204 (a)].

sue if there is a submission to the excise. The corporation and its shareholders will suffer irreparable loss, and many thousands of dollars will be subtracted from the value of the shares. The prayer is for an injunction and for a declaration that the act is void.

The corporation appeared and answered without raising any issue of fact. Later the United States Commissioner of Internal Revenue and the United States Collector for the District of Massachusetts, petitioners in this court, were allowed to intervene. They moved to strike so much of the bill as has relation to the tax on employees, taking the ground that the employer, not being subject to tax under those provisions, may not challenge their validity, and that the complainant shareholder, whose rights are no greater than those of his corporation, has even less standing to be heard on such a question. The intervening defendants also filed an answer which restated the point raised in the motion to strike, and maintained the validity of Title VIII in all its parts. The District Court held that the tax upon employees was not properly at issue, and that the tax upon employers was constitutional. It thereupon denied the prayer for an injunction, and dismissed the bill. On appeal to the Circuit Court of Appeals for the First Circuit, the decree was reversed, one judge dissenting. 89 F. (2d) 393. The court held that Title II was void as an invasion of powers reserved by the Tenth Amendment to the states or to the people, and that Title II in collapsing carried Title VIII along with it. As an additional reason for invalidating the tax upon employers, the court held that it was not an excise as excises were understood when the Constitution was adopted. Cf. *Davis* v. *Boston & Maine R. Co.*, 89 F. (2d) 368, decided the same day.

A petition for certiorari followed. It was filed by the intervening defendants, the Commissioner and the Collector, and brought two questions, and two only, to our

notice. We were asked to determine: (1) "whether the tax imposed upon employers by § 804 of the Social Security Act is within the power of Congress under the Constitution," and (2) "whether the validity of the tax imposed upon employees by § 801 of the Social Security Act is properly in issue in this case, and if it is, whether that tax is within the power of Congress under the Constitution." The defendant corporation gave notice to the Clerk that it joined in the petition, but it has taken no part in any subsequent proceedings. A writ of certiorari issued.

First. Questions as to the remedy invoked by the complainant confront us at the outset.

Was the conduct of the company in resolving to pay the taxes a legitimate exercise of the discretion of the directors? Has petitioner a standing to challenge that resolve in the absence of an adequate showing of irreparable injury? Does the acquiescence of the company in the equitable remedy affect the answer to those questions? Though power may still be ours to take such objections for ourselves, is acquiescence effective to rid us of the duty? Is duty modified still further by the attitude of the Government, its waiver of a defense under § 3224 of the Revised Statutes, its waiver of a defense that the legal remedy is adequate, its earnest request that we determine whether the law shall stand or fall? The writer of this opinion believes that the remedy is ill conceived, that in a controversy such as this a court must refuse to give equitable relief when a cause of action in equity is neither pleaded nor proved, and that the suit for an injunction should be dismissed upon that ground. He thinks this course should be followed in adherence to the general rule that constitutional questions are not to be determined in the absence of strict necessity. In that view he is supported by MR. JUSTICE BRANDEIS, MR. JUSTICE STONE and MR. JUSTICE ROBERTS. However, a majority of the

court have reached a different conclusion. They find in this case extraordinary features making it fitting in their judgment to determine whether the benefits and the taxes are valid or invalid. They distinguish *Norman* v. *Consolidated Gas Co.*, 89 F. (2d) 619, recently decided by the Court of Appeals for the Second Circuit, on the ground that in that case, the remedy was challenged by the company and the Government at every stage of the proceeding, thus withdrawing from the court any marginal discretion. The ruling of the majority removes from the case the preliminary objection as to the nature of the remedy which we took of our own motion at the beginning of the argument. Under the compulsion of that ruling, the merits are now here.

Second. The scheme of benefits created by the provisions of Title II is not in contravention of the limitations of the Tenth Amendment.

Congress may spend money in aid of the "general welfare." Constitution, Art. I, section 8; *United States* v. *Butler*, 297 U. S. 1, 65; *Steward Machine Co.* v. *Davis*, *supra*. There have been great statesmen in our history who have stood for other views. We will not resurrect the contest. It is now settled by decision. *United States* v. *Butler*, *supra*. The conception of the spending power advocated by Hamilton and strongly reinforced by Story has prevailed over that of Madison, which has not been lacking in adherents. Yet difficulties are left when the power is conceded. The line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event. There is a middle ground or certainly a penumbra in which discretion is at large. The discretion, however, is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment. This is now familiar law.

"When such a contention comes here we naturally require a showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress." *United States* v. *Butler, supra,* p. 67. Cf. *Cincinnati Soap Co.* v. *United States, ante,* p. 308; *United States* v. *Realty Co.,* 163 U. S. 427, 440; *Head Money Cases,* 112 U. S. 580, 595. Nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the Nation. What is critical or urgent changes with the times.

The purge of nation-wide calamity that began in 1929 has taught us many lessons. Not the least is the solidarity of interests that may once have seemed to be divided. Unemployment spreads from State to State, the hinterland now settled that in pioneer days gave an avenue of escape. *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 442. Spreading from State to State, unemployment is an ill not particular but general, which may be checked, if Congress so determines, by the resources of the Nation. If this can have been doubtful until now, our ruling today in the case of the *Steward Machine Co., supra,* has set the doubt at rest. But the ill is all one, or at least not greatly different, whether men are thrown out of work because there is no longer work to do or because the disabilities of age make them incapable of doing it. Rescue becomes necessary irrespective of the cause. The hope behind this statute is to save men and women from the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near.

Congress did not improvise a judgment when it found that the award of old age benefits would be conducive to the general welfare. The President's Committee on Economic Security made an investigation and report, aided by a research staff of Government officers and employees, and by an Advisory Council and seven other advisory

groups.[2] Extensive hearings followed before the House Committee on Ways and Means, and the Senate Committee on Finance.[3] A great mass of evidence was brought together supporting the policy which finds expression in the act. Among the relevant facts are these: The number of persons in the United States 65 years of age or over is increasing proportionately as well as absolutely. What is even more important the number of such persons unable to take care of themselves is growing at a threatening pace. More and more our population is becoming urban and industrial instead of rural and agricultural.[4] The evidence is impressive that among industrial workers the younger men and women are preferred over the older.[5] In times of retrenchment the older are commonly the first to go, and even if retained, their wages are likely to be lowered. The plight of men and women at so low an age as 40 is hard, almost hopeless, when they are driven to seek for reëmployment. Statistics are in the brief. A few illustrations will be chosen from many there collected. In 1930, out of 224 American factories investigated, 71, or almost one third, had fixed maximum hiring age limits; in 4 plants the limit was under 40; in 41 it was under 46. In the other 153 plants there were no fixed limits, but in practice few were hired if they were over 50 years of age.[6] With the loss of savings inevitable in periods of idleness,

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[2] Report to the President of the Committee on Economic Security, 1935.

[3] Hearings before the House Committee on Ways and Means on H. R. 4120, 74th Congress, 1st session; Hearings before the Senate Committee on Finance on S. 1130, 74th Congress, 1st Session.

[4] See Report of the Committee on Recent Social Trends, 1932, vol. 1, pp. 8, 502; Thompson and Whelpton, Population Trends in the United States, pp. 18, 19.

[5] See the authorities collected at pp. 54–62 of the Government's brief.

[6] Hiring and Separation Methods in American Industry, 35 Monthly Labor Review, pp. 1005, 1009.

the fate of workers over 65, when thrown out of work, is little less than desperate. A recent study of the Social Security Board informs us that "one-fifth of the aged in the United States were receiving old-age assistance, emergency relief, institutional care, employment under the works program, or some other form of aid from public or private funds; two-fifths to one-half were dependent on friends and relatives, one-eighth had some income from earnings; and possibly one-sixth had some savings or property. Approximately three out of four persons 65 or over were probably dependent wholly or partially on others for support." [7] We summarize in the margin the results of other studies by state and national commissions.[8] They point the same way.

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[7] Economic Insecurity in Old Age (Social Security Board, 1937), p. 15.

[8] The Senate Committee estimated, when investigating the present act, that over one half of the people in the United States over 65 years of age are dependent upon others for support. Senate Report, No. 628, 74th Congress, 1st Session, p. 4. A similar estimate was made in the Report to the President of the Committee on Economic Security, 1935, p. 24.

A Report of the Pennsylvania Commission on Old Age Pensions made in 1919 (p. 108) after a study of 16,281 persons and interviews with more than 3,500 persons 65 years and over showed two fifths with no income but wages and one fourth supported by children; 1.5 per cent had savings and 11.8 per cent had property.

A report on old age pensions by the Massachusetts Commission on Pensions (Senate No. 5, 1925, pp. 41, 52) showed that in 1924 two thirds of those above 65 had, alone or with a spouse, less than $5,000 of property, and one fourth had none. Two thirds of those with less than $5,000 and income of less than $1,000 were dependent in whole or in part on others for support.

A report of the New York State Commission made in 1930 (Legis. Doc. No. 67, 1930, p. 39) showed a condition of total dependency as to 58 per cent of those 65 and over, and 62 per cent of those 70 and over.

The national Government has found in connection with grants to states for old age assistance under another title of the Social Security

The problem is plainly national in area and dimensions. Moreover, laws of the separate states cannot deal with it effectively. Congress, at least, had a basis for that belief. States and local governments are often lacking in the resources that are necessary to finance an adequate program of security for the aged. This is brought out with a wealth of illustration in recent studies of the problem.[9] Apart from the failure of resources, states and local governments are at times reluctant to increase so heavily the burden of taxation to be borne by their residents for fear of placing themselves in a position of economic disadvantage as compared with neighbors or competitors. We have seen this in our study of the problem of unemployment compensation. *Steward Machine Co.* v. *Davis, supra.* A system of old age pensions has special dangers of its own, if put in force in one state and rejected in another. The existence of such a system is a bait to the needy and dependent elsewhere, encouraging them to migrate and seek a haven of repose. Only a power that is national can serve the interests of all.

Whether wisdom or unwisdom resides in the scheme of benefits set forth in Title II, it is not for us to say. The answer to such inquiries must come from Congress, not the courts. Our concern here, as often, is with power, not with wisdom. Counsel for respondent has recalled to us the virtues of self-reliance and frugality. There is a possibility, he says, that aid from a paternal government

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Act (Title I) that in February, 1937, 38.8 per cent of all persons over 65 in Colorado received public assistance; in Oklahoma the percentage was 44.1, and in Texas 37.5. In 10 states out of 40 with plans approved by the Social Security Board more than 25 per cent of those over 65 could meet the residence requirements and qualify under a means test and were actually receiving public aid. Economic Insecurity in Old Age, *supra,* p. 15.

[9] Economic Insecurity in Old Age, *supra,* chap. VI, p. 184.

may sap those sturdy virtues and breed a race of weaklings. If Massachusetts so believes and shapes her laws in that conviction, must her breed of sons be changed, he asks, because some other philosophy of government finds favor in the halls of Congress? But the answer is not doubtful. One might ask with equal reason whether the system of protective tariffs is to be set aside at will in one state or another whenever local policy prefers the rule of *laissez faire*. The issue is a closed one. It was fought out long ago.[10] When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states. So the concept be not arbitrary, the locality must yield. Constitution, Art. VI, Par. 2.

Third. Title II being valid, there is no occasion to inquire whether Title VIII would have to fall if Title II were set at naught.

The argument for the respondent is that the provisions of the two titles dovetail in such a way as to justify the conclusion that Congress would have been unwilling to pass one without the other. The argument for petitioners is that the tax moneys are not earmarked, and that Congress is at liberty to spend them as it will. The usual separability clause is embodied in the act. § 1103.

We find it unnecessary to make a choice between the arguments, and so leave the question open.

Fourth. The tax upon employers is a valid excise or duty upon the relation of employment.

As to this we need not add to our opinion in *Steward Machine Co.* v. *Davis, supra,* where we considered a like question in respect of Title IX.

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[10] IV Channing, History of the United States, p. 404 (South Carolina Nullification); 8 Adams, History of the United States (New England Nullification and the Hartford Convention).

Fifth. The tax is not invalid as a result of its exemptions.

Here again the opinion in *Steward Machine Co.* v. *Davis, supra,* says all that need be said.

Sixth. The decree of the Court of Appeals should be reversed and that of the District Court affirmed.

Reversed.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER are of opinion that the provisions of the act here challenged are repugnant to the Tenth Amendment, and that the decree of the Circuit Court of Appeals should be affirmed.

GREAT LAKES TRANSIT CORP. *v.* INTERSTATE STEAMSHIP CO. ET AL.

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

No. 716. Argued April 28, 29, 1937.—Decided June 1, 1937.

1. Where a common carrier by water, by its bills of lading and tariffs, waives the exemptions of the Harter Act and accepts liability as insurer of cargo against marine perils, it is entitled to insure itself against that liability. P. 651.
2. Where a carrier, by agreement with shippers, assumes liability as insurer of cargo against marine perils, the liability is not diminished by a further stipulation that the carrier will obtain marine insurance from others. P. 652.
3. Policies of insurance issued to a steamship company, naming it as the assured, contemplated that the assured, as common carrier, would take upon itself full liability to cargo owners for damage and loss due to perils of the sea, and expressly agreed to indemnify the assured against that liability. *Held:*

   (1) That ambiguities, if any, raised by other clauses, must be resolved so as still to give effect to this dominant purpose to insure the carrier. P. 652.

(2) The facts that the policies insured the carrier "for account of whom it may concern," and that loss was payable to the carrier "or order," and that the cost of the insurance was included in the carrier's rates to cargo owners, did not justify treating the policies as taken out by the carrier not for its own protection but for insurance of cargo owners. P. 653.

4. A carrier's rate to cargo may properly cover all reasonable expenses incident to the transportation, including the cost of insuring the carrier against liability which it has assumed to cargo for damages and losses caused by marine perils. P. 653.
5. A policy insuring a carrier against loss and damage to cargo from marine perils may inure to the benefit of shippers. P. 653.
6. Where a carrier, having assumed liability to cargo for loss or damage from marine perils and having insured itself against that liability, pays its shippers for losses suffered in a collision in which both vessels were at fault and collects the amount from its underwriters, the underwriters may have an equity of subrogation against the other vessel for a moiety of what they paid; but they cannot use that right to recover over against the carrier they insured. P. 653.

86 F. (2d) 740, reversed.

CERTIORARI, 300 U. S. 650, to review the affirmance of a decree in admiralty adjudging two vessels at fault and adjudging that intervening underwriters recover, from each of the vessels and their respective owners, a moiety of payments made under policies insuring one of the carriers against liability to cargo.

Mr. John B. Richards, with whom *Mr. Laurence E. Coffey* was on the brief, for petitioner.

Mr. Ray M. Stanley, with whom *Mr. Ellis H. Gidley* was on the brief, for Atlantic Mutual Insurance Co. et al., respondents.

Messrs. Frederick L. Leckie and *Thomas H. Garry* filed a brief on behalf of the Interstate Steamship Co., respondent.

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

A collision occurred in the St. Clair river between the vessel "George D. Dixon" owned by the petitioner, Great Lakes Transit Corporation, and the vessel "Willis L. King" owned by the Interstate Steamship Company. Each owner brought a libel in admiralty against the other. The suits were consolidated. The Atlantic Mutual Insurance Company and other underwriters having paid to the petitioner, under insurance policies procured by it, the amount of cargo damage and loss which petitioner had paid to owners of the cargo carried by the "Dixon," intervened and claimed the right through subrogation to recover the amount thus paid from the Interstate Steamship Company and its vessel, the "King." [1]

The District Court entered a decree adjudging both vessels at fault and that the intervening underwriters should recover from each of the vessels and their respective owners a moiety of the amounts paid and payable under the policies. The decree was affirmed by the Circuit Court of Appeals. 86 F. (2d) 740. In view of the importance of the issue, certiorari was granted, limited to the question of the correctness of the decree in directing recovery from the petitioner.

Petitioner's contention is that the insurance policies were contracts between the underwriters and the petitioner under which the latter was entitled to be indemnified for the liability it had assumed under its bill of lading and its tariff provisions; that the underwriters were not entitled to recover back from petitioner what they had paid it in discharge of their obligation. The underwriters insist that their policies insured cargo and that their pay-

[1] The underwriters' claim also covered such additional amounts as they would be called upon to pay as further damages and losses to cargo were ascertained and were paid by petitioner.

ments were made for cargo's benefit; that, the cargo damage and loss having been paid, they were entitled by subrogation to a decree for the full damage against the "King"; that as both vessels were at fault the "King" was entitled to contribution from the "Dixon," and that the decree in avoidance of circuity had fixed the ultimate liabilities by requiring each vessel to pay a moiety.

The cargo on the "Dixon" was carried under uniform bills of lading, approved by the Interstate Commerce Commission, which after referring in § 9 (a) to the exemptions contained in the Harter Act (46 U. S. C. 190 *et seq.*), provided in § 9 (e) as follows:

"If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading."

The court below concluded, and we think rightly, that by the applicable tariffs the petitioner waived the saving clauses of the Harter Act and assumed full liability to the cargo owners for loss or damage caused by marine perils.[2]

[2] It is sufficient, for the present purpose, to quote the following from one of these tariffs filed by the petitioner:

"Rule No. 15.—Marine Insurance.—Rates Named Herein Include Marine Insurance.—While shipments subject to rates named herein as including Marine Insurance are water-borne at and between lake ports, on the vessels of the Great Lakes Transit Corporation, said corporation assumes liability for loss or damage to said shipments caused by marine perils, to wit: Of the seas and lakes, fire, collision, stranding, jettisons, pirates, assailing thieves, barratry of the master or mariners and all other perils or misfortunes that have or shall come to the hurt or damage of said property, or any part thereof, including general average charges and expenses for which the owner may, under the Maritime Law, be chargeable, but excluding the risks of riots, war or insurrections; any loss from said marine perils for

While these tariffs were not uniform they also either stated or fairly imported that the specified rates should include marine insurance.

The policies of insurance had the following rider, by which the underwriters agreed to insure the Great Lakes Transit Corporation, for account of whom it may concern, loss, if any, to be payable to the Great Lakes Transit Corporation or order,—

"On cargo of any kind owned by the Assured and on the assured's liability to others in respect to cargo of any kind covering same from time said Great Lakes Transit Corporation becomes responsible therefor and until its responsibility ceases, wheresoever the same may be, including risks while on docks, in and/or on cars on docks, piers, wharves, lighters and/or craft, transfers, and all land conveyances, and also to cover upon any advances made by and payment of back charges made by or due from said Assured, and upon any charges of said Assured upon any and all cargo or any portion thereof; from the time the Assured becomes responsible for such cargo including risks of trans-shipment, and under and/or on deck on board of the Assured's steamers:

. . . . .

"Also to cover through to destination goods delivered by the Assured to other water transportation companies for shipment to destination."

The policies further provided that, the Assured taking "all the risks, perils and liabilities which by law a common carrier by land or water assumes, and also the insurance of said cargo against perils of the seas and lakes" etc., the Assurers agreed "to indemnify and hold harmless" the Assured against any loss or damage to cargo from all such risks, perils, etc., "to the extent which the Assured may be

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which said Corporation is liable hereunder, to be paid sixty days after proof of loss and proof of interest in said property have been furnished."

held by the owners thereof, under any liability the Assured shall have assumed as common carriers, insurers or otherwise." [3]

We are unable to accept the view that the provisions we have quoted cannot avail petitioner "because it did not take upon itself the insurance of cargo or assume any liability with reference thereto as an insurer"; that "its obligation as to insurance went no further than to require it to procure policies of insurance from others." Petitioner did more than agree to obtain marine insur-

[3] The text of the provision referred to is as follows:

"It is agreed between the parties hereto that said steamers are to be employed in carrying cargo, or cargo and passengers, in and on said steamers as aforesaid, the Assured taking upon themselves as to said cargo, or parts thereof, all the risks, perils and liabilities which by law a common carrier by land or water assumes, and also the insurance of said cargo against perils of the seas and lakes, fire, jettisons, barratry, negligence of master or mariners, loss or damage arising through explosions howsoever or wheresoever occurring, bursting of boilers, breakage of shafts or through any latent defect in the machinery or hull, and all other acts, perils or misfortunes that have or shall come to the hurt, detriment, damage to or loss of the said cargo or any part thereof, and the said Assurers agree and undertake to indemnify and hold harmless the said Assured against hurt, detriment, damage to or loss of such cargo from any and all such risks, perils, acts or misfortunes, to the extent which the Assured may be held by the owners thereof, under any liability the Assured shall have assumed as common carriers, insurers, or otherwise, and for any and all claims which said cargo may be called upon to contribute in General Average, and/or for salvage, landing, warehousing and/or special charges, and to cover in like manner duties and any cargo owned by the Assured, and also all advances made by and payment of back charges made by or due from said Assured and/or charges of said Assured upon any and all cargo or any portion thereof.

. . . . .

"In case of loss, such loss to be paid thirty days after proof of loss and proof of interest are furnished to this company. There shall, however, be deducted from the aggregate of all claims on each east bound or west bound passage, the sum of $1,000."

ance. Petitioner by its tariffs waived the provisions of the Harter Act and became itself an insurer of the cargo against marine perils. The agreement to obtain marine insurance did not detract from that undertaking. Had the underwriters been unable to respond to their contracts, petitioner would still have been liable to the cargo owners upon its own engagement. Having assumed that liability, petitioner was undoubtedly entitled to take out policies for its own protection. See Wyman, Partridge & Co. *v.* Boston & Maine R. Co., 13 I. C. C. 258, 262; 15 I. C. C. 577, 581; 19 I. C. C. 551, 553. It is a familiar rule that a common carrier "whether liable by law or custom to the same extent as an insurer, or only for his own negligence, may, in order to protect himself against his own responsibility, as well as to secure his lien, cause the goods in his custody to be insured to their full value." *Phoenix Insurance Co.* v. *Erie Transportation Co.*, 117 U. S. 312, 323, 324, and cases there cited. "I see nothing remarkable," said Lord Chief Justice Russell in *Hill* v. *Scott,* L. R. [1895] 2 Q. B. D. 371, 375, "in the shipowner insuring himself. In a case where there was a bill of lading with widely sweeping exceptions, no doubt it would be unnecessary; but where, as here, there is no bill of lading, the shipowner frequently effects an insurance in order to protect himself against liability." See, also, the same case, on appeal, *Id.*, pp. 713, 714.

The policies issued to petitioner explicitly afforded the protection which the petitioner was entitled to seek by virtue of the risks it had assumed. The petitioner was the "Assured" named in the policies. Their terms contemplated that the assured as a common carrier would take upon itself full liability to the cargo owners for all damage and loss due to perils of the sea, and the underwriters expressly agreed to indemnify the assured against that liability. There is no admissible construction of the policies which can eliminate or frustrate that undertak-

ing. In its presence, if ambiguities are raised by other clauses, they must be resolved so as still to give effect to the dominant purpose which the policies clearly reveal.

The fact that the policies insured the petitioner, Great Lakes Transit Corporation "for account of whom it may concern" and that the loss was payable to the Great Lakes Transit Corporation "or order" did not alter the fact that the Great Lakes Transit Corporation was itself directly concerned or detract from the stipulation running to that corporation as a carrier and affording it the specified indemnity. Nor does the fact that the cost of the insurance was included in the carrier's rate affect the question. The rate would properly cover all the reasonable expenses incident to the transportation, and when the carrier assumed liability to the cargo owners for damages and losses caused by marine perils, there was nothing unreasonable in the carrier's protecting itself against that risk by procuring insurance and covering the cost in its rate. Compare Wyman, Partridge & Co. *v.* Boston & Maine R. Co., *supra.* And if it be assumed, as we do assume, that the insurance would inure to the benefit of the cargo owners, that would be a protection to those owners additional to that afforded by the carrier's own engagement which still remained effective and covered by the stipulation in the policies for the benefit of the carrier. By reason of that coverage the underwriters were bound to pay, and did pay, to the petitioner, the amounts which the latter became liable to pay and had paid to the cargo owners under the contracts of carriage.

These payments having been made, the underwriters now seek to recover back from the petitioner a moiety of what they have paid to it. It is said that this results from the admiralty rule for a division of damages in case of fault on the part of both vessels involved in the collision, and that the decree for a recovery by the underwriters from the petitioner is for the purpose of avoiding

circuity of action. The effect none the less is to enable the underwriters to get back one-half of the amounts they had expressly agreed to pay to petitioner for its indemnity.

The underwriters seek to sustain the decree by invoking the doctrine of subrogation, but the equity of subrogation invests the underwriters with the rights of the assured against third persons (*Phoenix Insurance Co.* v. *Erie Transportation Co., supra; Wager* v. *Providence Insurance Co.*, 150 U. S. 99, 108; *Standard Marine Insurance Co.* v. *Scottish Assurance Co.*, 283 U. S. 284, 286) not with a right to override its own obligation to the assured. Thus, when a bill of lading provides that in case of loss the carrier, if liable therefor, shall have the full benefit of any insurance effected upon the goods, the provision limits the right of subrogation of the insurer, upon payment to the shipper, to recover over against the carrier. *Phoenix Insurance Co.* v. *Erie Transportation Co., supra; Wager* v. *Providence Insurance Co., supra.* Such a clause giving the carrier the benefit of insurance effected by the shipper is valid "because the carrier might himself have insured against the loss, even though occasioned by his own negligence, and if a shipper under a bill of lading containing this provision effects insurance and is paid the full amount of his loss, neither he nor the insurer can recover against the carrier." *Luckenbach* v. *McCahan Sugar Co.*, 248 U. S. 139, 146. Following the same reasoning, we have said that "If a valid claim by the underwriter to be subrogated to the rights of the owner will not arise where the carrier has contracted with the owner that he, the carrier, shall have the benefit of any insurance, it would seem to be clear that where the carrier is actually and in terms the party insured, the underwriter can have no right to recover over against the carrier, even if the amount of the policy has been paid by the insurance company to the owner on the order of the carrier." *Wager* v.

Providence Insurance Co., supra, pp. 108, 109. See, also, *The John Russell,* 68 F. (2d) 901, 902.

Construing the policies in this instance as indemnifying the carrier against the liability which it had assumed by its bills of lading and tariffs to the cargo owners, the payments by the underwriters operated as a discharge of their obligation to the carrier, and while, as the cargo owners had the benefit of the insurance, the underwriters could be subrogated to the right of the cargo owners against the "King," they could not use that right to recover over against the carrier in defiance of their own stipulation. They could recover against the "King" the moiety for which the "King" was liable but could not recover against the petitioner. The procedure in admiralty did not affect the substantive rights established by the policies.

The decree of the Circuit Court of Appeals is reversed and the cause is remanded for further proceedings in conformity with this opinion.

Reversed.

THOMAS, COLLECTOR, *v.* PERKINS ET AL.

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

No. 824. Argued May 4, 5, 1937.—Decided June 1, 1937.

1. The federal income tax Act is to be given a uniform construction of nation-wide application except in so far as Congress has made it dependent on state law. P. 659.
2. An instrument assigning oil leases for a specified sum "to be paid out of the oil produced and saved from the lands, and to be one-fourth of all the oil produced and saved" until that sum was paid, provided that the "oil payment" should be made to the two assignors, each to receive one-half thereof "out of the oil produced and saved" from the leased premises, "which payments shall be made by the pipe-line company or other purchaser of said oil" and be "one-fourth of all the oil produced and saved" from the

land, "until the full sum is fully paid." It further stipulated that the specified sum should be "payable out of oil only, if, as and when produced from said lands"; that "said oil payment" should not be a personal obligation of the assignee, and that it would "bear none of the expenses of the development of said oil leases or any other burden." No lien was reserved by the assignors. *Held,* without deciding whether technical title to the oil while in the ground was in assignors or in assignee,

(1) That the intention was to withold from the operation of the grant one-fourth of the oil to be produced and saved up to an amount sufficient when sold to yield the sum stipulated. P. 659.

This construction was confirmed by the acts of the parties under the assignment.

(2) That the amounts received by the assignors from the proceeds of operation were not chargeable for income tax purposes to the assignee as part of his gross income. *Id.*

86 F. (2d) 954, affirmed.

CERTIORARI, 300 U. S. 653, to review the reversal of a judgment rendered in favor of the Collector, in an action to recover a tax payment, tried without a jury.

Mr. J. Louis Monarch, with whom *Solicitor General Reed, Assistant Attorney General Morris,* and *Mr. Sewall Key* were on the brief, for petitioner.

Mr. Harry C. Weeks for the respondents.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Respondents, husband and wife, sued in the district court for northern Texas to recover a portion of the tax they paid for 1933 on their community income. In respect of the amount now in controversy, that court gave judgment for defendant (15 F. Supp. 356); the Circuit Court of Appeals reversed (86 F. (2d) 954) and, its decision being in apparent conflict with that of the Circuit Court of Appeals for the Eighth Circuit in *Comar Oil Co.* v. *Burnet,* 64 F. (2d) 965, this court granted the collector's petition for a writ of certiorari.

Hammonds and Branson owned oil and gas leases on undeveloped lands in Texas which provided for a royalty of one-eighth. They assigned to the Faith Oil Company which was principally owned by Green and Perkins. In taking the assignment the company acted for itself to the extent of one-fourth and for Green and Perkins to the extent of three-eighths each. Later it transferred its interest to Perkins. So far as concerns the question here presented, Perkins may be treated as sole assignee of Hammonds and Branson. The assignment recites that they are owners of all rights under or incident to the leases and declares that "in consideration of the sum of Ten Dollars ($10.00) cash [1] . . . and of the further sum of Three Hundred Ninety-Five Thousand Dollars ($395,000.00) to be paid out of the oil produced and saved from the . . . lands, and to be one-fourth of all the oil produced and saved . . . until the full sum . . . is paid, we . . . do hereby bargain, sell, transfer, assign, and convey all our rights, title, and interest in and to said leases and rights thereunder."

After description of the lands and leaseholds, the assignment provides that the oil payment shall be made to the assignors, Hammonds and Branson, each to receive one-half thereof, "out of the oil produced and saved from" the leased premises, "which payments shall be made by the pipe line company or other purchaser of said oil, and shall be one-fourth (¼) of all the oil produced and saved from the above described land, until the full sum . . . is fully paid." It is understood and agreed that the $395,000 "is payable out of oil only, if, as and when produced from said lands above described, and said oil payment does not constitute and shall not be a personal obligation of the assignee, its successors or assigns. . . . The oil payment

[1] Contemporaneously with the assignment there was paid $105,000 in cash and $50,000 in notes.

. . . shall bear none of the expenses of the development of said leases or any other burden." The instrument does not purport to reserve a lien.

Perkins drilled wells on the leased lands and in 1933 produced oil; the assignors received substantial amounts to apply on the payment to be made them; the oil was run from the wells into tanks on the leased premises from which it was taken by pipeline companies purchasing the oil. Each purchaser required and was furnished a division order executed by all the interested parties. By such orders assignors authorized purchasers to receive from the wells one-fourth of the oil and declared that the oil run should become the property of the purchasers as soon as received by them. In accordance with the orders, purchasers made payments directly and proportionately to the owner of the royalty reserved in the lease, to assignors, and to assignee. The last could not collect for any portion of the oil applicable to the oil payment to be made assignors.

In their tax return for 1933 respondents, Perkins and wife, did not include in income any part of the proceeds that went to assignors. But the commissioner charged the amounts received by the assignors to the respondents and allowed the latter depletion in respect of the same. At the trial it was proved that the long-established practice of the bureau was not to require the operator of an oil and gas lease to include as a part of his income the royalties payable in kind to the lessors. But where they were payable in cash the operator included the proceeds of all the oil and took as an offsetting deduction the amount of royalties paid. It was admitted that, if the assignors' payments are excluded, the depletion allowed respondents should be correspondingly reduced.

The question is whether respondents' gross income should include moneys paid to assignors by purchasers of the oil.

We need not decide whether technical title to the oil while in the ground was in assignors, or in assignee. The federal income tax Act is to be given a uniform construction of nation-wide application except insofar as Congress has made it dependent on state law.[2] The granting clause in the assignment would be sufficient, if standing alone, to transfer all the oil to the assignee. It does not specifically except or exclude any part of the oil. But it is qualified by other parts of the instrument. The provisions for payment to assignors in oil only, the absence of any obligation of the assignee to pay in oil or in money, and the failure of assignors to take any security by way of lien or otherwise unmistakably show that they intended to withhold from the operation of the grant one-fourth of the oil to be produced and saved up to an amount sufficient when sold to yield $395,000.[3]

The construction that the parties put upon the assignment makes for the same conclusion. There is no suggestion that, having taken title, the assignee transferred any of the oil back to assignors. The division orders designated, and so served to indicate ownership of, the quantities belonging to each of the interested parties. And, in the circumstances, the orders given and proceeds received by assignors necessarily covered and were derived from oil not transferred by the assignment.

Our decision in *Palmer* v. *Bender,* 287 U. S. 551, supports the view that the assignment did not transfer the

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[2] *Lynch* v. *Alworth-Stephens Co.,* 267 U. S. 364, 370. *Corliss* v. *Bowers,* 281 U. S. 376, 378. *Tyler* v. *United States,* 281 U. S. 497, 503. *Burnet* v. *Harmel,* 287 U. S. 103, 110. *Palmer* v. *Bender,* 287 U. S. 551, 556. *Burnet* v. *Guggenheim,* 288 U. S. 280, 284. *Helvering* v. *Falk,* 291 U. S. 183, 188.

[3] *Sheffield* v. *Hogg,* 124 Tex. 290; 77 S. W. (2d) 1021. See *Waggoner Estate* v. *Sigler Oil Co.,* 118 Tex. 509; 19 S. W. (2d) 27. *Hager* v. *Stakes,* 116 Tex. 453; 294 S. W. 835. *Stephens County* v. *Mid-Kansas Oil & Gas Co.,* 113 Tex. 160; 254 S. W. 290. *Texas Co.* v. *Daugherty,* 107 Tex. 226; 176 S. W. 717.

oil in question. We there construed § 214 (a) (10), Revenue Act of 1921, 42 Stat. 241, which directed a reasonable allowance for depletion in the case of oil and gas wells "according to the peculiar conditions in each case" and "that such depletion allowance based on discovery value shall not exceed the net income, computed without allowance for depletion, from the property upon which the discovery is made . . . In the case of leases the deductions allowed . . . shall be equitably apportioned between the lessor and the lessee."

The taxpayer, Palmer, was a member of a partnership that acquired oil and gas leases, discovered oil, executed a writing conferring on a company the right to take over a part of the leased property in consideration of a present payment of a cash bonus, and future payments to be made "out of one-half of the first oil produced and saved" to the extent of $1,000,000, and an additional "excess royalty" of one-eighth of all the oil produced and saved. The writing declared that the partnership "does sell, assign, set over, transfer and deliver . . . unto the" oil company the described leased premises.

In his tax return, Palmer reported his share of the income derived by the partnership from the bonus payment and oil received under its contract with the oil company and, relying on § 214 (a) (10), made a deduction for depletion based on value of oil in place on the date of discovery. The commissioner refused to allow the deduction on the theory that the transaction was a sale of the leases by the partnership, and that the only allowable deduction was one based upon the cost of the property. As cost was less than the discovery value, the commissioner's allowance of depletion was less than that claimed by Palmer and the tax was correspondingly greater. He paid it, and sued the collector to recover the amount by which the commissioner's ruling operated to increase his burden.

The district court upheld the commissioner's ruling, the Circuit Court of Appeals affirmed, this Court reversed.

We said (pp. 557–558): "The language of the statute is broad enough to provide, at least, for every case in which the taxpayer has acquired, by investment, any interest in the oil in place, and secures, by any form of legal relationship, income derived from the extraction of the oil, to which he must look for a return of his capital. . . . Similarly, the lessor's right to a depletion allowance does not depend upon his retention of ownership or any other particular form of legal interest in the mineral content of the land. It is enough if, by virtue of the leasing transaction, he has retained a right to share in the oil produced. If so he has an economic interest in the oil, in place, which is depleted by production. Thus, we have recently held that the lessor is entitled to a depletion allowance on bonus and royalties, although by the local law ownership of the minerals, in place, passed from the lessor upon the execution of the lease. . . . Thus, throughout their changing relationships with respect to the properties, the oil in the ground was a reservoir of capital investment of the several parties, all of whom . . . were entitled to share in the oil produced."

Thus in that case we held assignors' mere stipulation for royalty out of oil operated to save to them an economic interest in the oil sufficient to entitle them to deduct from their income derived from the oil an allowance for depletion. If Palmer had retained no interest in the oil he would have been entitled to no deduction on account of depletion. Ownership was essential. The assignee was not entitled to income from Palmer's share of the oil nor to deduct from the income it received from its own interest any part of the depletion allowance that was attributable to Palmer's interest.

Helvering v. *Twin Bell Oil Syndicate,* 293 U. S. 312, construed depletion provisions in the Revenue Act of 1926 which so far as concerns ownership are not to be distinguished from corresponding provisions considered in

Palmer v. *Bender, supra.* Section 204 (c) (2) declared that in the case of oil and gas wells "the allowance for depletion shall be 27½ per cent. of the gross income from the property during the taxable year." Section 234 (a) (8) required the deductions allowed to be equitably apportioned between the lessor and lessee. The taxpayer, assignee of the lease, extracted substantial quantities of oil. By the terms of the lease and assignment he was obligated to pay royalties in cash or kind totalling one-fourth of the oil. He claimed that gross proceeds of all the oil should form the basis for computation of the allowance for depletion. The commissioner ruled that the deduction should be limited to 27½ per cent. of the gross production less royalties. The Board of Tax Appeals upheld that ruling; the Circuit Court of Appeals reversed the Board; we sustained the Commissioner. Our opinion shows that the phrase, "income from the property," means income from oil and gas only; that, where the lessee turns over royalty oil in kind to the lessor, the amount retained by lessee is the basis for his computation of depletion and the royalty oil is the basis for that allowable to lessor. In that connection we suggested that Congress did not intend a different result where the lessee sells all the oil and pays over the royalty in the form of cash. And in approval of the Commissioner's ruling we said (p. 321): "The apportionment gives respondent 27½ per cent. of the gross income from production which it had the right to retain and the assignor and lessor respectively 27½ per cent. of the royalties they receive. Such an apportionment has regard to the economic interest of each of the parties entitled to participate in the depletion allowance. Compare *Palmer* v. *Bender,* 287 U. S. 551, 558."

As in the earlier of these cases the assignor was entitled to deduct depletion from income he received from his interest in the oil, so in the later one the assignee was not entitled to deduct from income received from its share an

allowance for depletion attributable to the assignor's interest. The owner of an interest in the deposit is entitled to deduct for depletion of the part producing his income but may not deduct for depletion of a share belonging to another.

As Hammonds and Branson, the assignors in this case, would be entitled to an allowance for depletion in respect of the oil sold out of their share,[4] the income from that interest is not chargeable to respondents, Perkins and wife. It follows that the Commissioner erred in including in their income the payments made by purchasers to assignors for their share of the oil.

Affirmed.

MR. JUSTICE STONE and MR. JUSTICE CARDOZO think the oil and gas produced by the assignee of the lease, and their proceeds, were his income and not any the less so because he agreed to apply a part to payment of the purchase price of the lease, and gave an equitable lien to secure the payment. Whether the purchase price, when paid, represented a capital gain taxable to the assignors, and whether in that case their interest would be subject to a depletion allowance under our decision in *Palmer* v. *Bender,* 287 U. S. 551, are questions irrelevant to the present issue. The judgment should be reversed.

[4] Revenue Act of 1932, §§ 23 (1), 114 (b) (3), 47 Stat. 181, 202. *Palmer* v. *Bender,* 287 U. S. 551. *Helvering* v. *Twin Bell Oil Syndicate,* 293 U. S. 312.

DECISIONS PER CURIAM, ETC., FROM APRIL 12, 1937, THROUGH JUNE 1, 1937.*

No. 875. ESPENLAUB *v.* INDIANA. Appeal from the Supreme Court of Indiana. Jurisdictional statement distributed April 17, 1937. Decided April 26, 1937. *Per Curiam:* The motion of the appellee to dismiss the appeal is granted, and the appeal is dismissed for the want of a substantial federal question. *Evanston* v. *Gunn,* 99 U. S. 660, 667, 668; *Baltimore & Ohio R. Co.* v. *Mackey,* 157 U. S. 72, 87; *Equitable Life Assurance Society* v. *Brown,* 187 U. S. 308, 311. *Mr. Clyde H. Jones* for appellant. *Mr. Urban C. Stover* for appellee. Reported below: 2 N. E. (2d) 979.

No. —, original. EX PARTE HIRAM STEELMAN. April 26, 1937. The motion for leave to file petition for writ of prohibition or mandamus is denied. *Ex parte United States,* 287 U. S. 241, 248, 249.

No. 625. FOX, STATE TAX COMMISSIONER OF WEST VIRGINIA, *v.* DRAVO CONTRACTING CO. April 26, 1937. Ernest K. James, successor in office to Fred L. Fox, as State Tax Commissioner, substituted as the party appellant on motion of *Mr. Clarence W. Meadows* for the appellant.

No. 906. CATHOLIC ORDER OF FORESTERS, INC., *v.* NORTH DAKOTA. Appeal from the Supreme Court of North Dakota. Jurisdictional statement distributed April 24, 1937. Decided May 3, 1937. *Per Curiam:* The appeal

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* For decisions on applications for certiorari, see *post,* pp. 673; 681; for rehearing, *post,* p. 712.

herein is dismissed for the want of jurisdiction. Section 237(a) Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon the appeal was allowed as a petition for a writ of certiorari, as required by § 237 (c), Judicial Code, as amended (43 Stat. 936, 938), certiorari is denied. *Mr. Howard G. Fuller* for appellant. *Messrs. P. O. Sathre* and *Francis Murphy* for appellee. Reported below: 67 N. D. —; 271 N. W. 670.

No. —. In re Paysoff Tinkoff. May 3, 1937. The motion for leave to file complaint is denied.

No. —, original. Ex parte John Brown. May 3, 1937. The motion for leave to file petition for writ of habeas corpus is denied.

No. 342. Peterson *v.* United States. May 3, 1937. The motion for leave to file petition for rehearing is granted. The petition for rehearing is denied.

No. 502. United States Savings Bank et al. *v.* Morgenthau, Secretary of the Treasury, et al. May 3, 1937. The motion for leave to file petition for rehearing is granted. The petition for rehearing is denied.

No. 11, original. Arkansas *v.* Tennessee. May 17, 1937. The motion for the appointment of a Special Master is granted, and Monte M. Lemann, Esquire, of New Orleans, Louisiana, is appointed Special Master.

No. 807. UNITED GAS PUBLIC SERVICE CO. *v.* TEXAS ET AL. Appeal from the Court of Civil Appeals, Third Supreme Judicial District, of Texas. May 17, 1937. The motion of the appellee to dismiss the appeal is denied. *Norfolk Turnpike Co.* v. *Virginia,* 225 U. S. 264, 269; *Second National Bank* v. *First National Bank,* 242 U. S. 600, 602; *Western Union* v. *Priester,* 276 U. S. 252, 258. *Messrs. John P. Bullington* and *F. G. Coates* for appellant. *Messrs. William McCraw, Alfred M. Scott,* and *Edward H. Lange* for appellees. Reported below: 80 S. W. (2d) 1094.

No. 938. PAINTER *v.* OHIO. Appeal from the Supreme Court of Ohio. Jurisdictional statement distributed May 15, 1937. Decided May 24, 1937. *Per Curiam:* The motion of the appellee for leave to file a statement against jurisdiction is granted. The appeal herein is dismissed for the want of a substantial federal question. *Hebert* v. *Louisiana,* 272 U. S. 312, 315; *Westfall* v. *United States,* 274 U. S. 256. *Messrs. Nugent Dodds, W. H. Boyd,* and *Ben B. Wickham* for appellant. *Mr. Frederick W. Green* for appellee. Reported below: 132 Oh. St. 302; 7 N. E. (2d) 229.

No. 944. FEARON *v.* TREANOR. Appeal from the Supreme Court of New York. Jurisdictional statement distributed May 15, 1937. Decided May 24, 1937. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Second Employers' Liability Cases,* 223 U. S. 1, 50; *New York Central R. Co.* v. *White,* 243 U. S. 188, 198; *Silver* v. *Silver,* 280 U. S. 117, 122. *Mr. Joseph S. Robinson* for appellant. No appearance for appellee. Reported below: 272 N. Y. 268; 5 N. E. (2d) 815.

No. 947. GRUBB *v.* LAWMAN, RECEIVER. Appeal from the Supreme Court of Tennessee. Jurisdictional statement distributed May 15, 1937. Decided May 24, 1937. *Per Curiam:* The motion of the appellee to dismiss the appeal is granted, and the appeal is dismissed for the reason that the judgment sought here to be reviewed is based upon a non-federal ground adequate to support it. *DeSaussure* v. *Gaillard,* 127 U. S. 216, 232, 233; *McCoy* v. *Shaw,* 277 U. S. 302, 303; *Kammerer* v. *Kroeger,* 299 U. S. 302, 304. *Messrs. J. B. Sizer* and *Charles C. Moore* for appellant. *Mr. T. Pope Shepherd* for appellee. Reported below: 170 Tenn. 469.

No. —, original. EX PARTE CHESTER G. BOLLENBACH. May 24, 1937. The motion for leave to file a petition for writ of certiorari herein is denied.

No. 13, original. TEXAS *v.* FLORIDA ET AL. May 24, 1937. The answers of the defendants are received and ordered filed.

No. 499. HARTRIDGE-CANNON CO. ET AL. *v.* GILLESPIE ET AL. May 24, 1937. The motion of the State of Florida for leave to file a petition to intervene is granted. The petition to intervene is denied.

No. 922. WORCESTER COUNTY TRUST CO. *v.* RILEY. See *post,* p. 678.

No. 499. HARTRIDGE-CANNON CO. ET AL. *v.* GILLESPIE ET AL. May 24, 1937. The motion for leave to file petition for rehearing is granted. The petition for rehearing is denied.

No. 855. GOODMAN LUMBER CO. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Eastern District of Wisconsin. Jurisdictional statement distributed April 10, 1937. Decided June 1, 1937. *Per Curiam:* The judgment is affirmed. *United States* v. *American Sheet & Tin Plate Co., ante,* p. 402. *Mr. John S. Burchmore* for appellant. *Messrs. Daniel W. Knowlton* and *Nelson Thomas* for appellees.

No. 856. A. O. SMITH CORP. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Eastern District of Wisconsin. Jurisdictional statement distributed April 10, 1937. Decided June 1, 1937. *Per Curiam:* The judgment is affirmed. *United States* v. *American Sheet & Tin Plate Co., ante,* p. 402. *Mr. John S. Burchmore* for appellant. *Messrs. Daniel W. Knowlton* and *Nelson Thomas* for appellees.

No. 804. RAILROAD COMMISSION OF CALIFORNIA ET AL. *v.* PACIFIC GAS & ELECTRIC CO. Appeal from the District Court of the United States for the Northern District of California. Jurisdictional statement distributed March 20, 1937. Decided June 1, 1937. *Per Curiam:* The decree is affirmed by an equally divided Court. MR. JUSTICE SUTHERLAND took no part in the consideration or decision of this case. *Mr. Ira H. Rowell* for appellants. *Messrs. Warren Olney, Jr., Allan P. Matthew,* and *Robert L. Lipman* for appellee. Reported below: 13 F. Supp. 931; 16 *id.* 884.

No. 988. DOLBOW *v.* NEW JERSEY; and

No. 989. DRISCOLL *v.* SAME. Appeals from the Court of Errors and Appeals of New Jersey. Jurisdictional statement distributed May 27, 1937. Decided June 1,

1937. *Per Curiam:* The appeals herein are dismissed for the want of a substantial federal question. *Hayes* v. *Missouri,* 120 U. S. 68, 71; *Brown* v. *New Jersey,* 175 U. S. 172, 175–177; *Frank* v. *Mangum,* 237 U. S. 309, 341, 342; *Snyder* v. *Massachusetts,* 291 U. S. 97, 105. *Mr. John Warren* for appellant in No. 988. *Mr. James Mercer Davis* for appellant in No. 989. No appearance for appellee. Reported below: 117 N. J. L. 560; 189 Atl. 915.

No. 1010. TEXAS COMPANY ET AL. *v.* DYER, VEHICLE COMMISSIONER. Appeal from the Supreme Court of Mississippi. Jurisdictional statement distributed May 29, 1937. Decided June 1, 1937. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Missouri Pacific Ry. Co.* v. *Humes,* 115 U. S. 512, 523; *Western Union* v. *Indiana,* 165 U. S. 304, 307, 310; *Bankers Trust Co.* v. *Blodgett,* 260 U. S. 647, 651, 652. *Mr. William H. Watkins* for appellants. No appearance for appellee. Reported below: 174 So. 80.

No. 1019. GIRAGI ET AL. *v.* MOORE ET AL. Appeal from the Supreme Court of Arizona. Jurisdictional statement distributed May 29, 1937. Decided June 1, 1937. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Grosjean* v. *American Press Co.,* 297 U. S. 233, 250; *Associated Press* v. *National Labor Relations Board, ante,* p. 103. *Messrs. Fred Sutter, Elisha Hanson,* and *John M. Ross* for appellants. *Mr. Allan K. Perry* for appellees. Reported below: 48 Ariz. 33; 58 P. (2d) 1249; 64 P. (2d) 819.

No. —, original. EX PARTE ANNIE SHERMAN ET AL. June 1, 1937. The motion for leave to file a petition for writ of certiorari is denied.

No. —, original. Ex parte Joseph Poresky. June 1, 1937. The motion for leave to file a petition for writ of mandamus is denied.

No. —, original. Ex parte Harry C. Robertson. June 1, 1937. The motion for leave to file a petition for writ of habeas corpus is denied.

No. 13, original. Texas *v.* Florida et al. June 1, 1937. The motion for the appointment of a Special Master is granted and John S. Flannery, Esquire, of Washington, D. C., is appointed Special Master.

No. 102 (October Term, 1934). Smith, Executor, *v.* Snow et al. June 1, 1937. The motion to recall and amend the mandate is denied. The motion for leave to file a supplemental answer and petition for rehearing in the United States District Court for the District of Minnesota is denied, without prejudice to an application to the District Court which may deal with the matter unaffected by the mandate of this Court.

No. 40. Atlantic Refining Co. *v.* Virginia; and No. 713. Dodge et al. *v.* Board of Education of Chicago et al. June 1, 1937. It is ordered that these cases be restored to the docket for reargument.

No. 552. Kelly, Director, et al. *v.* Washington ex rel. Foss Company, Inc., et al. June 1, 1937. This case is assigned for reargument, with direction to the Clerk to give notice to the Attorney General of the United States who is requested to present the views of the Government upon the question whether Chapter 200 of the

Laws of 1907 of the State of Washington, or the action of the officers of the State thereunder, conflicts with the authority of the United States or with the action of its officers under the Acts of Congress. Briefs may be filed by the Government on or before September 4, 1937, with leave to the respective parties to file briefs in reply on or before October 1, 1937.

No. 625. JAMES, STATE TAX COMMISSIONER OF WEST VIRGINIA, *v.* DRAVO CONTRACTING CO.;

No. 773. SILAS MASON CO., INC. ET AL. *v.* TAX COMMISSIONER OF WASHINGTON ET AL.; and

No. 774. RYAN *v.* WASHINGTON ET AL. June 1, 1937. These cases are assigned for reargument, with direction to the Clerk to give notice to the Attorney General of the United States who is requested to present the views of the Government upon the question (1) as to jurisdiction over the areas in which the work of the several contractors is being performed, and (2) whether the state tax imposes a burden upon the Government. Briefs may be filed by the Government on or before September 4, 1937, with leave to the respective parties to file briefs in reply on or before October 1, 1937.

No. 910. GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, ET AL. *v.* DAVIS. June 1, 1937. On consideration of the opinion filed in this cause on May 24, 1937, it is ordered that the following amendments be made therein:

1. The last paragraph on page 4, continuing for two lines on page 5, is amended to read as follows: "A petition for certiorari followed. It was filed by the intervening defendants, the Commissioner and the Collector, and brought two questions, and two only, to our notice. We were asked to determine: (1) "Whether the tax imposed

upon employers by Section 804 of the Social Security Act is within the power of Congress under the Constitution," and (2) "whether the validity of the tax imposed upon employees by Section 801 of the Social Security Act is properly in issue in this case, and if it is, whether that tax is within the power of Congress under the Constitution." The defendant corporation gave notice to the Clerk that it joined in the petition but it has taken no part in any subsequent proceedings. A writ of certiorari issued."

2. The words "decree for an injunction" on the ninth line of page 5 are struck out, and the words "equitable remedy" are substituted.

3. In the title of the cause the word "Petitioners" where it now appears is struck out, and inserted following the name of the Edison Electric Illuminating Company of Boston.

Reported as amended, *ante,* p. 619.

DECISIONS GRANTING CERTIORARI, FROM APRIL 12, 1937, THROUGH JUNE 1, 1937.

No. 787. OCEAN BEACH HEIGHTS, INC. ET AL. *v.* BROWN-CRUMMER INVESTMENT CO. ET AL. April 12, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. J. Julian Southerland, Scott M. Loftin, John P. Stokes, James E. Calkins,* and *Henry K. Gibson* for petitioners. *Messrs. Giles J. Patterson* and *Dewey Knight* for respondents. Reported below: 87 F. (2d) 978.

No. 795. UNITED STATES *v.* WILLIAMS. April 26, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Solicitor General Reed* for the United States. *Mr. Perry Smith* for respondent. Reported below: 86 F. (2d) 746.

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No. 825. FEDERAL TRADE COMMISSION *v.* STANDARD EDUCATION SOCIETY ET AL. April 26, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Reed* for petitioner. *Mr. Henry Ward Beer* for respondents. Reported below: 86 F. (2d) 692.

No. 830. BOGARDUS *v.* COMMISSIONER OF INTERNAL REVENUE. April 26, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. William D. Whitney* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *John G. Remey* for respondent. Reported below: 88 F. (2d) 646.

No. 836. TEXAS & NEW ORLEANS R. CO. ET AL. *v.* NEILL ET AL. April 26, 1937. Petition for writ of certiorari to the Court of Civil Appeals, 4th Supreme Judicial District, of Texas granted. *Messrs. Harper Macfarlane* and *W. L. Matthews* for petitioners. *Mr. H. C. Carter* for respondents. Reported below: 97 S. W. (2d) 279.

No. 910. HELVERING, COMMISSIONER OF INTERNAL REVENUE, ET AL. *v.* DAVIS. April 26, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Solicitor General Reed* for petitioners. *Messrs. Edward F. McClennen* and *Jacob J. Kaplan* for respondent. Reported below: 89 F. (2d) 393.

No. 890. TEXAS ET AL. *v.* DONOGHUE, TRUSTEE. May 3, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted, limited

to the questions raised upon the application of the State for permission to take proceedings for the confiscation of the alleged illegal oil. *Messrs. William McCraw, William C. Davis, W. J. Holt,* and *C. M. Kennedy* for petitioners. *Mr. W. B. Harrell* for respondent. Reported below: 88 F. (2d) 48.

No. 853. WHITE *v.* ARONSON, TRUSTEE. May 3, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Solicitor General Reed* for petitioner. *Mr. Samuel Gottlieb* for respondent. Reported below: 87 F. (2d) 272.

No. 878. PENNSYLVANIA EX REL. SULLIVAN *v.* ASHE, WARDEN. May 17, 1937. Petition for writ of certiorari to the Supreme Court of Pennsylvania granted. *Messrs. Wm. J. Hughes, Jr.,* and *Wm. E. Leahy* for petitioner. *Messrs. Charles J. Margiotti* and *Adrian Bonnelly* for respondent. Reported below: 325 Pa. 305; 188 Atl. 841.

No. 886. BERMAN *v.* UNITED STATES. May 17, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Samuel H. Kaufman, Emil Weitzner,* and *Isadore Polier* for petitioner. *Solicitor General Reed, Assistant Attorney General McMahon,* and *Messrs. Wm. W. Barron* and *W. Marvin Smith* for the United States. Reported below: 88 F. (2d) 645.

No. 842. PUERTO RICO *v.* SHELL COMPANY ET AL. May 17, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Messrs. William Cattron Rigby* and *Nathan R. Margold*

for petitioner. *Messrs. Wm. D. Whitney, Gabriel I. Lewis, Oscar B. Frazier,* and *James R. Beverley* for respondents. Reported below: 86 F. (2d) 577.

No. 848. PALMER *v.* COMMISSIONER OF INTERNAL REVENUE. May 17, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Messrs. Robert G. Dodge* and *Harold S. Davis* for petitioner. *Solicitor General Reed* for respondent. Reported below: 88 F. (2d) 559.

Nos. 865 and 866. CHICAGO TITLE & TRUST CO., SUCCESSOR TRUSTEE, *v.* FORTY-ONE THIRTY-SIX WILCOX BLDG. CORP. May 17, 1937. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Silas H. Strawn* for petitioner. *Mr. Lewis E. Pennish* for respondent. Reported below: 86 F. (2d) 667.

No. 887. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* GOWRAN. May 17, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Solicitor General Reed* for petitioner. *Mr. A. L. Nash* for respondent. Reported below: 87 F. (2d) 125.

No. 862. MAYER *v.* COMMISSIONER OF INTERNAL REVENUE. May 17, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Llewellyn A. Luce* for petitioner. *Solicitor General Reed* for respondent. Reported below: 86 F. (2d) 593.

No. 895. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* PFEIFFER. May 17, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Reed* for petitioner. *Mr. Roger S. Baldwin* for respondent. Reported below: 88 F. (2d) 3.

No. 854. GROMAN *v.* COMMISSIONER OF INTERNAL REVENUE. May 24, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. Egbert Robertson* and *James C. Spence* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Joseph M. Jones* for respondent. Reported below: 86 F. (2d) 670.

No. 905. UNITED STATES EX REL. WILLOUGHBY, TRUSTEE IN BANKRUPTCY, ET AL. *v.* HOWARD ET AL. May 24, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Walter E. Beebe* for petitioners. *Messrs. Julius Moses* and *Lloyd Heth* for respondents. Reported below: 87 F. (2d) 243.

No. 909. VOGT, SHERIFF, *v.* MURPHY. May 24, 1937. Petition for writ of certiorari to the Circuit Court of Kenton County, Kentucky, granted. *Mr. Dudley Miller Outcalt* for petitioner. *Messrs. S. H. Brown* and *Orie S. Ware* for respondent.

No. 911. ROSS, RECEIVER, *v.* KNOTT, TREASURER, ET AL. May 24, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. George P. Barse* and *J. Turner Butler* for petitioner. *Messrs. Cary D. Landis* and *H. E. Carter* for respondents. Reported below: 87 F. (2d) 817.

No. 934. WILLING, RECEIVER, *v.* BINENSTOCK ET AL. May 24, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. James M. Kane, Thomas J. Minnick, Jr.,* and *George P. Barse* for petitioner. *Mr. Robert T. McCracken* for respondents. Reported below: 88 F. (2d) 474.

No. 916. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* BASHFORD. May 24, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Solicitor General Reed* for petitioner. *Mr. Walter G. Moyle* for respondent. Reported below: 87 F. (2d) 827.

No. 922. WORCESTER COUNTY TRUST CO., EXECUTOR, *v.* RILEY, CONTROLLER, ET AL. May 24, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. The motion of Henry L. Long, Commissioner of Corporations and Taxation for Massachusetts, to intervene is granted. *Messrs. Merrill S. June* and *Bradley B. Gilman* for petitioner. *Mr. George S. Fuller* for respondents. Reported below: 89 F. (2d) 59.

No. 943. FIDELITY & DEPOSIT CO. *v.* PINK, SUPERINTENDENT OF INSURANCE OF NEW YORK. June 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. The CHIEF JUSTICE took no part in the consideration or decision of this application. *Messrs. Ralph S. Harris* and *Harold L. Smith* for petitioner. *Messrs. Alfred C. Bennett* and *Irvin Waldman* for respondent. Reported below: 88 F. (2d) 630.

No. 991. KAY *v.* UNITED STATES. June 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. MR. JUSTICE CARDOZO took no part in the consideration or decision of this application. *Mr. Wm. S. Culbertson* for petitioner. *Solicitor General Reed, Assistant Attorney General McMahon,* and *Mr. Wm. W. Barron* for the United States. Reported below: 89 F. (2d) 19.

No. 924. NATIONAL CITY BANK *v.* PHILIPPINE ISLANDS. June 1, 1937. Petition for writ of certiorari to the Supreme Court of the Philippine Islands granted. *Mr. Carl A. Mead* for petitioner. *Messrs. Harry B. Hawes, Raymond A. Walsh,* and *Bon Geaslin* for respondent.

No. 945. WOODRING, SECRETARY OF WAR, ET AL. *v.* CLARKSBURG-COLUMBUS SHORT ROUTE BRIDGE CO. June 1, 1937. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia granted. *Solicitor General Reed* for petitioners. *Mr. George D. Horning, Jr.,* for respondent. Reported below: 67 App. D. C. 44; 89 F. (2d) 788.

No. 946. AETNA INSURANCE CO. *v.* ILLINOIS CENTRAL R. CO. June 1, 1937. Petition for writ of certiorari to the Supreme Court of Illinois granted. *Messrs. Melvin L. Griffith* and *George M. Stevens* for petitioner. *Messrs. John W. Freels, Edward C. Craig,* and *Charles A. Helsell* for respondent. Reported below: 365 Ill. 303; 6 N. E. (2d) 189.

No. 960. SMYTH, EXECUTOR, *v.* UNITED STATES. June 1, 1937. Petition for writ of certiorari to the Court

of Claims granted. *Mr. Robert A. Taft* for petitioner. No appearance for the United States.

No. 961. DIXIE TERMINAL CO. *v.* UNITED STATES. June 1, 1937. Petition for writ of certiorari to the Court of Claims granted. *Mr. Robert A. Taft* for petitioner. *Solicitor General Reed* for the United States. Reported below: 83 Ct. Cls. 656.

No. 963. PHILLIPS-JONES CORP. ET AL. *v.* PARMLEY ET AL. June 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. Robert T. McCracken* and *Herman Goldman* for petitioners. No appearance for respondents. Reported below: 88 F. (2d) 958.

No. 986. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* PALMER. June 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Solicitor General Reed* for petitioner. *Messrs. Robert G. Dodge* and *Harold S. Davis* for respondent. Reported below: 88 F. (2d) 559.

No. 993. TEXTILE MACHINE WORKS *v.* LOUIS HIRSCH TEXTILE MACHINES, INC. June 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. William A. Smith, Jr.,* and *Hubert Howson* for petitioner. *Mr. Samuel E. Darby, Jr.,* for respondent. Reported below: 87 F. (2d) 702.

No. 939. WRIGHT *v.* UNITED STATES. June 1, 1937. Petition for writ of certiorari to the Court of Claims granted. *Mr. Ashby Williams* for petitioner. *Solicitor General Reed, Assistant Attorney General Whitaker* and *Mr. Paul A. Sweeney* for the United States.

Nos. 1024 and 1025. ALABAMA POWER CO. *v.* ICKES, FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, ET AL.; and

No. 1026. IOWA CITY LIGHT & POWER CO. *v.* SAME. June 1, 1937. Petition for writs of certiorari to the United States Court of Appeals for the District of Columbia granted. *Messrs. Newton D. Baker, Perry W. Turner, Walter B. Guy,* and *Wayne G. Cook* for petitioners. *Solicitor General Reed, Assistant Attorney General Morris, Assistant Attorney General Whitaker,* and *Messrs. John W. Scott, Edward H. Foley,* and *Jerome N. Frank* for respondents. Reported below: 91 F. (2d) 303.

No. 1027. FRAD *v.* KELLY, U. S. MARSHAL. June 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Louis Karasik* for petitioner. No appearance for respondent. Reported below: 89 F. (2d) 866.

DECISIONS DENYING CERTIORARI, FROM APRIL 12, 1937, THROUGH JUNE 1, 1937.

No. 849. OHIO EX REL. GREEN *v.* KING, CLERK, ET AL. April 12, 1937. Petition for writ of certiorari to the Supreme Court of Ohio and motion for leave to proceed further *in forma pauperis* denied. *Mr. Carl Green, pro se.* No appearance for respondents. Reported below: 132 Oh. St. 139; 5 N. E. (2d) 407.

No. 735. BRETT ET AL. *v.* UNITED STATES. April 12, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Frank Funkhouser* for petitioners. *Solicitor General Reed* and *Mr. G. A. Iverson* for the United States. Reported below: 86 F. (2d) 305.

Nos. 775 and 776. NEW YORK EX REL. HUDSON RIVER CONNECTING RAILROAD CORP. *v.* STATE TAX COMMISSION. April 12, 1937. Petition for writs of certiorari to the Supreme Court of New York denied. *Messrs. Kenneth O. Mott-Smith* and *Clive C. Handy* for petitioner. *Messrs. Wendell P. Brown* and *Henry Epstein* for respondent. Reported below: 272 N. Y. 652; 5 N. E. (2d) 377.

No. 779. SAN ANTONIO UTILITIES LEAGUE ET AL. *v.* SOUTHWESTERN BELL TELEPHONE CO. ET AL. April 12, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Robert Lee Bobbitt* for petitioners. No appearance for respondents. Reported below: 86 F. (2d) 584.

No. 786. MORAN BROTHERS CONTRACTING CO., INC. ET AL. *v.* DIOMEDE ET AL. April 12, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Elmer Clyde Sherwood* for petitioners. *Mr. Clayton J. Heermance* for respondents. Reported below: 87 F. (2d) 296.

No. 790. ISENBERG *v.* CUMMINGS, ATTORNEY GENERAL, ET AL. April 12, 1937. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Reuben D. Silliman, George*

W. Hott, and *Lester J. Dickinson* for petitioner. *Solicitor General Reed, Assistant Attorney General Whitaker,* and *Mr. Paul A. Sweeney* for respondents. Reported below: 67 App. D. C. 17; 89 F. (2d) 489.

No. 791. WILNER *v.* UNITED STATES. April 12, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Edward H. S. Martin* for petitioner. *Solicitor General Reed* and *Messrs. Julius C. Martin, Wilbur C. Pickett, Fendall Marbury,* and *W. Marvin Smith* for the United States. Reported below: 87 F. (2d) 164.

No. 792. MCQUILKIN *v.* UNITED STATES. April 12, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Edward H. S. Martin* for petitioner. *Solicitor General Reed* and *Messrs. Julius C. Martin, Wilbur C. Pickett,* and *W. Marvin Smith* for the United States. Reported below: 88 F. (2d) 476.

No. 794. JOHNSTON *v.* COMMISSIONER OF INTERNAL REVENUE. April 12, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. W. W. Spalding* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Berryman Green* for respondent. Reported below: 86 F. (2d) 732.

No. 798. FITZPATRICK *v.* UNITED STATES. April 12, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Richard E. Westbrooke* for petitioner. *Solicitor General Reed,*

Assistant Attorney General McMahon, and *Messrs. Wm. W. Barron, W. J. Connor,* and *W. Marvin Smith* for the United States. Reported below: 87 F. (2d) 471.

No. 805. National Electric Products Corp. *v.* Circle Flexible Conduit Co., Inc. et al. April 12, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. William H. Davis* and *Dean S. Edmonds* for petitioner. *Mr. Theodore S. Kenyon* for respondents. Reported below: 86 F. (2d) 84.

No. 808. Gardner *v.* Helvering, Commissioner of Internal Revenue. April 12, 1937. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Dorothy A. Moncure* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *F. A. LeSourd* for respondent. Reported below: 66 App. D. C. 364; 88 F. (2d) 746.

No. 809. Lund et al. *v.* Colwood Company. April 12, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Meyer Abrams* for petitioners. *Mr. Jason L. Honigman* for respondent. Reported below: 86 F. (2d) 995.

No. 810. McMann *v.* Engel et al. April 12, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Eugene L. Garey* and *Earl J. Garey* for petitioner. *Solicitor General Reed, Assistant Attorney General Jackson,* and *Mr. Allen E. Throop* for respondents. Reported below: 87 F. (2d) 377.

Nos. 811 and 812. KRENSKY, RECEIVER, *v.* WOLFE, TEMPORARY TRUSTEE. April 12, 1937. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Louis M. Mantynband* for petitioner. *Messrs. John S. Miller* and *Irwin T. Gilruth* for respondent. Reported below: 88 F. (2d) 257.

Nos. 813 and 814. KRENSKY, RECEIVER, *v.* WOLFE, TEMPORARY TRUSTEE. April 12, 1937. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Louis M. Mantynband* for petitioner. *Messrs. John S. Miller* and *Irwin T. Gilruth* for respondent. Reported below: 88 F. (2d) 257.

No. 819. ANAHMA REALTY CORP. *v.* PARK-LEXINGTON CORP. April 12, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. George F. Thompson* for petitioner. *Messrs. Pike P. Waldrop, Alexander Pfeiffer, Stuart McNamara, Charles Green Smith, Meyer Kraushaar,* and *Henry W. Taft* for respondent. Reported below: 87 F. (2d) 1013.

No. 823. MALLERS, EXECUTOR, *v.* EQUITABLE LIFE ASSURANCE SOCIETY ET AL. April 12, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Frederick A. Brown* for petitioner. *Messrs. Homer H. Cooper* and *Wendell J. Brown* for respondents. Reported below: 82 F. (2d) 233.

No. 888. GILL *v.* LOUISIANA. April 26, 1937. Petition for writ of certiorari to the Supreme Court of Louisiana and motion for leave to proceed further *in forma*

pauperis denied. *Mr. William Gill, pro se.* No appearance for respondent. Reported below: 186 La. 339; 172 So. 412.

No. 700. CON. P. CURRAN PRINTING CO. *v.* UNITED STATES. April 26, 1937. The motion to remand is denied. The petition for writ of certiorari to the Court of Claims is also denied. *Mr. Leo H. Hoffman* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Mr. Sewall Key* for the United States. Reported below: 83 Ct. Cls. 254; 14 F. Supp. 638.

No. 782. CON. P. CURRAN PRINTING CO. *v.* UNITED STATES. April 26, 1937. The motion to remand is denied. The petition for writ of certiorari to the Court of Claims is also denied. *Mr. Leo H. Hoffman* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Mr. Sewall Key* for the United States. Reported below: 83 Ct. Cls. 431; 15 F. Supp. 153.

No. 769. GOODHUE *v.* UNITED STATES. April 26, 1937. Petition for writ of certiorari to the Court of Claims denied. *Mr. Truman Henson* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Mr. Sewall Key* for the United States. Reported below: 84 Ct. Cls. 271; 17 F. Supp. 86.

No. 783. CUNNINGHAM *v.* UNITED STATES. April 26, 1937. Petition for writ of certiorari to the Court of Claims denied. *Messrs. F. W. Clements* and *Lawrence Cake* for petitioner. *Solicitor General Reed, Assistant Attorney General Whitaker,* and *Mr. Paul A. Sweeney* for the United States. Reported below: 83 Ct. Cls. 696.

No. 799. AMARAL ET AL. *v.* CLEARY ET AL. April 26, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Grove J. Fink* and *Lewis B. Randall* for petitioners. *Messrs. U. S. Webb* and *John O. Palstine* for respondents. Reported below: 87 F. (2d) 996.

No. 800. BORGES ET AL. *v.* LOFTIS, SHERIFF, ET AL. April 26, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Grove J. Fink* and *Lewis B. Randall* for petitioners. *Messrs. U. S. Webb* and *John O. Palstine* for respondents. Reported below: 87 F. (2d) 734.

No. 801. AFFONSO ET AL. *v.* CORNELL ET AL. April 26, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Grove J. Fink* and *Lewis B. Randall* for petitioners. *Messrs. U. S. Webb* and *John O. Palstine* for respondents. Reported below: 87 F. (2d) 996.

No. 822. GRAND INTERNATIONAL BROTHERHOOD OF LOCOMOTIVE ENGINEERS ET AL. *v.* KENAN ET AL. April 26, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Harold N. McLaughlin* for petitioners. *Mr. Giles J. Patterson* for respondents. Reported below: 87 F. (2d) 651.

No. 873. ALBEE GODFREY WHALE CREEK CO., INC. *v.* DINGFELDT ET AL. April 26, 1937. Petition for writ of certiorari to the Court of Appeals of New York denied. *Mr. Paul Koch* for petitioner. *Messrs. Henry Epstein, Joseph A. McLaughlin,* and *Roy Wiedersum* for respondents. Reported below: 272 N. Y. 623; 5 N. E. (2d) 362.

No. 821. SOUTHERN PACIFIC CO. *v.* MCDONNELL, ADMINISTRATRIX. April 26, 1937. Petition for writ of certiorari to the District Court of Appeal, 1st Appellate District, of California, denied. *Mr. Arthur Bergin Dunne* for petitioner. *Mr. Herbert W. Erskine* for respondent. Reported below: 17 Cal. App. (2d) 432; 62 P. (2d) 201.

No. 828. CAMERON *v.* UNITED STATES. April 26, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Lawrence E. Goldman* for petitioner. *Solicitor General Reed* and *Messrs. Julius C. Martin, Wilbur C. Pickett,* and *W. Marvin Smith* for the United States. Reported below: 87 F. (2d) 61.

No. 829. CAMPBELL *v.* COMMISSIONER OF INTERNAL REVENUE. April 26, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. George F. Mulligan, Marion L. Marshall,* and *George F. Mulligan, Jr.,* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Mr. Sewall Key* for respondent. Reported below: 87 F. (2d) 128.

No. 831. SARTORIUS *v.* COMMISSIONER OF INTERNAL REVENUE. April 26, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Harry J. Leffert* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Berryman Green* for respondent.

No. 833. MAYERHOFER *v.* UNITED STATES. April 26, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. A. M.*

Fitzgerald for petitioner. *Solicitor General Reed, Assistant Attorney General Jackson,* and *Messrs. Walter L. Rice* and *Wendell Berge* for the United States. Reported below: 90 F. (2d) 1013.

No. 834. CHAPMAN, ADMINISTRATRIX, *v.* REESE, RECEIVER. April 26, 1937. Petition for writ of certiorari to the Court of Appeals of Ohio denied. *Mr. H. B. Teegarden* for petitioner. *Mr. T. A. Billingsley* for respondent.

No. 906. CATHOLIC ORDER OF FORESTERS *v.* NORTH DAKOTA. See *ante,* p. 665.

No. 912. RUSSIAN, ADMINISTRATRIX, *v.* UNITED STATES. May 3, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit and motion for leave to proceed further *in forma pauperis* denied. *Mr. Joseph F. Gunster* for petitioner. No appearance for the United States. Reported below: 87 F. (2d) 895.

No. 889. TINKOFF *v.* UNITED STATES. May 3, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit and motion for leave to proceed further *in forma pauperis* denied. *Mr. Paysoff Tinkoff, pro se.* No appearance for the United States. Reported below: 86 F. (2d) 868.

No. 820. STATE TAX COMMISSION ET AL. *v.* WINSTON BROTHERS CO. ET AL. May 3, 1937. Petition for writ of certiorari to the Supreme Court of Oregon denied. *Mr.*

I. H. Van Winkle for petitioners. *Mr. Howard P. Arnest* for respondents. Reported below: 156 Ore. 505; 62 P. (2d) 7.

No. 827. Sly *v.* Prudential Insurance Co. May 3, 1937. Petition for writ of certiorari to the Supreme Court of California denied. *Mr. Robert B. Gaylord* for petitioner. *Mr. Cyril W. McClean* for respondent. Reported below: 7 Cal. (2d) 728; 62 P. (2d) 740.

No. 835. Halliburton et al. *v.* Johnston Formation Testing Corp. et al. May 3, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Frederick S. Lyon* and *Leonard S. Lyon* for petitioners. *Mr. D. A. Simmons* for respondents. Reported below: 88 F. (2d) 270.

No. 840. Block *v.* United States. May 3, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Louis Halle* for petitioner. *Solicitor General Reed, Assistant Attorney General McMahon,* and *Mr. Mahlon D. Kiefer* for the United States. Reported below: 88 F. (2d) 618.

No. 841. Grigsby *v.* Commissioner of Internal Revenue. May 3, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Isaac B. Lipson* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Berryman Green* for respondent. Reported below: 87 F. (2d) 96.

No. 843. F. A. MARTOCCIO CO. *v.* FEDERAL TRADE COMMISSION. May 3, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Arnold L. Guesmer* for petitioner. *Solicitor General Reed, Assistant Attorney General Jackson,* and *Messrs. A. H. Feller* and *W. T. Kelley* for respondent. Reported below: 87 F. (2d) 561.

No. 844. GREAT ATLANTIC & PACIFIC TEA CO. *v.* DISTRICT OF COLUMBIA. May 3, 1937. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Arthur G. Brode, Abbot P. Mills,* and *Caruthers Ewing* for petitioner. *Messrs. Elwood H. Seal* and *Vernon E. West* for respondent. Reported below: 67 App. D. C. 30; 89 F. (2d) 502.

No. 845. BOARD OF PUBLIC INSTRUCTION ET AL. *v.* NUVEEN. May 3, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. J. Oven* for petitioners. *Mr. C. L. Waller* for respondent. Reported below: 88 F. (2d) 175.

No. 847. SMITH *v.* GLENN, COLLECTOR OF INTERNAL REVENUE. May 3, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. James Clark, Richard C. Stoll,* and *Wallace Muir* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Mr. Sewall Key* for respondent. Reported below: 16 F. Supp. 83 (D. C.). See also 91 F. (2d) 447.

No. 850. ULLRICH ET AL. *v.* THOMAS, RECEIVER. May 3, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. William Alfred Lucking* for petitioners. *Mr. Robert S. Marx* for respondent. Reported below: 86 F. (2d) 678.

No. 857. CLAWANS *v.* DISTRICT OF COLUMBIA. May 3, 1937. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. F. D. Masucci* and *Allen Caruthers, Sr.*, and *Miss Lillian Clawans* for petitioner. *Messrs. Elwood H. Seal* and *Vernon E. West* for respondent. Reported below: 67 App. D. C. 58; 89 F. (2d) 802.

No. 858. GENEVA INVESTMENT CO. *v.* ST. LOUIS. May 3, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. William M. Fitch* for petitioner. *Messrs. Oliver Senti, Edgar H. Wayman, Luke E. Hart,* and *Forrest C. Donnell* for respondent. Reported below: 87 F. (2d) 83.

No. 859. FIRST NATIONAL BANK *v.* CONNOLLY, RECEIVER. May 3, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. George P. Barse* and *Robert S. Marx* for petitioner. *Mr. Wm. Henry Gallagher* for respondent. Reported below: 86 F. (2d) 683.

No. 860. COMMERCIAL NATIONAL BANK *v.* CONTINENTAL BANK & TRUST CO. May 3, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. A. J. Lewis* for petitioner. *Mr. Henry N. Longley* for respondent. Reported below: 88 F. (2d) 160.

No. 861. CADEK *v.* OHIO. May 3, 1937. Petition for writ of certiorari to the Supreme Court of Ohio denied. *Mr. William J. Corrigan* for petitioner. *Mr. Frederick W. Green* for respondent. Reported below: 132 Oh. St. 255; 6 N. E. (2d) 976.

No. 870. NEW YORK LIFE INSURANCE CO. *v.* LANIER ET AL. May 3, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Charles Cook Howell* and *Oscar O. McCollum* for petitioner. *Mr. John E. Mathews* for respondents. Reported below: 88 F. (2d) 196.

No. 881. NEW YORK LIFE INSURANCE CO. *v.* FREEDOM CASKET CO. May 3, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. William H. Eckert* and *Louis H. Cooke* for petitioner. *Mr. Charles J. Margiotti* for respondent. Reported below: 88 F. (2d) 833.

No. 920. NEW YORK LIFE INSURANCE CO. *v.* STRONG. May 3, 1937. Petition for writ of certiorari to the Supreme Court of Oklahoma denied. *Messrs. W. F. Wilson* and *Louis H. Cooke* for petitioner. *Mr. Edgar Fenton* for respondent. Reported below: 179 Okla. 280; 65 P. (2d) 194.

No. 948. KINCHLOW *v.* PEOPLES RAPID TRANSIT CO. ET AL. May 17, 1937. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia and motion for leave to proceed further *in forma pauperis* denied. *Mr. Nathan A. Dobbins* for petitioner. No appearance for respondents. Reported below: 66 App. D. C. 382; 88 F. (2d) 764.

No. 839. CONTINENTAL OIL CO. *v.* UNITED STATES. May 17, 1937. Motion to remand denied. The petition for writ of certiorari to the Court of Claims is also denied. *Mr. Arthur B. Hyman* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Mr. J. Louis Monarch* for the United States. Reported below: 83 Ct. Cls. 344; 14 F. Supp. 533.

No. 846. SABINE HARDWOOD CO., LTD. *v.* HOUSTON OIL CO. ET AL. May 17, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. D. Gordon* for petitioner. No appearance for respondents. Reported below: 87 F. (2d) 279.

No. 851. YOUNG *v.* NEW YORK, N. H. & H. R. Co. May 17, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Thomas J. O'Neill* for petitioner. *Mr. Edward R. Brumley* for respondent. Reported below: 87 F. (2d) 1023.

No. 852. STRECKFUS STEAMERS, INC. *v.* SHUTTLEWORTH. May 17, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. C. W. Strickling* for petitioner. *Mr. A. A. Lilly* for respondent. Reported below: 86 F. (2d) 327.

Nos. 863 and 864. BENEDICT *v.* SAVINGS INVESTMENT & TRUST CO., TRUSTEE. May 17, 1937. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. James S. Hays* for petitioner. *Mr. Benjamin P. DeWitt* for respondent. Reported below: 88 F. (2d) 436.

No. 871. SHELLMAR PRODUCTS CO. *v.* ALLEN-QUALLEY CO. ET AL. May 17, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Comfort S. Butler* for petitioner. *Messrs. Louis Quarles, George I. Haight,* and *M. K. Hobbs* for respondents. Reported below: 87 F. (2d) 104.

No. 872. DEERING *v.* NATIONAL MORTGAGE CORP. ET AL. May 17, 1937. Petition for writ of certiorari to the Court of Errors and Appeals of New Jersey denied. *Mr. James R. Deering* for petitioner. *Mr. Samuel Kaufman* for respondents. Reported below: 121 N. J. Eq. 274; 189 Atl. 64.

No. 877. SHALER COMPANY *v.* SPEAKER ET AL. May 17, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. George I. Haight* for petitioner. *Mr. George L. Wilkinson* for respondents. Reported below: 87 F. (2d) 985.

No. 880. UNITED STATES *v.* LEE. May 17, 1937. Petition for writ of certiorari to the Court of Claims denied. *Solicitor General Reed* for the United States. *Messrs. George A. King, Herman J. Galloway,* and *John W. Gaskins* for respondent. Reported below: 84 Ct. Cls. 629.

No. 882. BEVAN *v.* NEW YORK, C. & ST. L. R. Co. May 17, 1937. Petition for writ of certiorari to the Supreme Court of Ohio denied. *Mr. M. L. Bernsteen* for petitioner. *Mr. Walter T. Kinder* for respondent. Reported below: 132 Oh. St. 245; 6 N. E. (2d) 982.

No. 904. INDIANA FARMER'S GUIDE PUBLISHING CO. *v.* PRAIRIE FARMER PUBLISHING CO. May 17, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. U. S. Lesh* and *Eben Lesh* for petitioner. *Messrs. Maxwell V. Beghtol, Burke G. Slaymaker, Thomas E. Murphy,* and *J. L. Parrish, Jr.,* for respondent. Reported below: 88 F. (2d) 979.

Nos. 925 and 926. ANAHMA REALTY CORP. *v.* PARK-LEXINGTON CORP. May 17, 1937. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. George F. Thompson* and *Robert F. Wagner* for petitioner. *Messrs. Stuart McNamara, Charles Green Smith, Cornelius W. Wickersham, Pike P. Waldrop, Alexander Pfeiffer,* and *Meyer Kraushaar* for respondent. Reported below: 87 F. (2d) 1013.

No. 930. B. LEVY & SON ET AL. *v.* REIFSNYDER, TRUSTEE. May 17, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. J. Julius Levy* for petitioners. *Mr. M. J. Martin* for respondent. Reported below: 88 F. (2d) 287.

No. 876. GRINDLEY ET AL. *v.* SCHRAM, RECEIVER, ET AL. May 17, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Paul W. Voorhies* for petitioners. *Mr. Robert S. Marx* for respondents. Reported below: 87 F. (2d) 110.

No. 879. HOTEL SYRACUSE MEN'S SHOP, INC. ET AL. *v.* HAIGHT, RECEIVER, ET AL. May 17, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the

Second Circuit denied. *Messrs. Reynolds Robertson* and *Leonard J. Ganse* for petitioners. *Mr. Daniel F. Mathews* for respondents. Reported below: 87 F. (2d) 306.

No. 884. GIRSON ET AL. *v.* UNITED STATES. May 17, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John E. Patterson* for petitioners. *Solicitor General Reed, Assistant Attorney General McMahon,* and *Messrs. Wm. W. Barron* and *W. J. Connor* for the United States. Reported below: 88 F. (2d) 358.

No. 893. GENERAL UTILITIES INVESTORS CORP. ET AL. *v.* PUBLIC SERVICE CORP. ET AL. May 17, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. George M. LePine* for petitioners. *Messrs. Lawrence Bennett, Edmund W. Wakelee,* and *George W. Dalzell* for respondents. Reported below: 88 F. (2d) 19.

No. 897. MCDONALD *v.* UNITED STATES. May 17, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Edward M. Keating, Everett Jennings,* and *William L. Vandeventer* for petitioner. *Solicitor General Reed, Assistant Attorney General McMahon,* and *Mr. William W. Barron* for the United States. Reported below: 89 F. (2d) 128.

No. 899. NITKEY ET AL. *v.* S. T. MCKNIGHT CO. ET AL. May 17, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Edward M. Keating* for petitioners. *Messrs. Einor Hoidale, Frank J. Williams,* and *Frank J. Morley* for respondents. Reported below: 87 F. (2d) 916.

No. 900. HEYWOOD-WAKEFIELD CO. *v.* SMALL. May 17, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Arthur B. Marsh* for petitioner. *Mr. Herbert W. Kenway* for respondent. Reported below: 87 F. (2d) 716.

No. 902. GILLESPIE ET AL. *v.* WOODMEN OF THE WORLD; and

No. 903. SAME *v.* YELL COUNTY ET AL. May 17, 1937. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Thomas E. Elcock, James G. Martin,* and *Wallace Townsend* for petitioners. No appearance for respondents. Reported below: 87 F. (2d) 944.

No. 974. REILLY ET AL. *v.* STEDRONSKY ET AL. May 24, 1937. Petition for writ of certiorari to the Supreme Court of Ohio and motion for leave to proceed further *in forma pauperis* denied. *Leander T. Reilly, pro se.* No appearance for respondents.

No. 978. TURMAN *v.* TURMAN. May 24, 1937. Petition for writ of certiorari to the Court of Civil Appeals, 2nd Supreme Judicial District, of Texas, and motion for leave to proceed further *in forma pauperis* denied. *Mr. L. C. Turman, pro se.* No appearance for respondent. Reported below: 99 S. W. (2d) 947.

No. 984. KEESE *v.* ZERBST, WARDEN. May 24, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit and motion for leave to proceed further *in forma pauperis* denied. *Mr. Phillip G. Keese, pro se.* No appearance for respondent. Reported below: 88 F. (2d) 795.

No. 990. THORPE *v.* OHIO. May 24, 1937. Petition for writ of certiorari to the Supreme Court of Ohio and motion for leave to proceed further *in forma pauperis* denied. *Mr. Wm. D. Harris* for petitioner. No appearance for respondent. Reported below: 132 Oh. St. 234; 6 N. E. (2d) 790.

Nos. 867, 868 and 869. HALLIDAY ET AL. *v.* OHIO EX REL. FULTON, SUPERINTENDENT OF BANKS. May 24, 1937. Petition for writs of certiorari to the Supreme Court of Ohio denied. *Mr. Wm. T. Arnos* for petitioners. *Mr. Herbert S. Duffy* for respondent. Reported below: 132 Oh. St. 179; 5 N. E. (2d) 407.

No. 883. MADDOX *v.* JINKENS. May 24, 1937. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. L. Robinson Maddox, pro se.* No appearance for respondent. Reported below: 66 App. D. C. 362; 88 F. (2d) 744.

No. 891. LAUGHARN, TRUSTEE IN BANKRUPTCY, *v.* BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSN. May 24, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Thomas S. Tobin* for petitioner. *Mr. Wm. C. Day* for respondent. Reported below: 88 F. (2d) 551.

No. 892. HYLTON, ADMINISTRATRIX, *v.* SOUTHERN RY. CO. May 24, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. J. A. Fowler* for petitioner. *Messrs. H. O'B. Cooper, Charles H. Smith, Sidney S. Alderman,* and *S. R. Prince* for respondent. Reported below: 87 F. (2d) 393.

No. 894. BOLLENBACH *v.* BOTANY CONSOLIDATED MILLS, INC. ET AL. May 24, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. George W. C. McCarter* for petitioner. *Messrs. Merritt Lane* and *Wm. St. John Tozer* for respondents. Reported below: 89 F. (2d) 223.

No. 896. MORRIS *v.* DAVIS, SHERIFF, ET AL. May 24, 1937. Petition for writ of certiorari to the Court of Criminal Appeals of Texas denied. *Messrs. J. P. Cox, Jr.,* and *James D. Buster* for petitioner. No appearance for respondents. Reported below: 101 S. W. (2d) 259.

No. 898. SANBORN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. May 24, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Llewellyn A. Luce* and *John M. Cleary* for petitioners. *Solicitor General Reed, Assistant Attorney General Morris,* and *Mr. Sewall Key* for respondent. Reported below: 88 F. (2d) 134.

No. 901. CHICAGO, ST. P., M. & O. RY. CO. *v.* KULP, ADMINISTRATOR. May 24, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Warren Newcome* and *Wm. T. Faricy* for petitioner. *Messrs. Mortimer H. Boutelle* and *Walter H. Newton* for respondent. Reported below: 88 F. (2d) 466.

No. 913. NASH *v.* COMMISSIONER OF INTERNAL REVENUE. May 24, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Claude M. Houchins* for petitioner. *Solicitor Gen-*

eral Reed, Assistant Attorney General Morris, and *Messrs. Sewall Key* and *Maurice J. Mahoney* for respondent. Reported below: 88 F. (2d) 477.

No. 914. MILLHAUBT *v.* KANSAS. May 24, 1937. Petition for writ of certiorari to the Supreme Court of Kansas denied. *Mr. Fred Hinkle* for petitioner. *Messrs. Clarence V. Beck* and *Roland Boynton* for respondent. Reported below: 144 Kan. 574; 61 P. (2d) 1356.

No. 915. 164 EAST 72ND STREET CORP. *v.* GUNDER. May 24, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Henry A. Uterhart* for petitioner. *Messrs. Milfred O. Garner* and *Julius Moses* for respondent. Reported below: 88 F. (2d) 284.

No. 919. KLEE CORPORATION ET AL. *v.* ROOSEVELT ET AL. May 24, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Robert P. Weil* for petitioners. *Mr. Charles H. Tuttle* for respondents. Reported below: 88 F. (2d) 251.

No. 923. MEMPHIS *v.* ILLINOIS CENTRAL R. CO. ET AL. May 24, 1937. Petition for writ of certiorari to the Court of Appeals of Tennessee denied. *Mr. Abe D. Waldauer* for petitioner. *Messrs. H. D. Minor, Charles N. Burch, Clinton H. McKay,* and *Edw. C. Craig* for respondents. Reported below: 170 Tenn. 469.

No. 927. BUFFUM, TRUSTEE IN BANKRUPTCY, *v.* MARYLAND CASUALTY CO. May 24, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth

Circuit denied. *Messrs. Robert T. Devlin, Wm. H. Devlin,* and *Horace B. Wulff* for petitioner. *Mr. Charles A. Strong* for respondent. Reported below: 88 F. (2d) 547.

No. 928. KEIG, TRUSTEE, *v.* LLOYD ET AL. May 24, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. James A. O'Callaghan* for petitioner. *Mr. Henry H. Furth* for respondents. Reported below: 87 F. (2d) 101.

No. 929. MOVIETONEWS, INC. ET AL. *v.* ALEXANDER ET AL. May 24, 1937. Petition for writ of certiorari to the Supreme Court of New York denied. *Messrs. F. A. W. Ireland* and *Stanley H. Fischer* for petitioners. *Messrs. Herbert W. Haldenstein, Henry Epstein,* and *Joseph A. McLaughlin* for respondents. Reported below: 273 N. Y. 511; 6 N. E. (2d) 604.

No. 932. IRVIN *v.* BUICK MOTOR CO. ET AL. May 24, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. George W. Sutton* for petitioner. *Mr. Drury W. Cooper* for respondents. Reported below: 88 F. (2d) 947.

No. 940. GENERAL ELECTRIC CO. *v.* ELECTRIC MACHINERY MFG. CO. May 24, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Harrison F. Lyman, Henry R. Ashton, Reynolds Robertson,* and *Charles Neave* for petitioner. *Mr. William H. Davis* for respondent. Reported below: 88 F. (2d) 11.

No. 941. SOUTHERN BOULEVARD R. CO. *v.* NEW YORK CITY. May 24, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Alfred T. Davison* and *Reynolds Robertson* for petitioner. *Messrs. Paul Windels, Paxton Blair, Sol Charles Levine,* and *Meyer Bernstein* for respondent. Reported below: 86 F. (2d) 633.

No. 784. KITCHER *v.* SHERWOOD. May 24, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Sydney P. Simons* for petitioner. *Mr. D. Harold Cotter* for respondent. Reported below: 86 F. (2d) 750.

No. 885. COPLIN ET AL. *v.* UNITED STATES. May 24, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Nat Schmulowitz* and *Fred Horowitz* for petitioners. *Solicitor General Reed, Assistant Attorney General McMahon,* and *Messrs. Wm. W. Barron, W. Marvin Smith,* and *Allen E. Throop* for the United States. Reported below: 88 F. (2d) 652.

No. 1004. WEIBERT *v.* CALIFORNIA. June 1, 1937. Petition for writ of certiorari to the District Court of Appeal, 2nd Appellate District, of California, and motion for leave to proceed further *in forma pauperis* denied. *Mr. A. K. Shipe* for petitioner. No appearance for respondent. Reported below: 18 Cal. App. (2d) 457; 64 P. (2d) 169.

No. 1037. MADISON ET AL. *v.* PHILLIPS PETROLEUM CO. June 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit and mo-

tion for leave to proceed further *in forma pauperis* denied. *Mr. James O. Cade* for petitioners. No appearance for respondents. Reported below: 88 F. (2d) 515.

No. 874. GARCIA *v.* PHILIPPINE ISLANDS. June 1, 1937. Petition for writ of certiorari to the Supreme Court of the Philippine Islands denied. *Mr. Jose C. Abreu* for petitioner. *Mr. Quintin Paredes, Jr.,* for respondent.

No. 908. HERRING *v.* OKLAHOMA. June 1, 1937. Petition for writ of certiorari to the Criminal Court of Appeals of Oklahoma denied. *Mr. Finis E. Riddle* for petitioner. No appearance for respondent. Reported below: 64 P. (2d) 921.

No. 917. ELLINGSON *v.* PACIFIC STATES SAVINGS & LOAN CO. ET AL. June 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. George P. Barse, John F. Anderson,* and *Michael G. Luddy* for petitioner. *Mr. David R. Faries* for respondents. Reported below: 88 F. (2d) 384.

No. 918. DAVIS *v.* UNITED STATES. June 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Donald Horne* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. J. Louis Monarch* and *Harry Marselli* for the United States. Reported below: 87 F. (2d) 323.

No. 921. NEW YORK TRUST CO., EXECUTOR, *v.* UNITED STATES. June 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit

denied. *Mr. Edmund S. Kochersperger* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Maurice J. Mahoney* for the United States. Reported below: 87 F. (2d) 889.

No. 931. McLeod, Sheriff, et al. *v.* Cooper, Trustee. June 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. John B. Sutton* and *A. U. Brubaker* for petitioners. *Mr. Fred W. Brown* for respondent. Reported below: 88 F. (2d) 194.

No. 933. Gulf, M. & N. R. Co. et al. *v.* Kelly. June 1, 1937. Petition for writ of certiorari to the Supreme Court of Mississippi denied. *Messrs. Ellis B. Cooper* and *J. N. Flowers* for petitioners. *Mr. Marion W. Reily* for respondent. Reported below: 178 Miss. 531.

No. 935. Ratigan *v.* United States. June 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Marshall B. Woodworth* for petitioner. *Solicitor General Reed, Assistant Attorney General McMahon,* and *Messrs. Wm. W. Barron* and *W. Marvin Smith* for the United States. Reported below: 88 F. (2d) 919.

No. 936. Fan Shan Hang *v.* Prestlien. June 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Lane Summers, W. H. Hayden,* and *F. T. Merritt* for petitioner. *Messrs. Robert E. Bronson* and *H. B. Jones* for respondent. Reported below: 88 F. (2d) 42.

No. 937. LONG ET AL., TRUSTEES, *v.* STITES ET AL. June 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Greenberry Simmons* for petitioners. *Messrs. Allen P. Dodd, Edw. P. Humphrey,* and *Squire R. Ogden* for respondents. Reported below: 88 F. (2d) 554.

No. 942. BRANDES, GUARDIAN, *v.* PITCAIRN ET AL. June 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. H. B. Teegarden* for petitioner. *Messrs. George H. Beckwith, Gustavus Ohlinger,* and *S. Q. Pulver* for respondents. Reported below: 87 F. (2d) 928.

No. 949. ROBY ET AL. *v.* DUNNETT ET AL. June 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. T. P. Gore* and *Finis E. Riddle* for petitioners. No appearance for respondents. Reported below: 88 F. (2d) 68.

No. 950. PULLMAN COMPANY *v.* WEBSTER. June 1, 1937. Petition for writ of certiorari to the Supreme Court of Ohio denied. *Messrs. Luther Day, W. H. Miller,* and *Rufus Day* for petitioner. *Mr. Wm. W. Dawson* for respondent. Reported below: 132 Oh. St. 197; 5 N. E. (2d) 498.

No. 951. CADWALADER *v.* COMMISSIONER OF INTERNAL REVENUE. June 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Llewellyn A. Luce* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Ellis N. Slack* for respondent. Reported below: 88 F. (2d) 274.

No. 952. CAMPOS ET AL. *v.* UNITED STATES. June 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Isadore Polier* for petitioners. *Solicitor General Reed, Assistant Attorney General McMahon,* and *Mr. Amos W. W. Woodcock* for the United States. Reported below: 88 F. (2d) 138.

No. 953. FOX *v.* UNITED STATES. June 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. David P. Siegel* for petitioner. *Solicitor General Reed, Assistant Attorney General McMahon,* and *Messrs. Benjamin M. Parker* and *W. Marvin Smith* for the United States. Reported below: 89 F. (2d) 1021.

No. 954. RAVENSCROFT ET AL. *v.* UNITED STATES. June 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. D. Roger Englar* and *F. Herbert Prem* for petitioners. *Solicitor General Reed, Assistant Attorney General Whitaker,* and *Mr. Paul A. Sweeney* for the United States. Reported below: 88 F. (2d) 418.

No. 955. MASSACHUSETTS BONDING & INSURANCE CO. *v.* JOHN R. THOMPSON CO. June 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. David A. Murphy* and *John T. Harding* for petitioner. *Mr. Arthur Miller* for respondent. Reported below: 88 F. (2d) 825.

No. 956. INDEPENDENT WORKERS OF CLAYTON MARK & CO. ET AL. *v.* DEMAN, REGIONAL DIRECTOR, ET AL. June 1, 1937. Petition for writ of certiorari to the Circuit

Court of Appeals for the Seventh Circuit denied. *Mr. Ernest S. Ballard* for petitioners. *Solicitor General Reed* and *Messrs. A. H. Feller* and *Charles Fahy* for respondent. Reported below: 88 F. (2d) 59.

No. 959. DUBERSTEIN, TRUSTEE, *v.* KEIL ET AL. June 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Samuel C. Duberstein* for petitioner. *Mr. Alfred Hurrell* for respondents. Reported below: 88 F. (2d) 7.

No. 964. UPDIKE *v.* COMMISSIONER OF INTERNAL REVENUE. June 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Alfred G. Ellick* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. J. Louis Monarch* and *Joseph M. Jones* for respondent. Reported below: 88 F. (2d) 807.

No. 970. SHAPIRO *v.* UNITED STATES. June 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. I. Maurice Wormser* for petitioner. *Solicitor General Reed* and *Assistant Attorney General Jackson* for the United States. Reported below: 88 F. (2d) 625.

No. 977. NACHT ET AL. *v.* UNITED STATES. June 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Harold L. Turk* for petitioners. *Solicitor General Reed, Assistant Attorney General McMahon,* and *Messrs. Mahlon D. Kiefer* and *W. Marvin Smith* for the United States. Reported below: 89 F. (2d) 1015.

No. 980. SHERMAN ET AL. *v.* 333 NORTH MICHIGAN AVENUE BLDG. CORP. ET AL. June 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Charles Leibman* and *Benjamin I. Salinger* for petitioners. *Messrs. John S. Miller, Laurence G. Hastings, Conrad H. Poppenhusen, James W. Hyde, Samuel A. Ettilson, Edw. R. Johnston, Lincoln R. Clark,* and *Ervin M. Treusch* for respondents.

No. 992. DENNISTON *v.* UNITED STATES. June 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Harold H. Corbin* and *Edward J. Bennett* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. Sewall Key* and *Earl C. Crouter* for the United States. Reported below: 89 F. (2d) 696.

No. 995. ELECTRIC BOND & SHARE CO. ET AL. *v.* SECURITIES & EXCHANGE COMMISSION ET AL. June 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Thomas D. Thacher* and *John F. MacLane* for petitioners. *Solicitor General Reed* and *Assistant Attorney General Jackson* for respondents.

No. 957. BALTER ET AL. *v.* ICKES ET AL. June 1, 1937. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Messrs. Edmund M. Toland* and *Reynolds Robertson* for petitioners. *Solicitor General Reed* and *Assistant Attorney General McFarland* for respondents. Reported below: 67 App. D. C. 112; 89 F. (2d) 856.

No. 1003. TALLEY ET AL. *v.* FOX FILM CORP. ET AL. June 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Wm. H. Neblett* for petitioners. *Messrs. Oscar Lawler, Alfred Sutro, Walter K. Tuller, P. N. McCloskey,* and *Geo. E. Farrand* for respondents. Reported below: 88 F. (2d) 212.

No. 1005. TENNESSEE VALLEY AUTHORITY ET AL. *v.* TENNESSEE ELECTRIC POWER CO. ET AL. June 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Solicitor General Reed* and *Messrs. James Lawrence Fly, John Lord O'Brian,* and *William C. Fitts, Jr.,* for petitioners. *Messrs. Newton D. Baker, Raymond T. Jackson, Charles M. Seymour,* and *Charles C. Trabue* for respondents. Reported below: 90 F. (2d) 885.

No. 1017. EL PASO ELECTRIC CO. ET AL. *v.* ELLIOTT, REGIONAL DIRECTOR, ET AL.; and

No. 1018. PERRIN ET AL. *v.* SAME. June 1, 1937. Petition for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. H. Tallichet* for petitioner in No. 1017. *Mr. U. S. Goen* for petitioner in No. 1018. *Solicitor General Reed* and *Mr. Charles Fahy* for respondents. Reported below: 88 F. (2d) 505.

No. 971. WILLIAMS ET AL. *v.* GREAT LAKES TERMINAL WAREHOUSE CO. ET AL. June 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Harry W. Morgan* for petitioners. *Mr. Donald F. Melhorn* for respondents. Reported below: 87 F. (2d) 115.

No. 979. RAY, ADMINISTRATRIX, *v.* COMMISSIONER OF INTERNAL REVENUE. June 1, 1937. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. George E. H. Goodner* for petitioner. *Solicitor General Reed, Assistant Attorney General Morris,* and *Messrs. J. Louis Monarch* and *J. E. Youngman* for respondent. Reported below: 88 F. (2d) 891.

No. 1006. TOTTEN *v.* HARLOWE ET AL. June 1, 1937. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia denied. *Mr. Jacob N. Halper* for petitioner. *Messrs. Stanton C. Peelle* and *Paul E. Lesh* for respondents. Reported below: 67 App. D. C. 132; 90 F. (2d) 377.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM APRIL 12, 1937, THROUGH JUNE 1, 1937.

No. 721. LIPSON *v.* SOCONY VACUUM CORP.; and

No. 722. SAME *v.* STANDARD OIL CO. On writs of certiorari to the Circuit Court of Appeals for the First Circuit. April 26, 1937. Dismissed per stipulation of counsel. *Messrs. Edward O. Proctor* and *Edward C. Park* for petitioner. *Mr. George R. Stobbs* for respondents. Reported below: 87 F. (2d) 265.

PETITIONS FOR REHEARING DENIED, FROM APRIL 12, 1937, THROUGH JUNE 1, 1937.*

No. 655. REUBEN *v.* UNITED STATES. April 12, 1937. 300 U. S. 671.

No. 668. ROLLNICK *v.* UNITED STATES. April 12, 1937. 300 U. S. 671.

No. 758. SINGER *v.* ILLINOIS EX REL. RUSCH. April 12, 1937. 300 U. S. 642.

No. 770. ZIMMERN ET AL. *v.* UNITED STATES. April 12, 1937. 300 U. S. 671.

No. —, original. EX PARTE JOSEPH PORESKY. April 26, 1937.

No. 227. MATOS *v.* ALONSO HERMANOS ET AL. April 26, 1937. 300 U. S. 429.

No. 340. DUGAS *v.* AMERICAN SURETY CO. April 26, 1937. 300 U. S. 414.

No. 505. ATCHISON, TOPEKA & SANTA FE RY. CO. *v.* SCARLETT. April 26, 1937. 300 U. S. 471.

No. 694. PEARSON, ADMINISTRATOR, *v.* UNITED STATES. April 26, 1937. 300 U. S. 678.

* See Table of Cases Reported in this volume for earlier decisions in these cases, unless otherwise indicated.

No. 767. WACO DEVELOPMENT CO. *v.* RUPE ET AL. April 26, 1937. 300 U. S. 679.

No. 815. CARTEY, ADMINISTRATRIX, *v.* UNITED STATES. April 26, 1937. 300 U. S. 675.

No. 816. JENKINS, ADMINISTRATRIX, *v.* UNITED STATES. April 26, 1937. 300 U. S. 675.

No. 818. WHITMORE *v.* SALT LAKE CITY ET AL. April 26, 1937. 300 U. S. 644.

No. 342. PETERSON *v.* UNITED STATES. May 3, 1937. 299 U. S. 583.

No. 502. UNITED STATES SAVINGS BANK ET AL. *v.* MORGENTHAU, SECRETARY OF THE TREASURY, ET AL. May 3, 1937. 299 U. S. 605.

No. 745. HATFIELD *v.* GUAY, U. S. MARSHAL, ET AL. May 3, 1937. 300 U. S. 678.

No. 272. REEVES BROTHERS CO. *v.* UNITED STATES. May 17, 1937. 299 U. S. 573.

No. 790. ISENBERG *v.* CUMMINGS, ATTORNEY GENERAL, ET AL. May 17, 1937.

No. 819. ANAHMA REALTY CORP. *v.* PARK-LEXINGTON CORP. May 17, 1937.

No. 688. SHULMAN ET AL. *v.* WILSON-SHERIDAN HOTEL CO. ET AL. May 17, 1937.

No. 849. OHIO EX REL. GREEN *v.* KING ET AL. May 17, 1937.

No. 499. HARTRIDGE-CANNON CO. ET AL. *v.* GILLESPIE ET AL. May 24, 1937. 299 U. S. 606.

No. 49. W. H. H. CHAMBERLIN, INC. *v.* ANDREWS, INDUSTRIAL COMMISSIONER OF NEW YORK, ET AL.;

No. 50. E. C. STEARNS & CO. *v.* SAME; and

No. 64. ASSOCIATED INDUSTRIES OF NEW YORK STATE, INC. *v.* DEPARTMENT OF LABOR OF NEW YORK ET AL. May 24, 1937. 299 U. S. 515.

No. 799. AMARAL ET AL. *v.* CLEARY ET AL. May 24, 1937.

No. 800. BORGES ET AL. *v.* LOFTIS, SHERIFF. May 24, 1937.

No. 801. AFFONSO ET AL. *v.* CORNELL ET AL. May 24, 1937.

No. 829. CAMPBELL *v.* COMMISSIONER OF INTERNAL REVENUE. May 24, 1937.

No. 873. ALBEE GODFREY WHALE CREEK CO., INC. *v.* DINGFELDT. May 24, 1937.

No. 805. NATIONAL ELECTRIC PRODUCTS CORP. *v.* CIRCLE FLEXIBLE CONDUIT CO. ET AL. June 1, 1937.

No. 857. CLAWANS *v.* DISTRICT OF COLUMBIA. June 1, 1937.

No. 889. TINKOFF *v.* UNITED STATES. June 1, 1937.

No. 919. KLEE CORPORATION ET AL. *v.* ROOSEVELT ET AL. June 1, 1937.

AMENDMENT OF CRIMINAL RULES.

ORDER

It is ordered that Rule I of the Rules of Practice and Procedure in Criminal Cases be, and the same is hereby, amended to read as follows:

I. *Sentence.*—After a plea of guilty, or a verdict of guilt by a jury or finding of guilt by the trial court where a jury is waived, and except as provided in the Act of March 4, 1925, c. 521, 43 Stat. 1259, sentence shall be imposed without delay unless (1) a motion for the withdrawal of a plea of guilty, or in arrest of judgment or for a new trial, is pending, or the trial court is of opinion that there is reasonable ground for such a motion; or (2) the condition or character of the defendant, or other pertinent matters, should be investigated in the interest of justice before sentence is imposed. The judgment setting forth the sentence shall be signed by the judge who imposes the sentence and shall be entered by the clerk.

Pending sentence, the court may commit the defendant or continue or increase the amount of bail.

MAY 24, 1937.

APPENDIX

For the possible assistance of those who may find occasion to study the application of the National Labor Relations Act of July 5, 1935, or any similar federal legislation, to industrial activities which are claimed to be purely local in character, this Appendix deals with oral arguments presented by counsel in four of the cases reported earlier in the volume. The cases and the arguments are arranged in the order in which they were heard. The attempt is to set forth, by summary and by direct quotation, what was said concerning the principal issues of law. Space limits have required much condensation, especially of later arguments involving points argued previously by other counsel. What purports to be a full transcript of all will be found in Sen. Doc. 52, 75th Cong., 1st Sess.

Associated Press v. *National Labor Board,* 301 U. S. 103

Mr. John W. Davis, on behalf of the Associated Press, after stating the case:

"This case does not turn in any sense on the subject of collective bargaining, its merits, or its demerits, its wisdom or its unwisdom, its blessings or its injury, its virtue or its vice, or on the right and power of laborers of all characters to unionize for common purposes if they see fit. The right to combine for such a lawful purpose has in many years not been denied by any court, said Your Honors in *American Steel Foundries* v. *Tri-City Trades Council,* 257 U. S. 184, and not since the antique doctrine that a combination of men to raise their wages constituted an illegal restraint of trade finally perished from the reports has the right itself, so far as I know—the right *per se,* the naked right—been denied by any

judicial tribunal in this country. It may be abused, no doubt has been abused, but its existence does not derive from any declaration contained in this statute or in any other, because it antedates the statutes and was the subject of judicial recognition long before this Act or any similar Act was passed.

"What is involved here is the power of the Federal Government to make collective bargaining compulsory in all the industries of this country. We challenge that power.

"This case does not turn, in the second place, on the question whether or not the Associated Press is engaged, as to some of its activities, in interstate commerce. Some of its activities may be conceded to constitute interstate commerce. It is equally clear, as we think, that some of its activities do not constitute interstate commerce, and we think it to be clear that, as to its editorial employees, their duties are no more interstate commerce than those of a draftsman engaged in drawing plans for a steel mill or those of the tenders of looms in a textile factory.

"And, in the third place, this case does not turn upon the reason or unreason of Watson's discharge. There was nothing about his discharge which could give any right of action, this Act aside. He was an employee at will, for no fixed term, and both he and his employer had the right, at law, to terminate that relationship whenever they saw fit, without incurring any financial or other responsibility. Neither was it such a relationship as a court of equity could have enforced; for, of course, the doctrine only needs to be stated that a court of equity will not enforce a contract for the performance of personal services. . . .

"We assert that the Act is not a valid exercise of the commerce power, either in general or in its application to the Associated Press. We assert that the Act by its scope outruns the commerce power and is an effort to

regulate matters that fall far outside of the field, and that this appears in the Act itself, from its preamble, from its definitions, from its operative or effective sections, and from its legislative history. I think there shines through the Act a clear and studied purpose on the part of Congress to bring all the industries of the country, as far as language can accomplish it, within the reach of the supervision of the National Labor Relations Board. . . . The recital of purposes and reasons is coextensive with the entire industrial and commercial life of the country, and no regulation, presumably, which could attain that end could possibly reach these objectives unless it were all-inclusive. Regulations devoted only to those employees who could be found to be engaged in the act of interstate commerce could not alone preserve the economic level of the country or prevent this alleged injury to the general market and the maintenance of prices. . . .

"An employee who has been wrongfully discharged remains an employee under the terms of the Act until he has found another job."

The definitions, 'employer,' 'employee,' 'commerce,' 'affecting commerce,' and 'labor dispute' reveal the effort to include in the Act all the industries of the country. Under § 8, an employer dare not even make a contribution to a union of his employees, no matter how independent it may be; he can not let them confer with him, without their losing time and pay—unless permitted by the Labor Board. "That covers, of course, the whole life of the employee. There must be no discrimination as to hire or tenure or any condition—no shift of work, no assignment from one shop to the other, if there is an underlying purpose thereby to encourage or discourage membership in any labor organization. It confers, as the Circuit Court of Appeals of California has said, and

undertakes to confer, a civil-service status upon every employee so that whenever there is any shift in his relationship toward his employer, he may assert a coercive purpose and may take his case before the National Labor Relations Board or its divisions. The employer may not discharge his employee because of his membership in an organization. He may not discriminate against him because of his membership in a labor organization. But he may make a contract with the labor organization by virtue of which he will discriminate against those who are not members of it. In other words, there is an open declaration, we think, that the purpose of the Act is to make the closed shop universal and compulsory. In these effective clauses there is no phrase confining the employers and employees intended to those engaged in interstate commerce.

"The next section of the Act provides for representatives and elections. The minority who do not belong to the unit selected as the exclusive agent for bargaining but are to be bound by it nevertheless, either individually or as a group, have preserved to them the right of petition—and nothing more—for under the terms of the Act the contract which is made by the selected majority is binding upon them and upon their employer as well. The unit for collective bargaining is to be selected by the Board, and no standard is set up by which the Board may exercise that duty of selection; no guide is offered to them in deciding what is the appropriate unit, whether it is the factory unit, or the trade unit, or the craft unit, or the plant unit. The Board is given uncontrolled discretion to name the unit appropriate, and, when the unit has been named, a majority of that unit binds everybody in the plant.

"The learned Solicitor General insists that, in reading the Act as I have just done, and as we read it in our brief, we are entirely too literal about it; that the Act

bears a construction more benign than we would give to it; that we must start with the assumption that Congress did not intend to exceed its jurisdiction over interstate commerce, and that there are lodged in the Act here and there technical phrases upon which that construction can be based. Whether that construction would save them in this case is a question I shall come to in a moment. But as to the all-inclusive character of the Act, it is asserted that the definition defines interstate commerce in the orthodox terms. It then passes on to a section in which they undertake to define 'affecting commerce,' being careful, however, in that definitive clause not to use the words 'directly affecting commerce.'

"And finally we come to section 10 (a). . . . The employer and employee can no longer set up their own arbitral machinery. The power of the Board is to be exclusive. In that there is the phrase 'prevent any person from engaging in any unfair labor practice affecting commerce'—not 'directly affecting commerce,' not 'affecting commerce' as that phrase has been defined by the prior decisions of this Court. And if we want any light on the subject as to what, in the opinion of the Board, is to be the interpretation of that clause, we only have to turn to their decisions. That clause, says the learned Solicitor General, imposes upon the Board a duty to inquire, in each case, whether the dispute does or does not affect commerce. It is left to the Board, by what he is pleased to call an *ad hoc* application of the statute, to determine whether the instant controversy is within or without the congressional intent.

"But as for producing industries in the country, the decisions of the Labor Board, which are now available in printed form as a public document, demonstrate that the only test the Board has ever applied as to whether any controversy, large or small, affected commerce, was whether the raw materials of the industry, in whole or

in part, were drawn from without the State, and whether the finished products, in whole or in part, were shipped without the State after they were finished. Wherever the Board has found those circumstances to exist, it has declared, as the basis of its jurisdiction, that it has detected a flow of commerce; and as you read the decisions of the Board, you can only conclude that the word 'flow' is to them the grand omnific word that disposes of all their doubts and controversies, and wherever they find any prior or any subsequent movement in interstate commerce, they describe the result as a 'flow,' and they proceed to adjudicate. . . . I make no complaint of the triviality in many of these cases. If this law is a law at all, it must apply to the great and the small alike. If this theory of interstate commerce can support this sort of intrusion, then it must be clear that no workman in the United States in any of its productive industries, can be discharged, or even the terms or place of his daily labor altered, without a hearing before the National Labor Board. The very magnitude of the probable task ought to be enough to make men of average humility shrink from its assumption.

"The universality of this Act, reading its preamble, reading its effective clauses, is its very bone and sinew, and it appears so from the reports of the committees of Congress that had it in their charge. As a regulation of commerce we are to penetrate into the economic life of the country and undertake to preserve the 'balance of economic forces' upon which the full flow of commerce is said to depend.

"If the Act lacks the universality that I assert, a universality which must be necessarily fatal to it; if it admits the construction which the learned Solicitor General would put upon it in order to preserve some part of its efficiency, will that construction, applied to the instant case, make out of the relations between the Associated

Press and its editorial employees anything that, by the remotest stretch of the human imagination, can be considered commerce between States?

"I take it that there are some axioms which have settled into the jurisprudence of this country too firmly for disturbance. I take it that no man will pretend that the power of Congress is not confined to interstate commerce and those matters which directly affect it; that interstate commerce itself is an act performed, as one of the decisions said, by the labor of men with the help of things, and that it is only when men are engaged in the act itself, or when they are engaged in activities that directly affect the performance of that act by others, that they come within reach of the federal power.

"I suppose, contrary to what one sometimes hears, that no one will seriously try to argue in this Court that the right to engage in interstate commerce is a privilege and not a natural right, antedating the Constitution as it does. It is not to be granted or withheld at the mere will and pleasure of Congress. It is to be protected against interruption. It is to be guided by rules appropriate to its exercise, and its abuse by acts which would be injurious to the pubic welfare is to be prevented.

"So far, and no farther, as I contend, can the Congressional power extend.

"What is the pedigree of necessity that they think supports the Act so far as the Associated Press is concerned? They say the Associated Press is engaged in interstate commerce. This Act regulates the Associated Press. Therefore, this Act regulates interstate commerce. And, if the faint glimmerings of my collegiate logic remain with me, I think that syllogism has the fallacy of the undistributed middle. The Associated Press is engaged in the dissemination of news. The dissemination of news constitutes interstate commerce. News cannot be disseminated unless it is gathered. News after it is gathered

cannot be used until it has been written. Editorial writers are necessary both to edit and to gather the news, and, if no news is gathered, no news can be transmitted. Editorial writers, being like most artists, perhaps, temperamental, must be of a contented mind before they can efficiently perform their duties. A contented mind can only be based upon satisfactory working conditions, hours, and terms of payment. Satisfactory working conditions, hours, and terms of payment can only be brought about by collective bargaining. Ergo, to force the Associated Press to engage in collective bargaining is a bona-fide regulation of commerce.

"That, I respectfully submit, is nothing but a repetition in argumentative form of the nursery rhyme about The House that Jack Built. . . .

"I repeat what I have said before, and what I shall perhaps repeat in another branch of this argument: The Associated Press is not an instrumentality of commerce. It is not a railroad. And I shall not enter at all into the scope of the Congressional power in regulating the labor relations between the railroads and their employees. They, it may be said, are dedicated, by their being and by their consent, to a continuous public service, and it may be that anything necessary to preserve the continuity of that service, which is the law of their nature, is within the power of the regulatory body. But there is nothing of that sort with this Associated Press here. It is not a carrier for hire.

"These editorial employees are engaged—in the court below I used the phrase 'in the manufacture of news,' and the double implication of that word caused me some embarrassment. Therefore I do not use that phrase here. They are engaged in the production of news, in its obtainment, in its formulation, in its preparation—as truly a productive energy as that of the roller in the steel mill, or the herder of cattle on the western plains, or the agricultural laborer on his farm.

"Of course, the Government is driven to some very old means in order to sustain its contention on this subject. We hear again of the 'throat' cases, *Stafford* v. *Wallace,* 258 U. S. 495, and the rest. We hear of the railroad case, *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548. We hear of the strike cases, *Coronado Coal Co.* v. *United Mine Workers,* 268 U. S. 295, and so forth.

"Your Honors are so familiar with that that a word in differentiation would indicate our point of view. There is no 'throat' here. There is no 'current' here. We do not sit like the stockyards, astride a current of commerce which other men are trying to conduct, and which, by the Stock Yards Act, they were forbidden to interrupt. This is our commerce, and what this law proposes when applied to us, is to regulate us, not in order that we may be prevented from interrupting the commerce from other people, but to regulate us in order that we may be prevented from interrupting our own business—which is a horse of a very different color.

"The railroad cases stand on their own footing. I was interested to notice the effort made by the learned opponent's brief to bring the doctrine of the strike cases to the support of this Act. In the strike cases, as Your Honors have pointed out, there was a clear intent to interrupt interstate commerce, and interstate commerce was the object of attack. Here is the reasoning by which this Act is supposed to bear on that situation. 'Consequently,' says my learned friend, where the situation in a particular enterprise—and this Act, if I am right, embraces all enterprises—'presents a reasonable likelihood'—there is no question here of certainty or inevitable result—where the situation in a particular enterprise presents a reasonable likelihood that a dispute, if it occurred—and we are supposed to imagine a dispute occurring—would involve an intent—this hypothetical

dispute would involve a hypothetical intent to restrain commerce—then the Board can apply the statute to that enterprise.

"There is a chain of hypotheses. You must first hypothesize a reasonable likelihood. You must next imagine a dispute, and, as a third hypothesis, grounded upon the other two, you must imagine that those who engage in the dispute would have an intent to restrain commerce, and, then on that hypothesis, you take possession of the enterprise and regulate it.

"So much for the interstate commerce features of the Act, which I lay aside.

"The second point is that the statute is a direct violation of the Fifth Amendment, and it is so because it is an invasion of freedom of contract between an employer and an employee who are engaged in a wholly private occupation, as to which invasion no emergency exists, or is so much as alleged. It is a sweeping undertaking to regulate the right of men to sell their labor, and the right of men to buy.

"We understood that under *Adair* v. *United States,* 208 U. S. 161, *Coppage* v. *Kansas,* 236 U. S. 1, and *Wolff Packing Co.* v. *Court of Industrial Relations,* 262 U. S. 522, the power of the legislature to compel continuity in a business can only arise where the obligation of continued service by the owner and his employees is direct and is assumed when the business is entered upon. That is the criterion. And in normal relations between employer and employee, no Government, on the Fifth Amendment standard, can undertake to step in and make contracts in their name.

"We assert that the Act is bad under the Fifth Amendment not only because it imposes this compulsory collective bargaining, from which all permissive features have been removed; not only because of its scope; but because of the methods to which resort is had.

"The learned Solicitor General says that that question is not in this case; that we are not concerned with the compulsory bargaining which the Act undertakes to provide, because that hand has not yet been laid upon us; that we are only entitled to concern ourselves with the discharge of this particular employee and the demand for his reinstatement.

"To which our answer is, first, that the Act is an entirety; that it is impossible to read the Act and conclude that it is susceptible of any separation; that the whole declared object and purpose of the Act fall unless compulsory collective bargaining is attained. Furthermore, in the order which the Board entered against us, requiring us to reinstate this employee, it also required us to abstain from restraining, interfering with, or coercing him in his right to bargain collectively, as declared by section 7 of the Act. . . .

"But let me indicate what are the specific points on which we think these provisions of the Act are arbitrary and unreasonable.

"The first is that the employer, and the employer alone, is bound by this mandate. It is only the employer who can be compelled to bargain. No such mandate is laid on his employees or upon any association or union they may choose to form. On the contrary, not even is the duty of observance, after a bargaining has been had, laid upon the employees, for the thirteenth section of the Act specifically provides that 'Nothing in this act shall be construed so as to interfere with or impede or diminish in any way the right to strike.'

"If the collectively bargaining employee refuses to collectively bargain, he has lost none of his rights. He is given the collective right to strike whenever and wherever he sees fit.

"It is arbitrary on the subject of the majority rule. After a unit has once been chosen the vote of the major-

ity of that unit makes it the exclusive bargaining agent. That is sought to be defended on the ground that that is democracy; that the system of majority rule is one to which in this country, under our democratic institutions, we have become thoroughly accustomed, and for which there is no substitute, and therefore, say the proponents of this Act, it is quite normal and proper to write into the Act that a majority shall control for all.

"But the analogy, if the Court please, is utterly lacking in foundation. Majority rule prevails under democracy in matters of government solely because no other organ has been found by which a democracy may express its will. There is no other method under a democracy by which the officers of the Government may be peacefully chosen, except by an acquiescence in the will of the majority. It is an integral part of democratic government *ex necessitate;* but there is no reason, *ex necessitate,* to make it a part of the dealings of individual men with their individual rights of person and of property. There is no reason, because a man is compelled by the very existence and form of his government, to yield to the majority, why he should be compelled, against his will, to appoint some other agent to dispose of his own individual rights. When a law undertakes to deprive a minority, large or small it matters little, of their right to contract for their own labor under their own terms and their own conditions, the Fifth Amendment is clearly invaded.

"It is not a thing of which the employer has no right to complain, because, of course, to deny the minority the right to deal with the employer is to deny to the employer the right to deal with the minority. . . .

"I have referred to the closed union shop. I have referred to this arbitrary selection of bargaining units. I have referred to the outlawing of company unions. I pass that whole subject to go on to what seems to me

perhaps the most important subject I have to present on this argument.

"I assert this Act, as applied to the Associated Press, is a direct, palpable, undisguised attack upon the freedom of the press.

"Let me remind Your Honors of the nature and character of the parties involved in this controversy. The Associated Press, it is true, publishes no newspaper; but, as the Government has been at great pains in its brief to demonstrate, it is the largest of the news-gathering agencies of the country, and its activities are Nation-wide. It supplies, under contract with its members, a very large part of the news they furnish the reading public of America, and under contracts which require them, if they take it at all, to take it as the Associated Press gives it, and, so much as they publish, to publish in that form, with credit to the Associated Press. . . .

"The Associated Press, so far as the news columns are concerned, is as integral a part of the press of the United States as the Washington Post or the New York Times. Indeed, without derogating from any individual publication, it may be said to be far more important than any one of them. There is no agency in this country that surpasses it. I question greatly if there is any agency in this country that equals it in its furnishing of information to the American public.

"Who is Watson? Watson was not a mechanical employee. He was not a telegrapher, whose only function is to send over the wires what is given him. He was not a man to whom manuscript was sent, and who had nothing but a mechanical function to perform in connection with it. He was the writer, the reporter, the rewriter, the composer of headlines. As he himself said, he wrote the 'leads.' As I understand, that in newspaper terminology means the opening paragraphs of a story where they are supposed to give you the whole gist of it, for tired busi-

ness men, in a few sentences. . . . Some epigrammatist said: 'If I may write the songs of a nation, I care not who makes its laws.' And I think it might be said, in the newspaper world, 'If I write the news of the nation, I care not who writes its editorials.' I think we might press on from that still farther and say, 'If I may write the headlines and the leads of the news, I care not who writes the rest of the two-column story.'

"That is the business in which Watson was engaged. It is proposed to say to the Associated Press, 'You cannot put somebody else in that chair. You must take Watson and Watson's work and Watson's selection, and broadcast that over your channels of communication throughout the United States.' Is that an invasion of the freedom of the press, or is it not?

"What is the freedom of the press? Why, the learned Solicitor General says in his brief, a newspaper publisher does not have a special immunity from the application of general legislation, nor a special privilege to destroy the recognized rights and liberties of others. And of course he does not, and who would so contend? But he does have a right to live under the law, and the supreme law is that the press shall be free—not partially free, not free within the discretion in this or that public officer; but free—not only free from advance censorship which says what shall be published or how much, but, broader than that, he shall have the right to formulate and disseminate the news of the day to the people of the United States so long as he does not invade the laws of libel or incite to some form of crime.

"Nothing less than that can be said to be guaranteed by the freedom of the press—not as a privilege to the newspaper owner; not that he may stand in a class apart from and above his fellows; but—as Your Honors have said, 'If we fetter the press, we fetter ourselves'—in order that democratic government may be fed with the only

thing which can keep it alive. The Constitution forbids the invasion of this field.

"I need say no more in defense of the doctrine. What about its application? They say that our only complaint of any invasion is that Watson would be biased as a labor-union man in the news he might collect, and therefore we rely solely on bias. . . .

"It is not that he may be more biased, not that he may be less biased, but it is that those who publish and print the news must have the right to choose the people by whom the news is to be written before it is printed. You cannot divorce, in this sense, the author from his product. . . . What is written is the news, and the man who writes it is utterly inseparable from it. . . .

"Can the newspaper be free if it is not able to choose between authors? Suppose one of our dictatorial neighbors in Europe should say . . . to the newspaper publisher, 'You shall not dismiss this man because he is a member of the Nazi or the Fascist or the Communist Party; you cannot dismiss him for that reason,' is it conceivable that that would leave the press free? . . . Indeed, what more effective engine could dictatorial power employ than to name the man who shall furnish the food of facts on which the public must feed?

"Another illustration: The Fifth Amendment forbids the establishment of a religion or any law prohibiting the free exercise thereof. If some legislative body were to enact that no congregation, no administrative, ecclesiastical agency set up under the church policy, could dismiss its minister because, forsooth, he had joined the Ministerial Guild, would that prohibit the free exercise of religion? Would it diminish the right of free exercise of religion if the congregation were robbed in any degree of the right to select the minister of their choice? . . .

"How can one remain the master of the operation of his business if his right to hire and discharge is qualified in

any way whatever other than by his own voluntary contract or by an employment at term? How can a newspaper remain the master of its business if the right to select those who compose its editorial page—and even more important, as I insist, from the standpoint of the effect upon the public at large, those who shall compose its news columns—is no longer within its choice? A man who is publishing a labor journal has a perfect right to do it. He has a right to make that journal just as partisan in the interest of labor as he chooses, and if he is wrong about it, in our American theory, the truth must ultimately prevail. Can we say to him, without impairing his freedom, 'You shall not discharge any editorial or news writer or reporter simply because he refuses to join a labor union, simply because he is entirely out of sympathy with the cause you are trying to promote; you can discharge him for any other reason—the color of his eyes, if you please—but you cannot discharge him for that?' Would or would not that invade the freedom of the man who is publishing that journal?

"I put it in a sentence, if the Court please. The author, in this field, is the maker; and he and the thing made—the author and the product—are one and inseparable. No law, no sophistry can divide them; and if you restrict the right to choose the one you have inevitably restricted the right to choose the other.

"I submit that whatever may be said of this Act, whether it is as fatally inclusive as I contend, or whether there is a field where its operation may lawfully be effective, if there is one field which, under the Constitution of the United States, escapes congressional intrusion, that field is the freedom of the press, which the order entered here clearly and directly invades."

Mr. Charles E. Wyzanski, Jr., Special Assistant to the Attorney General, on behalf of the Labor Board:

". . . There can be no question but that not merely the transmission of news but the person whose news is trans-

mitted is in interstate commerce. [Citing *Gibbons* v. *Ogden,* 8 Wheat. 298; *International Textbook Co.* v. *Pigg,* 217 U. S. 91; *Fisher's Blend Station* v. *Tax Commission,* 297 U. S. 650.] It has been settled, since *Caminetti* v. *United States,* 242 U. S. 470, that it is of no consequence so far as the regulation of commerce goes whether the person engaged in it is operating with or without a pecuniary motive. And, moreover, if it were necessary to show a pecuniary motive it would be easy to do so on the facts in the case at bar, for the Associated Press not only in its incidental contracts . . . operates for a profit, but its whole enterprise is for the benefit of newspapers which operate at a profit, and, as this Court recognized in *International News Association* v. *Associated Press,* 248 U. S. 215, the members do operate at a profit, and presumably the money which they contribute to the Associated Press they recoup out of the profits of their own enterprise.

"The second distinction which is attempted to be made is that this enterprise does not hold itself out to serve the public, and hence is not subject to regulation under the commerce clause. A sufficient answer to that contention is supplied by the case of *United States* v. *Brooklyn Eastern District Terminal,* 249 U. S. 296. Moreover, it is very doubtful whether, even if there were any doctrine such as that for which the petitioner contends, the petitioner would be within it; for, though it does not hold itself out directly to serve the public, it does serve its members, who in turn serve the public. Incidentally, it is to be remembered that the Association Press communicates not only with itself but with its members, and the dealings between the corporation and its shareholders are not to be regarded as dealings by the corporation with itself. There are a number of cases which hold that, even where a person is engaged solely in dealing with himself, he is within the scope of the regulatory

power of Congress under the commerce clause. E. g., *United States* v. *Simpson,* 252 U. S. 465, and *Pipe Line Cases,* 234 U. S. 548.

[Counsel then explained the character of the man Watson's employment.]

If a filing editor is not *sui generis,* he resembles more closely the man who dispatches freight and determines how much baggage shall go on a train, than a factory worker, for his duty is to determine how much shall go over the line and to keep the line balanced.

Not only are these employees often themselves in commerce, but they are constantly about commerce. If they were to cease their work there would be an instantaneous dam to the flow of business. There can be no question that these employees with respect to this company are much closer to commerce than the stenographers, janitors, and filing clerks, who were held in the *Texas & New Orleans* case to be within the scope of the commerce power.

"But even if these employees are not regarded as themselves in or about commerce, we submit that they stand at the heart, or at the very nerve center, of a well-defined stream or flow of commerce. . . ."

It has been suggested that the flow, if it exists, stops at the teletype machine. There is a decision in this Court to the contrary. *Western Union Telegraph Co.* v. *Foster,* 247 U. S. 105.

It also has been suggested . . . that the "flow of commerce applies" only where somebody else's goods are passing through some public market. See *contra, Federal Trade Commission* v. *Beech-Nut Packing Co.,* 257 U. S. 441, 453.

Petitioner says that the flow of commerce doctrine cannot properly be applied, because there is no single focal point through which everything passes. . . . The Packers and Stockyards Act would apply not only to Chicago but to any similar market.

Is the statute as here applied a reasonable regulation of commerce? . . . There are involved in this case only the first and third definitions of unfair labor practices to protect freedom of association and freedom of representation. . . . It may be true and it certainly is the hope of Congress, that people once allowed freedom of association and freedom of representation will be able to agree upon wages, hours, and working conditions voluntarily and apart from any congressional or legislative edict; but the statute itself does not fix substantive working conditions.

[Counsel then explained at length the importance of free organization, representation, and collective bargaining to the avoidance of industrial disputes; the history and beneficial effects of railway labor legislation of Congress applying these principles; the reports of various federal commissions dealing with the subject.]

But it is said that these principles, though reasonable, bear no reasonable relation to commerce. We answer that the decisions in this Court are to the contrary, and we point specifically to a case not yet seven years old, *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548. [Counsel analyzed that decision in detail.] . . .

The contention that the principles embodied in the Railway Labor Act cannot be applied unless the enterprise is an instrumentality of commerce, ignores the reasoning which, from the time of *Gibbons* v. *Ogden,* 9 Wheat. 1, to the present, has been followed by this Court in subjecting instrumentalities of commerce to the power of Congress. The reasoning of this Court has been, we submit, as follows: Congress has the power to protect commerce from interruptions. An interruption of an instrumentality of commerce would interrupt commerce. Hence Congress has the power to protect the instrumentalities of commerce from being interrupted.

The power which existed in the *Texas & New Orleans* case is derived from a power to regulate commerce generally, as well as the instrumentalities of commerce, and there is no logical support for the position that what bears a reasonable relation to instrumentalities of commerce does not bear a reasonable relation to commerce itself. I am not talking, of course, about the questions which arise under the due process clause, which may be entirely different. . . .

Now, it has been suggested by the petitioner that this statute is defective in its relation to commerce on the ground that it covers only employer practices and on the ground that it does not outlaw strikes. We submit that Congress can deal with some causes of an evil without dealing with all causes of an evil, and that experience apparently justified Congress in finding that interferences by employers with employees' freedom of association and freedom of representation occurred more frequently than interference by employees with employers' freedom of association and freedom of representation. The fact that the statute did not cover employee practices therefore was justifiable on the basis of the experience shown before congressional committees.

The point is also made that the statute is defective because it does not outlaw strikes but merely deals with the causes. Every preventive statute deals with the causes and not with the evil itself. . . .

I have emphasized the fact that in this statute Congress is not governing the substantive terms of the employment contract. . . . Congress believes that those matters can be determined by self-government; and in order to protect self-government it has established the principles of freedom of association and freedom of representation. There seems nothing unreasonable in the belief on the part of Congress that working men, freely allowed to associate and freely allowed to select their representatives, will

choose, no less than employers will choose, to protect the free flow of commerce which is their common interest. . . .

Five circuit courts of appeals have agreed that the statute is separable and capable of application in some, if not in all, situations. Moreover, it was well known to Congress, to the Executive, and to this administrative board, that the statute would be applicable in some and not in all situations. The Senate committee pointed out that the exact ambit of the statute would have to be marked by judicial decisions. The Chief Executive, in approving the statute, emphasized the fact that this Act applied only where the practice burdened commerce and was not generally applicable.

"Affecting commerce," is defined in the Act as meaning "in commerce, or burdening or obstructing commerce, or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

Now, that is the language of this Court, and the question is, What does it mean? We submit that it means first that a practice is within the power of Congress when it occurs in commerce, and also in three other general situations. . . .

We say that a dispute burdens or obstructs commerce if it is a dispute with an intent to affect commerce, or if it is a dispute that has a necessary effect on commerce, or if it is one of a recurring series of disputes which affect commerce. . . .

Mr. Charles Fahy, General Counsel, National Labor Relations Board, presented the argument for the Government on the due-process issue:

As to the first three practices listed in § 8 of the Act, which lend themselves to joint consideration, we submit that the decision of this Court in the *Texas & New Orleans* case has settled their validity as against any contentions which may be raised under the Fifth Amendment. . . .

It is submitted that petitioner entirely misconstrues the proviso to § 8, the so-called closed-shop proviso. The closed-shop agreement is a matter of contract. In the first place, it would seem that the only party who could be injured by it would be an employee and not the employer who might enter into the agreement; and the petitioner is not here representing any employee.

In the second place, the proviso does not encourage or foster the closed shop. The closed-shop agreement, being a matter of contract, is valid or invalid in accordance with the law of the State where it is entered into. . . .

I should qualify that, however, by saying that there are certain possible limitations placed upon the closed shop by the proviso, instead of any extension or fostering of it, because under the proviso the Board is not precluded from finding discrimination if the closed-shop agreement is entered into with minority employees or with the representatives of employees dominated and controlled by the employer in violation of other provisions of the Act; and it is clearly seen that such a closed-shop agreement might be considered the grossest form of discrimination prohibited by § 8 (3). . . .

Petitioner makes some particular objection also in its oral argument to the proviso that, subject to rules and regulations, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay. That proviso follows the requirement that the employer shall not dominate or interfere with the formation of, or administration of, a labor organization. The reason for the proviso, if the Court please, was simply this: It was not the desire of Congress, of course, to prevent conferences between employers and employees. On the contrary, that was the central purpose of the Act. However, the permitting of conferences without loss of pay, on company time, unless

this proviso had been inserted, might have been construed to be the contribution of financial support to an organization.

We come now to the fourth unfair labor practice. But petitioner does not attack this provision of the statute, so I need not defend it. . . .

That brings us to the fifth and last of the listed practices which may be prevented and around which a great deal of the objections of the petitioner concentrates.

The fifth practice which may be prevented is the refusal of the employer to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a). Section 9 (a) provides that in an appropriate bargaining unit where a majority of the employees select representatives they shall be the exclusive representatives of all the employees in that unit for the purposes of collective bargaining.

But this provision is not invoked against the petitioner in this case. The order in this case in no respect rests upon this provision of the statute. It is entirely separable from the other provisions, petitioner is not injured by it, and a decision on its validity would seem clearly unnecessary in the disposition of this case, unless it is so interwoven with the remaining provisions of section 8 that a decision on its constitutionality is necessary . . .

As for the provision of the order requiring the petitioner to make whole the discharged employee, the seventh amendment protects the right of trial by jury only in actions known to the common law. Obviously, this is not an action at common law. Here is a special statutory procedure to protect rights unknown to the common law. There is no private right here, in the discharged employee, for wages or damages. There is no right of action, even by the Government against the employer, for damages or penalty. Here is a public right enforced to protect interstate commerce, enforced by

cease-and-desist orders. The provision supplementary to this equitable remedy of cease-and-desist order permitting the restoration of the *status quo* is no more than was permitted by this Court in the injunction sustained in the *Texas & New Orleans* decision . . .

This statute provides in § 9 that where controversy arises as to representatives, a hearing on petition, as provided in the rules of the Board, may be had, and, of course, it is necessary, in determining the choice of representatives, that there be some bargaining unit. . . .

So a hearing may be had on that question, and the employer as well as the employee is entitled to participate and reserve all his legal rights for review by the courts. That hearing goes to the question of the appropriateness of a particular unit as a bargaining unit and the question of who, if anyone, are the representatives; which may make it necessary to hold an election, which is permitted under this section, and if the majority in the election designate representatives then those representatives become the representatives of all in that unit.

But before any proceedings could arise under section 8 (5) those representatives must seek to bargain with the employer, and they must be refused that right, and then, if so advised, they may file a charge with the Board of an unfair labor practice under 8 (5). Then the Board may issue a complaint and a notice of hearing, and then there would be a hearing on the question of whether 8 (5) had been violated, and the Board, perhaps, determined by what occurred at the hearing and by the testimony, might issue a cease-and-desist order.

Now, during all of those proceedings, including those involving the appropriateness of the unit and the election or designation of representatives, the petitioner would have the right to reserve all possible legal objections, and before any enforceable obligation came about he could have a review by an appropriate circuit court

of appeals, and in its discretion by this Court, to determine whether or not during any of these proceedings any rights of petitioner had been infringed.

It would seem clear that permitting the Board, on notice and hearing and the taking of testimony, to determine the appropriateness of the unit constitutes no unlawful delegation of authority, but is the kind of proceeding which this Court in the *Schechter* case referred to as "appropriate" when it compared the procedure, like this, of the Federal Trade Commission, with that of the National Industrial Recovery Act. . . .

Petitioner does not contend that the First Amendment lifts the commerce clause from petitioner or that a valid regulation of general application in the field of interstate commerce may not be applied to it, but it does contend that under this order the requirement of restoration of the discharged employee is a particular application of this statute which violates the freedom of the press.

Watson was not discharged for any reason having to do with the expression of news or the circulation of news. It is an established fact in this case that Watson was discharged because he engaged in activities in connection with the Guild, and the immediate cause of his discharge was his efforts to obtain collective bargaining with petitioner. . . .

If petitioner's contention is that, since the record in this case was made, Watson has become biased or undesirable, then it need not retain Watson. The order of restoration, of course, gives no continuing status to the employee, and it is not possible by any provision of this Act to give status of that sort to any employee. The provision of restoration is merely to restore a status disturbed for reasons proved in this record, which have nothing to do with the man's qualifications or the desire of the petitioner to express the news in any manner which it may desire. . . .

This statute imposes no terms of employment, it fixes no wages, it makes no agreements, it imposes no employee upon any one, except as a supplementary enforcement measure, supplementary to a cease-and-desist order to right a wrong *ab initio* which has occurred in violation of the statute.

The liberty claimed by the petitioner is really not the liberty that the Constitution protects against invasion; it is the liberty to interfere with and coerce and restrain others in the exercise of liberties which this Court has long recognized and characterized as essential. And all that the employer is asked to do under this statute, should the Court, after full judicial review, approve any particular order made under its terms, is to restrain the full and absolute exercise of its liberty so that by its side there may exist these essential liberties of the employees too; and this is done under this statute under the strong power of Congress under the commerce clause to regulate interstate commerce. . . .

Mr. John W. Davis closed the argument.

National Labor Relations Board v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1

Mr. J. Warren Madden, Chairman, National Labor Relations Board, on behalf of the Board, after stating the case:

"The statutes and the Board's order were based upon the commerce clause of the Constitution, and so the question arises what had the respondent's conduct to do with commerce among the several States?

"Congress has found, and history and experience show, that the conduct of which the respondent was found guilty produces industrial strife.

"This Court, in *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184, has said that em-

ployees have a right to their union and a right to organize for the purpose of protecting themselves, and if the employer interferes with that right trouble may be expected. . . .

"The question for the Board was: Does this conduct of the respondent in this situation affect commerce within the meaning of the Constitution? If it does, it affects it within the meaning of this statute and the Board has a right to apply the statutes to the situation. Congress intended that the application of the law should be as broad as it constitutionally could be made.

"Obviously, in the administration of the law the Board must look to the decisions and opinions of this Court with reference to the situations to which it could constitutionally apply the law, finding exact precedents where it could, drawing analogies which seemed to it to be fair. . . .

"Except for the experience in the railway industry, the National Government's dealing with industrial strife has been only on a penal or control basis; that is, attempting to do something about it after the strife had broken out. This is a preventive statute. . . .

"We have no doubt that the National Government may take measures to prevent industrial strife reasonably likely to occur and of the sort that the Government could deal with if it actually did occur. The history of the Packers and Stockyards Act is an example. . . .

"We think the decisions of this Court approve the application of the federal power to the following situations involving industrial strife:

"(*a*) Where such strife involves an intent to affect commerce.

"(*b*) Where such strife has the necessary effect of substantially burdening commerce.

"(*c*) Where such strife is an example of constantly recurring industrial strife which is a burden upon interstate commerce.

"In this case there is a very considerable probability of a strike with intent to affect commerce. . . . But the National Government's power is not limited to cases of intent [to affect commerce. On the contrary, "necessary effect" may be just as valid a reason for the application of the commerce power as "intent."] *Industrial Association* v. *United States,* 268 U. S. 64; *Leather Workers* v. *Herkert & Meisel Trunk Co.,* 265 U. S. 457.

"The respondent's brief tells us: 'If this were a proceeding against striking employees under the anti-trust laws, the connection between strikes and stoppages of commerce might be legitimately urged as a reason for inferring an intent to restrain the movement of commerce, but here there is no actual or threatened strike such as the petitioner supposes to exist.'

[If a strike actually occurred, interrupting commerce, the respondent would go to the federal court and obtain an injunction under the anti-trust law; and yet, according to the opinion of the court below in this case, the very thing which caused the strike, and caused it immediately, would have had no relation to interstate commerce sufficient to enable the Federal Government to do anything about it.] . . .

"This doctrine, then, of 'necessary effect' as being the equivalent of 'intent,' is the doctrine of this Court. It is plain then that this Court has not placed any spurious and crippling limitations upon the constitutional grant of power to Congress to regulate commerce.

"Can there be any doubt that industrial strife in a stockyard which would stop the stream of commerce through that stockyard would be a proper subject for the cognizance of the National Government? . . .

"Now, it seems to me that the flow of commerce which is described in *Stafford* v. *Wallace,* 258 U. S. 495, 514, in those stockyards cases, was a flow of commerce not only through the stockyards but through the meat

factories, through the packing plants. The consequence is that the analogy which we draw of the flow of raw materials into and through, and the flow of finished products out of, the steel mills, seems to be a logical one.

MR. JUSTICE SUTHERLAND. "So far as the cattle are concerned, how far could you go? You say that that is an analogous situation?"

MR. MADDEN. "That is right."

MR. JUSTICE SUTHERLAND. "Taking it back, for instance, to the herder; suppose the herders raising cattle organized a union. Could Congress regulate that?"

MR. MADDEN. "I should say not, Your Honor. I should say that you have with reference to the commerce of the United States a problem somewhat similar to that which you have with reference to physical streams of water. The water after it becomes a stream gets a wholly different sort of protection from what it gets when it is surface water or when it is percolating through the ground. At that time it is practically any man's property and it has very little protection from destruction. When it becomes a stream, however, it then comes under the scope of a different set of legal powers. . . .

"Now, it does seem to me that by your own authority the meat factory is in the stream of commerce. The stream of commerce flows through it. I can imagine no reason why the Government, which has not only the right but the duty to protect that great flow of commerce, cannot protect it there as well as it can just before it reaches that point or just after it reaches that point. Indeed, it seems to me that the attempt of the National Government to protect its great streams of commerce is futile if there is somewhere along the stream a point where the hand of the Government is stayed and where stupid State regulation, or lack of regulation, may destroy the whole stream which the Government has so carefully conserved up to that point, and which it is going to pick up again and conserve so carefully beyond that point.

"I cannot see why the Government, which undertakes to protect this thing, should allow it to get out of control at some stage in the course of the stream and then perhaps permit it to be destroyed; which would be exactly what would happen, of course, to our enormous stream of raw materials coming into this steel mill and our finished products going out.

"If labor trouble should stop this mill, there is no question but that transportation would stop, communication would stop, boats would be tied at their docks, interstate orders and shipments could not be made.

"Now, why should the Government interest itself so meticulously in all of these things just before [the raw materials] enter the gates of this factory, and then allow the whole work of conservation to be lost while they are inside it?

"We no more assert that manufacturing is interstate commerce than did this Court in *Stafford* v. *Wallace* assert that meat packing, or soap making, or feeding hay to cows, is interstate commerce. We merely assert that the Government, which has the responsibility, cannot have the factory gates slammed in its face and be told, 'Inside here you have lost your control, and whatever happens to your great stream of commerce is none of the National Government's business.'

"A grave problem for this Court, of course, is the preservation of our very useful American system of dual sovereignty, but it does seem that where the United States has found its responsibility . . . to foster and protect the Nation's commerce . . . the States must give way to whatever means it develops as necessary. . . .

"Respondent cites a large number of state taxation cases. It seems to us quite evident that those cases have no bearing whatever upon the matter. . . ." [Citing *Stafford* v. *Wallace, supra,* and *Minnesota* v. *Blasius,* 290 U. S. 1, and distinguishing *Arkadelphia Milling Co.* v. *St. Louis S. W. Ry.,* 249 U. S. 134.]

SOLICITOR GENERAL STANLEY REED, on behalf of the National Labor Relations Board:

"In the series of cases that we are now discussing we have a situation which requires that we give thought to the power of the Federal Government to regulate interstate commerce and to protect its flow, even though to do so it must reach into the industrial and manufacturing enterprises of the Nation.

"In the brief for respondent in this case an effort is made to discuss not only the precise issues which we conceive to be presented to Your Honors at this time, but also the entire theory of collective bargaining, its effects upon industry, and the right of the Government to interfere in the rather intricate employer-employee relationship.

"It seems to me that the same point of view was presented in the *Associated Press* case (see *ante,* p. 719)—that you were asked to consider not the particular instances that are before the Court in these cases, and not the particular sections of the Act which we shall attempt to bring before this Court, but the broad field of labor relations.

"Now, quite obviously, there are going to be many problems arising in the field of labor relations that will at some time be considered by this Court, but it does not seem to us that this Act, phrased as it is, permits the entire theory of collective bargaining to be raised in these cases.

"There are other provisions of the Act that are criticized. The section as to exclusive representation—that is not before the Court at this time. It is our position that this Act, which is a regulation and protection and control and encouragement of interstate commerce, undertakes to protect that commerce through dealing with those labor relations that directly affect that commerce.

"Whether that is separable from collective bargaining I do not intend to argue at length. I do, however, wish

to make this comment—that collective bargaining is not the ultimate end of this Act. It is phrased, of course, as a regulation of commerce. It is, from our point of view, a regulation of commerce. It deals with labor relations as they directly affect commerce. And in labor relations, as they are known today to all men, nothing is of more importance than the right of freedom of organization and the right to be free from dictation or coercion in that organization and the right to select representatives to deal with employers, whether through coercive collective bargaining processes or otherwise. . . .

"Regardless of collective bargaining provisions and regardless of provisions as to exclusive representation, this Act sufficiently manifests the intention of Congress—and the intent is the test of separability—that even though collective bargaining might be found to be contrary to the due process clause, certainly there is, nevertheless, sufficient virtue and sufficient good to be found in the provisions dealing with representatives, and with freedom from coercion or interference in the choice of those representatives or in the organization of unions, to justify their separate enactment.

"The legal principles, counsel for the respondent and ourselves would probably state in almost the same language. We do not contend, of course, that this Act is based upon any power except that derived from the commerce clause. They certainly would not say that due process requires that everyone should be left absolutely free from the power of government to protect the general good. It is in the application of those different theories that we find ourselves in disagreement. . . .

"Section 1 of the Act is based particularly on the proposition that the refusal by employers to accept the procedure of collective bargaining leads to strikes and other forms of industrial strife or unrest which have the intent or the necessary effect of burdening or obstructing commerce.

"The last paragraph of that same section states:

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of interstate commerce."

"As has been repeatedly said here, this Act is based on the commerce clause and on this declaration of policy in the Act. Moreover, the Act is limited in its application by § 10 (a) to conditions of industry or labor which directly affect commerce.

"Congress could have approached the problem in either of two ways: It could have dealt with each strike situation after it arose, or it could have had a preventive bill which sought to stop strikes before they started. The Sherman Act, of course, is one of the best examples of the prohibitory or punitive power of Congress. The Federal Trade Commission Act, the Grain Futures Act, and the Packers and Stock Yards Act are examples of the preventive power of Congress.

"It has never been thought by Congress, by the Executive, or by the Board, that this Act applied to all strikes or to all the causes of any strike. It applies only to labor situations that develop and affect commerce. The closest analogy to this Act has already been referred to from the bench. That is, of course, the Federal Trade Commission Act, in which practically the same language, of 'in commerce' or 'competition in commerce,' was used to outline the jurisdiction of the Commission.

"Section 10 (a) of the present Act deals with its application, and its application is precisely the same as the application of the Federal Trade Commission Act. . . . *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441; *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643. . . . This Act has the same procedural provisions as the Federal Trade Commission Act. . . .

"The theory upon which Congress has control and may regulate strikes with intent to affect interstate commerce

is quite clear and quite well known. We contend that Congress has an equal right to protect against strikes with the intent to interfere with interstate commerce, even when the strike has not taken place, or when the intent has not actually developed; that is, that Congress has a right to protect interstate commerce not only from the attack that has already gathered force, but also to go back into the causes that create strikes with intent. [Citing *Stafford* v. *Wallace,* 258 U. S. 495, 520; *Board of Trade* v. *Olsen,* 262 U. S. 1.]

"We say that the Board, when a case such as this is presented to it, has a right to go into the question as to whether or not there is a strike with intent, or evidence of a conspiracy to interfere with interstate commerce, or evidence of conditions that would reasonably be thought to lead to a strike with intent. We say that such an intent is very likely to be found in a wholly integrated organization such as we have in this case—one that begins in Minnesota and Michigan and runs through the whole stream of commerce that has been detailed to the Court. Many of the employees are actually engaged in transportation itself. The boats of this organization run down the Ohio and the Mississippi. It operates its own intraplant railroads and loads its cars by its own employees.

"Situations such as that which developed in *In re Debs,* 158 U. S. 564, can easily develop in these cases. . . .

"We do not rest our argument upon the question of intent, nor upon the ability of Congress either to protect the flow of interstate commerce from strikes with intent or to eliminate the causes that lead up to strikes with intent to interfere with interstate commerce. But we say that, from the decisions of this Court, as Congress might reasonably, and did, reach the conclusion that there were conditions the necessary effect of which was to bring about an interference with interstate commerce, it

had the right to protect that commerce from those conditions. [Quoting from *Coronado* case, 259 U. S. 344; *Industrial Association* v. *United States,* 268 U. S. 64, 81; and *United States* v. *Patten,* 226 U. S. 525.]

"Now, on the question whether or not the necessary effect of a strike or labor difficulty is to affect commerce, we think that the Board is entitled to take into consideration the mechanics of the particular industry against which the complaint has been made. . . . Citing *United States* v. *Reading Co.,* 226 U. S. 324. . . .

"I pass now to another factor, the size of the enterprise in its relation to the entire industry. . . . Where an enterprise is a large part of an industry, it is quite obvious that industrial disturbances in that particular enterprise have a large effect, whether or not they have a direct effect. Here we have an enterprise which is a large factor in the business of making steel. . . . The enterprise now before the Court is one of the most striking examples of an industrial stream of commerce. The details are before you: The commingling of the limestone and iron ore and the coal; the constant flow through the particular plants; the many people in the enterprise who are engaged in transportation activities; the close relation between the transportation facilities and the flow of the material; and the movement of the steel down the Ohio and the Mississippi to be distributed to the various consumers throughout the country:

"Whether or not that is a stream of commerce in the sense that the phrase is used in *Stafford* v. *Wallace,* 258 U. S. 495, and *Board of Trade* v. *Olsen,* 262 U. S. 1, I think is immaterial on this particular point. What we are saying is that this stream of commerce—whether or not it is a stream of commerce that is in and of itself subject to the regulatory power of Congress—which is so gigantic in size, and which reaches not only a particular locality, but also runs across State lines from the iron ore

production, from the limestone production, from the coal production, to distribution throughout the country, must be an important factor when we come to determine whether or not industrial disturbances in this particular enterprise are likely to or will probably interfere with commerce. Of course, disturbances in such an enterprise do disturb commerce.

"There is another factor that we wish to comment upon, and that is the recurrent nature of the strikes which have an effect upon interstate commerce, whether direct or not. There is no doubt of the magnitude of the effect upon interstate commerce. The problem is whether the effect upon commerce is direct. Just as Congress has the power to control strikes with intent and strikes the necessary effect of which is to interfere with commerce, so we contend that the recurrent nature of industrial disturbances gives further power to Congress to act upon such situations. . . .

"Of course, we do not contend that the mere continuous recurrence of difficulties is sufficient to give Congress power to regulate a particular industry, nor do we say that mere recurrence, in and of itself, is sufficient to give Congress power to pass Acts which undertake to eliminate the causes of those difficulties. It is only when those recurring practices are of a type that would come within the control of Congress, by repetition, by the danger of bringing about intent, by the danger of creating situations which will necessarily affect commerce, that the constantly recurring difficulties fall within the power of Congress. [Referring to *Stafford* v. *Wallace,* 258 U. S. 495, 520; the *Coronado* cases, 259 U. S. 344; 268 U. S. 295; *Loewe* v. *Lawlor*, 208 U. S. 474; *Duplex Printing Co.* v. *Deering,* 254 U. S. 443.]

"In so far as recurrence is an argument for the exercise of the preventive power of Congress to protect interstate commerce, the fact that the recurrence of labor difficulties occurs in transportation does not place them any more

under the control of Congress than if they had occurred in industry. . . .

"In the present case we say that the record makes it very clear that we have a situation where there is a reasonable probability that strikes will develop with the intent to interfere with commerce; that if they do develop they will have the necessary effect of burdening and obstructing commerce. These facts, together with the recurring difficulties in the steel industry, the large size of respondent's operations, and its important place in the steel world, justify the finding on the part of the Board that the labor disturbances in this enterprise would affect commerce.

"That brings me to what I conceive to be one of the two important and critical questions in this case; that is, whether or not labor disturbances, in industries such as we are discussing here, so directly affect commerce that Congress has power to provide for their amelioration, if not their elimination.

"We are faced with the decision of this Court in *Carter* v. *Carter Coal Co.,* 298 U. S. 238, in which you said that wages and hours and labor conditions in that industry were beyond the power of Congress because they had only an indirect effect upon interstate commerce, and that however great the magnitude of the effect might be, it was not sufficient to give Congressional power unless the effect was direct.

"We conceive that the *Carter* case turned upon the question of the purpose of the Bituminous Coal Act. The Court said that 'the primary contemplation of the Act is stabilization of the industry through the regulation of labor and the regulation of prices.' If that was the purpose of the Bituminous Coal Act, as stated by Your Honors, its aim was at a situation different from that which is sought to be cured by this Act. We do not seek to argue contrary to the *Carter* case. For the pur-

pose of this argument we feel that the *Carter* case may be taken, as stated by the Court, to be directed at the control of labor conditions and prices. We submit that when you considered the *Carter* case you considered it from the standpoint of the power of Congress to reach in and control a wage or a labor condition as a part of the scheme of stabilizing the industry which was undertaken by Congress.

"Here we have an Act with a different purpose, aimed at a different evil. It is merely repetitious for me to say again that this Act sought to control strikes which had the intent or the necessary effect of interfering with commerce, not the labor relations in and of themselves. The Act is not, in other words, directed at a regulation of wages or hours, but at the elimination of the causes of those types of industrial disturbances which this Court has repeatedly said were within the power of Congress. . . . It is not necessary that the *Carter* case should be overruled if this Act is upheld. Nor is it necessary to think that if we can go this far in protecting commerce from obstructions because of the power to regulate strikes with intent or with the necessary effect of obstructing commerce, that we need open the door to go farther into control of wages, or hours, or conditions of labor. It may well be that wages, or hours, or conditions of labor, as such, are beyond the power of Congress, because to interfere with them would be a violation of the due-process clause; or we may say that wages and hours are so distinct and separate from interstate commerce that they do not have a direct effect upon it under any circumstances, while here the rights of labor which are protected fit directly into labor conditions which result directly in interferences and obstructions to interstate commerce.

"I now pass from the question of direct effect on commerce to that of the due-process clause, in so far as this particular decree is concerned."

MR. JUSTICE SUTHERLAND. "Before you pass to that point, what is the primary effect of a strike in a steel mill? Is it not simply to curtail production?"

MR. STANLEY REED. "Certainly; that is one of the effects."

MR. JUSTICE SUTHERLAND. "Isn't that the primary effect, the immediate effect?"

MR. STANLEY REED. "Well, I should say it was the first effect. I do not mean to split hairs. Of course, that is one of the primary effects of it."

MR. JUSTICE SUTHERLAND. "That is the primary effect, to curtail production, and then the curtailment of production in its turn has an effect upon interstate commerce; isn't that true?"

MR. STANLEY REED. "As I understand it, no. The strike is something that . . . instantaneously and at the same time that it stops production stops interstate commerce. It is a single thing that happens, and that stoppage of works stops interstate commerce right at that instant."

MR. JUSTICE SUTHERLAND. "It affects interstate commerce just as the cessation of work in a coal mine. The primary effect of that, as suggested in the *Carter* case, was to curtail the production, and then the secondary effect which came from the curtailment of production was the effect upon interstate commerce."

MR. STANLEY REED. "Well, if we were undertaking to defend this Act on the ground that Congress had the power to regulate labor conditions as such, I would fully agree with what Your Honor has said, but our contention is that Congress is not undertaking to regulate labor conditions as such; that it is undertaking to protect interstate commerce from situations that develop from those labor conditions, and that the causes which lead to these strikes with intent, and to strikes with the necessary effect to interfere with interstate commerce, are within the regulatory power of Congress."

MR. JUSTICE SUTHERLAND. "If by some means you curtail the production of wheat, the immediate effect, of course, is to curtail the production of wheat, and that in its turn has an effect upon interstate commerce. So would you say that Congress could step into that field and regulate the production of wheat under the commerce clause or under some other power?"

MR. STANLEY REED. "I am sure that what I would say would not bar Congress on it, but it seems to me that there is a great distinction between whether Congress can regulate production as such and whether Congress can regulate conditions which might interfere with the transportation of agricultural products after produced.

"I will say this: That although this Act does not apply to agricultural production, probably, if Congress had undertaken to control situations that had for their purpose the stopping of such production, the same rule would apply. Fortunately, we do not have to reach so far in this case.

"The present decree directs that these parties cease and desist from interfering with the organization of their employees; that they cease and desist from discrimination in regard to their employees; that they restore to their places the men who have been discharged; and that they post notices. I direct myself now at the question whether such orders are a denial of due process. . . .

"We do not contend that the *Texas* case determines whether it is a violation of due process to require a man to be reinstated by an employer who has violated an Act such as the Railway Labor Act or this Act. . . .

"We do say, however, that it is consistent with due process to require reinstatement of an employee by an employer who has violated a constitutional Act and has interfered with the organization of his employees by discrimination against union employees in their discharge—we say that that, while not definitely and finally ruled upon by this Court, is within the due process clause.

"That brings me to a consideration of the second series of cases which, like the *Carter* case, I think are at the heart of this particular controversy. I refer to *Adair* v. *United States,* 208 U. S. 161, and *Coppage* v. *Kansas,* 236 U. S. 1.

[Here counsel sought to distinguish the two cases last-mentioned, comparing them with *Texas & New Orleans R. Co.* v. *Railway Clerks,* 281 U. S. 548.]

"Therefore, we submit that the *Adair* and the *Coppage* cases are not a bar to this Act; that whatever interference to the employee-employer relationship there is in saying that a man cannot be discharged because of his association with a labor union or because of the undertaking of the employer to destroy that union is different from that in the *Coppage* and *Adair* cases.

"It is our view that the interferences with the rights of employers which are implicit in this Act are interferences which, under the doctrine of due process so frequently declared by this Court, are reasonable and proper in their character and are not capricious. They are aimed at a situation which is within the power of Congress to control in protecting the commerce of the country from these recurring and huge dislocations arising from the various strikes that afflict the Nation.

"We leave to the employer all the natural rights which he needs to regulate and operate his business. He is not forbidden to discharge an employee. He is forbidden to discharge him for only one thing—his labor relations. The employer has great powers, of course. The employee has been permitted, and I believe that this Court has approved, unionization and collective bargaining and ordinary labor activities. The workman has been found to have rights—rights of organization to protect himself against the overwhelming material force of the employer. To ask the employer to give up but a trifle of the power which he has, to compel him to keep his hands from the

labor organizations of his workmen, is, in our view, not a deprivation of any liberty or property which is beyond a reasonable interpretation of due process."

MR. EARL F. REED, on behalf of the Jones & Laughlin Steel Corporation:

"The conclusion that the men were discharged because of union activities is based upon the flimsiest kind of evidence; what the petition really amounts to is that the Board did not agree with the superintendents of the Company as to the sufficiency of the causes for which they discharged the employees.

"The record abounds in hypothetical testimony, hundreds of pages of it. . . . Various persons came forward and said they believed that organized labor and national unions were a good thing for labor. The Board took judicial notice of theses written by professors in colleges about the advantages of union labor and of declarations made years ago—a vast mass of opinion evidence that national unions would be a good thing for workers. And it was not confined to the steel industry. They went into the producing industries. They offered college theses. They offered public records. They even offered a book as evidence to show that the stoppage of business and commerce was in large part due to strikes.

"It was on the basis of that testimony that the Board found that a labor dispute in the steel industry would interrupt commerce. This company was not shut down in 1919 when the labor strife occurred. It operated throughout. It has had no labor disturbance since 1892; but all these other intervening labor disturbances were used to show that they had a tendency to interrupt commerce. . . .

"It is suggested in the petitioner's brief that since the Act makes its findings on matters of fact final, and it has found that this disturbance had a tendency to interrupt interstate commerce, that is conclusive.

"Under *Crowell* v. *Benson,* 285 U. S. 22, and *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, it seems to me there can be no doubt that the jurisdictional question of whether or not this company is engaged in interstate commerce is one that we are entitled to have reviewed.

"The National Labor Relations Act, we contend, is on its face a regulation of labor and not any effort to regulate commerce among the States or to remove obstructions to commerce among the States.

"Mr. Davis, the other day (see *ante,* p. 719), went over the Act in some detail, and I do not intend to do that again. I do want to point out one or two things about the Act which I think were perhaps not sufficiently covered, which indicate that it is wholly an attempt of Congress to intrude itself into the industrial relations of what has been traditionally regarded as a State matter. In the first place, in the legislative history of this type of legislation the first effort that Congress made to regulate labor matters was in the original Railway Labor Act, which was reënacted and enlarged in 1926 and amended in 1934. Then in 1932 came the Norris-LaGuardia Act, which curtailed the power of the courts on certain labor matters. . . . The amendments to the Bankruptcy Act passed in 1933 and 1934 again attempted to endorse a national organization of employees, in that they prevented funds in bankruptcy matters and labor-organization matters being used in any way to contribute to the support of plant or local or so-called company unions.

"Now it cannot be said that Congress in the Norris-LaGuardia Act was trying to prevent the interruption of commerce by strikes, nor in the Bankruptcy Act. The real purpose there, and again in the National Recovery Act, was to regulate labor relations. And that is what they are trying to do here. . . .

"An examination of the Act itself reveals this. The closed shop is made legal. You cannot force a man not

to belong to a union, but you may force a man to join a union; and then you may not contribute any support to a local or plant union, no matter if it has been in existence for many years, no matter if you have a contract with it to pay a certain amount annually; and here is a form of organization of employees that has been successful in Europe, that has been existing in this country since 1904, and successfully in many places, and yet you are forbidden under this Act to make any contribution to it.

"To my mind, this indicates an effort on the part of Congress to force national organization in industry, to prevent local unions, prevent plant organizations, and compel employees to join national organizations. The provisions about the majority rule are for the same purpose. The Act says that no minority group can bargain at all. The minority union in a plant will not exist very long if it cannot obtain anything for its members, if it cannot negotiate with the management.

"The determination of the unit is entirely for the Board. Suppose the Board determines that the whole of the employees in the coal industry is the proper bargaining unit. You may be situated in a plant in which not a man belongs to that union, but you are bound by the determination of the majority, because the Board has found that that is the proper unit. The Board may have found that all of your employees are the proper unit, and not one of your electricians or mechanical men may belong to that unit. They may have their own union. Yet you are forbidden by this Act to deal with that group, because they are a minority group.

"Does that indicate a purpose on the part of Congress to free commerce from obstruction? Nothing of the kind. It indicates the congressional purpose to force national unions upon industry, and the Act is sweeping in its language. It purports to cover all industry, and it is exactly what was intended. . . .

"The fact that the Act is by its terms confined in application to matters affecting commerce does not change the situation. You cannot change the things which are not interstate commerce into things which are, by the use of words. If you say that it must be something affecting commerce, there is no limit.

"The question then comes to whether, in this particular case, the connection is direct or remote.

"The fact that we receive materials in interstate commerce or that we ship our products out in interstate commerce is not material. That is true of every manufacturing industry. The steel industry probably receives its products in a rawer form and gives a greater transformation to them before they are shipped out than almost any other industry. . . .

"I think the language of this Court in *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245, 259, on what would be the effect of holding that prior or subsequent movements in interstate commerce bring the industry within interstate commerce, covers the situation better than any argument. . . .

"The Government argues that it is in the stream of commerce. I shall not go into that except to point out that in *Stafford* v. *Wallace*, 258 U. S. 495, and in *Board of Trade* v. *Olsen*, 262 U. S. 1, the evidence and the data before Congress showed focal points in which practically all of the commerce passed. This mill is not any way stationed in the stream of commerce. This plant, into which we take coal and coke and limestone and turn out steel, is not any mere temporary stoppage in a stream of commerce coming from the West to the East. It is not comparable; and because Congress could regulate stockyards, it is a far cry to say that they could regulate the labor relations of an industry like the steel industry.

"The Government argues that there is the possibility of an intention on the part of the strikers to obstruct

interstate commerce. It seems to me that that argument weakens the connection. In the stockyards cases, in *Swift & Co.* v. *United States,* 196 U. S. 375, the intent to obstruct interstate commerce was clear, proven. The stockyards were regulated on the theory that they might be used as an instrumentality in monopoly. But here the intention that the Government ascribes is an intention on the part of the strikers to interrupt interstate commerce, an intention on the part of a third party, an intervening agency. They do not claim that in discharging 10 men we had any intention of creating a controversy that might obstruct interstate commerce, but that these discharges might lead to dissatisfaction, which might lead to a dispute of more serious consequences, which might result in a walk-out, in which the strikers might have an intention to interrupt or change the stream of interstate commerce. If that reasoning is good there is no reason why Congress cannot regulate every activity relating to manufacture, [however remote its effect on interstate commerce]. . . .

"We raised before the Board, and raise now, the question of the violation of the Fifth Amendment. The case of *Adair* v. *United States,* 208 U. S. 161, decided flatly that a man had a right to hire whom he wished, and that a statute which forbade the discharge of an employee for union activities was unconstitutional.

"The same substantive decision was made in *Coppage* v. *Kansas,* 236 U. S. 1; and now it is said that the *Texas & New Orleans* decision, 281 U. S. 548, modified or at least cast some doubt as to those decisions. [Cases distinguished.]

"Now, in this case the order is made flatly that we reinstate these employees. . . . If this Act is valid, it means that when the 10 men come back they cannot be discharged except for a cause which would seem sufficient to the Labor Board. Certainly it does not mean that

they could be discharged right away, because the same complaint would be made again.

"The fact that these men were to be taken back and kept is evidenced by this unusual provision in the order. The Board ordered not only the restoration and the payment of the back pay, but that the company should post a notice that it 'will not discharge or in any manner discriminate against members of or those desiring to become members of Beaver Valley Lodge No. 200, Amalgamated Association,' and so forth. . . .

"Those men, if they can come back into this organization and go back to work for us, have a civil-service status. They stand differently from any other employee in our employ, because they cannot be discharged without a hearing.

"If their department shuts down, I suppose we shall have to go to the Labor Board and ask to reopen this decree. . . . Suppose they are tendered some other work that they do not want. . . . Under this decree we pay them back wages indefinitely, apparently.

"If we want to transfer the men to another department, then, I suppose, we must go to the Board and show them that we have good ground for transferring them. . . . Every time we want to promote a man we shall have to go to the Board to ask them to reopen this decree and let us do so.

"Now, an employer must have a discretion. He cannot always give a reason for a discharge. There are times when sabotage occurs, times when there is theft, and he cannot fasten the responsibility. There are men who are just a disorganizing influence and have to be transferred. There are men who have no promise of ability, who cannot either maintain or operate a machine, or who are a constant menace to their fellow employees. Is the discretion of the management to be reviewed every time the man discharged happens to be a

union man? Here are 22,000 employees, and 10 of them over 6 months discharged that happen to be members of the union, and we are hauled into court and have to show why we discharged those 10 men. Is that an interference with the right of freedom of contract, with the right to run our business as we think best?

"It seems to me that the Government's argument comes down to an economic argument. 'It would be a good thing if the Federal Government could control the labor relations of industry.' But that is not the law, and never has been. . . .

"For a century this Court has adhered to the simple, literal meaning which Marshall found in the commerce clause. It has given assurance to the States that their rights shall be as the Constitution fixes them. The taxing authority and the police power of the States have been protected, and the rights of individuals to maintain their own property have been protected.

"What the petitioner is asking is that the traditions and precedents of a century be cast aside, and that we change the meaning of the Constitution by a judicial decree, and say that things that for a century have not been the business of the Federal Government are now to be subject to its regulation, because of the remote possibility that interstate commerce may be obstructed."

National Labor Board v. *Fruehauf Trailer Co.*, 301 U. S. 49.

Mr. Thomas G. Long, counsel for the respondent, described the nature and history of the Trailer Company's business and explained in detail the manner in which it was conducted. The company paid the highest wages in the industry and for many years had had no disagreements with its labor until "legislation of this nature came along." Then came organizers, agitators fomenting disturbance.

He challenged findings of the Board touching the respondent's reasons for discharging the men who made the complaints, and touching the relations of the manufacture to interstate commerce. When materials come into the shop they are generally placed in inventory or stock and remain there from one to four months before being incorporated into a finished product which is shipped away. The seven men who were discharged were engaged in manufacturing the "raw materials" into the finished products that were sold. There is no "immediacy" of connection between the making, which is local, a purely intrastate matter (*Minnesota Rate Cases*, 230 U. S. 352, 410-411) and the interstate features of the business,—no "flow."

Stafford v. *Wallace*, 258 U. S. 495, involved a "stream of commerce"—the livestock with which the commission men and dealers had to do went into the stockyards as livestock and came out as livestock; what it was to be made into had nothing to do with any question before the court. Again, in the *Olsen* case, (*Chicago Board of Trade* v. *Olsen*, 262 U. S. 1) the statute dealt with a commodity, grain, in course of interstate commerce, by the very acts of the parties through bills of lading.

Intention to find a market for the trailers in other States does not make their manufacture a part of commerce. *Oliver Iron Mining Co.* v. *Lord*, 262 U. S. 172; *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165. The reasoning of these cases can not be put aside here because they were tax cases.

"The conclusion of the Board is this, that, while the manufacturing itself may be something local in character, nevertheless, if a labor dispute were to arise and if the operations of these factories were to shut down as a result of the dispute, raw materials would not be shipped in, finished products would not be shipped out; thereby there would be a burden and obstruction on the free flow of commerce; and that unrest caused among the production

employees therefore would have the effect of burdening and obstructing commerce, because those acts of unrest might lead to a labor dispute.

"Now, that is a very, very tenuous series of arguments. It does not hold together. In fact, it seems to me that *United Leather Workers* v. *Herkert & Meisel Trunk Co.*, 265 U. S. 467; *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344, and *Coronado Coal Co.* v. *United Mine Workers*, 268 U. S. 295, dispose of that sort of argument. . . .

"As to what must be the relation to bring it within the term 'affecting commerce,' counsel on the other side make much of the use of the word 'necessary,' but they omit in most of their talk the use of the word 'direct.' This Court always couples the two together. Probably the best statement that this Court has made is in the *Coronado* case, 259 U. S. 411, where it said: '. . . intended to restrain commerce . . . or has necessarily such a direct, material, and substantial effect to restrain it that the intent reasonably must be inferred.'

"Now, I take it that any act has a number of incidental effects as well as direct effects. The three building cases, of which *Industrial Association* v. *United States*, 268 U. S. 64, is one, well exemplify this. In each of them the effect of the course of action complained of upon interstate commerce was to curtail the use of materials which to that time had been coming into the State and had been used in building. In the first and third cases this was an incidental result, albeit a necessary result, of the course of action complained of, while in the second case it was a direct result, the course of action complained of being directed solely and exclusively at materials which had been shipped in interstate commerce.

"They also discuss the question of 'intent' and 'necessary effect,' and say that those are two bases of what they call the 'control power,' and then they leave them away

behind and proceed to push out the federal power to include any situation which presents 'a reasonable likelihood that a strike, if it occurred, would involve an intent to affect commerce, etc.'

"A strike may not have that intention but it might develop, and then the Board is to determine 'the probability of the occurrence of an evil which Congress could control'—whether the situation is comparable to and of the same general type as those situations 'from which in the past there had evolved strikes with intent to affect commerce, or where such intention might reasonably be expected to develop.' And then they push out in still another direction and they say that the basis of their power is found 'in recurring evils which in their totality constitute a burden on interstate commerce' though such evils arise from activities 'usually of only local concern.' And this may extend to any situation 'where the reduction in the supply of the commodity is so large that an intent to burden and obstruct interstate commerce may be inferred.' That argument is too tenuous to follow. . . ."

[The remainder of the argument was occupied mainly with the question of due process.]

National Labor Board v. *Friedman-Harry Marks Clothing Co.*, 301 U. S. 58

Mr. Charles Fahy, General Counsel, National Labor Relations Board, after stating the case:

"Without going again into the arguments as to the position of the Government on the application of this Act to such an enterprise, I will simply add that it is apparent from the nature of this business, which I have briefly described . . ., that the respondent, as a regular course of its business, is utterly and completely depend-

ent upon interstate commerce, and it would seem that if a strike occurred at Richmond in the plant there . . . would be a complete cessation of its interstate commerce.

"A strike ordinarily closes an entire plant. Orders could not be filled. . . . Strike clauses are inserted in many contracts of those supplying products, to take care of just such a situation. . . .

"The respondent employs 800 employees. Therefore, although not as large, of course, as the Jones & Laughlin Steel Corporation or the Fruehauf Company, it is a large manufacturer. It has grown up in Virginia, the site of its manufacturing operations, with a national market, because of the control of the Federal Government over interstate commerce, which allows the respondent, while located in Virginia, to receive without impediment its raw materials from outside the State, and to sell to a national market 82 per cent. of his products."

MR. LEONARD WEINBERG, for the Clothing Company, after restating the case:

"The business of this company comprehends perhaps less than one per cent. of the clothing manufactured in the United States. This company does not differ in any respect from the hundreds of thousands of manufacturers in the United States producing apparel, and furniture and machinery, and utensils, and all the myriad articles which all of us wear or use in our daily lives.

"The unfair labor practices which are charged consist in discharging 19 of 800 employees, all of whom are engaged in the manufacture of clothing in this plant, all of whom are engaged in a conversion and fabrication which requires some 100 operations, or thereabouts, from the time the materials arrive in our plant until they leave as a finished product. . . .

"If on the Government's theory of the current and stream of commerce . . . this Act is applicable to us,

then I respectfully submit to Your Honors that the same considerations apply not only to every wholesaler, but with more force, it seems to me, to retailers. . . . If in our case, where we take utterly unrelated raw materials and convert and fabricate them, taking them out of the stream when they get to our factory, changing their character and transforming them into a suit of clothes, they can be said to be in the stream or current of commerce, because those clothes, forsooth, go out to purchasers beyond the State of Virginia—then how much more so can it be said of concerns which wholesale products coming from all over the United States, indeed from foreign countries, which do not transform those articles, and in many cases sell them in the original packages, and, indeed, in many instances never even take the merchandise into their own plants. [Referring to certain well known mail-order and other large mercantile establishments.]

"So that, if this argument of my friends with respect to the stream of commerce is applicable to a manufacturer who takes raw materials and converts them, it is equally applicable to everyone engaged in almost any business. . . . Now, if Your Honors please, I think the absurdity of the thing demonstrates its impracticability, without any further laboring with the law on the subject.

[Counsel discussed and countered the Board's findings of "unfair labor practices" in this case; denied that there had been any "industrial strife" or interruptions of business, and assailed the administrative conduct of the Board as arbitrary and unreasonable, especially with regard to the manner of obtaining evidence from the respondent and the irrelevancy of the evidence introduced and relied on by the Board.]

". . . We think that this decision that we cannot discharge men is tantamount to depriving the employer,

under the construction of this Act, as placed upon it by this Board in this and other cases, of all control in its management of its labor relations and of its internal business, in the promotion and the disciplining and the demoting of its employees, and substitutes the management of this National Labor Relations Board for the management of this company. It would be a work of supererogation to discuss at this hour the law respecting the power of Congress under the commerce clause, when it has been settled for at least 85 years by the decisions of this Court from *Gibbons* v. *Ogden,* 9 Wheat. 1, and *Kidd* v. *Pearson,* 128 U. S. 1, down to the *Carter* case in the last few months.

"Nor will I argue the arbitrary and unreasonable character of the order of reinstatement, although I do say that it attacks the very fundamentals of the relationship between employer and employee; and while it does not require, and cannot require, the employee to return to work, it requires the employer unwillingly to put the man back to work; and while the order does not say how long, certainly, I respectfully submit, it would be an empty gesture—an empty gesture—if it meant that all we had to do was to take him back that day and then find an excuse to discharge him the next day. . . . For the first time in the history of the English and the American law, specific performance is now set up for personal service contracts at will—the will of the Board.

[Counsel expressed objections to the provisions of the Board's order in respect of back pay and the posting of a notice, and to the action of the Board in bringing the case before the Circuit Court of Appeals for the Second Circuit rather than the court in whose jurisdiction the respondent's plant is located.]

"I say that these facts, as I have outlined them, demonstrate the abuses and the invasions of fundamental right that inevitably flow from this obnoxious Act and must always flow from legislation such as this. We sub-

mit that the *ex parte* facts in this case show conclusively that this respondent is not engaged in interstate commerce and that the unfair labor practices alleged cannot be said in law to directly affect interstate commerce."

MR. HARRY J. GREEN, on behalf of the Clothing Company.

"If this Act is valid, particularly as applied against a manufacturing concern local in its nature, and if the Federal Government has the right to regulate the relations and the individuals in the course of what must be admittedly a local business, then the right of the State to legislate on that subject in a form in anywise different is gone. . . .

"These very powers sought to be exercised by the Federal Government are powers denied by this Court to the State governments; and I need only refer Your Honors to two cases, *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522, and 267 U. S. 552. In both of those cases the attempt was to require the employer to arbitrate his labor disputes. The attempt was made there, too, to require the employer to take back into his employ any persons whom he had discharged as a result of a labor dispute. So that the Federal Government is now claiming over a local enterprise powers which the local government itself does not have.

"In order to evade—evade—the implications there and the rulings, direct as they are, in the *Carter* and the *Schechter* cases, the Government contends now that this is not a regulation of wages and hours and conditions of employment and that the *Carter* and *Schechter* cases only related to them.

"On both of those propositions the Government, in the face of the decisions, must be in error; and there is no difference between requiring the employer and employee to bargain to a conclusion, as this Board has held, about

wages and hours and conditions of employment, and a direct regulation. The attempt here is to accomplish by indirection what has been forbidden when attempted by direct action. . . ."

MR. CHARLES E. WYZANSKI, Special Assistant to the Attorney General, on behalf of the Board, closed the argument.

". . . I turn now to what I began the argument with [in the Associated Press case, *ante* p. 734], the discussion whether or not this Act may be so applied as to cover all industry and labor throughout the country, and I wish in particular to develop the lines of possible distinction which were implicit in my opening argument but which I did not fully elaborate then.

"Of course, the Government contends that the Act may be applied to all the parties here at Bar, but if we are mistaken we wish to suggest possible lines of distinction between the different cases.

"The first two cases, those involving the Associated Press and the Washington, Virginia and Maryland Coach Company (301 U. S. 132), were cases in which the parties' principal activity was interstate commerce and the employees involved were either in or about commerce. We feel clearly that they are within the line of Congressional power, and I shall not pause to discuss the facts in those cases in any greater degree, but I turn to consider a comparison between the three manufacturing cases which are at bar, in order that, if Your Honors disagree with our position that all of them are within the scope of the Act, you may have a possible line for distinguishing between the cases.

"Your Honors will recall that this statute is a preventive statute designed to prevent those labor disputes which burden or obstruct commerce. There has been some talk at bar of the failure of Congress to include the

word 'directly' in the statute. Of course, Your Honors know that in the Sherman Act the word 'directly' is not included. In fact, with the exception of the ill-fated Bituminous Coal Conservation Act, I know of no Act of Congress relating to commerce which uses the word 'directly' in its jurisdictional ambit. The word 'directly' is necessarily implied by the decisions of this Court in interpreting all the statutes, and its omission here is, in our opinion, of no significance, provided that the Act be applied only to those disputes, or the causes of those disputes, which directly affect commerce.

"Now, there are several preliminary matters that I wish to state are not involved in this final discussion of the cases. At the outset I pointed out that the question whether freedom of organization and freedom of representation could be protected, whether that protection was reasonably related to commerce, was decided by Congress, and that that decision by Congress is a decision which does not have to be made again by the Board every time. The Board is entitled to assume that [discriminatory] practice will lead, or is likely to lead, to a dispute. The issue before the Board is whether or not a dispute, if it occurs, will be likely to burden or obstruct commerce; not whether the practice is likely to lead to the dispute. That issue is foreclosed under the terms of the statute, according to our reading of it. . . .

"A preventive statute, in order to be effective, must be addressed to those situations in which it is reasonably to be anticipated that a dispute within the power of Congress will occur. Until the practice has in fact spent its force nobody can tell what its consequences will be, but if there is a reasonable likelihood that the consequences will be a dispute that burdens commerce, then we say Congress has the power to prevent indulgence in that practice. . . .

"The mere fact that a cause has a local consequence as well as a national consequence does not prevent its being within the power of Congress, for obviously any cause is bound to have many different effects. The only question is whether it has a national effect within the power of Congress.

"Our position with respect to these manufacturing cases is perhaps stated most succinctly in the summary of our argument in Jones & Laughlin, where we have tried to state as briefly as possible the various theories upon which we suggest it is possible to apply this statute to one, two, or three of the manufacturing cases at bar.

"As I said, there is a distinct difference between the enterprises which are at bar. We have said that the power of Congress clearly includes the power to prevent a strike—rather to punish a strike—called with the intent of affecting commerce, and we have suggested that at least in some of these cases there is a very grave danger that the continuance of this discriminatory sort of practice will cause a strike of that type. . . .

"Jones & Laughlin is an integrated enterprise operating in many States, with approximately 20 different outlets, getting its raw materials from many different States. Although the principal manufacturing is done in Pittsburgh, the enterprise is farflung. If a dispute began in Jones & Laughlin, we know with reasonable certainty that it would be bound to involve, intentionally, interstate commerce; for persons at one particular focal point would undoubtedly choose to get as much support as they could from the persons working in other parts of the enterprise, including the persons working on the transportation and interstate activities of the company.

"Moreover, we know, for the record shows [Exhibit 44] that the steel companies of this country have united on a common labor policy, and though I do not intend to discuss the merit of that policy, I merely advert to it for

the point of showing that if a dispute occurs between the employees in this company and the company itself, it is reasonable to expect that the dispute will spread to other employees dealing with employers united on a common front with respect to their labor policy.

"We have said that the power of Congress relates not only to strikes with intent, but strikes where there is a necessary effect, of interrupting commerce. The scope of the 'necessary effect' principle is by no means certain, and on this we may make a number of alternative suggestions. We have merely pointed out, as something of which we feel certain, that intent is not necessary in order to show that a dispute is within the power of Congress, because, as Your Honors have said in the *Patten* case, 226 U. S. 525, if the necessary effect of a practice is to obstruct commerce it is unnecessary to charge a specific intent.

"Now, when does a labor dispute have a necessary effect upon commerce? We have suggested what one criterion may be, if the dispute involves a substantial amount of the commerce in a particular commodity.

"The Fruehauf Trailer Company [see *ante,* p. 766] presents a case very much in point. They are admittedly the largest of the companies in the trailer business. Their nearest competitor does only 37 per cent. as much as they do. If there is anything in the doctrine that we suggest, that the obstruction of a substantial amount of the commerce in a commodity works such a necessary effect upon commerce that Congress can control it, the principle would apply to the Fruehauf Trailer Company. It would also seem that it might apply to Jones & Laughlin, but I am not going to spell out all the possible implications. I am just covering in summary fashion the argument which has already been made. . . .

"We do not rest our whole case, even with respect to necessary effect, upon stream of commerce. Nor do we

say that necessarily every enterprise which receives and ships in interstate commerce is in a well defined stream of commerce. The exact scope of that doctrine may be broad or narrow. If it is broad, it would cover the case of the respondent clothing company, for that company admittedly receives 90 per cent. of its raw materials from outside of the State, and ships 80 per cent. of its products outside of the State, in which it manufactures.

"But it is not necessary to consider stream of commerce in any such broad way as we have urged. There is a narrower aspect of the doctrine which is open to this Court. It may be that a well-defined stream of commerce exists only in those cases where a single enterprise controls the sources of supplies, does the processing, and controls the outlets, so that the processing is a 'throat' with respect to that enterprise's flow of commerce. If such a concept be adopted it would clearly apply to the Jones & Laughlin case.

"There is another situation in which a necessary effect on commerce might possibly be spelled out, and that is where the effect of a dispute would be to interrupt a substantial volume of goods, although not a substantial proportion of the commerce in a commodity. If this is the doctrine, all the cases at bar would seem to be within it, for there is no case at bar in which the goods moving out of the enterprise amount to less than $1,750,000 a year, and in some cases they amount to much more than that. But I do not intend to describe in detail the facts with respect to all these things. I merely suggest possible lines of distinction.

"There is also a possibility which was developed by the Solicitor General in his argument in Jones & Laughlin; that is, that where a practice recurs frequently, as labor disputes recur frequently, it may be that Congress has the power to legislate with respect to those practices if they bear a relation to commerce.

"If that doctrine be accepted, it is admittedly the broadest of the doctrines with which I have dealt. We do not contend that it would apply to firms such as have been mentioned by the respondent, that is, retail firms who receive some of their products in interstate commerce or send out some of their goods in interstate commerce. We say it would apply only to those enterprises a substantial part of whose own business is either the receipt of goods in interstate commerce or the shipment of goods in interstate commerce. We do not claim that every one who receives or ships in interstate commerce would fall within the scope of the principle.

"I have one more specific word to say, and that is, as to whether a determination in this case with respect to the right of self-organization, freedom of representation, and freedom of association, forecloses any question with respect to wages, hours or substantive working conditions. Of course, as Your Honors are now well aware, the statute itself has nothing whatsoever to do with wages or hours; but the question may be raised, does the principle apply? It may or it may not, and we suggest that a distinction may be drawn, though we do not necessarily press it. This is the distinction which we suggest: It has been shown by the decisions in this Court that interference with freedom of association and freedom of representation bears a reasonable relation to commerce, because the protection of those rights avoids labor disputes. Now it may be that a fixing of minimum wages or of maximum hours would not in the same way avoid labor disputes, because the fixing of minimum wages and of maximum hours would not settle the field of controversy but would leave a large area of conflict; whereas this settles a large area of conflict and sets up a procedure for the voluntary amicable adjustment of the disputes. . . ."

STATEMENT SHOWING CASES ON DOCKET, CASES DISPOSED OF, AND CASES REMAINING ON DOCKETS FOR THE OCTOBER TERMS 1934, 1935, AND 1936

	ORIGINAL			APPELLATE			TOTALS		
Terms	1934	1935	1936	1934	1935	1936	1934	1935	1936
Total cases on dockets	18	16	13	1,022	1,076	1,039	1,040	1,092	1,052
Cases disposed of during terms	5	4	1	926	986	941	931	990	942
Cases remaining on dockets	13	12	12	96	90	98	109	102	110

	TERMS		
	1934	1935	1936
Distribution of cases disposed of during terms:			
Original cases	5	4	1
Appellate cases on merits	256	269	270
Petitions for certiorari	670	717	671
Cases remaining on dockets:			
Original cases	13	12	12
Appellate cases on merits	51	56	53
Petitions for certiorari	45	34	45

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VALUE. See **Evidence**, 4.

VERDICT. See **Jury**, 2.

WAIVER. See **Jury**, 2.

WAREHOUSES.

State regulation of charges of tobacco warehouses. *Townsend* v. *Yeomans*, 441.

WASTE. See **Bankruptcy**, 2.

WISCONSIN LABOR CODE. See **Constitutional Law**, VII, (B), 3.

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