COMMENTS

PER CURIAM DECISIONS OF THE SUPREME COURT: 1958 TERM

This second annual study of the per curiam decisions of the United States Supreme Court\(^1\) presents an opportunity to compare the per curiam practice of the Court in successive terms. More important than comparative statistics, however, is whatever knowledge of the Court's general per curiam practice can be gleaned from the study of the 1958 Term. Under what circumstances and for what reasons does the Supreme Court resort to the per curiam device? When are such dispositions justifiable? Of what precedent value are the decisions so rendered? Broad questions such as these will not be answered on the basis of two or even twenty annual studies; but it must be assumed that a case-by-case study of the Court's more important per curiam decisions will bring us closer to the answers.

The Supreme Court handed down 100 full, signed opinions and 151 per curiam decisions in the 1958 Term. Only 96 of the per curiam cases, however, were decided on their merits, the others being disposed of on non-substantive grounds, e.g., certiorari denied, certiorari dismissed and orders in original jurisdiction cases. Although fewer cases were decided by the Court in the 1958 Term than in the 1957 Term, the ratio of full opinions to substantive per curiam decisions only increased slightly.\(^2\)

The statistical charts, designed primarily to give an over-all picture of the Court's per curiam practice, raise some points of particular interest. In the 1958 Term, as in the 1957 Term, there appears to have been a close correlation between those cases in which the Court heard oral argument and those in which a written explanation accompanied the decision. Counsel, then, who can convince the Court in the first instance that his case is important enough to be worthy of oral argument is more likely to have the satisfaction of explanation by the Court. There was a marked increase in the 1958 Term in the percentage of cases in which appeal was dismissed for want of substantial federal question. Although no generalizations are justified on the basis of

\(^1\) The first study appeared in the Winter 1959 issue of the University of Chicago Law Review. 26 U. CHI. L. REV. 279 (1959).

\(^2\) In addition to the 129 per curiam decisions on the merits in the 1957 Term (see Table 1) there were 109 full, signed opinions. 26 U. CHI. L. REV. at 280, n. 7. Non-per curiam orders are not included in this study.
### Table 1

**Subject Matter**

<table>
<thead>
<tr>
<th>Principal Subject</th>
<th>1957</th>
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<td>Armed Forces</td>
<td>2</td>
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<tr>
<td>Bill of Rights:</td>
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<tr>
<td>Freedom of Speech</td>
<td>5</td>
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<tr>
<td>Self-Incrimination</td>
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<tr>
<td>Federal Civil Jurisdiction and Procedure</td>
<td>3</td>
<td>6</td>
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<td>Federal Criminal Cases:</td>
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<td></td>
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<tr>
<td>Procedure</td>
<td>18</td>
<td>9</td>
</tr>
<tr>
<td>Crimes</td>
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<tr>
<td>Federal Habeas Corpus Procedure</td>
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<td>3</td>
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<tr>
<td>Federal Regulation under the Commerce Clause:</td>
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<td></td>
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<tr>
<td>Agriculture</td>
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<tr>
<td>Antitrust</td>
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<td>2</td>
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<tr>
<td>Carriers</td>
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<td>6</td>
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<tr>
<td>Communications</td>
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<td>3</td>
</tr>
<tr>
<td>Compensation and Employer's Liability</td>
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<td>3</td>
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<tr>
<td>Labor</td>
<td>4</td>
<td>4</td>
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<td>Fourteenth Amendment:</td>
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<tr>
<td>Criminal Procedure</td>
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<td>Freedom of Speech, Press, Assembly, Religion</td>
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<td>2</td>
</tr>
<tr>
<td>Segregation</td>
<td>3</td>
<td></td>
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<tr>
<td>State Statutes</td>
<td>25</td>
<td>16</td>
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<tr>
<td>Other</td>
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<td>5</td>
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<tr>
<td>Immigration and Naturalization</td>
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<td>Land Laws</td>
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<td>Patents, Copyrights, Trademarks</td>
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<td>Power of State Courts</td>
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<tr>
<td>Review of Federal Administrative Agencies (not otherwise classified)</td>
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<tr>
<td>State Regulation of Commerce</td>
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<td>3</td>
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<tr>
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<tr>
<td>State</td>
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<td><strong>Total</strong></td>
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### Table 2

**Origin of Cases**

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<tr>
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<td>Lower Federal Courts</td>
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<td>Specialized Federal Courts</td>
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129
TABLE 3  
**JURISDICTIONAL BASIS**  

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<tr>
<td>Certiorari</td>
<td>63</td>
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<td>Appeal</td>
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<td>59</td>
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TABLE 4  
**ORAL ARGUMENT**  

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<tbody>
<tr>
<td>With</td>
<td>19</td>
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<td>Without</td>
<td>110</td>
<td>82</td>
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TABLE 5  
**TREATMENT OF CASES**  

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<tr>
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<th>1957 Orally Argued</th>
<th>1957 Total</th>
<th>1958 Orally Argued</th>
<th>1958 Total</th>
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<tbody>
<tr>
<td>Without explanation or citation.</td>
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<td>68</td>
<td>4</td>
<td>56</td>
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<tr>
<td>With citation only.</td>
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<td>34</td>
<td>2</td>
<td>14</td>
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<tr>
<td>With explanation.</td>
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TABLE 6  
**DISPOSITION OF CASES**  

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<tbody>
<tr>
<td>Appeal Dismissed for Want of Substantial Federal Question</td>
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<td>Appeal Dismissed</td>
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<tr>
<td>Judgment Affirmed by an Equally Divided Court</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>Judgment Affirmed</td>
<td>29</td>
<td>16</td>
</tr>
<tr>
<td>Judgment Vacated and Case Remanded for Reconsideration in Light of Authority Cited</td>
<td>11</td>
<td>5</td>
</tr>
<tr>
<td>Judgment Vacated and Case Remanded with Instructions Other than To Reconsider in Light of Authority Cited</td>
<td>5</td>
<td>14</td>
</tr>
<tr>
<td>Judgment Reversed</td>
<td>31</td>
<td>11</td>
</tr>
<tr>
<td>Judgment Reversed and Case Remanded</td>
<td>5</td>
<td>5</td>
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<tr>
<td>Judgment Reversed on Confession of Error</td>
<td>9</td>
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<tr>
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TABLE 7  

<table>
<thead>
<tr>
<th></th>
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<tbody>
<tr>
<td>Unanimous Court.</td>
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<td>Concurring Justice(s).</td>
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</tr>
<tr>
<td>Dissenting Justice(s).</td>
<td></td>
<td>18†</td>
</tr>
<tr>
<td>Both Concurring and Dissenting Justices.</td>
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<td></td>
</tr>
<tr>
<td>Equally Divided Court.</td>
<td>3</td>
<td></td>
</tr>
</tbody>
</table>

*This total includes one case in which one Justice was of the opinion that certiorari had been improvidently granted.
†This total includes five cases dismissing appeals in which one or more of the Justices was of the opinion that probable jurisdiction should be noted.
an increase between any two terms, the fact that this was the most frequent disposition in both the 1957 and 1958 terms adds some evidence to the suspicion that the Court is using this disposition in appeal cases much as it uses its power to deny certiorari. It is of further interest that 73 of the 96 per curiam decisions were by a unanimous Court. Although it is not insignificant that there were 23 non-unanimous per curiam decisions, there was a higher degree of unanimity in per curiam decisions than in cases decided in signed opinions, a fact which indicates that at least to some degree the Court still uses the per curiam to decide cases in which there is little disagreement. However, it is interesting to note that in the 1958 Little Rock Case, in which the Court obviously desired to indicate strong unity, the Court shied away from the per curiam disposition and instead resorted to the novel technique of listing each Justice by name before the opinion. This suggests that the Court felt the per curiam device would not sufficiently indicate unity.

Many cases decided by the Supreme Court can be effectively disposed of in short, per curiam decisions. A great majority of the 1958 Term per curiam decisions fall within this category. Thus, in areas of the law which are well settled elaboration beyond the citation of key cases is unnecessary, and there are times when the Court need accompany its decision by neither citation nor explanation. In still other cases the Court alters or expands existing law in per curiam decisions and seems justified in doing so. Thus, in Hotel Employees v. Leedom the Court, in ruling that the National Labor Relations Board has no authority to refuse jurisdiction in all cases involving hotels, cited a case which explicitly refused to rule on the hotel situation. The reasoning of the cited case, however, does logically apply to Hotel and the citation makes the decision clear. In Patterson v. United States the Court affirmed a lower court decision that the exclusive remedy of a seaman for injuries incurred on a United States merchant vessel lies under the Federal Employees

3 Of the 100 cases decided in full, signed opinions in the 1958 Term the Court was unanimous in 25.

4 An exception to this practice is the per curiam disposition of cases in which the Court is equally divided. See, in the 1958 Term, Lev v. United States, 360 U.S. 470 (1959); Woody v. United States, 359 U.S. 118 (1959); Eagle Lion Studios, Inc. v. Loew's, Inc., 358 U.S. 100 (1958).


penetration Act\textsuperscript{11} and not under the Suits in Admiralty Act\textsuperscript{12} This decision is consistent with that reached in Johansen \textit{v. United States}\textsuperscript{13} concerning seamen injured on public vessels. The \textit{Johansen} decision was expressly confined to public vessel seamen but the reasoning seems equally applicable to seamen on a merchant vessel. In \textit{Patterson} the Court justifiably extended the \textit{Johansen} rule.

In some instances, however, the Court appears to use the per curiam as a device by which it can decide a case in a controversial area of the law without expressing an opinion.\textsuperscript{14} \textit{DeVries v. Baumgartner's Electric Constr. Co.}\textsuperscript{15} would appear to be such a case. "Right to Work" statutes have caused great controversy and political debate for some years. At the same time, Supreme Court decisions concerning federal pre-emption have received a great deal of criticism.\textsuperscript{16} \textit{DeVries}, involving both "Right to Work" and federal pre-emption, required the Court either to go on record in favor of one controversial position and against another, or to decide the case without explanation. By resorting to the latter, the Court may have saved itself from further abuse by some of its less articulate, result-oriented critics. The Court has, however, by failing either to clarify the law or to defend rationally a questionable decision, left itself open to adverse criticism by more informed scholars of our legal system.

In other cases the per curiam disposition leaves unclear what was decided. In \textit{NAACP v. Bennett}\textsuperscript{17} the Court vacated a decision in which the District Court had abstained from adjudging the validity of a state statute until it had been construed by the state courts. In remanding the case the Court declared that "When the validity of a state statute, challenged under the United States Constitution, is properly for adjudication...reference to the state court...should not automatically be made."\textsuperscript{18} To support this proposition, however, the Court cited \textit{Harrison v. NAACP},\textsuperscript{19} a recently decided case in

\textsuperscript{11} 5 U.S.C. § 751 (1952).
\textsuperscript{13} 343 U.S. 427 (1952).
\textsuperscript{14} In the study of the 1957 Term "misuses" of the per curiam disposition were categorized as follows: "(1) In some instances the Court appears to use per curiams to avoid an expression of opinion on important issues. (2) Frequently the Court does not make clear what is decided. (3) At times the law appears to be altered with little if any expressed explanation or justification." 26 U. CHI. L. REV. at 282. For comparative purposes the same general organization will be used in the study of the 1958 Term.
\textsuperscript{15} 359 U.S. 498 (1959).
\textsuperscript{16} See Meltzer, \textit{The Supreme Court, Congress, and State Jurisdiction over Labor Relations: I,} 59 COLUM. L. REV. 6, 26–36 (1959) for a recent discussion of the general problem of pre-emption in the labor field, with a list of other secondary material at n.4.
\textsuperscript{17} 360 U.S. 471 (1959).
\textsuperscript{18} \textit{Ibid.}
\textsuperscript{19} 360 U.S. 167 (1959).
which the Court reversed the lower court for not waiting until the state statute involved had been interpreted by the state courts. Although the cite to Harrison clearly indicates that that case is to be given a somewhat restricted interpretation, the lower court is told nothing other than that it might, under some circumstances, undefined by the Court, decide the case before it without waiting for state judicial construction.

In Mills v. Louisiana the Court seems to have erred in another manner. By citing a case in which the Court expressly refused to deal with the problem involved in Mills, the Court, without explanation, appears to have increased the restrictions on an individual’s right against self-incrimination. There is no apparent justification for the Court’s failure to defend this far-reaching decision by a reasoned opinion.

It is interesting to note that some of the problems presented by per curiams of the 1958 Term had previously been dealt with by the Court in per curiam decisions. DeVries v. Baumgartner's Electric Constr. Co. held that a state court could not give damages for union activity which was designed to force an employer to violate a state Right to Work statute and which also reasonably could be an unfair labor practice. A preceding case decided per curiam held that state courts could not enjoin such conduct. In Deen v. Hickman the Supreme Court had to determine the validity of a state procedure in Federal Employer's Liability Act cases, which procedure required the jury to answer special interrogatories in addition to rendering a general verdict and which authorized appellate courts to order new trials after weighing the evidence. The Court had previously ruled on the special verdict point in Arnold v. Panhandle & Santa Fe Ry. and arguably had ruled on the new trial point in Harsh v. Illinois Terminal R.R. Both cases were decided per curiam. If it is true that there are certain areas of the law in which the Court decides cases per curiam—either because the Court does not consider them important enough for more extensive treatment, or because the Court does not want to express itself on the issues in the area, or for any other reason—the possibility exists that a doctrine could be developed over a period of years by a series of per curiam decisions, all but unnoticed by the legal profession.

26 353 U.S. 360 (1957).
An interesting problem is presented by the use of the per curiam disposition in the affirmance by an equally divided court of lower court judgments. When the Court affirms in this manner with no explanation of the views of the individual justices great doubt is cast upon the treatment which will be accorded the issues involved when they next arise. An equally divided Court does not necessarily signify an equal division on any one issue but could result from small but different minorities on each of several issues. *Lev v. United States,* for example, involved four related but disparate questions. In affirming by an equally divided Court, the Court has placed the status of all four in doubt. If in fact only one Justice favored reversal on each of the four grounds, propositions on which the Court were in substantial agreement were needlessly opened to question. Were opinions of the individual Justices published in these cases it would be clear on which issues, if any, the Court was evenly divided.

II

A. "RIGHT TO WORK" AND PRE-EMPTION

In *DeVries v. Baumgartner’s Electric Constr. Co.* the Supreme Court reversed the South Dakota Supreme Court in a per curiam decision, citing *San Diego Unions v. Garmon,* the key labor case decided in the 1958 Term. The situations in both cases were similar. The defendant union in each case had engaged in picketing for the purpose of forcing the employer to enter into a union shop agreement although his employees had indicated no desire to join the union. Without prior determination by the NLRB, the state courts held in both cases that, although they were precluded from enjoining the picketing because in all probability it was an unfair labor practice under the Labor Management Relations Act, they were free to award damages under the doctrine laid down by

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31 When the *Garmon* case was before the Supreme Court of California that court stated that the union demanded "that the plaintiffs enter into an agreement which would require that all of the plaintiffs' employees be or become members of the defendant unions" although the employees "had indicated that they do not desire to join." 49 Cal.2d 595, 598, 320 P.2d 473, 475 (1958). (Emphasis added.) In the *DeVries* case finding of fact No. 13 by the trial court reads: "It was the purpose of the defendants to tie up plaintiff's jobs, to compel the termination of plaintiff's contracts for work and material on said jobs and to apply pressure on the plaintiff in order to influence or make plaintiff consent to be organized or to sign a Union Contract and exert economic pressure on the plaintiff to require its employees to join the union or to discharge them or to hire only Union Members, as employees doing electrical work." Petition for Writ of Certiorari, 28a.
32 It is settled that activities which arguably are unfair labor practices under the national act cannot be enjoined in the absence of violence or the threat of violence. Weber v. Anheuser-Busch, 348 U.S. 468 (1955); Garner v. Teamsters Union, 346 U.S. 485 (1953).
the Supreme Court in *United Const. Workers v. Laburnum*[^33] and *Automobile Workers v. Russell*.[^34]

In *Garmon* the Supreme Court, reversing the California Supreme Court, held that in the absence of prior determination by the NLRB the states are precluded from awarding damages in tort actions arising out of union conduct. The Court stated that damages could not be given for activity which might reasonably be either protected or prohibited activity under the LMRA; it also indicated grave doubt as to whether the states could award damages for non-violent activity affecting commerce in the area which is neither protected nor prohibited by the LMRA.[^35] Four members of the Court (all of whom dissented in *DeVries*) concurred on the ground that the concerted activity before the Court was arguably protected by the LMRA, but they vigorously dissented from the Court's foreclosure of state power over prohibited activity.[^36]

*Garmon* would appear to control *DeVries* but for the fact that *DeVries* arose under the South Dakota "Right to Work" statute.[^37] This fact posed important issues not before the Court in *Garmon* and makes the per curiam reversal worthy of comment.

It is important to differentiate among three peaceful picketing situations: (1) those involving Right to Work but no pre-emption question; (2) those involv-

[^33]: 347 U.S. 656 (1954). In *Laburnum* the Supreme Court affirmed a judgment by a state court awarding the plaintiff company damages against the defendant union in a tort action. By threatening violence the union had forced the company to close down. The Court held that although the union activity was probably an unfair labor practice, the state court still had jurisdiction to award damages in a tort action, for no similar remedy was available under the LMRA.

[^34]: 356 U.S. 634 (1958). In *Russell* the Supreme Court upheld a judgment of a state court awarding compensatory damages to a non-union employee who had been kept from his job by the mass picketing of the defendant union. The Court recognized that the union conduct was probably an unfair labor practice and assumed that the NLRB could validly award lost pay to the plaintiff. *Garmon* limits both *Laburnum* and *Russell* to situations of violence or near violence. For a comprehensive discussion of the *Russell* and *Laburnum* cases see Meltzer, *The Supreme Court, Congress, and State Jurisdiction over Labor Relations: I*, 59 COLUM. L. REV. 6, 26-36 (1959).

[^35]: "If the Board decides, subject to appropriate federal judicial review, that conduct is protected by § 7, or prohibited by § 8, then the matter is at an end, and the States are ousted of all jurisdiction. Or, the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States." 359 U.S. at 245.

[^36]: The four concurring Justices urged that if the union conduct was clearly unprotected by the LMRA the state's award of damages should be affirmed on the authority of United Constr. Workers v. Laburnum and Automobile Workers v. Russell. See notes 5 and 6 supra. These Justices could, moreover, see no reason for doubting the principle of the *Briggs-Stratton* case, Automobile Workers v. Wisconsin Board, 336 U.S. 245 (1949), that the states had power to act in those areas neither protected nor prohibited by the LMRA. *Id.* at 250, 253. For a more extensive discussion of the *Garmon* case, see Wellington, *Labor and the Federal System*, 26 U. CHI. L. REV. 542, 552-556 (1959).

[^37]: S.D. CODE ch. 17.11 (Supp. 1952). The Right to Work policy has been written into section 2 of article 6 of the South Dakota Constitution.
ing pre-emption but no Right to Work; and (3) those involving both a Right to Work statute and the problem of federal pre-emption. In five cases in which the pre-emption issue was not raised the Supreme Court has upheld the power of state courts to enjoin picketing, the purpose of which was illegal under state law. In four of these cases the purpose of the picketing has been to force employers to enter into a union shop agreement violative of the states' Right to Work statutes. In these cases the Court rejected the unions' contention based on *Thornhill v. Alabama,* that the injunctions violated their constitutional right of free speech.

In those cases where pre-emption is raised and no Right to Work issue is involved, it is highly doubtful whether the states have any power to enjoin illegal purpose picketing. The Court has not expressly overruled *Automobile Workers v. Wisconsin Board,* which upheld state power to enjoin activity neither protected nor prohibited by the LMRA. This view was, however, expressly questioned in the majority opinion of *Garmon,* and in the 1957 Term the Court refused to apply *Briggs-Stratton* in a case where the concerted activity involved—the refusal to cross the picket lines of a struck shipper—appeared to be neither protected nor prohibited by the national act.

Typical legislation designated as Right to Work statutes provide that union membership, or correspondingly, non-membership, shall not be a condition of employment. These statutes prohibit either all or some forms of union security agreements and provide criminal penalties for employers who violate the law. Although picketing designed to force an employer to enter into an illegal union security agreement does not violate a Right to Work statute aimed solely at employers, state courts have held such picketing tortious by reasoning that it is for the "illegal purpose" of coercing an employer to violate the Right to Work law. *E.g., Construction and Gen. Labor Union, Local 688 v. Stephenson,* 225 S.W.2d 958 (Tex. 1950); *cf. Pappas v. Stacey,* 151 Me. 36, 116 A.2d 497, 500 (1955). Such picketing will be referred to as "anti-Right to Work" picketing in this Comment.

*International Brotherhood v. Vogt,* 354 U.S. 284 (1957); *Plumbers Union v. Graham,* 245 U.S. 192 (1952); *Building Service Union v. Gazzam,* 339 U.S. 532 (1950); *Teamsters Union v. Hanke,* 339 U.S. 470 (1950). In *Gibony v. Empire Storage Co.,* 336 U.S. 490 (1949), the fifth case, the picketing was aimed at forcing a wholesale distributor to enter into an exclusive dealing agreement which would have violated state law as an illegal restraint of trade.

The treatment of *Briggs-Stratton* in *Garmon* is not surprising in view of the emphasis placed on the NLRB's exclusive responsibility for determining the status of union activity in the *Garmon* decision.

*Aladdin Industries v. Associated Transport,* 355 U.S. 8 (1957), which was remanded for consideration in light of *Kerrigan Iron Workers v. Cook Truck Lines,* 353 U.S. 968 (1956); noted in *Per Curiam Decisions of the Supreme Court: 1957 Term,* 26 U. Chr. L. Rev. 279, 288 (1959). See *Meltzer, op. cit. supra* note 34, for a recent discussion of the general problem of pre-emption in the labor field, with a list of other secondary material at n.4. See *Meltzer, op. cit. supra* note 34, at n.18, for citations to the legislative history relevant to the general pre-emption problem and to secondary sources discussing the problem.
Cases involving both the pre-emption and the Right to Work issues present a unique problem. In the general pre-emption area the Supreme Court developed doctrine without the clear-cut guidance of Congress, but Congress in section 14(b) of the LMRA, unquestionably confirmed state authority to enact Right to Work statutes, and the legislative history of that section reflected an awareness and consideration of the problems of federalism. The corollary of such statutes appears to be the power of enforcement including the power to enjoin activity aimed at securing agreements which would violate the state statutes permitted by Congress.

Recognition by state courts of the distinctive problem of federal-state jurisdiction in the Right to Work area is striking in comparison to the neglect of this problem by the Supreme Court. In the first case in which exclusive federal jurisdiction was raised as a defense in a state suit to enjoin anti-Right to Work picketing, the Supreme Court of North Dakota upheld the state injunction. Invoking section 14(b) to demonstrate that the pre-emption in the Right to Work area was unique, the Court declared that the picketing involved could not be considered an unfair labor practice because “the unfair practices prohibited by the Taft-Hartley Act involved conduct carried on for the purpose of preventing some objective protected by that act” while the Right to Work statute was “in a field excepted from the Taft-Hartley Act.”

In the 1956 Term the Supreme Court, in Local Union 429 v. Farnsworth & Chambers, reversed the Supreme Court of Tennessee, which had upheld an injunction against picketing to compel an employer to enter into a union shop agreement in violation of the state Right to Work statute. The Court delivered

"Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial Law." Labor Management Relations Act (Taft-Hartley Act) § 14(b), 61 Stat. 151 (1947), 29 U.S.C. § 164(b) (1952).

This was the basic contention of the North Carolina Supreme Court in Douglas Aircraft Co. v. Local Union 379, 247 N.C. 620, 101 S.E.2d 800 (1958).

Minor v. Building & Construction Trades Council, 75 N.W.2d 139 (N.D. 1956). There have been many cases in the state courts involving power to enjoin picketing violative of Right to Work policy in which the pre-emption issue was not raised. E.g., Baldwin v. Arizona Flame Restaurant, 82 Ariz. 385, 313 P.2d 759 (1957); Woodard v. Collier, 210 Ga. 239, 78 S.E.2d 526 (1953); Miami Typographical Union No. 430 v. Ormerod, 22 CCH Lab. Cas. ¶ 82,700 (1952); Self v. Taylor, 217 Ark. 953, 235 S.W.2d 45 (1951); Local Union No. 519 v. Robertson, 44 So.2d 899 (Fla. 1950). The fact that the defendant unions did not raise the pre-emption issue as a defense in those cases prior to the Supreme Court's ruling in Guss v. Utah Labor Relations Board, 353 U.S. 1 (1957), is probably explicable on the grounds that they did not forecast the Guss decision and believed that the state courts had jurisdiction to grant injunctions because the industries involved did not meet the NLRB's jurisdictional standards. The fact that pre-emption was not raised in some cases decided after Guss, e.g. Arizona Flame, is some indication that counsel believed that Right to Work disputes fell outside the usual pre-emption rules. (But note that Arizona Flame was decided after Local Union 429 v. Farnsworth & Chambers, 353 U.S. 969 (1957), discussed in text at note 48 infra.)

75 N.W.2d at 151. 48 353 U.S. 969 (1957).
a one sentence per curiam opinion consisting only of citations to Weber v. An-
heuser-Busch and Garner v. Teamsters. Although Weber and Garner are im-
portant pre-emption cases, neither case involved the Right to Work issue; nor
did either indicate how anti-Right to Work activity should be treated in light
of section 14(b).

State reaction to Farnsworth was confused and varied. In 1958 the North
Carolina Supreme Court recognized the binding effect of Farnsworth and held
that anti-Right to Work picketing was not enjoinable. But early in 1959 the
Supreme Court of Alabama upheld an injunction against similar picketing
without mentioning Farnsworth in its discussion of the effect of section 14(b)
on state power.

The two most interesting post-Farnsworth cases came out of Kansas and Ten-
nessee. In October, 1957, the Supreme Court of Kansas decided Asphalt Paving
v. International Brotherhood. At issue was state jurisdiction to enjoin picketing
at a construction site for the purpose of compelling a subcontractor who em-
ployed non-union labor to enter into a union shop agreement. The court held
that the union had violated both the state Right to Work statute and the state
secondary boycott law. But the court also held that the activity was an unfair
labor practice under section 8(b) (4) (A) of the LMRA and that state power was
foreclosed by Supreme Court decisions including Farnsworth. A concurring
opinion urged the Supreme Court to give some rationale for its pre-emption
rule in the Right to Work field expressed grave doubts as to the correctness
of the Farnsworth decision in light of 14(b) and concluded with the following:

The light of state jurisdiction, illuminated by § 14(b), has been dimmed and states
may no longer look to that section as a federal authorization to enjoin conduct directed
toward the execution of union security agreements in violation of their laws, which
conduct is definable as an unfair labor practice under section 8. It is in the semi-dark-
ness of these precedents that I affirm the judgment of the district court.

50 346 U.S. 485 (1953).
51 For a more extended discussion of the Weber and Garner cases see Meltzer, op. cit.
supra note 34, at 15–19.
53 Alabama Highway Express v. Local 612, 108 So. 2d 350 (Ala. 1959). A second and
independent ground for the ruling was that independent contractors and not "employes" as
defined in section 2(3) of the LMRA were involved in the dispute.
55 I agreeably accept decisions of the Supreme Court manifesting an obvious purpose of
securing uniformity in the administration of national labor relations, but I should prefer
to understand the rationale of the Supreme Court's limitation of § 14(b). Without this under-
standing, it is a burdensome task thrust upon a judge of a state court by the supremacy clause
to apply the laws of the United States in matters relating to the adjustment of federal-state
relations. 181 Kan. 775, 792, 317 P.2d 349, 362 (1957).
Two months after *Asphalt* was decided, a chancery court of Tennessee, the state where *Farnsworth* originated, held in *Pruitt v. Lamber* that the state courts had jurisdiction to enjoin picketing violative of Right to Work policy. It decided that, in spite of the language of the Tennessee Supreme Court, there had been no Right to Work issue in the *Farnsworth* case. The court urged that the union in *Farnsworth* had only requested that the employer hire union labor, and that this request did not contravene the Right to Work law. As to the Supreme Court's opinion in *Farnsworth*, the court stated:

Possibly, the Supreme Court of the United States in the *Farnsworth & Chambers* case recognized that the peaceful picketing of the complainant company—admittedly engaged in interstate commerce—was not a violation of the Tennessee Right-to-Work Act, and reversed the case for that reason.

The court defended this strained interpretation of *Farnsworth* by stating that it could not "conceive that the Supreme Court of the United States makes such an anomalous and unrealistic construction of section 14(b) of the LMRA, and [it did] not consider . . . that the Court has."

*DeVries v. Baumgartner's Electric Constr. Co.* gave the Supreme Court an opportunity to clarify pre-emption law in the Right to Work area by making explicit its rationale for the *Farnsworth* decision. Its exclusive reliance on *San Diego Unions v. Garmon* failed to do so. *Garmon* declared that concerted activity which could not be enjoined could not be the basis for damages in tort. Accordingly, *Garmon* applies to *DeVries* only if the picketing in that case was not enjoinable. In other words, *Garmon* applies to *DeVries* only if *Farnsworth* is binding law in the Right to Work area. This is the precise question which has produced so much disagreement in the state courts.

In support of its decisions in *Farnsworth* and *DeVries* the Supreme Court might have referred to an earlier pre-emption decision relating to problems of union security. In *Plankington v. Wisconsin Employment Relations Board*, the Court, in a per curiam decision, struck down an order of the state board requiring an employer to reinstate an employee who had been dismissed for failure to comply with a union security agreement which violated both the state act and the LMRA. Subsequent explanation of *Plankington* by the Court indicates the import of that decision is that the states are without power to grant

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57 41 L.R.R.M. 2369 (1957).
58 "The demurrers filed to the original and supplemental bill raises [sic] one issue, that is, whether the Courts of Tennessee have the power to enforce the right to work law . . . or whether it was the intention of Congress in the enactment of the Labor Management Act . . . to so exclusively pre-empt the field of Labor Management Relations in inter-state commerce as to remove the matter from the jurisdiction of the state courts." 299 S.W.2d 8, 9 (Tenn. 1957).
59 41 L.R.R.M. 2369, 2378 (1957).
60 Id. at 2379.
If the states, according to Plankington, are precluded from remedying conduct directly violative of their Right to Work laws and caused by union security agreements contravening those laws, it would appear to follow that they would also be precluded from granting relief against union conduct aimed at securing such agreements where the LMRA also prohibited such conduct.

The difficulty with this approach is that, in effect, it writes section 14(b) out of the LMRA. The legislative history of that section indicates that Congress did not intend to delegate to the states the power to regulate union security arrangements on the one hand, and, on the other, to deprive them of the means of enforcement. As section 14(b) appears to be one area in which Congress was concerned with problems of federalism it seems likely that they considered concurrent federal-state jurisdiction would result with respect to union security.

If it could be believed that Farnsworth and DeVries have settled the pre-emption problems in the Right to Work field, it might be argued that the fact that the law is settled more than compensates for any rational doubts as to the wisdom of the decisions. But the most unfortunate aspect of the two cases is that the lack of well-reasoned opinions makes it impossible to conclude that the questions of law have been settled. When in deciding Farnsworth the Supreme Court cited two cases which were unrelated to the unique problem involved and made no mention of either Right to Work or section 14(b), the precedent of that decision was impaired. It has been both ignored and distinguished away. DeVries, with its citation of another non-Right to Work case, Garmon, is likely to receive the same treatment. When DeVries was before the Supreme Court of South Dakota it was decided on general pre-emption grounds with no mention made of any special problems arising from the Right to Work statute. Counsel for both sides before the United States Supreme Court agreed that the case was controlled by Laburnum and Russell, but disagreed in the interpretation of those cases. Both sides urged, moreover, that Garmon, not yet decided, presented substantially the same questions. There is at least some reason to doubt,
therefore, whether the Supreme Court even considered the unique pre-emption problems involved in the Right to Work area. As long as this doubt exists—as long as it is possible that in a later case, with the issues more clearly presented to the Court, *Farnsworth* and *DeVries* might be overruled or distinguished—these cases will fail to settle the law of pre-emption in the Right to Work area.

**III**

B. **Appellate Review of New Trial Motions in State FELA Cases**

In *Deen v. Hickman* the Supreme Court made its second per curiam disposition of a case arising in the Texas state courts under the Federal Employer's Liability Act. The plaintiff, a coppersmith working in a roundhouse of the defendant Gulf, Colorado & Santa Fe Railway Co., had his leg broken when it was hit by babbitt falling from a melting pot. The jury answered special interrogatories and rendered a general verdict in favor of the plaintiff. The judgment on the verdict was reversed on appeal and judgment entered for the defendant railroad, but the United States Supreme Court, in the first per curiam decision, reversed the appellate court, holding that there was sufficient proof of employer's negligence to sustain the jury's verdict for plaintiff. On remand the Texas Court of Civil Appeals decided that further consideration of the negligence issue was precluded by the Supreme Court's decision and affirmed the jury verdict on condition of a remittur by the plaintiff. The Texas Supreme Court then ordered the Court of Civil Appeals either to affirm the verdict as rendered by the jury, or to order a new trial if it felt that the verdict was against the weight of the evidence. However, the United States Supreme Court, in its

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70 358 U.S. 57 (1958).


72 Among the special interrogatories were the following: "Do you find from a preponderance of the evidence that the Defendant failed to furnish one or more additional men to Plaintiff, other than Snow, to assist Plaintiff in removing the babbitt from the melting pot at the time and on the occasion in question?" Answer: "No." "Do you find from a preponderance of the evidence that the Plaintiff Deen was negligent in failing to [ob]tain additional help to do the work he was doing at the time he received his injuries?" Answer: "Yes." Record from the District Court of Brown County, State of Texas, as printed in Petition for Certiorari filed June 25, 1956 with the United States Supreme Court. Plaintiff had attempted to remove the babbitt with the help of only one other man. Evidence was presented to the effect that the job could be safely done by four or five men, and no other method to do the job was provided by the defendant railroad. Considering the jury's answers to the above interrogatories it is difficult to see how the verdict for plaintiff could be justified. The Texas Court of Civil Appeals considered this factor, along with the insubstantial evidence when it reversed the trial court. The fact that the Supreme Court ignored this aspect of the case is not too surprising in light of its per curiam opinion in *Arnold v. Panhandle & S.F. Ry.*, 353 U.S. 360 (1957), in which it demanded affirmance of a verdict for the plaintiff in spite of the fact that every special interrogatory was answered in favor of the defendant.


second per curiam decision, held that the determination of the new trial issue was "foreclosed" by its earlier opinion.\footnote{Deen v. Hickman, 358 U.S. 57 (1958). The Court said that "[t]he determination of [the new trial] issue was foreclosed by Deen v. Gulf, Colorado and Santa Fe R. Co. supra."}

In recent years the Supreme Court has been highly sensitive to the danger of plaintiffs being deprived of their substantive rights under the FELA by state court procedure,\footnote{"The federal right cannot be defeated by the forms of local practice." Brown v. Western Ry. of Alabama, 338 U.S. 294, 296 (1949). Areas in which local practices must conform to federal practice include: burden of proof as to contributory negligence, Central Vermont Ry. v. White, 238 U.S. 507 (1915); presumptions involving burden of proof, New Orleans & N.E.R.R. v. Harris, 247 U.S. 367 (1918); allocation of factual issues between judge and jury, Dice v. Akron, C. & Y.R.R., 342 U.S. 359 (1952); conflict between general and special verdicts, Arnold v. Panhandle & S.F. Ry., 353 U.S. 360 (1957). Hill, \textit{Substance and Procedure in State FELA Actions—The Converse of the Erie Problem?}, 17 Ohio St. L.J. 384 (1956), concludes that the Court is applying an outcome determinative rule in FELA cases, much as federal courts are supposed to do as to state procedure when following the Erie doctrine in diversity cases. The author also concludes that states are required to hold federal type jury trials. Professor Hart, in \textit{The Relations Between State and Federal Law}, 54 Colum. L. Rev. 489 (1954), decries the reasoning of the Court which has argued from possible differences in result because of different procedure to a rule which seeks to eliminate these different procedures. While this criticism may be valid, it is not the purpose of this comment to attempt to show the correctness of the criticism. For the consideration of the present cases, rather, it accepts the apparent trend of the Court's opinions.} and on one occasion it stated that the state courts fail to realize the special nature of FELA actions.\footnote{State courts fail to "take into account the special features of this statutory negligence action that make it significantly different from the ordinary common law negligence action. \ldots." Rogers v. Missouri Pac. R.R., 352 U.S. 500, 509–10 (1957).} Thus, the Supreme Court has established the rule that judicial interference with the jury function by means of directed verdicts\footnote{Wilkerson v. McCarthy, 336 U.S. 53 (1949).} and judgments notwithstanding the verdict\footnote{Myers v. Reading Co., 331 U.S. 477 (1947).} will seldom be tolerated. Similarly, appellate courts are not allowed to achieve by reversal what the trial courts cannot accomplish in the first instance.\footnote{Lavender v. Kurn, 327 U.S. 645 (1946).} "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear."\footnote{\textit{Id.} at 653. The Supreme Court has gone to great lengths to insure that its concept of the evidence sufficient to require submission of the case to the jury or to sustain a jury verdict in FELA cases be applied in the lower courts. See Appendix B to Justice Frankfurter's dissent in Ferguson v. Moore-McCormack Lines, 352 U.S. 521, 524 (1957).} It is only natural, then, that the Court should be concerned with the state practice of ordering new trials.\footnote{This comment deals only with the power of appellate courts to order a new trial where it is alleged the verdict was against the weight of the evidence. It does not deal with this power when other errors such as admission of improper evidence or the making of inflammatory remarks is alleged. This comment does not deal with the closely analogous questions of the power of the trial court to order a new trial or of the power of appellate courts to review a trial court order for a new trial.} Although to a lesser degree, it is clear that this practice, like those mentioned above, can deprive a plaintiff of the benefits of a favorable jury verdict.
Previous to *Deen v. Hickman* the Supreme Court had reversed a state order for new trial in an FELA case only once, and because of the strange state procedure involved in that case it is not clear that the Court faced the issue even then. In *Harsh v. Illinois Terminal R.R.*\(^6\) the Court, after the Illinois Supreme Court denied plaintiff's petition for leave to appeal, reversed the Illinois Appellate Court which had reversed a judgment entered upon a verdict for the plaintiff. In a two sentence per curiam opinion the Court rested solely on the authority of *Lavender v. Kurn*,\(^6\) a case involving a reversal of a judgment without a remand for a new trial. The Supreme Court did not discuss the contention, vigorously pressed by counsel for the railroad, that, unlike directed verdicts, judgments n.o.v. and reversals by appellate courts, the grant of a new trial did not deny the employee's right to a jury trial.\(^8\) After the appellate court reversed the judgment on the verdict and remanded for a new trial, the plaintiff, desiring an immediate appeal to the Illinois Supreme Court, invoked an Illinois procedural rule\(^8\) under which he waived the new trial and accepted instead an adverse judgment. It is quite possible, then, in view of the fact that there was a final judgment against the plaintiff at the time the Supreme Court heard the case and further, that the Court cited a case not involving the new trial issue as authority, that the Court viewed *Harsh* as a case in which the judgment on the verdict was reversed, with no new trial issue involved.\(^8\)


\(^8\) "Judgment reversed. Lavender v. Kurn, 327 U.S. 645," 348 U.S. 940 (1955). The *Lavender* case, as decided by the Supreme Court, did involve only a reversal without remand. However, subsequent to this decision the Missouri Supreme Court ordered a new trial on the ground that some evidence was improperly admitted, Lavender v. Kurn, 355 Mo. 168, 195 S.W.2d 460 (1946). The United States Supreme Court denied a motion to issue a writ of mandamus to the Missouri court, the petitioner arguing that the Court's earlier decision required a reinstatement of the jury verdict, Lavender v. Clark, 329 U.S. 674 (1946), and certiorari was denied for lack of a final judgment, 329 U.S. 762 (1946). The Supreme Court in the *Lavender* case did, however, lay down a general rule as to the reviewing power of appellate courts that could be read as applying to the ordering of a new trial as well as a pure reversal. "But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." Lavender v. Kurn, 327 U.S. 645, 653 (1946). The action of the Supreme Court in *Deen v. Gulf, C. & S.F. Ry.,* 79 S. Ct. 725 (1959), would indicate that this language cannot be taken completely at its face value because the Court refused to disturb the remittitur ordered by the Texas Civil Appeals Court.


\(^8\) Ill. Rev. Stat. ch. 110, § 75(2)(c) (1953).

\(^9\) The Illinois Supreme Court in *Bowman v. Illinois Cent. R.R.,* 11 Ill.2d 186, 142 N.E.2d 104 (1957), which arose upon procedural facts parallel to those in *Harsh*, followed what it thought was the implication of *Harsh*. It reinstated a judgment based upon a jury verdict, reasoning that "contrary to the determination of the Appellate Court the scope of review of a jury verdict in a [FELA] case is governed by Federal law and is limited to determining whether there is an evidentiary basis for the jury verdict. . . ." *Id.* at 215, 122 (Per curiam
Deen v. Hickman is of interest, then, because it is the first case in which the Supreme Court necessarily determined the power of state appellate courts to order new trials in FELA actions. Not only is the Texas procedure not open to the same ambiguity as was the Illinois procedure in Harsh, but Deen reached the Supreme Court in such a way as to preclude the possibility that the Court's decision rested on nothing more than an independent survey of the evidence and a finding that the verdict was not contrary to the evidence. In Deen the Court relied exclusively upon their findings in the first decision of the case, which dealt with the appellate court's reversal. Thus the Court found that its determination of the sufficiency of the evidence to go to the jury was enough to foreclose a new trial, and it did not make a separate finding upon the new trial issue.

The most likely interpretation of Deen v. Hickman is that the Supreme Court meant to restrict the review power of state appellate courts to determining merely whether there was enough evidence upon which the jury could reasonably find for the plaintiff. In its first review of the Deen case the directed verdict issue was the only matter decided by the Supreme Court because that was the only issue before the Court. In the second per curiam decision the Court stated that its earlier decision precluded the Texas courts from examining the verdict from a new trial standard. An obvious inference, then, is that the directed verdict review is the only review open to the appellate courts. The major difficulty with accepting the view that the appellate courts are restricted to applying a directed verdict standard when reviewing evidence is that it ignores the traditional right of appellate courts to review the rulings of trial courts on new trial motions.

An alternative interpretation of Deen, although not one clearly indicated by the Court's reliance on its first decision on the case, is that the Court felt that the state court was applying an improper test in reviewing the new trial motion. The Harsh case is also open to this interpretation and in both Harsh and Deen the standard involved was one of reviewing the weight of the evidence. While

decision on reargument.) Thus the state supreme court felt constrained to hold that state appellate courts in FELA cases have no power to order new trials if there is enough evidence to preclude a directed verdict.

See note 77 supra.

An appeal from the denial of a new trial was before the Texas Court of Civil Appeals when it rendered the judgment n.o.v., but they said it did not have to reach the new trial issue because of its decision. Gulf, C. & S.F. Ry. v. Deen, 275 S.W.2d 529, 536 (Tex. Civ. App. 1955). The Supreme Court, in its reversal of the decision, merely remanded the case and did not, as it did in Rogers v. Missouri Pac. R.R., 352 U.S. 500 (1957), indicate that it was deciding all issues raised before the lower court but not decided by it.

Ibid.

such a standard may be permissible in the usual state trial, depending upon the particular constitution and procedure of each state, because of the peculiar nature of the FELA suit, the Supreme Court may be requiring a different standard in actions under this federal statute. As the *Harsh* and *Deen* cases do not indicate what, if any, standard should be used in reviewing motions for new trial, the state courts must determine what this standard is without such guides.

In the search for the appropriate test to be used in FELA cases, the state courts must be mindful of the Supreme Court's expression that uniformity of application of the FELA in state and federal courts is necessary. In view of the Court's insistence that the parties have the fullest benefit of a jury trial, the aforementioned uniformity must extend to the various means by which judges control jury verdicts. Of these controls the power to order a new trial is prominent. The FELA does not establish the extent to which this control may be exercised by trial or appellate courts, and the Supreme Court has not yet articulated a standard which would give guidance to state courts dealing with federally created rights as to what forms of jury control are consistent with the federal right and which are not. As a consequence the state courts must seek elsewhere for a guide as to the permissible control over the jury which the courts may exercise. While the Court has not held that state courts must grant a federal type of jury trial it would seem reasonable that if the state courts restrict themselves to those controls exercised by the federal courts, at least until the Court establishes a rule for FELA cases, they can exercise such controls without fear of being reversed by the Supreme Court for infringing upon the right to a jury trial granted by the statute.

The right to a jury trial in the federal courts derives, of course, from the seventh amendment. This same amendment also circumscribes review of jury verdicts by the courts. To find an indication of the allowable review, therefore, reference must be made to the English practice at the time of the adoption of the amendment. This practice contemplated that trial courts, in cases at law, review jury findings of fact and set aside verdicts and order new trials where

94 "Should this Court fail to protect federally created rights from dismissal because of over-exacting local requirements for meticulous pleadings, desirable uniformity in adjudication of federally created rights could not be achieved." Brown v. Western Ry. of Alabama, 338 U.S. 294, 299 (1949). "Only by a uniform federal rule as to the necessary amount of evidence may litigants under the federal act receive similar treatment in all states." Brady v. Southern Ry., 320 U.S. 476, 479 (1943).


96 Minneapolis & St. L. Ry. v. Bombolis, 241 U.S. 211 (1916), held that the seventh amendment did not apply to state courts even when enforcing federally created rights. However, Hill, *op. cit. supra* note 78, at 393, concludes that the tendency of recent decisions is to compel states to conduct jury trials substantially similar to the manner in which they are conducted in the federal courts. Cf. Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958).

97 "[N]o fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the Common Law."
the verdict was unreasonable or unjust in the particular case. This was not regarded as an invasion of the jury function but only as a common sense limitation upon a power that could be abused. The practice in the federal trial courts has consistently involved the use of the new trial for the same purpose—to avoid injustice in jury verdicts.

The appellate courts in the federal system are usually said not to have the power to weigh factual issues in reviewing the grant or denial of a new trial because of the prohibition of the seventh amendment. However, the Constitution does not preclude completely all appellate review because of the nature of the new trial motion at the trial level. A motion for a new trial is addressed to the discretion of the trial court. Thus the only possible review by the appellate court is of the exercise of the judicial discretion. Since the exercise of this discretion is considered a legal rather than a factual matter, review of the trial court's action does not violate the constitutional prescription of review of the facts.

Stated as a general rule then, federal appellate courts are said to have the power to review the exercise of judicial discretion in the trial court's treatment of the new trial motion. Before such a standard can unhesitatingly be applied to FELA cases, however, it must be determined whether the special nature of the FELA suit required a different standard. That such might be the case is suggested by certain language in Rogers v. Missouri Pac. R.R. This case indicated that the remedial nature of the FELA is such that any case arising under that act is significantly different from an ordinary common law negligence action. It is possible that the actions of the Supreme Court in Harsh and Deen were intended to show that the restriction upon appellate review of the new trial motion is one of the instances in which an FELA action is significantly different from an ordinary negligence action, both in the state and federal courts. This possibility is weakened, however, by the fact that in Neese v. Southern Ry., an FELA case prosecuted in the federal courts, the Supreme Court reversed a Court of Appeals order awarding a new trial without indicat-

99 Ibid.
102 Id. at 59.08 [6].
103 Moore, op. cit. supra note 102.
105 350 U.S. 77 (1955). McBride v. Toledo Terminal R.R., 354 U.S. 517 (1957), would indicate that there is no special rule in FELA cases for the ordering of a new trial by trial courts. In this case the trial court had given judgment n.o.v. and awarded a new trial in the alternative. The Supreme Court did not allow the judgment n.o.v. to stand but did not disturb the alternative new trial order.
ing in any way that FELA cases require a different standard than do other negligence cases.

Although the state courts in *Harsh* and *Deen* phrased the standard for reviewing the denial of the new trial motion in terms of the weight of the evidence, it seems clear that the courts were not, in fact, stating the applicable standard of review but rather the grounds upon which the trial court should have ordered a new trial. The authority of the intermediate appellate courts in Illinois and Texas to order a new trial is established by statute in the former and by the constitution in the latter. In each, the intermediate appellate court is given the same authority as the trial court, which, in the present circumstances, extends to the ordering of a new trial whenever the verdict is against the manifest weight of the evidence. However, the declarations of many courts in both states make it clear that the intermediate appellate courts do not reverse the trial court's ruling on the new trial motion unless the trial court abused its discretion in the disposition of the matter.

The "weight of the evidence" phrase becomes involved because it is in these terms that the trial court is requested to order a new trial. The use of this same phrase by the appellate courts in reviewing such a motion does not mean that the court is exercising the same privilege as the trial court in reviewing the weight of the evidence; rather, it is merely reviewing the trial court's disposition of a motion seeking the overturning of a verdict allegedly against the weight of the evidence.

Even if the state courts actually were making an independent testing of the evidence, the proper correction is not to deny completely to these courts the right to review the denial of a new trial, but merely to indicate the proper standard for such a review. For the sake of uniformity in the application of the statute in state and federal courts it would seem reasonable to insist that jury

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106 In Illinois the powers of the appellate court are set out in Ill. Rev. Stat. ch. 110, § 92 (1) (1957): "In all appeals the reviewing court may... (e) Give any judgment and make any order which ought to have been given or made...." § 92 (3) (b): "Error of fact, in that the judgment, decree or order appealed from is not sustained by the evidence or is against the weight of the evidence, may be brought up for review in any civil case...." The reviewing power of the Texas Court of Civil Appeals is established by Tex. Const., art. 5, § 6. "[T]he decision of said courts shall be conclusive on all questions of fact brought before them on appeal or error." This provision was interpreted by the Texas Supreme Court in *Deen* to give to the Court of Civil Appeals the same power that the trial court has to weigh the evidence and order a new trial. Gulf, C. & S.F. Ry. v. Deen, 312 S.W.2d 933, 937 (Tex. 1958).

verdicts in both systems be tested by the same standard. Such a result is achieved by permitting such review according to the abuse of discretion rule. To go further is either to place upon state courts a more limited review than the federal courts, or to require that the two systems adopt a more restrictive rule than exists in any other type of case. Neither rule would appear to be required to achieve the purposes sought by the statute.

IV

C. FEDERAL CRIMINAL PROCEDURE: CUMULATIVE SENTENCING

In enacting penal legislation, Congress has often made a single transaction violative of several different statutory provisions.108 The legislators, however, seldom have indicated whether punishment for the consummated act precludes separate punishment for the individual phases of the proscribed conduct. The Supreme Court has often been faced with the issue of whether cumulative sentencing resulting from conviction for multiple offenses arising out of a single transaction or fact situation violates either the legislative intent of Congress or the double jeopardy provision of the fifth amendment.

Four cases decided by the Supreme Court in the 1958 Term dealt with the vexatious problem of cumulative sentencing. In two of the cases, Ladner v. United States109 and Heflin v. United States,110 the Court struck down consecutive sentences. In one case, Harris v. United States,111 such sentences were upheld. And in the fourth case, Woody v. United States,112 decided per curiam by an equally divided court,113 consecutive sentences were upheld. Notwithstanding the difficulties in comprehending the import of a per curiam decision rendered without citation by an equally divided court, Woody may shed light on the Supreme Court's recent treatment of cumulative sentencing.

Petitioner, Woody, had been indicted under the National Motor Vehicle Theft Act for the separate offenses of transporting a stolen automobile in interstate commerce114 and of receiving and concealing the same vehicle.115 Independ-


113 Justice Stewart did not sit. As Judge Stewart he had heard the case and written the opinion for the Sixth Circuit. Woody v. United States, 258 F.2d 535 (1957).

114 "Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both." 18 U.S.C. § 2312 (1958).

115 "Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both." 18 U.S.C. § 2313 (1958).
ent violation of each provision is punishable by a fine of $5,000, imprisonment
for five years, or both. Having been found guilty of both offenses, Woody re-
ceived two five year sentences to be served consecutively. The Court of Appeals
for the Sixth Circuit denied leave to appeal in forma pauperis from both the
convictions and the cumulative sentences. On certiorari to the Supreme
Court, the decision of the Court of Appeals was affirmed per curiam by an
equally divided court.

Cumulative sentencing may be attacked as either contrary to the congres-
sional purpose in enacting the particular penal legislation or violative of the
fifth amendment's protection against double jeopardy. It seems clear, how-
ever, that the double jeopardy contention carries little weight with the Court.
As early as 1927 the Court stated:

There is nothing in the Constitution which prevents Congress from punishing sepa-
rately each step leading to the consummation of a transaction which it has power to
prohibit and punishing also the complete transaction. Until recently, the Court's treatment of the contention that statutory interpre-
tation precluded cumulative sentencing met with little better fate than the
double jeopardy contention. The Court applied a "same evidence" test to
both contentions. Basically, the test stands for the proposition that
when the same act or transaction violates a number of distinct statutory provi-
sions, the determinant of whether one or more crimes have been committed
rests upon the dissimilarity of the evidence required to establish each offense.
Thus, if conviction under both statutory provisions does not require proof of
identical facts, neither the Constitution nor legislative intent is considered
violated by multiple prosecution and cumulative sentencing.

Recent decisions, however, evidence a changed judicial attitude regarding
multiple convictions and cumulative sentencing. In United States v. Universal
C.I.T. Credit Corp. the Supreme Court held that a series of payments to em-

118 Woody v. United States, 258 F.2d 535 (6th Cir. 1957).
120 In United States v. Michener, 331 U.S. 789 (1946), the Court, in a per curiam decision
reversed the Court of Appeals, 157 F.2d 616 (1946), and reinstated convictions and cumulative
sentences for making a plate to produce counterfeit and for possessing that plate. Appellant's
contention that he could not have made the plate without having it in his possession was of
no avail. The Court relied on Blockburger v. United States, 284 U.S. 299 (1932); see note
120 infra.
121 The leading case involving the "same evidence" test is Blockburger v. United States,
284 U.S. 299 (1932). The Court held that a single sale of morphine violated two provisions
of the Harrison Narcotics Act, 38 Stat. 785 (1914), as amended, 40 Stat. 1037, 1131 (1919);
and 38 Stat. 786 (1914). Cumulative sentences were upheld on the ground that each of the
offenses required proof of a different element.
122 344 U.S. 218 (1952).
ployees below the minimum set by the Fair Labor Standards Act\textsuperscript{122} constituted only a single criminal violation of that act rather than multiple offenses determined by the number of employees and the number of weeks in which underpayment occurred. Then in \textit{Bell v. United States},\textsuperscript{123} the Court held that the simultaneous transportation of more than one woman in interstate commerce in violation of the Mann Act\textsuperscript{124} constituted only a single offense under that act.

Both \textit{Universal} and \textit{Bell} might be distinguished from the prior decisions on the ground that they involved contemporaneous violations of only one statutory provision. The rationale in \textit{Bell}, however, that "if Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses,"\textsuperscript{125} found expression in the subsequent decision of \textit{Prince v. United States}.\textsuperscript{126} In \textit{Prince} the Court dealt with the propriety of cumulative sentencing under the Federal Bank Robbery Act.\textsuperscript{127} Prince, having been indicted and convicted for the separate offenses of entering a bank with the intent to commit robbery and of robbery, was sentenced to fifteen years for entering and twenty years for robbery; the sentences to be served consecutively. Remanding the case to the district court for purposes of resentencing, the Court held that Prince could be sentenced only on the conviction for the robbery count. Two rationales prompted this result. First, the Court inferred from the wording of the Act that "the unlawful entry provision was inserted to cover the situation where a person enters a bank for the purpose of committing a crime, but is frustrated for some reason before completing the crime."\textsuperscript{128} Consequently, the unlawful entry provision merged in the consummated crime of robbery. Second, the Court, mindful of the inconclusive legislative history of the Bank Robbery Act reiterated its policy announced in \textit{Bell} of "not attributing to Congress, in the enactment of criminal statutes, an intention to punish more severely than the language of its laws clearly imports. . . ."\textsuperscript{129}

Both \textit{Ladner}\textsuperscript{130} and \textit{Heflin},\textsuperscript{131} decided in the 1958 Term, relied on the policy of lenity established in the \textit{Bell} and \textit{Prince} decisions. As in the earlier cases, \textit{Ladner} presented a situation where the language and the legislative history of a statute were less than definite. Petitioner had been convicted of assaulting two federal officers with a deadly weapon in violation of a federal statute which prohibited interference with federal officers engaged in official duties.\textsuperscript{132} Having

\begin{footnotes}
\item[123] 349 U.S. 81 (1955).
\item[125] 349 U.S. 81, 84 (1955).
\item[126] 352 U.S. 322 (1957).
\item[128] 352 U.S. 322, 328 (1957).
\item[129] \textit{Id.} at 329.
\item[130] See note 109 \textit{supra}.
\item[131] See note 110 \textit{supra}.
\end{footnotes}
wounded the two officers with one blast from his shotgun, Ladner received a ten year sentence for each assault, the sentences to run consecutively. Certiorari was granted, and an equally divided Court in a per curiam decision upheld the sentences. Upon reargument the Court vacated its prior judgment and held that, in the absence of a clear expression by Congress to the contrary, Ladner's single wrongful act did not constitute more than one offense under the statute. Heflin, as Prince, involved multiple convictions and cumulative sentencing under the Federal Bank Robbery Act. Having been convicted of taking property of a bank by force and violence, of receiving the property so stolen, and of conspiracy to violate the Act, petitioner was sentenced to consecutive terms of imprisonment for each conviction. Due to apparent conflict with Prince and in response to Heflin's contention that he could not be lawfully convicted of receiving and feloniously taking the same property, the Supreme Court granted certiorari. Reversing the conviction for "receiving" the Court held that the legislative history of the statute indicated that the "receiving" provision of the statute was meant to provide punishment only for the person who subsequently obtained the stolen property; it was not meant to increase the penalties imposed on the thief.

Notwithstanding the Harris decision which seems to indicate that the Court is less critical of cumulative sentencing in cases involving violation of the federal narcotics laws, the division of the Court in Woody appears curious in light of Bell, Prince, Ladner and Heflin. The legislative history of the Motor Vehicle Theft Act suggests two possible interpretations of the "receiver" provision. The House debates imply that the purpose of the "receiver" provision was to punish the individual who received the vehicle from the "transporter".

Cases involving cumulative sentencing for violation of federal narcotics laws have generally followed the decision in Blockburger v. United States, note 120 supra. In Gore v. United States, 357 U.S. 935 (1958), the Court held the Gore decision controlling. In Harris, the question of cumulative sentences under § 4704(a) of the Internal Revenue Code and § 2(c) of the Narcotic Drugs Import and Export Act was again before the Court. The Court held the Gore decision controlling.

"It provides, gentlemen, for only two things. Section 3 [the present section 2312] provides for the punishment of a thief stealing a car and transporting it from one State to another. Section 4 [the present section 2313] provides for the receipt of the stolen car by thieves in another State for the purpose of selling and disposing of it." 58 CONG. REC. 5472 (1919) (remarks of Congressman Dyer who proposed the bill).
similar to the interpretation placed upon the "receiver" provision of the Bank Robbery Act in *Heflin.* From the Senate debates, on the other hand, it appears that the "receiver" provision was intended to fill up the interstices which might not have been covered by the "transporter" provision. Although such an interpretation would mean that the "receiver" and "transporter" provisions cover the same persons, there is no indication in the legislative history that an individual violating both sections was to be subjected to double confinement.

Since counsel for petitioner brought this ambiguous legislative history to the Court's attention, it would appear that the import of *Woody* is that at least four members of the Court are unwilling to extend the rationale of the *Prince* decision outside of the area of the Federal Bank Robbery Act. In his opinion for the Court of Appeals in *Woody,* Justice Stewart, then Judge Stewart, expressly restricted the application of *Prince* to the statute involved. It would appear, however, that *Ladner,* in which only Justice Clark dissented, does represent such an extension of *Prince,* at least to the extent that the Court there followed its policy, first announced in *Bell,* of determining the validity of multiple conviction and cumulative sentencing in favor of the defendant unless either the statutory language or legislative history reveals a Congressional intent to the contrary. Thus, it would seem that the mechanical "same evidence" test (in spite of *Bell,* *Prince* and the subsequent decisions,) still retains vitality in areas other than the limited one of narcotics violation.

V

D. FEDERALISM AND THE RIGHT AGAINST SELF-INCrimINATION

The right of an individual to avoid self-incrimination in a jurisdiction other than that in which he is testifying may have been restricted by the Supreme Court in its summary disposition of *Mills v. Louisiana.* In a Louisiana grand jury hearing, held in connection with an investigation of bribes allegedly given to members of the New Orleans Police Department by petitioners and others,

141 The general interpretation of statutes punishing receivers of stolen goods is that such statutes do not authorize punishment for the thief. See *Perkins, Criminal Law* 276 (1957). In *People v. Bigley,* 178 Misc. 552, 554, 35 N.Y.S.2d. 130, 133 (Sup. Ct. 1942), the court stated that: "To say that one can feloniously again receive from himself to himself what he has already feloniously acquired by himself and taken unto himself is an absurdity." It would appear that under the Motor Vehicle Act the "transporter" occupies an analogous position to that of a thief. Punishment for both "transporting" and "receiving" would seem contrary to Congressman Dyer's explanation of the bill. See note 140 supra.

142 "The practice is to steal an automobile close to a State line and run it across the State line. The first section is intended to punish anyone who does that thing, knowing the vehicle to have been stolen. The further practice is, if possible, to dispose of the vehicle to some other party, confederate or otherwise, when it gets across the State line, and section 4 is for the purpose of punishing a man who barters or sells or disposes of the property with intent to deprive the owner of the possession thereof, or if he conceals it knowing it to have been stolen. I think that would probably embrace every case that could be reached." 58 Cong. Rec. 6434 (1919) (remarks of Senator Cummins).

143 *Woody v. United States,* 258 F.2d 535, 537 (6th Cir. 1957).

petitioners were ordered to answer questions put to them by the District Attorney for the Parish of Orleans. Although offered the appropriate immunity from state prosecution,\textsuperscript{14} they refused to answer, contending that they were in immediate danger of prosecution for tax evasion by the federal government and that federal agents had collaborated and cooperated with the state investigating officials. For this refusal the Criminal District Court of the Parish of Orleans adjudged them guilty of contempt of court. The Supreme Court of Louisiana rejected applications for writs of certiorari, mandamus and prohibition.\textsuperscript{146} The Supreme Court affirmed the convictions, citing only Knapp v. Schweitzer.\textsuperscript{147}

Since the decision of Feldman v. United States\textsuperscript{148} it has been clear that testimony compelled in a state proceeding can be used against the witness in a subsequent federal prosecution unless "a representative of the United States is a participant in the extortion of such evidence."\textsuperscript{149} The witness would be protected could he refuse to testify in the state proceeding by asserting his federal right against self-incrimination. This was attempted by the petitioner in Knapp v. Schweitzer\textsuperscript{146} but the Supreme Court found the Fifth Amendment inapplicable to this situation and affirmed the contempt conviction. The Court applied and expanded the "two sovereignties doctrine," which disregards jurisdictions other than that in which the testimony is sought to be compelled in determining what immunity need be given.\textsuperscript{151}

\textsuperscript{14} LA. Const. art. 19, § 13 (1921); LA. Rev. Stat. ch. 14, § 121 (1950); LA. Rev. Stat. ch. 15, § 468 (1930).
\textsuperscript{146} Record, No. 74, p. 97; No. 75, p. 51, Mills v. Louisiana, 360 U.S. 230 (1959).
\textsuperscript{147} 357 U.S. 371 (1958).
\textsuperscript{148} 322 U.S. 487 (1943).
\textsuperscript{149} Id. at 492. In noting this exception to the general rule of admissibility of evidence, the Court in Feldman relied on Byars v. United States, 273 U.S. 28 (1927), a search and seizure case under the Fourth Amendment.
\textsuperscript{151} 357 U.S. 371 (1958).

The doctrine emphasizes the separate and independent natures of state and federal governments in determining the scope of protection against self-incrimination. Testimony may be compelled in a federal tribunal as long as complete immunity from federal prosecution is afforded, regardless of the likelihood of state prosecution. United States v. Murdock, 284 U.S. 141 (1931); Hale v. Henkel, 201 U.S. 43 (1906). The doctrine had its beginning in decisions put on the ground that the testimony sought to be compelled was unlikely to be used in a prosecution in another jurisdiction. Brown v. Walker, 161 U.S. 591 (1896) (witness fearing state prosecution refused to answer questions before a federal tribunal); Jack v. Kansas, 199 U.S. 372 (1905) (witness fearing federal prosecution refused to answer questions before a state tribunal). Two early decisions exonerated witnesses from testifying in a federal proceeding when a state prosecution appeared likely. Balmann v. Fagin, 200 U.S. 186 (1905); United States v. Saline Bank of Virginia, 26 U.S. (1 Pet.) 100 (1828). The "two sovereignties" doctrine is evaluated and its evolution traced in a series of articles by Professor J. A. C. Grant. Grant, Immunity from Compulsory Self-Incrimination in a Federal System of Government, 9 Temp. L.Q. 57 (1934); Grant, Federalism and Self-Incrimination, Part I, 4 U.C.L.A. L. Rev. 459 (1957); Grant, Federalism and Self-Incrimination, Part II, 5 U.C.L.A. L. Rev. 1 (1958). Professor Grant criticizes the Court's use of its prior decisions in developing this doctrine on several grounds. Among these is the failure to distinguish between the case of a witness in a state court who fears federal prosecution and that of a federal court witness fearing state prosecution. These situations would seem to involve very different constitutional problems.
The Court in *Knapp* restricted the applicability of its decision to situations involving no participation of federal agents in the state proceeding. "Whether, in a case of such collaboration between state and federal officers, the defendant could successfully assert his privilege in a state proceeding, we need not decide, for the record before us is barren of evidence that the State was used as an instrument of federal prosecution or investigation." It seems strange that in the *Mills* case the Court regarded *Knapp* as controlling since, as is pointed out by Chief Justice Warren in one of two dissenting opinions, *Mills* would appear to present the precise question which the *Knapp* Court expressly refused to decide.

The claim of the petitioner in *Knapp* of federal and state collaboration was based on a statement of the United States Attorney that he intended to cooperate with the District Attorney in the prosecution of federal offenses which arose out of the subject matter being investigated by the state. It would seem that the petitioners in the *Mills* case had a more impressive case of federal-state collaboration. The case came up on a stipulation of facts agreed to by counsel for both respondent and petitioners. Included in the stipulation was the following.

That there has existed, and now exists, close cooperation and collaboration between the District Attorney for the Parish of Orleans and the United States Attorney for the Eastern District of Louisiana and the Internal Revenue Service of the United States of America and its investigators, as well as with the Police Bureau of Investigation of the City of New Orleans in reference to members of the New Orleans Police Department regarding public bribery and income tax evasion. . . .

It was further alleged and admitted that the petitioners were then under investigation by the United States Department of Internal Revenue and that they had been required by this department to sign waivers extending the period of limitations for assessment of back income and profits taxes. The statutory period of limitations for a prosecution for tax evasion had not lapsed.

The per curiam affirmance of the Louisiana contempt conviction, citing only *Knapp*, leaves unclear the position the Court was taking. Most probably, the Court felt the *Mills* record was as barren of evidence of cooperation and collaboration as that in *Knapp* and, therefore, found the cases to be on all fours.

152 357 U.S. at 380.

153 The other, by Mr. Justice Douglas, argues that *Knapp* was wrongly decided and that the federal right against self-incrimination must be protected in all courts. A few state courts have accomplished this themselves by interpreting their state constitutions to guarantee protection from both state and federal self-incrimination. State *ex rel.* Mitchell v. Kelly, 71 So. 2d 887 (Fla. 1954); People v. Den Uyl, 318 Mich. 645, 29 N.W.2d 284 (1947); *In re Cohen*, 295 Mich. 748, 295 N.W. 481 (1940); *In re Schnitzer*, 295 Mich. 736, 295 N.W. 478 (1940); *In re Watson*, 293 Mich. 263, 291 N.W. 652 (1940). *Accord:* State *v.* Dominguez, 228 La. 284, 82 So. 2d 12 (1955); State *ex rel.* Doran v. Doran, 215 La. 151, 39 So. 2d 894 (1949).

154 Record, No. 74, pp. 46, 53; No. 75, p. 15.

155 Record, No. 74, pp. 44, 52; No. 75, p. 15.

In making such a finding, the Court might have found persuasive the respondent's argument that the stipulated cooperation was only "in reference to members of the New Orleans Police Department" and not necessarily to those who were thought to have bribed them. This limited interpretation of the stipulation is rendered somewhat implausible by the unchallenged existence of an investigation of petitioners by the United States Department of Internal Revenue. That the petitioners had been requested to, and did, sign consent waivers extending the period of limitation in regard to assessment of back taxes raises a strong inference that the cooperation of the federal officers in the state proceedings included the petitioners in its scope. A United States Attorney is not likely to acknowledge that he was attempting to take advantage of the doctrine recognizing a state's autonomy in order to further federal prosecutions. Taken as a whole, the evidence in *Mills* presents as close an approximation of such an acknowledgement as a case is likely to present. If the Court found this evidence inadequate, it seems to have so narrowed the category of collaboration cases as to make it virtually non-existent.

In view of the harshness of this result it may not be amiss to consider an interpretation of the *Mills* case other than that directly suggested by the citation of *Knapp*. It is possible that the Court believed this was a case of federal-state collaboration but affirmed the convictions because it felt that the proper time for the petitioners to object would be at the predicted subsequent federal prosecution. Under this interpretation the case would stand for the principle that a witness, if offered immunity from state prosecutions, must testify at the state level regardless of the existence of federal-state collaboration. Proof of collaboration, however, would render the compelled testimony inadmissible in a subsequent federal proceeding. This explanation of *Mills* is suggested by the dissent of Mr. Justice Douglas. Douglas' insistence that the federal right could be asserted in the state proceeding may be an indication that the majority of the Court felt the right more properly invoked in a federal tribunal. The principle suggested by this interpretation of the *Mills* case is not in conflict with *Feldman v. United States* in which compelled testimony was admitted in a subsequent federal trial, since the *Feldman* decision explicitly excepted cases of federal-state collaboration. There would, however, be practical difficulties in protecting an individual from self-incrimination in this way. It has long been accepted that the Fifth Amendment protects witnesses not only from the introduction of compelled testimony at a subsequent trial but also from the use of any "derivative" evidence which was discovered only because of the compelled testimony of the witness. 

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157 Record, No. 74, pp. 46, 53; No. 75, p. 15.

158 "It is, therefore, too late to protect the federal right if one waits for action by the federal court. The federal right is lost irretrievably, if it is not saved by the state court." 360 U.S. at 238 (Douglas, J., dissenting). (Italics in original.).

159 322 U.S. 487 (1943).

160 Text accompanying note 149 *supra*. 
testimony. There would be rather complex problems of proof at the federal trial in determining whether or not evidence had been "derived" from the compelled testimony. To attach this meaning to the Mills case is, of course, to engage in unsubstantiated speculation, since the bare citation of the Knapp case would seem a strange way for the Court to indicate its acceptance of such a principle. Speculation of this sort is perhaps unavoidable, however, when the Court disposes of cases involving complex issues in one sentence per curiam opinions. The Mills decision leaves in doubt the type of protection, if any, which is to be afforded an individual against federal use of state machinery to obtain compulsory testimony.

VI

E. NEWSPAPERS AND THE FEDERAL JUDICIARY

In Marshall v. United States the Court granted a new trial to petitioner, who had been convicted of unlawfully dispensing certain drugs without a prescription from a licensed physician. During the trial some of the jurors had read newspaper articles stating that Marshall had a past criminal record. This evidence, originally offered by the prosecutor to refute a defense of entrapment, had been rejected by the trial judge as prejudicial to defendant.

161 Counselman v. Hitchcock, 142 U.S. 547 (1892).
162 But it would seem that cases involving federal-state collaboration would normally justify disallowance of a wide range of evidence as "derived."
163 360 U.S. 310 (1959), reversing 238 F.2d 94 (10th Cir. 1958).
165 The Supreme Court denied certiorari on the issue of entrapment, 358 U.S. 892 (1958). Certiorari was granted only on the question of "Whether a defendant in a criminal trial to a jury is denied a fair trial when members of the jury during the course of the trial read newspaper articles which state that the defendant has a record of two previous felony convictions and recite other defamatory matter." Ibid.

The issue of entrapment previously divided the court in all three cases in which it has been the ground of decision. In Sorrells v. United States, 287 U.S. 435 (1932), Chief Justice Hughes, writing for the majority, and Justice Roberts, writing for the three concurring justices, disagreed on the nature of entrapment; on whether its source is statute or public policy, on whether it is a question for the court or the jury, and on the evidence the government may introduce to refute it. The Court divided on the same questions in two 1958 cases, Sherman v. United States, 356 U.S. 369 (1958), and Masciale v. United States, 356 U.S. 386 (1958). Chief Justice Warren, for the majority, followed the Hughes theory; Justice Frankfurter and three others urged the adoption of the Roberts theory.

Marshall v. United States is sufficiently similar to the Sherman case to raise the same entrapment issues once more. Marshall, like Sherman, relied on the evidence of a government witness for substantiation of his claim of entrapment. At Marshall's trial, the government offered evidence (which the judge refused to admit) of Marshall's past as tending to refute entrapment, and entrapment was submitted to the jury. The court of appeals in Marshall considered entrapment issues and interpreted Sherman to mean that entrapment is for the court when the defense depends on the undisputed testimony of a government witness. Perhaps the Court declined to consider entrapment again because it felt one year after Sherman and Masciale was too soon; perhaps the addition of Justice Stewart to the Court has not changed the division that appeared in those cases. Perhaps it is impossible to work out a logical system of rules governing entrapment. See Mikell, The Doctrine of Entrapment in the Federal Courts, 90 U. Pa. L. Rev. 245 (1942).
Though the jurors had assured the judge that the articles had not influenced them, and though appropriate instructions had been given, the Supreme Court held that the material was so prejudicial that it should not have reached the jurors, and the safeguards taken by the trial court were not adequate to remove the need for a new trial.

The Supreme Court long ago decided that a conviction is not automatically vitiated because jurors read newspaper comments on the case before them. But the trial court has discretion to determine whether exposure of jurors to newspaper comments on the case makes it necessary to discharge the jury before it has rendered a verdict or to grant a new trial. The trial court is to decide whether the independence and freedom of each juror, essential to a fair trial, is still present. Thus in deciding whether a fair trial has been impaired the lower federal courts followed two general principles: some newspaper articles are intrinsically not prejudicial because of their innocuous content; and even prejudicial material need not prevent conviction if the court is satisfied the jurors can resist its effects.

While many comments read by jurors have been held to be innocuous, there were cases prior to Marshall which held newspaper comments prejudicial. A juror's reading of a newspaper comment on defendant's refusal to testify, which neither court nor counsel could have pointed out in court, as well as a newspaper report that defendants had confessed, have been held in the federal courts to deny defendants a fair trial. It also had been held by the Supreme Court, in Mattox v. United States, that jurors' reading of an article which reported that defendant had been once before tried for his life was sufficiently prejudicial to call for a new trial. But the Court in Marshall chose not to rely on Mattox, a

172 Circuit courts have found no prejudice in accurate accounts of the trial, Tinkoff v. United States, 86 F.2d 868 (7th Cir. 1936), cert. denied 301 U.S. 689 (1937); see Madden v. United States, 20 F.2d 289 (9th Cir. 1927), cert. denied 275 U.S. 554 (1927), or in statements the newspapers said were merely assertions of the prosecution, McHenry v. United States, 276 Fed. 761 (D.C. Cir. 1921).
173 E.g., United States v. Leviton, 193 F.2d 848 (2d Cir. 1951), cert. denied 343 U.S. 946 (1952).
174 See cases cited in note 172 supra.
176 Griffin v. United States, 295 Fed. 437 (3rd Cir. 1924).
177 146 U.S. 140, (1892).
178 "It is not open to reasonable doubt that the tendency of that article was injurious to the defendant. Statements that the defendant had been tried for his life once before; that the evidence against him was claimed to be very strong by those who had heard all the
case which was clearly applicable; nor did the Court mention any of the other specific newspaper comments which have been held ground for a new trial. The Court rather stated its rule in the broadest terms: that a new trial should be granted because the jurors read information "of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence."\footnote{7}

Exactly what effect the Court's statement of the rule may have cannot, of course, be accurately stated. It may have influence on the conduct of prosecuting attorneys, for if the letter of the rule is to be followed, an offering of evidence which the trial judge rules prejudicial may, if the offered evidence finds its way into the newspapers, imperil the prosecution's case.

But if the full implications of \textit{Marshall} are realized a practical result may be closer supervision of juries. A Supreme Court case as early as 1851,\footnote{180} and subsequent circuit court decisions,\footnote{181} indicated that the effect of prejudicial material read by jurors could be cured if the judge received from the jurors assurances that they were not influenced,\footnote{182} followed by an instruction to disregard what had been read.\footnote{183} In \textit{Marshall} both these factors were present, and yet without discussing their relevance the Court ordered the new trial. That this silent reversal\footnote{184} makes some change in the law cannot be doubted. Many of the circuit court cases in which the juror's assurance and judge's instruction were said to cure prejudice are cases in which the reports also were held to be non-prejudicial.\footnote{185} But the judge's actions also have been considered effective in the

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\textit{testimony}; that the argument for the prosecution was such that the defendant's friends gave up all hope of any result but conviction; and that it was expected that the deliberations of the jury would not last an hour before they would return a verdict, could have no other tendency." 146 U.S. 140, 150 (1892). See also United States v. Ogden, 105 Fed. 371 (E.D. Pa. 1900).

\footnote{179} 360 U.S. 310, 312 (1959).
\footnote{180} United States v. Reid, 53 U.S. (12 How.) 361 (1851).
\footnote{181} See cases cited notes \footnote{182} and \footnote{183} infra.
\footnote{182} See Welch v. United States, 135 F.2d 465 (D.C. Cir. 1943); Shackow v. Gov't. of Canal Zone, 108 F.2d 625 (5th Cir. 1939); United States v. Wolf, 102 F. Supp. 824 (W.D. Pa. 1952).
\footnote{183} See United States v. Hirsch, 74 F.2d 215 (2d Cir. 1934).
\footnote{184} The Court was careful to preface its holding with the \textit{caveat}, "The trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial. Holt v. United States, 218 U.S. 245, 251. Generalizations beyond that statement are not profitable, because each case must turn on its special facts." Marshall v. United States, 360 U.S. 310, 312 (1959).
\footnote{185} That "each case must turn on its own facts" may foreshadow a possible future distinguishing of Marshall. Until such time, however, the "special facts" of Marshall—information ruled prejudicial by the trial judge, plus questioning of jurors and an instruction—will continue to require a new trial.

\footnote{186} Welch v. United States, 135 F.2d 465 (D.C. Cir. 1943); Shackow v. Gov't. of Canal Zone, 108 F.2d 625 (5th Cir. 1939); United States v. Hirsch, 74 F.2d 215 (2d Cir. 1934); Madden v. United States, 20 F.2d 289 (9th Cir. 1927); United States v. Wolf, 102 F. Supp. 824 (W.D. Pa. 1952).
face of admittedly prejudicial testimony. In *United States v. Postma*, newspapers printed exaggerated articles concerning the stabbing of a witness for the prosecution. The court did not deny the prejudicial nature of the stories, but declined to order a new trial on the ground that the judge had secured assurances from the two jurors who had read the stories that no prejudice had resulted and had admonished the jurors not to take the articles into account. The court considered the judge's actions crucial; for it distinguished a previous circuit court case on the grounds that in that case there was not the "forceful admonition of the judge" as in *Postma*.

*Marshall*, by failing to consider the effect of the trial judge's actions, is bound to have significant influence on the course of future trials. For its test is whether the newspaper article is prejudicial. If it is, no action by the trial judge can cure the prejudice. If the news report is not prejudicial it would seem that the trial judge's actions become less important. And placing paramount importance on the content of the article means that great precautions will have to be taken to prevent the news report from reaching the jury. This would necessitate closer supervision of juries; which, it has been argued, would be impractical for trials in large cities.

But though *Marshall* may have substantial effect on jury trials, the Court was careful to delineate the basis of its decision and to limit that effect to the federal courts. It had been unclear in previous cases on exactly what ground a new trial was ordered when the jurors received prejudicial information. The opinions only spoke vaguely in terms of a "fair trial." The Court in *Marshall* repeatedly emphasized that the basis of its decision was its "supervisory power to formulate proper standards for enforcement of the criminal law in the federal courts." Whether *Marshall* foreshadows a possible due process holding in this area cannot be known; it may well be that the Court's care to avoid due process problems in *Marshall* will be scrupulously continued. That a due process holding is not impossible may be indicated by the concurring opinion of two justices in *Shepherd v. Florida*, that a false newspaper report of the defendant's confes-

186 242 F.2d 488 (2d Cir. 1957).
187 Id. at 495
188 Briggs v. United States, 221 F.2d 636 (2d Cir. 1955).
189 United States v. Postma, 242 F.2d 488, 495 (2d Cir. 1957).
190 United States v. Leviton, 193 F.2d 848 (2d Cir. 1951). "Trial by newspaper may be unfortunate, but it is not new and, unless the court accepts the standard judicial hypothesis that cautioning instructions are effective, criminal trials in the large metropolitan centers may well prove impossible." Id. at 857. Frank, J., dissenting, found the argument empty: "My colleagues admit that 'trial by newspaper' is unfortunate. But they dismiss it as an unavoidable curse of metropolitan living (like, I suppose, crowded subways). They rely on the old 'ritualistic admonition' to purge the record. The futility of that sort of exorcism is notorious. As I have elsewhere observed, it is like the Mark Twain story of the little boy who was told to stand in a corner and not to think of a white elephant." Id. at 865.
sion, read by the jurors, was a denial of due process.\textsuperscript{193} \textit{Shepherd} can, however, easily be distinguished. The arguments there also involved the effects of violence which enveloped the trial,\textsuperscript{194} a fact which also was relied upon in the concurring opinion.\textsuperscript{195} However, the possible use of \textit{Shepherd} in the future is uncertain, since it too was a cryptic per curiam opinion.

\section*{VII

F. Cost Allocation and Substantive Due Process}

The Supreme Court dismissed for want of a substantial federal question two cases\textsuperscript{196} in which it was contended that alleged arbitrary cost allocations by state agencies contravened the due process clause of the Fourteenth Amendment. In each case the state agency, acting pursuant to a state statute, had ordered a railroad to pay the entire cost of improvements at an intersection of the road's trackage with a public thoroughfare. The per curiam disposition of these two cases may be explained by the Court's lack of concern with claims of substantive due process in the area of economic regulation;\textsuperscript{197} however, the prior decisions of the Supreme Court in this area and the present confusion engendered in the state courts strongly suggest that a reasoned opinion would have been appropriate.

\textit{Pennsylvania R.R. v. Borough of Sayreville},\textsuperscript{198} the first of the cases presenting the cost apportionment issue in the 1958 Term, concerned an order that the railroad reconstruct, at its sole expense, a bridge carrying a county road over the carrier's right of way. In reviewing the agency's order, the Supreme Court of New Jersey determined that a 1947 statute limiting railroad expenditures to fifteen per cent of cost\textsuperscript{199} applied only to new grade separations.\textsuperscript{200} The court applied a 1903\textsuperscript{201} statute which it interpreted as requiring the road to pay 100 per cent of cost in all cases. Under this interpretation, the agency which made the initial cost allocation was precluded from considering any special facts which the railroad alleged made the agency's cost determination inappropriate.

In \textit{Southern Pac. Co. v. Corporation Comm'n of Arizona},\textsuperscript{202} the Commission had

\textsuperscript{193} Id. at 52–53 (concurring opinion).

\textsuperscript{194} Brief for petitioners, pp. 26–30.

\textsuperscript{195} \textit{Shepherd v. Florida}, 341 U.S. 50, 53–54 (1951) (concurring opinion).


\textsuperscript{198} 358 U.S. 44 (1958).


\textsuperscript{200} 26 \textit{N.J.} 197, 139 A.2d 97 (1958).

\textsuperscript{201} \textit{N.J. Rev. Stat.} tit. 48, § 12–49 (1937).

\textsuperscript{202} 359 U.S. 532 (1959).
ordered the road to bear the sole expense for the installation of two signal units. The Commission had refused to consider any circumstances which the road contended justified imposition of a portion of the cost on the city of Tucson. On appeal to the Supreme Court of Arizona, the Commission's order was upheld as the court interpreted the statute providing for the improvements as requiring the Commission, once it has found an improvement necessary, to assess the road for the total expense without consideration of further evidence.

On appeal to the Supreme Court, both roads relied on the doctrine claimed to have been established in *Nashville, C. & St. L. Ry. v. Walters*. In that case the Supreme Court had invalidated the application of a Tennessee statute which required the state commission, when it found eliminations of grade crossings necessary, to charge the road one-half of all costs. Mr. Justice Brandeis, speaking for the Court, stated that while the statute was not unconstitutional per se, the state tribunals were required to consider the special circumstances in each case in order to determine if the application of the statute would be "so arbitrary and unreasonable as to deprive [the railway] of property without due process of law in violation of the Fourteenth Amendment." The "special facts" dictating the result in *Nashville* were summarized by the Court:

[T]he revolutionary changes incident to transportation wrought in recent years by the widespread introduction of motor vehicles; the assumption by the Federal Government of the functions of road builder; the resulting depletion of rail revenue; the change in the character, the construction and the use of the highways; the change in the occasion for elimination of grade crossings, in the purpose of such elimination, and in the chief beneficiaries thereof; and the change in the relative responsibility of the railroads and vehicles moving on the highways as elements of danger and causes of accidents.

Supreme Court decisions prior to *Nashville* had held that a state might require a railroad to contribute up to the full cost for roadway improvements. Although in each of these cases the Court might have relied on "special facts" similar to those which dictated the decision in *Nashville*, the Court uniformly rejected the roads' claims of arbitrariness. In view of these former decisions, commentators heralded *Nashville* as marking a significant change in the law. The decision was viewed as a precursor to "fairer" apportionment of costs in improving grade crossings through mandatory consideration of all surrounding circumstances.

The effect of *Nashville*, however, has been somewhat less than dramatic. In its only subsequent consideration of the issue, the Supreme Court, in *Atchison*, [203] Ariz. Rev. Stat. § 40-336 (1956).


[206] Id. at 413.

[207] Id. at 416.


T. & S.F. Ry. v. Public Util. Comm'n,\textsuperscript{210} acknowledged that Nashville forbade an unreasonable cost allocation. Nevertheless, the Court upheld an order assessing the carrier one-half of the cost of an improvement from which the railway would derive no benefit. The Court held that benefit to the railroad was immaterial in determining cost allocation where the improvement was necessitated by local necessity and convenience. Nashville was further distinguished from the case at hand by the Court's declaration that the state procedure in Nashville allowed the tribunal no discretion in allocating cost, while the Commission in Atchison had held hearings before determining the assessment.

State courts have experienced difficulties in attempting to determine the permissible boundaries of cost allocation in view of Nashville and its subsequent treatment in Atchison. Generally the state courts have followed one of three paths. First, two courts have held that Nashville requires judicial consideration of all relevant circumstances in order to determine whether a particular allocation is arbitrary.\textsuperscript{211} Second, some courts have followed Nashville by reversing allocations made without consideration of "special facts" where the improvements were only to provide for increased convenience rather than safety.\textsuperscript{212} And third, some courts have limited the application of Nashville to those situations in which the improvement was not in response to local needs.\textsuperscript{213}

In view of the confusion in state courts when faced with the question of cost apportionment, it may be suggested that Pennsylvania R.R. and Southern Pacific merits more than per curiam dismissals. By dismissing for want of a substantial federal question the Court has avoided an opportunity to furnish guidance to the state courts by clarifying its present position. These courts and state legislatures may still be troubled by the apparent vitality of the Nashville decision.

VIII

G. Business Expenses and the Away from Home Test

The Supreme Court in Peurifoy v. Commissioner,\textsuperscript{214} utilized the per curiam decision as a vehicle to delay consideration of the troublesome issue of differentiating business from personal traveling expenses under the Internal Revenue

\textsuperscript{210} 346 U.S. 346 (1953).


\textsuperscript{214} 358 U.S. 59 (1958).
Code. The code provides for the deduction of: "traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business."

The only prior decision of the Supreme Court in this area was *Commissioner v. Flowers*. This case involved the deductibility of meals and lodging incurred at the principal place of business of the taxpayer who maintained his residence two hundred miles distant from his principal place of business. The Court found it unnecessary to decide the meaning of the term, "home," and disposed of the case by holding the expenses to have been incurred as the result of the taxpayer's personal convenience and choice rather than necessitated by the "exigencies of business."

The Commissioner and the Tax Court, both before and after *Flowers*, have consistently considered "home" to mean one's post of duty or principal place of business rather than residence. This definition plus the necessary determination that the expenses were incurred in the pursuit of business proved sufficient to dispose of the case of the traveling salesman, who resided near his business headquarters and to exclude the long distance commuter as in *Flowers*. However, this definition of "home" proved unsatisfactory in those cases involving temporary construction workers who maintained a single residence from which they traveled to their various temporary construction jobs. In these instances, since it would not be reasonable to require the taxpayer to transfer his residence and family to every construction job, the Tax Court and the Commissioner maintained that those expenses incurred at the taxpayer's post...

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215 Peurifoy v. Commissioner arose under § 23(a)(1)(A) of the 1939 Internal Revenue Code. § 162(a)(2) of the 1954 Code is identical to the 1939 provisions. Personal, living and family expenses are expressly excluded by § 24(a)(1) of the 1939 Code, and § 262 of the 1954 Code.


217 Id. at 474.


219 E.g., Kershner, 14 T.C. 168 (1950).

220 Appeal of Sonenblick, 4 B.T.A. 986 (1926); Appeal of Burgio, 4 B.T.A. 4 (1926).

221 E.g., Walter M. Friddy, 43 B.T.A. 18 (1940).

222 See Ney v. United States, 171 F.2d 449 (8th Cir. 1948); Bercaw v. Commissioner, 165 F.2d 521 (4th Cir. 1948); Barnhill v. Commissioner, 148 F.2d 913 (4th Cir. 1945); James R. Whitaker, 24 T.C. 750 (1955); Willard S. Jones, 13 T.C. 880 (1949); Henry C. Warren, 13 T.C. 205 (1949); Beatrice H. Albert, 13 T.C. 129 (1949); Robert F. Green, 12 T.C. 656 (1949); John D. Johnson, 8 T.C. 303 (1947); Arnold P. Bark, 6 T.C. 851 (1946); S. M. R. O'Hara, 6 T.C. 841 (1946); George W. Lindsay, 34 B.T.A. 840 (1936).

of duty would be deductible provided the taxpayer continually returned to
the same residence at the termination of a job the duration of which was "tem-
porary" as opposed to "indefinite" or "indeterminate."

Application of this exception, formulated by the Tax Court, has required the
development of an elaborate list of indicia. Such factors as length of employ-
ment, duration of the job, and the intent of the taxpayer when he com-
menced his employment have been significant in determining whether the
employment was temporary. Other considerations such as union hiring, location
and extent of family, home ownership, etc., have gone to the issue of
whether one has an established residence to which he consistently returned.

It is in this context, i.e., the Commissioner's and the Tax Court's treatment
of the statutory term "home" as meaning post of duty, with the "temporary"
employment exception, that the Peurifoy case arose. The Supreme Court had
passed on neither the precise meaning of "home," the validity of the "tem-
porary" exception, nor the appropriateness of the several factors that had be-
come influential in the question whether the taxpayer was engaged in "tem-
porary" employment.

In Peurifoy v. Commissioner, taxpayers, construction workers on sites ap-
proximately one hundred miles distant from their normal residences, claimed
deductions for meals and lodging while on jobs lasting over twenty, twelve, and
eight months. Each taxpayer was a home owner; two of the three were married.
The Commissioner conceded the deductibility of the lodging and meal expenses
of one of the petitioners for jobs extending only three and seven weeks, but dis-
allowed the deductions for the longer periods. The Tax Court, stressing both the
nature of the work and the length of the employment, held that the work was

224 Coburn v. Commissioner, 138 F.2d 763 (2d Cir. 1943); E. G. Leach, 12 T.C. 20 (1949);
Harry F. Schurer, 3 T.C. 544 (1944).
225 Ralph A. Waugh, 9 T.C.M. 600 (1950); Beatrice H. Albert, 13 T.C. 129 (1949).
226 Willard S. Jones, 13 T.C. 880 (1949); Arnold P. Bark, 6 T.C. 851 (1946). Recent cases
have formalized the several indicia into the following test: Employment is "temporary" where
"termination can be foreseen within a fixed or reasonably short period of time." John J. Har-
23,799 (M) (October 20, 1959); Glendyl R. Hendricks, CCH Tax Ct. Rep. Dec. 23,800 (M)
227 Ralph A. Stegner, 14 T.C.M. 1081 (1955). See the discussion by the Tax Court in James
228 Wesley H. Harrington, 12 T.C.M. 436 (1953).
229 In James E. Peurifoy all three petitioners "owned" their homes. It apparently made
no difference that one of the petitioners was unmarried. 27 T.C. at 150.
230 In a Comment of Peurifoy v. Commissioner in 44 CORN. L.Q. 270 (1959), it was ar-
gued that the opinion in the Flowers case required the conclusion that the Court meant
"home" to mean principal place of business. Although perhaps true for this particular case,
it is doubtful that the inference can be extended beyond that case.
232 27 T.C. 149 (1956).
"temporary," as opposed to "indefinite" in nature, and that it would "not be reasonable to expect them to shift their residences to the place of employment or to regard [the construction site] as their 'home' for tax purposes."233

The Court of Appeals for the Fourth Circuit reversed234 the Tax Court on the grounds that its finding that the employment was "temporary" was grossly in error. This Court emphasized the fact that the particular construction jobs were of substantial duration and the somewhat shorter employment of the petitioners was the result of voluntary termination.

The Supreme Court granted certiorari, but in its per curiam decision expressly declined to pass upon the approach of the Tax Court, instead choosing to limit the case to the "narrow question of fact—Was the petitioners' 'employment' 'temporary' or 'indefinite?'"236 Refusing to disturb the findings of the Court of Appeals, the Court affirmed the decision. The three-justice dissent237 written by Justice Douglas urged that the definition of "home" in the instant case be considered as the taxpayers' residence and since these expenses were necessary if the taxpayers were to carry on their chosen trade, even though not necessary to their employer's business, argued that the deduction should be allowed.

The disposition of this case by the majority opinion certainly does not reject the reasoning of both the Tax Court and the Court of Appeals,238 but the Court's specific rejection of the opportunity to consider and foreclose some of the conflicts in this area perhaps suggests that the past approach of the Tax Court is not fully in accord with the Supreme Court's conception of the determinative factors.

It may be that the reluctance of the Court to consider the Peurifoy issue is largely due to the fact that two distinct approaches to the problem have evolved—the intermingling of which has created unnecessary confusion. While the rationale of the Flowers case adopts the "pursuit of business" clause the Tax Court and the Commissioner, to resolve traveling expense issues, have chosen to emphasize the "away from home" provision. Neither approach, however, is in itself adequate to deal with the circumstances of the Peurifoy case. The Tax Court found it necessary to introduce into its definition of "home" the "temporary" employment qualification in order to circumvent its premise that home equals principal place of business. Likewise, the narrow Flowers rationale had to be amplified by consideration of duration of employment to determine more accurately whether the expense was motivated by personal convenience or

233 Id. at 157.
234 254 F.2d 483 (1957).
236 358 U.S. at 60-61.
237 358 U.S. at 61.
238 It is arguable that the per curiam opinion, by considering whether the employment was of a temporary nature, implicitly admitted the validity of the Tax Court's temporary-employment exception. The more accurate view, it is submitted, is that the Court, finding that the employment was indefinite did not have to pass upon the soundness of the exception.
"business exigencies." Since, however, the duration of employment is ultimately crucial to each approach, the results obtained in the Peurifoy-type situation will be identical.

However, this confusion may be eliminated by according to the term "home" its everyday meaning, i.e., the taxpayer's residence. Assuming the taxpayer to be away from his residence, each case can be decided by employing the rationale of the Flowers opinion, and the question there posed: was the expense motivated by "the exigencies of business rather than the personal conveniences and necessities of the traveler."\footnote{239}

The statutory term "home" then need only be considered on two occasions. First, in those cases involving migratory workers\footnote{240} the determination must be made whether or not the taxpayer has a "home." If not, he would not satisfy the statutory requirement that the expenses be incurred away from home. Where a taxpayer has two residences and a business near each,\footnote{241} the question of the proper tax home must again be considered. The issue in these circumstances is what is his primary home and business, for only those expenses incurred while away from that home and business will be deductible. By thus limiting considerations of the term "home" to these narrow situations a step can be taken towards reducing the confusion surrounding this heavily litigated issue.\footnote{242}

IX

H. THE TWILIGHT ZONE AND LONGSHOREMEN'S REMEDIES

The Federal Longshoremen's and Harbor Worker's Compensation Act of 1927\footnote{243} establishes a system of federal compensation for certain classes of injured maritime employees as their exclusive remedy but only "if recovery... through workmen's compensation proceedings may not validly be provided by State law."\footnote{244} State law provides a valid remedy when the injury occurs under circumstances which are "maritime but local."\footnote{245} Prior to Davis v. Department of Labor,\footnote{246} injured waterfront workers were confronted with the risk of guessing whether the accident fell under the state or federal compensation system, with the danger that a wrong guess could lead to no recovery whatsoever if the

\footnote{239}{239} 326 U.S. 465, 474 (1946).
\footnote{244}{244} 33 U.S.C. § 903 (1952).
\footnote{245}{245} See Grant Smith-Porter Co. v. Rhode, 257 U.S. 469 (1922); Western Fuel Co. v. Garcia, 257 U.S. 253, 242 (1921).
\footnote{246}{246} 317 U.S. 249 (1942).
statutory period for the other compensation system had elapsed. The Supreme Court in Davis set out a practical solution to this problem: the "twilight zone"—a rule that the plaintiff's choice of compensation system would be presumed correct in all doubtful cases.

_Hahn v. Ross Island Sand & Gravel Co._ involved an injury in Oregon clearly within the twilight zone. However, the Oregon Compensation Act permitted employers to elect between compensation coverage or common law liability without the benefit of the traditional common law defenses. The employer in _Hahn_ had rejected the compensation plan, and his injured employee brought suit against him in the state courts instead of filing for federal compensation. The Oregon Supreme Court held that the Federal Longshoremen's and Harbor Worker's Act did not envisage a choice between federal compensation and a state damage action, but only a choice between federal and state compensation systems. The damage action was disallowed and the plaintiff was told that his only recovery was by way of federal compensation.

The United States Supreme Court rejected this interpretation. Nothing in the Longshoremen's Act or the Constitution barred such a suit said the Court, and,

[Petitioner's injury occurred in the "twilight zone," and . . . recovery for it "through workmen's compensation proceedings," could have been, and in fact was, validly "provided by State law." . . .]

Underlying the Supreme Court's disposition of the case may have been the assumption that the situation presented here was an aberrational one with the result that the decision would have no repercussions upon any other branches of admiralty law. The Court may have simply felt that with an employer who elects to be sued rather than pay a fixed sum and an employee who prefers to


248 The twilight zone doctrine has limited application. It has been confined to situations where the choice is between the state and federal compensation plan. It has not been recognized in cases where the plaintiff must choose between the Longshoremen's Compensation Act and the Jones Act or FELA. Pennsylvania R.R. v. O'Rourke, 334 U.S. 344 (1953); Desper v. Starved Rock Ferry Co., 342 U.S. 187 (1952); Norton v. Warner Co., 321 U.S. 565 (1944); Nogueira v. New York, N.H. & H. R.R., 281 U.S. 128 (1930); cf. Rodes, _Workmen's Compensation for Maritime Employees: Obscurity in the Twilight Zone_, 68 Harv. L. Rev. 637, 650-54 (1955); Gilmore & Black, _The Law of Admiralty_ 355 (1957).


252 358 U.S. at 273. Mr. Justice Stewart, joined by Mr. Justice Harlan, dissented, arguing that the federal act did not permit suits by employees in state courts. The status of the damage action in Oregon, although ostensibly a question of Oregon state law, is more properly the question of whether the federal act permits such a suit. It is thus a question upon which the Supreme Court was not bound to obey the opinion of the Oregon Supreme Court.
sue rather than take a fixed sum there is no harm done in permitting such a suit to occur. On the other hand, the employer in the Hahn case may not be the only employer in the country who both employs maritime workers and elects not to belong to a state compensation plan for economic reasons. If so, it may be that the Supreme Court arrived at its decision according to considerations of policy, as it had done in the Davis case.

The policies generating the twilight zone in Davis were obvious as well as explicit however, while whatever policies controlled the outcome in Hahn were not articulated. But consideration of the nature of workmen's compensation may give some indication of the rationale of the Hahn decision.

Approximately two-thirds of the state compensation acts in the country are voluntary plans permitting employers to choose liability at law instead of compensation. The defenses of assumption of risk, fellow servant, and contributory negligence are usually abolished if compensation is rejected, in order to persuade employers to take the compensation plan.

While the average employer generally finds it wiser to prefer the compensation program, the decision of the Oregon Supreme Court would put the waterfront employer in a different situation. Such an employer is faced with paying two compensation premiums under the federal and the state plans. While he cannot reject the federal compensation system, the state system is optional. The employer can thus safely reject the state plan, not pay state compensation premiums and not have to worry about being sued in the state courts since the Oregon Supreme Court opinion would bar such an action.

Under such conditions, the waterfront employer in Oregon and other states with elective compensation plans is unlikely to accept state compensation. Although these employers would still have to subscribe to the federal compensation plan, the clear desire of Congress in enacting the Federal Longshoremen's


255 Apparently, the main reason that the plans are not compulsory is due to early doubts by the legislatures of the constitutionality of such plans. See 1 Larson, op. cit. supra at § 5.20.

256 Section 938(a) of the Federal Longshoremen's and Harbor Worker's Compensation Act makes it a misdemeanor for an employer to fail to secure coverage for compensation with penalties of a maximum fine of $1000 or a maximum prison term of one year or both.

257 The assumption that the employer must pay two compensation premiums is perhaps the strongest argument for the existence of the twilight zone. See Note, Workmen's Compensation for Maritime Employees: The Jensen Doctrine Re-examined, 10 U. Cin. L. Rev. 339, 344 (1943); Rodes, Workmen's Compensation for Maritime Employees: Obscurity in the Twilight Zone, 68 Harv. L. Rev. 637, 650–54 (1955). In such circumstances, it should be a matter of indifference to the employer which board pays his employee. Where the choice is not between two compensation plans, but a compensation plan on one side and a jury trial on the other (as for Jones Act or FELA cases), the inequity of applying twilight zone concepts is obvious. Here the employer has no choice of accepting or rejecting a compensation plan. Unlike the situation in the Hahn case, allowing the employee an action at law can have no beneficial effect in terms of coercing employers to subscribe to any compensation plans.
and Harbor Worker's Compensation Act was to enable state compensation plans to operate wherever constitutionally possible. The logic of the Oregon Supreme Court would have impeded this policy, and reversal by the United States Supreme Court thus preserved one of the initial purposes of the Longshoremen's Compensation Act.

See Senate Comm. on the Judiciary, Report on the Longshoremen's and Harbor Worker's Compensation Act, S.REP. 973, 67th Cong., 2d Sess. 16, 62 CONG. REC. 7754 (1922); Davis v. Department of Labor, 317 U.S. 249, 254 (1942); Nogueira v. New York, N.H. & H. R.R., 281 U.S. 128, 136 (1930); Crowell v. Benson, 285 U.S. 22, 39-41 (1932); Nogueira v. New York, N.H. & H. RR., 281 U.S. 128, 136 (1930); Gilmore & Black, The Law of Admiralty 245 (1957). The legislative history of the Longshoremen's Act begins with the decision of Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917) holding New York's compensation act constitutionally inapplicable to maritime situations. Congress thereupon made two attempts to amend the Savings to Suitors Clause, 28 U.S.C. § 1333(1) (1949) to permit state compensation plans to apply to admiralty situations but both were held unconstitutional as unwarranted delegations of Congressional power and as destructive of the uniformity of admiralty law established by the Constitution State of Washington v. W. C. Dawson & Co., 264 U.S. 219 (1924); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920). Since the Supreme Court had indicated in the Dawson case that the existence of a national compensation was the prerequisite to constitutionally permissible state compensation plans in maritime law, Congress thus enacted the Longshoremen's and Harbor Worker's Compensation Act, establishing a system of federal compensation, but one to be applied only when state workmen's compensation proceedings could not validly apply. The federal act was upheld against constitutional attacks in Crowell v. Benson, supra.

The federal act has a provision similar to the Oregon Compensation Act, that an employer failing to secure federal compensation coverage becomes liable at law to his employee without regard to the defenses of assumption of risk, fellow servant and contributory negligence available. 33 U.S.C. § 905 (1952). Since this coercive clause, used to further federal compensation, is given effect under the federal statute, the argument is strengthened that the similar Oregon clause must be enforced if the policy is to extend state compensation coverage.