COMMENTS

PER CURIAM DECISIONS OF THE SUPREME COURT: 1959 TERM

This third annual study of the per curiam decisions of the Supreme Court has several distinct purposes. Part I contains statistical tables comparing the cases disposed of through per curiam decisions in the term just completed with those of the prior two terms. The tables and accompanying textual discussion are intended to direct attention to the Court's use of the per curiam disposition as a procedural device. In Parts II and III individual decisions are commented upon, not necessarily to facilitate generalizations about the Court's per curiam practice, but rather because the substantive problems raised in these cases are felt to be of particular interest. The cases discussed in Part II were decided by the court with no explanation of the grounds for decision other than an occasional citation of authority. These decisions are of the cryptic nature commonly associated with the per curiam label. The commentary on them is intended both to provide an analysis of the substantive problems involved and to serve the informative function of disclosing precedents created during the 1959 Term which would not otherwise be apparent to a reader of the United States Reports. The decisions commented upon in Part III were to some extent, explained by the Court. They differ in no material aspect from cases decided in an opinion signed by an individual justice; the discussion in Part III thus attempts merely to analyze Supreme Court decisions interesting on their merits.

I. INTRODUCTION

In the 1959 Term, 135 cases were disposed of by per curiam decisions while 97 were decided in full, signed opinions. Of the 135 per curiam cases only 80 are included in the accompanying tables. These are the cases in which the Court passed on the merits of the litigants' contentions or on controversial problems of jurisdiction and procedure. Not included in the tables are the 55 per curiam decisions in which the Court did not pass on the merits of the case and in which only routine application of jurisdictional or procedural rules was involved. Although extended comment upon the data presented in the statistical tables would be superfluous, a few points deserve mention.

While the number of cases decided by signed opinions decreased only slightly from the 1957 Term through that of 1959, a much more striking de-


2 There were 109 cases decided in full opinions in the 1957 Term, 100 in the 1958 Term, and 97 in the 1959 Term.
### TABLE 1

<table>
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<th>Subject Matter</th>
<th>Principal Subject</th>
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<td>6</td>
<td>6</td>
<td></td>
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<td>Federal Criminal Cases:</td>
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<td>Criminal Procedure</td>
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<td>Lower Federal Courts</td>
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<td>Specialized Federal Courts</td>
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TABLE 3
JURISDICTIONAL BASIS

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ORAL ARGUMENT

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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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<td>Oraly Argued Total</td>
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<tr>
<td>Without explanation or citation</td>
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<td>4</td>
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<td>With citation only</td>
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<td>With explanation</td>
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DISPOSITION OF CASES

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<td>Judgment Affirmed by an Equally Divided Court</td>
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<td>Judgment Affirmed</td>
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<tr>
<td>Judgment Vacated and Case Remanded for Reconsideration in Light of Authority Cited</td>
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<td>5</td>
<td>7</td>
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<tr>
<td>Judgment Vacated and Case Remanded with Instructions Other than To Reconsider in Light of Authority Cited</td>
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<td>14</td>
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<td>10</td>
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<td>Judgment Reversed and Case Remanded</td>
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<td>Judgment Reversed on Confession of Error</td>
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TABLE 7

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<td>Unanimous Court</td>
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<td>0</td>
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<tr>
<td>Dissenting Justice(s)</td>
<td>18†</td>
<td>16†</td>
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<tr>
<td>Both Concurring and Dissenting Justices</td>
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<td>3</td>
</tr>
<tr>
<td>Equally Divided Court</td>
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</table>

* Each of these totals includes one case in which one Justice was of the opinion that certiorari had been improvidently granted.
† Each of these totals includes five cases dismissing appeals in which one or more of the Justices was of the opinion that probable jurisdiction should be noted.
<table>
<thead>
<tr>
<th>Number of decisions upsetting lower court judgments at the same time the petition for certiorari is granted</th>
<th>1957 Term</th>
<th>1958 Term</th>
<th>1959 Term</th>
</tr>
</thead>
<tbody>
<tr>
<td>State Courts</td>
<td>Federal Courts</td>
<td>Total</td>
<td>State Courts</td>
</tr>
<tr>
<td>7</td>
<td>42</td>
<td>49</td>
<td>7</td>
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</table>

**Identity of Respondent:**

- **United States government or governmental agency:**
  - Criminal case: 17, 5, 7
  - Civil case: 10 (27), 6, (27)

- **State or local government or governmental agency:**
  - Criminal case: 1, 2, 5
  - Civil case: 1 (3), 1 (3), 1 (6)
  - Private person: 6, 12, 18

- **Decisions based on a full opinion of the Court during the current term:**
  - 5, 5, 2, 4, 4
cline is to be noted in the number of per curiam decisions. The reduction
in the volume of decisions does not appear to have been deliberately brought
about by the Court, since the decrease from the 1958 Term to the 1959 Term
is wholly a function of the reduction of the number of cases which arose on
appeal rather than on petition for certiorari. Whatever the cause of the reduc-
tion, it was accompanied by several other developments. The proportion
of the total number of per curiam decisions on which oral argument was heard
was higher in the term just completed than in either of the prior two terms.
Similarly, the proportion of decisions accompanied by either a citation of
authority or by a full explanation increased. As one would expect, it appears
that a lessening of the quantitative case burden on the Court has permitted a
greater expenditure of judicial time and care on individual cases.

The use of the per curiam device which may be of the greatest interest to
the bar is represented by an order granting a petition for certiorari accom-
panied by a simultaneous decision on the merits of the petitioner’s claim.
Where the decision is conclusively adverse to the interests of the respondent,
this summary mode of disposition has been criticized on the ground that the
respondent is not adequately afforded an opportunity to present his arguments
to the Court.3 This objection would seem to apply with only slightly dimin-
ished force to decisions in which the Court grants certiorari and at the same
time modifies the lower court judgment or vacates the judgment and remands
the case for further proceedings. In each of these situations, a judgment favor-
able to the respondent has been impaired without oral argument and without
full briefs on the merits of the controversy. The Court reaches its decision
solely on the basis of a petition for certiorari, respondent’s brief in opposition
and occasionally a reply brief on behalf of the petitioner. Counsel submitting
a brief in opposition to a petition for certiorari would appear to be under pres-
sure to make an argument considerably different from that which he would
make in a brief on the merits of the case.4 An examination of the incidence
in the last three terms of per curiam decisions granting certiorari and at the
same time upsetting lower court judgments can be expected to shed light on
the magnitude of whatever dangers are inherent in this procedure.

The figures in Table 8 show that in the 1958 and 1959 Terms there were sub-

3 See Brown, Foreword to the Supreme Court, 1957 Term, 72 HARV. L. REV. 77 (1958); Note, Supreme Court Per Curiam Practice: A Critique, 69 HARV. L. REV. 707, 724 (1956).

4 Directives that respondent’s brief in opposition be both concise and brief are found in the rules of the Court, in Supreme Court decisions and in manuals advising counsel. See Sup. Ct. R. 24(I), 23(I)(h); Zap v. United States, 326 U.S. 777 (1945) (denial of certiorari), order stayed, 326 U.S. 692 (1945), cert. granted, 326 U.S. 802 (1946); Stern & Gressman, Supreme Court Practice 221 (2d ed. 1954). The goal of respondent’s counsel is to induce the Court not to take the case. He is advised to keep in mind that “... he is seeking to induce the Court to deny a petition for certiorari, not to win a case on the merits.” Stern & Gressman, supra at 220. “Sensitive advocates will recognize the difference in performance which the difference of purpose requires.” Brown, supra note 3, at 79–80,
stantially fewer decisions upsetting a lower court judgment contemporaneous-
yly with the granting of certiorari than in the 1957 Term. The significance of
this decrease can be best seen from an inspection of the subcategories in
Table 8. The propriety of a summary reversal based on a full opinion of the
same term turns on considerations different from those relevant to an evalua-
tion of other summary reversals. Of interest is whether counsel for respond-
ents in the case decided summarily had reason to believe that their case was
to be disposed of in accord with the disposition made of the case decided by
full opinion, whether they agreed to this procedure, and whether they par-
ticipated in the preparation of argument in the other case.

If it be accepted that a respondent is subject to pressures influencing him
to frame his argument differently in a brief in opposition than he would in a
brief on the merits, the possibility of unfairness exists whenever a case is de-
cided without briefs on the merits. The unfairness is reduced if the respondent
has reason to anticipate that his case may be disposed of summarily or if it is
unlikely that he would submit fuller argument in a brief on the merits even if
afforded the opportunity. A respondent may anticipate such summary treat-
ment if he is aware that his case is to be decided in accord with a similar pend-
ing case, as discussed above, or if his case is of a category of cases customarily
disposed of without full briefing. Table 8 provides some indication of the type
of case in which the likelihood of summary disposition is greatest. In all three
terms, governmental entities were unsuccessful respondents more often than
private persons. In the earlier two terms the federal government was adversely
affected more often than any other party. Criminal cases are generally decided
without full argument more often than civil cases to which a governmental
entity is a party. Justification for summary reversal of many criminal cases
may lie in the probability that the government would make no fuller argument
even if briefs on the merits were permitted.

The incidence of decisions upsetting judgments in favor of private persons
without argument on the merits has steadily declined over the last three terms.
Of the seven cases disposed of in this way in the 1959 Term, five represented
the final stages of litigation which had been before the Court in previous terms
and had been disposed of in full opinions; and in two others the decision was
rested upon a case decided earlier in the 1959 term in a full opinion. The
court appears to have been sensitive to its critics.

Saint Nicholas Cathedral, 363 U.S. 190 (1960); Local 24, Teamsters v. Oliver, 362 U.S.
605 (1960); Bogle v. Jakes Foundry Co., 362 U.S. 401 (1960); United States v. Terminal

6 Kreshik v. Saint Nicholas Cathedral, 363 U.S. 190 (1960); Local 24, Teamsters v.
Oliver, 362 U.S. 605 (1960)

7 United Railroad Workers v. Baltimore & O. R.R., 364 U.S. 278 (1960); United Ter-
II. DECISIONS NOT EXPLAINED BY THE COURT

PRIMARY JURISDICTION AND CONSPIRACY TO ELIMINATE A COMPETITOR

One of the issues before the Court in Luckenbach S.S. Co. v. United States1 was whether an allegation that certain carriers have conspired to eliminate a competitor is cognizable by a district court, without prior resort to the Interstate Commerce Commission. In its per curiam disposition, the Supreme Court declined to discuss a limitation to the doctrine of primary jurisdiction2 which the complaining carrier had urged upon it.

Luckenbach, an intercoastal water carrier, petitioned the ICC for a temporary order suspending a proposed reduction in rail rates, requested by seven railroads acting in concert under an agreement approved by the ICC pursuant to section 5a(2) of the Reed-Bulwinkle Act.3 The ICC agreed to investigate the lawfulness of the rates, but denied Luckenbach's petition for suspension of the reduction. Luckenbach then filed suit in a three-judge district court to enjoin the ICC's denial of the suspension order and to secure relief under the Sherman Act. The thrust of the antitrust phase of its complaint was that the railroads' collective ratemaking procedures were used "for the purpose and with the intent of destroying a competitor."4 The court denied both the injunction and the antitrust relief.5 It recognized the denial of a suspension order to be a valid exercise of administrative discretion, not reviewable under Section 10 of the Administrative Procedure Act.6 In regard to the antitrust phase of the suit, the court held that the ICC has primary jurisdiction over all controversies involving rail rates. The court declared that it could not consider the antitrust allegations until after the ICC had determined the lawfulness of the rates. Furthermore, since the agreement under which the

2 For representative definitions of the doctrine of primary jurisdiction, see Mr. Justice Frankfurter's opinion in Far East Conference v. United States, 342 U.S. 570, 574 (1952); 3 DAVIS, ADMINISTRATIVE LAW TREATISE § 19.01 (1958). The doctrine of primary jurisdiction requires the courts to refer to administrative agencies, for initial determination, issues of fact within the agencies' particular expertise, thereby securing uniformity and consistency in the determination of such issues.
4 1 Brief for Appellant Opposing Motions to Affirm, p. 12.
defendant carriers acted in setting their rates exempted them from certain antitrust sanctions, and because the ICC had approved the agreement, the court sought the counsel of the ICC in construing the extent of the exemption. Because the maximum suspension period had expired, the Supreme Court vacated the judgment as to the suspension of the rate schedule and remanded to the three-judge court with instructions to dismiss the cause as moot. It affirmed the district court’s dismissal of the antitrust phase of the suit.

Justices Black and Douglas dissented from the majority’s disposition of the antitrust phase of the suit, relying upon Georgia v. Pennsylvania R.R. In that case, decided three years before the Reed-Bulwinkle Act authorized immunity from the antitrust laws, the Court had admitted an exception to the doctrine of primary jurisdiction. The state of Georgia charged a conspiracy on the part of certain railroads to restrain trade and commerce through the fixing of arbitrary freight rates which would impede the development of the South. While the Court recognized the primary jurisdiction of the ICC over tariffs, it held that Georgia was not seeking an injunction against the continuation of a tariff, but, rather, against action over which the ICC had no control—the conspiracy itself. To justify its separation of the conspiracy from the rates, the Court relied on dicta in Keogh v. Chicago and Nw. Ry. Co. for the proposition that a combination of carriers to fix reasonable and non-discriminatory rates may be illegal under the antitrust laws.

Section 5a(9) of the Reed-Bulwinkle Act declares that parties to any agreement approved by the ICC are “relieved from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with its provisions and in conformity with the terms and conditions prescribed by the Commission.” Because the ICC had approved the agreement and had perhaps attached certain conditions, the court requested the ICC to explain the coverage of the exemption. Presumably the ICC might find that certain activities carried on by the railroads were outside the exemption and, in fact, inconsistent with the national transportation policy.

One further problem raised by the procedural history of the Luckenbach case, which will not be discussed in this note, is whether a three-judge statutory court whose jurisdiction is limited by 28 U.S.C. § 2325 (1958) can decide any collateral issue. Did the three-judge court and the Supreme Court have any standing even to dismiss the antitrust charges on the ground of primary jurisdiction? Perhaps the antitrust question should first be resolved by a one-judge district court. In a dissenting opinion in the instant case, District Judge Rodney so argues. 179 F. Supp. 614 (D. Del. 1959).

Under § 15(7) of the Interstate Commerce Act, the ICC may suspend the operation of a rate schedule for no more than seven months “beyond the time when it would otherwise go into effect.” By the time the review of the ICC’s discretion was before the Supreme Court, the seven month period had elapsed, rendering this question moot. The Court cited United States v. Amarillo-Borger Express, 352 U.S. 1028 (1957); Atchison, T. & S.F. Ry. v. Dixie Carriers, Inc., 355 U.S. 179 (1957).

Mr. Chief Justice Stone, and Justices Roberts, Frankfurter, and Jackson were not convinced by this argument. They saw the question of rates as the crucial question, because without unlawful rates there is no legally cognizable damage, and without damage there is no basis for injunctive relief. 324 U.S. 439, 468 (1945) (dissenting opinion).

260 U.S. 156, 161-62 (1922). See also United States Nav. Co. v. Cunard S.S. Co., 284 U.S. 474 (1932) (Here an independent water carrier failed to sustain an allegation of a con-
The Reed-Bulwinkle Act made difficult the separation of the issue of conspiracy from that of rates. By the provisions of the act the ICC was authorized to approve agreements among carriers "upon such terms and conditions" as it might prescribe. Section 5a(9) of the Act rendered immune from the antitrust laws activities conforming to the approved agreement and prescribed conditions. What might formerly have been a conspiracy within the Sherman Act was thus immunizable by the ICC. The exemption imported into the law by the Reed-Bulwinkle Act closely resembled antitrust exemptions established by the Shipping Act and the Civil Aeronautics Act. All three acts empower the appropriate administrative agency to immunize the activities of certain carriers by approving agreements among the carriers.

Despite the emphasis placed on agency action by the immunity provisions, the applicability of the doctrine of primary jurisdiction in this area has not gone unchallenged. In Slick Airways, Inc. v. American Airlines, Inc., an air-freight carrier brought suit under the Sherman Act against three competing carriers. It charged a conspiracy by the defendants to eliminate it from business and alleged predatory rate policies, abuse of privilege in Civil Aeronautics Board proceedings, and the execution of the conspiracy through a campaign of unfair practices. Although the defendants urged the point forcefully, the court refused to recognize primary jurisdiction of the controversy in the CAB. The court acknowledged the primary jurisdiction of the CAB to determine the legality of each of the component parts of the conspiracy alleged, but distinguished the important legal issue from the legality of the parts: "a court can have jurisdiction over an illegal conspiracy even though effectuated by legal means and methods." Because a conspiracy to eliminate a competitor is not the type of agreement which the agency may approve, the court considered itself competent to entertain the plaintiff's complaint. The court

13 The Reed-Bulwinkle Act was intended to nullify the impact of the Georgia case. H. R. REP. No. 1100, 80th Cong., 2nd Sess. 1844, 1846-47 (1948). In order now to charge carriers under the antitrust laws, a further distinction must be made between legitimate activities under ICC approved agreements and activities not exempted under these agreements.


17 107 F. Supp. at 216.

18 Contra, S.S.W., Inc. v. Air Transp. Ass'n of America, 191 F.2d 658 (D.C. Cir. 1951), cert. denied, 343 U.S. 955 (1952); Agpar Travel Agency v. International Air Transp. Ass'n,
observed that the plaintiff had already resorted to the CAB and that the CAB seemed to have approved the rates in question.\textsuperscript{19} Although the court in \textit{Slick} placed little importance on the preliminary recourse to the agency in the case before it, that fact weakens the authority of the case in the development of a possible conspiracy limitation upon primary jurisdiction.

The limitation upon primary jurisdiction, announced in the \textit{Slick} case, was recognized in \textit{Atchison, T. \& S.F. Ry. v. Aircoach Transp. Ass’n}.\textsuperscript{20} Four supplemental air carriers, banded together in Aircoach, brought suit under the Sherman Act against forty railroads and two railroad rate committees; they charged that the practice of offering large “spot reductions” to military personnel was illegal per se. The railroads, acting in concert under a section 5(a) agreement, contended that the practice was immunized from the antitrust laws by the ICC’s approval of their agreement and moved for summary judgment. The district court, however, entered summary judgment for the plaintiffs.\textsuperscript{21} The court of appeals vacated the judgment and announced a double holding: the ICC had primary jurisdiction to determine the scope of the immunity; but even if the concerted rate reductions were immune, they might still be the basis for antitrust relief as part of a provable conspiracy to eliminate competition by the plaintiffs. Whether the district court should suspend the suit pending determination of the scope of immunity granted by the ICC, or whether it should proceed upon the assumption that the conduct was immune was entrusted to the discretion of the trial court.

The significance of the conspiracy exception to primary jurisdiction, recognized by the district court in the second holding of the \textit{Aircoach} case, was tempered the same year by the Supreme Court in \textit{Federal Maritime Bd. v. Isbrandtsen Co.}.\textsuperscript{22} Isbrandtsen had charged a conspiracy by members of a shipping conference to eliminate it from the business. The FMB had found that the purpose of the conference’s dual-rate system was to stifle outside competition, but it nevertheless approved the system.\textsuperscript{23} The Supreme Court affirmed the court of appeals’ judgment setting aside the FMB’s order. The Court’s

\begin{itemize}
  \item 107 F. Supp. 706 (S.D.N.Y. 1952) (In these two cases there had been no prior recourse to the Civil Aeronautics Board); United States v. Alaska S.S. Co., 110 F. Supp. 104 (W.D. Wash. 1952) (Allegation of scheme to exclude plaintiff from the shipping business. Nevertheless, the court invoked the doctrine of primary jurisdiction, following the \textit{Cunard} case, 284 U.S. 474 (1932), and the \textit{Far East} case, infra); VonMehren, supra note 2, at 944; \textit{but see}, Far East Conference v. United States, 342 U.S. 570 (1952) (Doctrine of primary jurisdiction applied where the question was one of the reasonableness of the rates, and not of the illegal ends sought by a conspiratorial association of carriers); \textit{cf.}, L. Schwartz, supra note 2, at 468 n. 86.
  \item 107 F. Supp. at 213.
  \item 253 F.2d 877 (D.C. Cir. 1958).
  \item 356 U.S. 481 (1958).
  \item 4 F.M.B. 706 (1958).
\end{itemize}
ratio decidendi would appear to be reflected in its statements that (1) the agency determination does not foreclose judicial review, and (2) the dual-rate system was, because of the purpose for which it was adopted, illegal under section 14 of the Shipping Act of 1916.24 In the course of its opinion, the Court said that the question of purpose and intent was for the FMB to decide,25 and, therefore, on the facts of the case, initial resort to the agency seemed proper. However, the question of primary jurisdiction was not before the Court at a time when it had to decide whether to permit a trial court to retain jurisdiction of an antitrust suit. The Commission had, in Isbrandtsen, already made the necessary finding. Therefore, the dicta as to agency determination of purpose and intent might not be considered authority for such a proposition in the future.

One year later in Riss & Co. v. Association of Am. Railroads,26 a district court attempted to assess the effect of Isbrandtsen on Aircoach. It may be that the per curiam opinion in the instant case represents tacit approval of the formulation made in Riss. Confronted by a trucker’s charge that seventy railroads were conspiring to eliminate it from interstate commerce, the court retained jurisdiction. The court declared that a conspiracy to eliminate a competitor could not be approved and immunized by the ICC, and that the administrative determination of the scope of section 5a(9) immunity could not foreclose the issue to the courts. The court, following an order of the court of appeals,27 considered the impact of the dicta in Isbrandtsen and declared that whenever “the issue of the intent and effect” of rate reductions “is the sole or dominant issue”28 in a case, the agency has primary jurisdiction. However, since Riss alleged and offered to prove means other than predatory rates in order to establish the conspiracy charged,29 the court concluded that the rate issue was not “sole or dominant,” and that resort to the ICC was

25 356 U.S. at 499.
27 The Court of Appeals for the District of Columbia Circuit had issued an interlocutory opinion on August 8, 1958, quoted in the district court’s opinion, 170 F. Supp. at 362–63.
28 170 F. Supp. at 363. The judge declared that this expression by the court of appeals indicates that Isbrandtsen modifies only the first holding of Aircoach: that the scope of the immunity is within the primary jurisdiction of the agency. In this analysis, the judge appears to have erred. The “sole or dominant” formulation modifies the second holding of Aircoach: that the antitrust suit might be continued in the district court when a non-immunizable conspiracy was alleged.
29 Riss charged political pressure on elected officials to secure revocation of its license, illegal influence on the Ohio Public Utilities Commission, illegal influence to secure unreasonably low weight limits and extensive anti-truck propaganda in various media, including infiltration of the Illinois and Oklahoma parent-teacher organizations.
unnecessary. The court also took notice of the potentially damaging effects of the prolonged delay required to permit full ICC findings.30

Luckenbach was unable to benefit from the rule announced in Riss. Its complaint charged a conspiracy to eliminate it from business, but alleged only predatory rate practices as the means of executing the conspiracy. Thus the Supreme Court did not have before it an application of the rule announced in Riss; and the decision cannot be said to approve that rule, or indeed any limitation to the doctrine of primary jurisdiction. At the most, the Court was given an opportunity to apply its dicta in Isbrandtsen by finding the agency well-suited for the initial determination of the intent of the rate practices. This indeed may be the most satisfactory explanation of its per curiam opinion.

For Luckenbach the result was unfortunate because injunctive relief may come too late. If the conspiracy to eliminate it from competition exists and meets with swift success, the results of the ICC's promised investigation may not prevent the harm feared. In order to avoid the delay31 of detailed investigation, Luckenbach tried to persuade the court to consider its charge; but the exception to primary jurisdiction, on which it sought to rely, had not yet been developed sufficiently to permit its success. It remains to be seen whether another carrier, alleging more than predatory rate practices, can persuade the Supreme Court to develop the doctrine further by approving the Riss rule.32


31 One further problem is suggested by the conspiracy exception and its attempted use by Luckenbach. Plaintiffs, seeking to resort to the courts rather than to the often industry-oriented administrative agencies, might tend to pad their complaints with conspiracy charges so as to invoke the jurisdiction of the courts. This in turn might tend to unjustifiably increase the workload of the courts. However, it can be argued that it is equally wasteful to send the suit from court to agency and back to the courts again to apply the administrative findings. See Jaffe, supra note 2, at 601.

32 For a defense of the Riss rule, see generally Note, 48 Geo. L.J. 563, 576 (1960).

MULTIPLE OFFENSES AND MULTIPLE PENALTIES UNDER THE FEDERAL NARCOTICS LAWS

In vain attempts to eliminate the illicit narcotics traffic, Congress has defined and redefined offenses and penalties for the purchase, possession and sale of narcotics. This proliferation of offenses1 may make the violator more susceptible to conviction; it may also force him to run the risk of prolonged confinement under consecutive sentences for a single act or for a related series of acts committed within a short period of time. Yancy v. United States,2 a recent


per curiam case, seems to sanction broad use of consecutive sentences in narcotics cases.

Yancy was convicted of two violations of 26 U.S.C. § 4704(a), the first count charging the purchase and the second the sale of 775 grains of heroin not “in or from the original stamped package,” for which consecutive five year sentences were imposed. The prosecution proved both counts by introducing evidence of a single sale and the possession necessarily incident thereto, since the statute made such possession “prima facie evidence of a [purchase] violation.” Thereafter defendant filed a motion to correct sentence, contending that the sentences constituted double punishment in excess of the statutory maximum. Reciting the “unbroken line of judicial authority” contrary to defendant’s contentions, the court of appeals held that there was “no choice but to affirm” the district court’s denial of the motion. The Supreme Court affirmed by an equally divided Court.

It has been suggested that, in deciding multiple offense cases, the “courts have announced as significant, the following elements: (1) the act, (2) the intent, (3) the consequences . . . or (4) the law.” Cases in which more than one crime is charged as a result of a single act which violates two or more statutory provisions may be termed, for convenience, multiple-law offenses. Similarly, cases in which the act, intent or consequence is the relevant plural element may be classified in terms of that element. Multiple-act and multiple-intent cases tend to raise questions of factual, or temporal, separability. Multiple-consequence and multiple-law cases, however, raise questions of legal separability since, by definition, the offenses charged are based upon a single fact situation. Regardless of the multiple element involved, the issue is the same:

3 INT. REV. CODE OF 1954, § 4707(a). “General requirement. It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.”

4 28 U.S.C. § 2255 (1958). “A prisoner ... claiming the right to be released upon the ground ... that the sentence was in excess of the maximum authorized by law ... may move the court which imposed the sentence to vacate, set aside or correct the sentence.”

5 Yancy v. United States, 252 F.2d 554, 556 (6th Cir. 1958).

6 Yancy v. United States, 362 U.S. 389 (1960). Having heard the case below, Mr. Justice Stewart did not participate.

7 See Horack, The Multiple Consequences of a Single Criminal Act, 21 MINN. L. REV. 805 (1937). Simply put, the question is whether there shall be multiple prosecutions for a criminal transaction when it involves more than one act (id. at 806–11), or more than one intention (id. at 812–14), or more than one consequence (id. at 814–19, 822) or when the conduct violates more than one legal prohibition (id. at 811).


Does the multiplicity provide a rational basis for conviction of multiple offenses, for which consecutive penalties may be imposed? To answer this question the courts commonly resort to either the "same evidence" or the "same transaction" test.

The "same evidence" test seeks to differentiate offenses by determining "whether each . . . [offense] requires proof of a fact which the other does not." If each offense requires proof of a unique fact, then multiple convictions and multiple penalties are appropriate. According to the "same transaction" test, multiple elements are irrelevant so long as they are part of a single transaction. Often, as in Yancy, the tests arrive at opposite conclusions on the same facts.

The problem of multiple penalties arises when the trial court imposes consecutive sentences for conviction of a multiple offense. In opposing the imposition of multiple penalties, defendants commonly make one or more of three contentions: (1) that the "same transaction" test should have been applied; (2) the multiple penalties violate the double jeopardy clause; and (3) that Congress intended that only one penalty be imposed.

Blockburger v. United States, the leading case, squarely holds that both multiple-acts and single acts in violation of more than one statute are subject to multiple penalties. Blockburger was convicted of three violations of the Harrison Narcotics Act on proof of two sales of morphine on consecutive days to the same government agent. For the second sale the prosecution separately charged violations of both the stamped package requirement and the written order requirement. The defense contended that the two sales were a single continuing offense. The Court held, however, that each sale was factually separable, requiring a fresh impulse of "a new bargain;" that the "same evidence" test rendered the two offenses charged under the second sale separable, since "each of the offenses . . . requires proof of a different element." The Court found the plain meaning of the statute to be that "each offense is subject to the penalty prescribed. . . ." The Blockburger case may be said to stand for three propositions: (1) that the "same evidence" test prop-
erly differentiates one offense from another; 18 (2) that Congress had the power to punish such offenses consecutively; 19 and (3) that Congress intended that such offenses might be punished consecutively. 20

Three multiple-offense cases 21 decided after Blockburger seem to have rejected the “same evidence” test in favor of the “same transaction” test, although they mention neither Blockburger nor the tests. The Court found in each instance a single allowable unit of prosecution, and held that in the absence of clear congressional intent to authorize multiple penalties, “the principle of lenity should control.” 22 Of the three, only Prince v. United States 23 was a multiple-law case, and it was decided under the “lesser-included-offense” rationale. 24 None of the cases controlled the multiple-law situation as presented by Blockburger or by Yancy; but in Gore v. United States 25 the Court felt constrained to “consider whether some of our more recent decisions, while not questioning Blockburger but moving in related areas, may not have impaired its authority.” 26

On proof of one sale, Gore was convicted of violating three separate sections of the Code, 27 and consecutive sentences were imposed. In affirming this disposition, the court of appeals recognized the controlling authority of Blockburger. 28 A concurring opinion, however, questioned the effect of the recent cases and suggested that the proper interpretation of congressional

18 Id. at 304.
19 Id. at 303-04 (by implication). For explicit statements of this proposition see Albrecht v. United States, 273 U.S. 1, 11 (1927); Burton v. United States, 202 U.S. 344, 377 (1906).
20 284 U.S. at 305.
24 Id. at 329. On denial of defendant’s motion to correct consecutive sentences, the issue was whether the crime of entering a bank with intent to commit a robbery is merged with the crime of robbery when the latter is consummated. Reversal was grounded upon a judicial determination that Congress did not intend to double the maximum penalty for robbery, but sought, rather, to allow the maximum penalty “if the culprit should fall short of accomplishing his purpose...” Thus the Prince case presents a clear example of a “lesser included offense.” For the suggestion that not only such obvious cases, but also cases where the “legislator has attempted to carve out a variety of offenses from one and the same transaction,” should be subject to single punishment under the rule “lex consumens derogat legi consumpta,” see Kirchheimer, The Act, The Offense and Double Jeopardy, 58 Yale L.J. 513, 518-20 (1949).
25 357 U.S. 386 (1958); Note, supra note 1.
26 357 U.S. at 388.
28 Gore v. United States, 244 F.2d 763 (D.C. Cir. 1957).
intent might warrant reversal.29 By a five-four decision the sentences were approved by the Supreme Court.30 The court followed Blockburger and reaffirmed the three propositions for which it has been said to stand.31 It also declared a fourth proposition: since Congress had the power to punish each of the offenses separately, multiple penalties could not violate the double jeopardy clause.32 The question was then whether Congress had exercised this power. That it had was inferred from the fact that each of the three statutes was enacted separately. This revealed the “determination of Congress to turn the screw of the criminal machinery . . . tighter and tighter.”33

In a dissenting opinion, Justices Black and Douglas questioned Congress’s power to impose such penalties, resisting “a reading which . . . [infers] that Congress intended multiple offenses from the same sale, for that would not square with the [double jeopardy clause of the] Constitution.”34 The Chief Justice, who had written the majority opinion in Prince,35 argued that in view of Congress’s purpose to achieve uniformity in sentences “the present purpose of these statutes is to make sure that a prosecutor has three avenues by which to prosecute one who traffics in narcotics, and not to authorize three cumulative punishments for the defendant who consummates a single sale.”36

Mr. Justice Brennan, the fourth dissenter, found the majority opinion “inconsistent with the principles of Blockburger because it allows separate offenses to be proved and separate punishments to be imposed on the proof of

29 Id. at 766 (concurring opinion).
31 See text at notes 18–20 supra.
32 Speaking for the majority, Mr. Justice Frankfurter posited the following statute:
“Anyone who sells drugs except from the original stamped package and who sells such drugs not in pursuance of a written order of the person to whom the drug is sold, and who does so by way of facilitating the concealment and sale of drugs knowing the same to have been unlawfully imported, shall be sentenced to not less than fifteen years’ imprisonment . . . [provided that the penalty shall be reduced by one-third for any missing element].” 357 U.S. at 392.

The Court then put these questions: “Is it conceivable that such a statute would not be within the power of Congress? And is it rational to find such a statute constitutional but to strike down the Blockburger doctrine as violative of the double jeopardy clause?” Id. at 393.

While this argument may dispose of the double jeopardy contention, the fact that Congress did not express itself in the manner suggested by Mr. Justice Frankfurter raises additional questions: Is it not conceivable that Congress did not intend to impose multiple penalties under the existing statutes? And is it rational to conceive of this possibility and yet fail to find sufficient ambiguity of intent to invoke the principle of lenity?

33 Id. at 390. The “stamped package” requirement derives from the Revenue Act of 1918, § 1006, 40 Stat. 1057, 1130 (1919); the “written order” requirement from the Act of December 17, 1914, § 2, 38 Stat. 785, 786 (1914); the “facilitating concealment and sale” prohibition from an enactment of February 9, 1909, § 2, 35 Stat. 614.
34 357 U.S. at 395, 397 (dissenting opinion).
35 See note 26 supra.
36 357 U.S. at 393, 394 (dissenting opinion).
The possibility of securing two convictions from presumptions raised by the single fact of unexplained possession of narcotics violated, he maintained, the literal requirements of the "same evidence" test, i.e., "whether each provision requires proof of a fact which the other does not." The opportunity to limit the application of the "same evidence" test to its literal requirements was presented in *Harris v. United States*. The Court rejected that formulation, finding it sufficient that "the violation, as distinguished from the direct evidence offered to prove that violation, was distinctly different under each of the statutes." In a dictum, the Court argued that close scrutiny of the facts required to raise each of the presumptions would distinguish the offenses, even under the Brennan formulation of the test.

The equal division of the Court in *Yancy* suggests that a factor not common to *Gore* and *Harris* was at issue. The difference is the apparent absence of a multiple element. Yancy executed a single act with a single intent resulting in a single consequence in violation of a single section of the Code. The Court's failure to overturn his conviction permits multiple offenses to be charged for violations of several specific provisions within one section of a single narcotics statute. The *Gore* case had held that Congress's intention to impose multiple penalties could be inferred from the fact that each statute had been enacted separately. Since this rationale cannot be applied in *Yancy*, it was the

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37 357 U.S. at 397 (dissenting opinion).
40 Id. at 23.
41 "[T]o take advantage of the presumption of § 174 it is necessary only to prove possession by direct evidence; whereas to take advantage of the presumption of § 4707(a) it is necessary to prove by direct evidence that the narcotic was unstamped as well as that it was in the defendant's possession." Id. at 23–24. This argument is not to be accepted at face value, for § 174 requires that the drugs in question have been imported "contrary to law." 65 Stat. 767 (1951), 21 U.S.C. § 174 (1958). In the ordinary case this requirement would be satisfied by showing that the drugs were unstamped. Thus the "direct evidence" normally adduced under each of these sections will be precisely the same.
42 See note 3 supra. The Government's brief explains that "the prosecutive technique used here of charging both a purchase and a sale in violation of the stamped package requirement is atypical . . ." and that the typical method, as exemplified in *Gore*, is now used in the Eastern District of Michigan, where the *Yancy* case arose. Brief for the United States, p. 15 n. 9, Yancy v. United States, 362 U.S. 389 (1960).
It should also be noted that, on proof of a separate sale, the indictment had charged two additional violations of the stamped package requirement. These counts were held in abeyance until the time of sentencing, when they were dismissed on the government's motion. Record, pp. 4, 6, Yancy v. United States, 362 U.S. 389 (1960).
43 Nor would Mr. Justice Stewart's participation in *Yancy* have changed that result. His opinion below suggested that the *Blockburger* doctrine be "re-examined" (252 F.2d 554, 556 (6th Cir. 1958)). That re-examination took place in the *Gore* case; Mr. Justice Stewart acquiesced in the results thereof in the *Harris* case.
Court, rather than Congress, that "turn[ed] the screw...tighter and tighter." 44

The Court's disposition of the double jeopardy contention seems proper. That defense is based upon the proposition that, even if Congress intended to punish these offenses separately and had explicitly declared such intention, separate punishments would be void as violative of the double jeopardy clause. Thus to circumscribe congressional power seems the least desirable solution to the problem. 45

The three statutes involved in the typical narcotics prosecution 46 were amended in 1951 47 and 1956 48 by legislation providing for more stringent and

44 See note 33 supra. It is not contended that single statutes have not in the past been the basis for a finding of multiple violations, but the Yancy case appears to be the first narcotics case where this was done. That this extension is a significant one may be inferred from the fact that, in the Gore case, only the narrowest majority found that separate statutes provided such a basis; and from the fact that were it insignificant, Mr. Justice Frankfurter need not have grounded the Gore decision on the fact that each violation arose from "three penal laws...[having] different origins both in time and in design" (357 U.S. at 390).

In Mullaney v. United States, 82 F.2d 638 (9th Cir. 1936), separate punishments were upheld for convictions under two counts charging purchase and sale of the same quantity of morphine "not in or from the original stamped package." The decision was based upon the original stamped package." The decision was based upon the court's determination that the sale charge was brought under the Harrison Narcotics Act (38 Stat. 785), while the purchase charge was based upon the Jones-Miller Act (42 Stat. 596). Id. at 644. In fact, both the purchase and the sale provisions derive from the Revenue Act of 1918, § 1006, 40 Stat. 1057, 1130 (1919). It may be assumed that an accurate reading of the statute would have led the court to reverse the conviction under one of the charges.

45 See Note, supra note 1. Compare Comment, Statutory Implementation of the Double Jeopardy Clause, 65 YALE L.J. 339 (1956). The issue raised is whether the double jeopardy clause has any applicability in the one-trial, multiple count situation. That the clause would serve to bar successive trials for a single sale which transgress more than one statute is illustrated by the unique circumstances in United States v. Sabella, 272 F.2d 206 (2d Cir. 1959). In the course of enacting the INTERNAL REVENUE CODE OF 1954, Congress had failed to prescribe penalties for conduct made unlawful under § 4705, the written order requirement. This omission was corrected by the Act of January 20, 1955, 69 Stat. 3. Defendants were convicted and sentenced for violation of § 4705 based on a sale of heroin "on or about January 17, 1955." In April 1956, the defendants sought and obtained release from imprisonment by writ of habeas corpus on the ground that at the date of the offense there was no law authorizing the sentence. On the Government's motion, the court ordered the sentences vacated and set aside the judgment of conviction.

Thereafter, the defendants were indicted for violation of 21 U.S.C.A. §§ 173, 174 based upon the same sale charged in the previous action. Relying upon Blockburger, the trial court rejected the defendants' pleas of double jeopardy and the defendants were again convicted and sentenced.

The court of appeals reversed citing Blockburger, Gore and Harris for the proposition that "the defendants here could have been initially indicted for the single sale and given consecutive sentences under the two counts..." 272 F.2d 206, 211 (1959).

"The Fifth Amendment guarantees when the government has proceeded to judgment on a certain fact situation, there can be no further prosecution on that same fact situation... Although in such a prosecution it may join other charges based on the same fact situation, it may not have a succession of trials seriatim." Id. at 212.

46 See note 27 supra.
more uniform penalties.\textsuperscript{49} It remains, therefore, to determine whether these amendments are instructive of congressional intent.

Prior to 1951 a violation of each of these statutes was punishable by a sentence of up to five years imprisonment. Thus the typical prosecution might have yielded a fifteen year sentence. In 1951 the Boggs Act\textsuperscript{50} was enacted in response to the apparent increase in drug addiction and the felt inadequacies of existing penalties.\textsuperscript{51} It provided graduated minimum and maximum penalties for repeated violations of the narcotics laws,\textsuperscript{52} and precluded suspension of sentence and probation on conviction of a second or subsequent offense.

Defendants Gore, Harris and Yancy were sentenced to prison terms in excess of the statutory maximum for first offenders, but by defining the violation of each statute as a separate offense, the Court was able to reconcile the sentences with the statute. This approach does violence to the legislative objective of establishing uniform penalties.\textsuperscript{53} The variety of offenses which may be shaped from a single act, compounded by the court's discretionary imposition of concurrent or consecutive sentences, yields a complex of variables which may be arranged in a great number of sentencing patterns. Without disturbing the sanctity of the trial judge's discretion, greater national uniformity can be achieved only by limiting the prosecutor to one conviction for each "trans-action."

The Boggs Act was amended in 1956\textsuperscript{54} to provide even more severe penalties.\textsuperscript{55} The difficulty of uniformity under the Act is exacerbated by this amendment, since it gives the prosecutor and the judge the power to impose no-parole sentences ranging from five to sixty years. Imposition of the current maximum sentences in the typical multiple offense case\textsuperscript{56} would incarcerate the offender literally for the duration of his life. The statute does not support the inference that Congress intended this result, for it would render inoperative those sections providing for graduated penalties for repeated violations. Such a result, moreover, cannot be supported by any modern theory of penology. To avoid imputing a contradictory and anachronistic intent to Congress, the present statute should be interpreted as punishing a course of conduct, for which one punishment only may be imposed.

\textsuperscript{49} See 2 U.S. Code Cong. & Ad. Serv. 2602 (1951).
\textsuperscript{50} See note 47 supra.
\textsuperscript{51} 2 U.S. Code Cong. & Ad. Serv. 2603-06 (1951).
\textsuperscript{52} First offense: two–five years' imprisonment; second offense: five–ten years'; third and subsequent offenses: ten–twenty years' imprisonment.
\textsuperscript{53} Gore v. United States, 244 F.2d 763, 766 (concurring opinion).
\textsuperscript{54} See note 48 supra.
\textsuperscript{55} First offense: five–twenty years' imprisonment; subsequent offenses: ten–forty years' imprisonment, with suspension of sentence, probation and parole precluded for all offenders.
\textsuperscript{56} See note 27 supra.
So long as the federal courts continue to differentiate multiple offenses by application of the "same evidence" test, the burden will be upon the defense to show that Congress intended a single punishment for a single transaction, or that there is sufficient ambiguity of intent to invoke the "principle of lenity." The cases indicate that such attempts will probably be unsuccessful. If, on the other hand, the "same transaction" test were consistently applied, it would be up to Congress to make clear whether a given transaction, in violation of several statutes, was to be subject to multiple penalties. In the absence of such clarification, the "same transaction" test would require a single penalty. It may well be that this is the more realistic approach.57 Strict and exclusive application of either test proceeds upon the assumption that Congress can correct results inconsistent with its intent. Although this corrective power is theoretically available, the weight and direction of public opinion, organized pressure groups and traditional policy make it abundantly clear that Congress will not, as a practical matter, reduce the penalties prescribed for persons convicted of heinous crimes.

The solution would appear to lie in the application of the "same transaction" test to multiple-law offenses. Since that test would always operate to reduce the possible range of penalties, defendants would benefit by congressional inaction, and corrective legislation could be directed toward the politically feasible goal of increasing the range of penalties.


THE ROLE OF "INHERENT ADVANTAGES" IN INTERCARRIER COMPETITION

In Wabash R.R. v. Commercial Transp., Inc.,1 the Supreme Court reasserted the importance of weighing the "inherent advantages" of competing modes of transportation in applications for certificates of convenience and necessity before the Interstate Commerce Commission. Commercial Transport, Inc., applied for a certificate of public convenience and necessity2 authorizing the carriage of cement in bulk between points in Missouri and Illinois. The application was opposed by five railroads which provided the only available transportation of cement in that area. Three cement producers who controlled the shipping routes also opposed the application. They testified that such service was unnecessary and would entail expensive construction of truck loading facilities.3 The proposed trucking service was supported by the

1 361 U.S. 1 (1959).
Association of General Contractors of Illinois and by a highway construction firm. Their testimony tended to establish the need for, and advantages of, the cheaper and more flexible motor carrier mode of transportation. There was additional testimony to the effect that great quantities of cement would be required in the near future because of a large highway building program scheduled by the State of Illinois. A joint board recommended that the certificate be granted. This report subsequently was rejected by Division I of the ICC. The full Commission upheld the decision of Division I denying the application. On review, a three-judge district court reversed and remanded the case to the ICC for further proceedings. The federal court found that the Commission had heeded the shippers' interests without any consideration of interests of receivers and consignees. The Commission, the court concluded, had failed to assess the "inherent advantages" of the proposed service to the public, and thus had acted inconsistently with the National Transportation Policy. On direct appeal the Supreme Court affirmed per curiam without opinion.

The phrase "inherent advantages" is, of course, nowhere defined by Congress. But it is typical of the broad and vague policy pronouncements embodied in the Transportation Act of 1940. The ICC has broad discretion to

9 "National Transportation Policy: It is hereby declared to be the national transportation policy of Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this act shall be administered and enforced with a view to carrying out the above declaration of policy." 54 Stat. 899 (1940), 49 U.S.C. preceding § 1 (1958). (Emphasis added.)
11 The phrase was contained in the policy declaration that prefaced the Motor Carrier Act of 1935, 49 Stat. 543, repealed when the National Transportation Act was enacted.
12 54 Stat. 899 (1940), 49 U.S.C. § 1 (1958). The National Transportation Policy, set forth as the guide to the Transportation Act of 1940, is the product of a long history of congressional attempts to regulate the nation's transportation facilities beginning with the Interstate Commerce Act of 1887, 24 Stat. 79. The Transportation Act of 1920, 41 Stat. 456, directed policy objectives away from a concern with the prevention of abuses towards an affirmative
interpret and give concrete meaning to the congressional declarations. In a few instances, the Supreme Court has indicated explicitly that the 1940 revisions gave the more positive task to the Commission to assess "inherent advantages" in their proceedings. In the mass of reported decisions, however, the "inherent advantages" of a particular mode of transportation are seldom discussed. When competition between two different forms of transportation occurs—between motor and rail in the instant case—the apparent reluctance of the Commission to interpret policy should be abandoned more readily, in light of the express mandate of Congress "to preserve the inherent advantages" of each form of service.

In proceedings on two applications to transport bulk liquids filed pursuant to the Motor Carrier Act of 1935, the Commission considered this matter and concluded that motor carriage had "inherent advantages" over rail carriage, and that shippers of those commodities were entitled to adequate service by both modes of transportation. This position was later reversed when an application to transport petroleum in bulk by motor carrier was refused, even though the Commission noted that shipment by railroad did not move as expeditiously as would the applicant's service. The Supreme Court finally considered the matter in Schaffer Transp. Co. v. United States, where a Ver-build-up of a system of railways able to handle all the country's interstate traffic. The ICC was to be guided in its administration primarily by consideration for "adequacy of transportation service." Beginning with the rapid growth of competing modes of service in the 1930's, Congress extended federal regulation into other kinds of transportation, eventually consolidating the various enactments (excluding air transportation) into the Transportation Act of 1940.


14 McLean Trucking Co. v. United States, 321 U.S. 67, 82 (1944) ("That policy, which is the Commission's guide to 'the public interest'... demands that all modes of transportation... be so regulated as to 'recognize and preserve the inherent advantages of each...'"); Eastern-Cent. Motor Carrier Ass'n. v. United States, 321 U.S. 194, 205-06 (1944) ("It [the ICC] became, not merely the regulator, but to some extent the coordinator of different modes of transportation."); ICC v. Parker, 326 U.S. 60, 68 (1945) ("[T]he preservation of the inherent advantages of motor carriers is of equal importance with efficiency under the national transportation policy. . . .").

15 "Notably [the ICC] has shied away from any clear interpretation of the national transportation policy. . . ." Williams, THE REGULATION OF RAIL-MOTOR RATE COMPErrnoN 206 (1958). Williams goes on to point out that the carriers themselves in presenting evidence have many times failed to point up important policy and issues. In fairness to the ICC, it should also be indicated that the great load of cases before the Commission gives little opportunity for an understaffed agency to come to grips with national policy.

16 Columbia Terminals Co., 9 M.C.C. 727 (1938); Edwin A. Bowles, 1 M.C.C. 589 (1937).

17 Bailey Common Carrier Application, 33 M.C.C. 537 (1942). One possible explanation for the abandonment of the earlier position in this particular case might be found in the wartime circumstances which favored sound maintenance of the railroads whose service was never more crucial than in such a period. The loss of important traffic might have led to abandonment of some rail service.

18 355 U.S. 83 (1957) (Mr. Justice Frankfurter dissenting).
mont trucker, with the support of three shippers, six receivers, and a granite manufacturers' association, was denied a certificate by the Commission in an area served exclusively by railroads, primarily on a finding that the main purpose of the shippers was to obtain lower rates. The Supreme Court reversed, noting that the Commission had failed to assess the need for a service having the advantages possessed by motor carriers. The Court stated specifically that lower rates were "precisely" the kind of "inherent advantages" which the Commission was to recognize.

In Wabash, all the shippers who controlled the routing of traffic testified that they would not utilize the service. In Schaffer, on the other hand, both shippers and receivers requested that the certificate be granted. The significance of the instant case would, therefore, seem to lie in the fact that "inherent advantages" were given a broader recognition than in previous cases. This may reflect an effort of the federal courts to increase competition in many areas now served only by railroads. A line of motor carrier application cases had established that shipper testimony was the most important single item in showing public need for a new service. A denial of the trucker's application appeared certain without at least one shipper's backing. The Commission, furthermore, has been reluctant to grant certificates on the showing of only a "future" need. The attitude of the Commission was reflected in an article


20 "When a motor carrier seeks to offer service where only rail transportation is presently authorized, the inherent advantages of the proposed service are a critical factor which the Commission must assess." 355 U.S. at 89-90.

21 In its report on reconsideration, the Commission gave further attention to the "inherent advantages" of motor carrier service, and granted the application. Because of these superior services, the Commission concluded that the grant was warranted without taking into account the alleged rate advantage. A. W. Schaffer, 77 M.C.C. 5 (1958).

22 In a case note on the district court opinion stressing the stake of the cement shippers in opposing the application because of their control over price levels by using stabilized railroad costs, the writer saw the significant holding of the instant case in a different light: "The crucial impact of [the] decision is not so much on the rail-motor conflict itself, but on the vested interest of the producers of cement." 108 U. Pa. L. Rev. 606, 609 (1960).

23 E.g., Post Norris Express Co., Inc., No. MC-110841 (April 30, 1958) (Application supported by a dissatisfied receiver of limestone via rail, while shipper, on behalf of opponent, testified that there were no motor vehicle loading facilities); Harold C. Gabler, 69 M.C.C. 663 (1956); Eldon Miller, Inc., 68 M.C.C. 583 (1956). In neither of the above cases did the Commission mention "inherent advantages," although both involved inter-carrier competition between railroads and motor carriers.

24 Ray Peake, 68 M.C.C. 45, 49 (1956); George F. Barnett Co., Inc., 64 M.C.C. 400, 402 (1955). Although in the instant case the highway construction program to start in Illinois in 1957 (Commercial Transportation, Inc., applied in 1956) was by no means "indefinite," the Commission has denied an application for transportation of cement in bulk based on future public need on the ground that a dam to be built in one of two counties was "too indefinite" evidence to support a grant. Bangerter Extension, 71 M.C.C. 105, 108 (1957).
co-authored by the Chairman of Division I, Commissioner Hutchinson. In his extensive treatment of evidence in motor carrier application cases, Commissioner Hutchinson clearly pointed to a result opposite to that reached by the Court.

It would appear that the federal courts, by couching their reversals of Commission orders in the language of "inherent advantages," may be directing the ICC to reassess its role in the regulation of transportation. Surely the Commission should not consider itself the maker of policy or the planner for a particular industry, but a shift from a passive to an active view of its responsibilities under the Transportation Act now appears desirable. The result of such a change in attitude would be a more informative presentation of the "inherent advantages" of the particular modes of transportation by the competing shippers and carriers in proceedings before the Commission. While the great bulk of past proceedings were devoid of useful economic evidence, the Commission would in the future be able to act consistently on the comprehensive showings which the carriers would make in the proceedings. This would also enable the Commission to decide more efficiently whether the public need warrants the increased competition. The suggested judicial attitude in favor of increased competition, in the final analysis, indicates that the "inherent advantages" of a competing mode should be given more weight in the balancing of statutory transportation policies than previously acknowledged by the ICC.

Support is given to the above conclusions by two other cases involving the National Transportation Policy, which were before the Supreme Court in the 1959 Term, and were affirmed per curiam. State Corp. Comm'n v. Arrow Transp. Co. reasserted the federal courts' insistence that the ICC assess the "inherent advantages" of each particular mode of transportation. Three barge lines filed a complaint with the Commission asking it to prescribe ex-


26 Id. at 1068-73.

27 The Schaffer and Wabash decisions at least should indicate to the ICC a dissatisfaction with its previous hesitancy to assess the "inherent advantages" of a particular mode in inter-carrier competition. There is some indication that the Commission has responded in part to the new directives. See note infra and accompanying text.

28 The application of restrictive standards by the ICC tends to protect established carriers against potential competition. See Dearing and Owen, National Transportation Policy 191-92 (1949) and Williams, op. cit. supra note 15, at 201.

29 If the Commission wishes to deny competing service in a particular area, it might protect itself from reversal on appeal by entertaining evidence and making findings on the "inherent advantages," which could be found to be outweighed by other economic policies. Compare the approach of the ICC in Brooks-Gillespie Motors, Inc., 10 M.C.C. 151 (1938) (authorizing service), with Kenosha Auto Transp. Corp., 52 M.C.C. 123 (1950) (denying application).

barge rates on grain from Tennessee River ports. Complainants asserted discrimi-
nation under the existing rate structure, which permitted the railroads to
charge full local rates for rail shipment of ex-barge grain, while affording more
favorable treatment to ex-rail grain transported from the same ports. The
three-judge court reversed the Commission’s refusal to change the rates, relying in its opinion on previous decisions forbidding any rate-making de-
vice which deprived barge transportation of its “inherent advantage” of cheaper service.

In St. John’s Motor Express Co. v. United States, a trucker sought a cer-
tificate to transport chemicals and acids in the western states. His only com-
petitors were other motor carriers already serving the area. Thus there was
no question of competitive modes or of “inherent advantages.” The Commis-
sion granted the application on the basis of the expanding requirements in the
western states for use of liquid chemicals. Using the National Transporta-
tion Policy and Schaffer as a guide, the Commission found that the applicant
had met the requirements of “public convenience and necessity.” The order
was sustained by the reviewing federal court, and affirmed per curiam.

These two decisions serve to emphasize first, that the reviewing federal
court, in order to foster and preserve competitive advantage, will set aside a
Commission order which discriminates or fails to assess the competing modes’
“inherent advantages.” Secondly, the Schaffer decision has, in at least some
instances, directed the Commission toward a more precise investigation of
what constitutes a sound transportation system in its consideration of appli-
cations to transport goods.

32 ICC v. Mechling, 330 U.S. 567 (1947) (Commission could not lawfully permit the rail-
roads to charge higher rate on ex-barge grain than they charged on ex-rail grain); Dixie
Carriers, Inc. v. U.S., 351 U.S. 56 (1956) (Commission could not permit the railroads to
apply local rates to the handling of ex-barge sulphur where ex-rail sulphur was handled on a
division of joint rate). The Schaffer case was relied on for the general proposition that the
standards prescribed by the National Transportation Policy are binding on the Commission.
Id. at 416.

33 “[T]his case presents another chapter in the conflict between the requirements of the
National Transportation Policy that the provisions of the Interstate Commerce Act be
administered in such a way as to preserve the inherent advantages of water transportation
and the desire of the railroads to offset those advantages by refusing to accord traffic re-
ceived from a connecting barge line the same treatment accorded to traffic received from
Ala. 1959).
34 361 U.S. 84 (1959).
36 “We have, of course, constantly kept in mind our responsibility under the national
transportation policy. It goes without saying that the purpose of the policy must be con-
sidered in all proceedings of the character presented.” Id. at 765.
37 The most recent acknowledgement of the directive in Schaffer by the ICC was in Best
Transp., Inc., 82 M.C.C. 407 (1960) (application denied on other grounds).
Although the extension of the "inherent advantages" test in Schaffer and Wabash should serve the useful purpose of leading the Commission, "despite its enormous volume of business, to a more detailed and illuminating formulation of the reasons for the judgment that it reaches . . .," the responsibility to preserve and foster competition between the various modes is not without a latent ambiguity. The National Transportation Act does not clearly indicate whether Congress intended that carriers be formed into a strongly "coordinated" transportation system or that carriers retain their individual and competitive character. This ambiguity is most apparent in carrier certification cases and where railroads seek to establish subsidiary trucking units. The preservation of the "inherent advantages" of each of the several types of carriers in competition and the assurance to the shipper of a choice of service will necessarily conflict on occasion with the advantages to be gained by efficient consolidation internally and externally in a particular industry. Hopefully, however, the increased concern of the reviewing court with the "inherent advantages" of competing modes of transportation—a concern tacitly acquiesced in by the Supreme Court in the Wabash per curiam decision—will now suggest to the ICC that it attack the individual case along a broader front, with the whole pattern of competition freshly in mind.


39 See National Transportation Policy, supra note 9.

40 See Mack & Bogue, Federal Regulation of Motor Carrier Unification, 50 Yale L.J. 1376, 1414 (1941).

41 McLean Trucking Co. v. United States, 321 U.S. 67 (1944) (ICC authorized largest consolidation of motor carriers to date on the basis of improved transportation service and the policy; anti-trust legislation held subordinate as a specific expression of objectives); Association Transp., Inc., 38 M.C.C. 137, 163 (1942) ("The large size of a motor carrier which would result from a unification alone does not constitute sufficient ground for denial of application."); But cf. Pacific Intermountain Express Co., 57 M.C.C. 341 (1950), aff'd on rehearing, 57 M.C.C. 467 (1951) (Proposed consolidation of motor carriers denied on basis that railroad system damaged irreparably by such a grant; "inherent advantages" of railroads assessed).

42 ICC v. Parker Motor Freight, 326 U.S. 60 (1942) (ICC grant to motor carrier subsidiary of railway upheld by Supreme Court with vigorous dissent by Mr. Justice Douglas, who claimed majority opinion affixed "railroad convenience" instead of "public convenience").

43 Justices Douglas and Black generally support the preservation of free competition under the Interstate Commerce Act. See McLean Trucking Co. v. United States, 321 U.S. 67 (1944). Mr. Justice Frankfurter, on the other hand, shows a reluctance to go beyond a section of a statute to determine a possible intent of Congress in its grants to the Commission, and rests his decision on substantial evidence grounds, competitive factors being merely a portion of the evidence to be weighed. See his dissent in Schaffer Transp. Co., Inc. v. United States, 355 U.S. 83 (1957).
STATE TAXATION OF GOVERNMENT CONTRACTORS AND THE "LEGAL INCIDENCE" TEST

In Livingston v. United States\(^1\) the Supreme Court affirmed per curiam, without opinion,\(^2\) a decision of a three judge district court,\(^3\) enjoining the collection of South Carolina sales and use taxes from a contractor of the Atomic Energy Commission.

The Savannah River plant of the AEC was operated and managed by the du Pont Company under a contract between du Pont and the AEC. Du Pont's sole fee for its services was to be one dollar. Du Pont was to be reimbursed for all expenses incurred in connection with the project. Funds were deposited by the government with various banks, and du Pont drew against these to pay operating expenses. Title to all materials purchased by du Pont vested in the government when title left the vendor. Section 9(b) of the Atomic Energy Act\(^4\) had expressly exempted the property and activities of the Commission from state taxation. When this provision was repealed,\(^5\) the South Carolina Tax Commission took the position that du Pont would be liable for sales and use taxes on all subsequent purchases. The United States and du Pont sought, in a three judge district court,\(^6\) to enjoin collection of the taxes. At issue was the sum of $1,700,000 in South Carolina sales and use taxes. The court granted the injunction, one judge dissenting.\(^7\) It held that the contract between du Pont and the AEC constituted du Pont the "alter ego" and agent of the government and that all purchases by du Pont under the contract resulted in sales to the United States; the United States being the purchaser, collection of the taxes would violate the government's constitutional immunity to state taxation.\(^8\)

\(^1\) 364 U.S. 281 (1960).
\(^2\) Mr. Justice Black and Mr. Justice Douglas were of the opinion that probable jurisdiction should be noted.
\(^4\) 60 Stat. 765 (1946).
\(^6\) Convened pursuant to 28 U.S.C. \(\S\) 2281 (1958).
\(^7\) 179 F. Supp. at 24.
\(^8\) The district court also considered its jurisdiction to enjoin the collection of a state tax under 28 U.S.C. \(\S\) 1341 (1958): "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." The court assumed jurisdiction on two grounds. First, it held that \(\S\) 1341 has been construed not to apply to suits by the United States, citing United States v. Woodworth, 170 F.2d 1019 (2d Cir. 1948); Board of Comm'r's of Pawnee County v. United States, 139 F.2d 248 (10th Cir. 1944); City of Springfield v. United States, 99 F.2d 860 (1st Cir. 1938); and United States v. Okaloosa County, 59 F. Supp. 426 (N.D. Fla. 1945). Secondly, it noted that South Carolina law provides for payment of tax under protest and a suit for refund. Since it was not certain whether interest is awardable to the winner of a refund suit, the South Carolina remedy was not "plain, speedy and efficient," citing Dollar Savings Bank v. United States, 86 U.S. (19 Wall.) 277 (1873). 179 F. Supp. at 11-15.
This decision raises once more the question of the extent of the federal government's constitutional immunity to state taxation. The immunity doctrine was first announced in the landmark case of *McCulloch v. Maryland*. The doctrine was subsequently extended to cover a wide variety of situations, and the economic-burden test was developed to govern the scope of application of the immunity. Under that test a state tax violated governmental immunity if the economic burden was transferred to the federal government, whether or not the tax was directly levied against the government.

*James v. Dravo Contracting Co.* marked the beginning of the curtailment of the immunity doctrine and the abandonment of the economic-burden test. The Court there upheld the levy of a West Virginia gross receipts tax on the income of a builder who was constructing locks and dams in a navigable stream under contract with the federal government. In *Alabama v. King & Boozer* the Court expressly discarded the economic-burden test. It approved the imposition of an Alabama sales tax on the sale of lumber to a government contractor, even though Alabama law required the seller to add the tax to the purchase price, and the government clearly bore the economic burden under its cost-plus contract with the builder. The Court noted that Alabama law placed the legal incidence of the tax on the purchaser. The decision turned upon the identity of the purchaser. Examining the contract between the builder and the government, the Court found that title to materials did not vest in the government until they were accepted by a government agent; that all purchases were to be made in the builder's name; and that the purchase contracts

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10 17 U.S. (4 Wheat.) 316 (1819).


12 The oft-cited case of Pollock v. Farmers Loan & Trust Co., 157 U.S. 429 (1895), is thought by some to be the first case applying the economic-burden test to the field of tax immunities. However that case involved state immunity to federal taxation. For cases applying the economic-burden test to the type of situation presented by the instant case, see Graves v. Texas Co., 298 U.S. 393 (1936); Panhandle Oil Co. v. Mississippi *ex rel.* Knox, 277 U.S. 218 (1928).


14 314 U.S. 1 (1941).
were not to purport to bind the government. On the basis of these findings, the Court concluded that the government was not the purchaser, and approved the tax.

In *Kern-Limerick Inc. v. Scurlock* the Court considered a contract which “differed [from that in *Alabama v. King & Boozer*] in form but not in economic effect on the United States.” Here, too, state law required that the tax be passed on to the purchaser, but the contract between the government and the builder designated the builder as purchasing agent for the government and provided that title to materials would vest in the government whenever it left the vendor. On the basis of this distinction, the Court concluded the government was the purchaser and disallowed the tax.

The test for the application of the immunity doctrine as established by *Kern-Limerick* and *King & Boozer* is thus one of form rather than substance. If the state tax statute requires the retailer to pass on the tax to the purchaser and if the government is the direct purchaser, the incidence of the tax is clearly on the government and the tax violates governmental immunity. If, on the other hand, a private company does work for the government under contract and is the immediate purchaser, then the contract is examined; and if it is determined that the contractor purchases as agent for the government, rather than for his own account, immunity is violated by the imposition of a state tax. Thus emerges the “legal incidence” test.

*United States v. City of Detroit,* United States v. Township of Muskegon, and *City of Detroit v. Murray Corp.* further limited the scope of the immunity doctrine. In all three cases the Court held that private contractors could be taxed for the use of government property in performance of contracts with the government; the Court approved the imposition of a tax based upon the value of the property. These decisions tacitly overruled *United States v. County of Allegheny* which had held that government property interests were not taxable to the government or its bailee. The *Detroit* cases thus made it possible for states to impose a property use tax upon government contractors who utilized bailed or leased government property in performing their contracts, as did du Pont in the instant case.

16 Id. at 119.
17 Cf. *Federal Land Bank v. Bismark Lumber Co.*, 314 U.S. 95 (1941). Whether or not a state tax violates governmental immunity will thus depend partly on the form of the state sales tax statute. These statutes either require, forbid or merely permit the retailer to add the tax to the purchase price. Of the 33 states and the District of Columbia with sales taxes, 21 place the burden of the tax upon the purchaser. 22 *TAX ADMINISTRATORS NEWS* 73 (1958).
22 But see *Conlon, Some Tax and Revenue Problems of the State*, XXXIII STATE GOVERNMENT 114, 120 (Spring 1960). The author advises against state legislation designed to take advantage of the *Detroit* decisions mainly due to uncertainty as to how state courts will construe the decisions.
Although *Livingston* does strike down a tax on the ground of constitutional immunity, it should not be considered a retreat from the Supreme Court’s post-1937 curtailment of the immunity doctrine. The district court applied the “legal incidence” test established by *King & Boozer* and *Kern-Limerick*. Absent in *Livingston* was the express designation of the contractor as purchasing agent which characterized the contract in *Kern-Limerick*. Nevertheless the district court concluded that du Pont bought as agent for the government; and since the South Carolina statute required the vendor to charge the tax to the purchaser, the government bore the legal incidence of the tax. The court noted particularly the purely nominal nature of du Pont’s one dollar fee, and observed that du Pont never bought in its own name nor with its own money and never took title to the materials. It also felt that the urgency which attended the establishment of the Savannah River plant made it appropriate for the AEC to constitute du Pont its “alter ego” and agent. The court’s reasoning is open to question from the viewpoint of orthodox agency doctrine. Agent and independent contractor are not generally differentiated on the basis of magnitude of the fee or urgency of the endeavor. Nonetheless it would seem that the mode of procurement specified in the du Pont-AEC contract did make du Pont an agent at least for procurement purposes. Thus the case would seem to establish that for purposes of application of the *Kern-Limerick* rule a government contractor need not be expressly designated an agent.

The South Carolina Tax Commission and the dissenting district court judge sought to bring the case within the scope of the *Detroit* cases. They argued that whereas du Pont was not a contractor for profit, as were the contractors in the *Detroit* cases, the company, nevertheless, made a profit on sales of its own commercial products for use in the plant, and also reaped the benefits of experience and training gained by its personnel while operating the plant. The court rejected the first contention on the ground that the amount of du Pont’s commercial products used was minute compared with total materials used. The second argument has more force. The court rejected it, stating that the techniques and skills required to operate the Savannah River plant were foreign to du Pont’s ordinary field of endeavor and cited du Pont’s withdrawal from the Manhattan Project after the World War II emergency had abated.

23 It is interesting to note that the du Pont–AEC contract antedates the *Kern-Limerick* decision, and so could not have been expressly drafted to create immunity under the rule announced in that case.

24 65 S.C. Code § 1407 (1952). The compulsory pass-on provision was repealed in 1954 (S. C. Acts 1954, No. 644, Part III, § 15(a) at 1682), and sales taxes after that year were not at issue since thereafter “... South Carolina vendors [had] presumptively paid the tax. . . .” 179 F. Supp. at 19 n. 16.

25 See Restatement, Agency § 220(2) (1957).

26 During the period in question total purchases for the Savannah River plant were $557,085,000. Of these, $1,379,000, less than 1/4 of 1%, were commercial products of du Pont. 179 F. Supp. at 22.
This rationale is not entirely persuasive. Certainly du Pont would not have been selected on two occasions when such plants had to be established with speed and efficiency if these operations were entirely foreign to du Pont's ordinary commercial activities. By rejecting the theory of the Detroit cases on grounds of insufficient benefit to du Pont,27 the court shed some light on the question of how much benefit must accrue to a user of government property before he becomes taxable under the Detroit decisions—a question left open by the Detroit cases themselves. Narrowly construed, the case would seem to indicate that the benefit must be more than nominal and intangible; but dicta of the district court would limit the Detroit doctrine to cases where the user of government property is an independent contractor for profit.

Although the district court correctly applied the "legal incidence" test, the test itself is open to challenge. Because expenditures by state governments have continued to exceed income despite increased revenues,28 most states are in need of more money from existing sources. At the same time activities of the federal government are proliferating, so that continued federal-state conflict in the field of taxation can be expected. The resolution of this conflict is an urgent and complex problem. The "legal incidence" test results in the application of purely formal standards to this area where public policy should be a prime consideration.29 Government officials should not be allowed to "draw the constitutional line by changing a few words in a contract."30 Nor should state legislators be permitted to draw the line by altering statutory language. A return to the "economic-burden" test would at least supply a rational element, absent under the present test, to the application of the immunity doctrine.31 Any solution to the problem must recognize that the application of immunity involves a weighing of state need against federal sovereignty—a conflict inherent in our federal system. Although such a guiding principle is abstractly appealing, it is difficult to conceive of any criteria, short of economic burden, which could be applied by the courts in the resolution of the conflict. In short, there may be no middle ground between "legal incidence" and "economic burden."

Given this dilemma, one further suggestion might be advanced. The courts might leave to Congress the entire responsibility for the application of governmental immunity and allow all government contractors to be taxed by the

27 The court might have been able to find du Pont exempt from the South Carolina use tax on the ground that the South Carolina law defines the taxable use as "incident to ownership" (65 S.C. Code § 1367 (1952)) and du Pont did not have legal title to the property. Compare 6 Mich. Stat. Ann. § 7.7(5)-(6) (Supp. 1957), which was involved in the Detroit cases.


30 Id. at 126.

31 See Powell, supra note 9, at 670–71.
states where Congress has not expressly prohibited the tax. It can be argued that the protection of tax immunity should be invoked only when Congress feels that it is warranted by the specific case. Congress could likewise make provision for hardship imposed upon states when they are deprived of revenue by federal governmental activity within their boundaries.

In the instant case, the argument that the tax should have been allowed in the absence of express congressional prohibition is particularly compelling. *Carson v. Roane Anderson Co.* exempted from state tax a contractor supplying materials to the AEC Oak Ridge plant, on the basis of section 9(b) of the Atomic Energy Act. The section expressly exempted activities of the commission from state tax. Thereafter Congress repealed 9(b). The district court majority in *Livingston* felt that Congress merely meant to return the AEC to whatever tax status it enjoyed under the Constitution. But an intention to allow states to tax contractors dealing with the AEC seems at least equally plausible.

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33 Congress has done this in many cases. For a detailed study of such legislation, see U.S. Comm'n on Intergovernmental Relations, *A Study Committee Report on Payments in Lieu of Taxes and Shared Revenues* (June 1955).


37 179 F. Supp. at 19.

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**THE OUT-OF-STATE SELLER AND THE LOCAL PRIVILEGE TAX**

In *Berkshire Fine Spinning Associates v. City of New York,* the Supreme Court dismissed an appeal from a state court decision which, although it would not seem to be directly supported by any prior full opinion of the Court, finds authority in previous per curiam decisions of the Court. The “drummer rule,” as formulated in a number of the Court’s decisions, protects an out-of-state corporation from state taxation imposed on the mere solicitation of orders. In determining what activity over and above solicitation

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3 Norton Co. v. Dep't of Revenue, 340 U.S. 534, 537 (1951), states the rule as follows: “Where a corporation chooses to stay at home in all respects except to send abroad advertising or drummers to solicit orders which are sent directly to the home office for acceptance, filling, and delivery back to the buyer, it is obvious that the State of the buyer has no local grip on the seller. Unless some local incident occurs sufficient to bring the transaction within its taxing power, the vendor is not taxable. *McLeod v. Dilworth Co.*, 322 U.S. 327.”
tion within the taxing state affords a basis for taxation, the Court has sharply differentiated between taxes which the state has declared to be levied upon the privilege of doing business within the state and taxes taking other forms. Although the economic bases for such a differentiation may be questioned, it must be respected in any search for precedential authority for unexplained per curiam dispositions since it has never been repudiated by the Court. Berkshire and its predecessors raise the question of what activities besides solicitation must be engaged in within the taxing state in order to form the basis for a tax on the privilege of doing business within that state. As recently as 1951, the Court in Spector Motor Serv. v. O'Connor declared invalid a state tax upon the franchise of a foreign corporation for the privilege of doing business within a state when the business consisted solely of interstate commerce. Spector makes it clear that any local privilege tax imposed upon a foreign corporation must be based on the company's intrastate activity which is separable from interstate commerce.

In Berkshire, a Massachusetts corporation manufacturing textiles sought a refund of taxes paid and a declaratory judgment that its sales proceeds were exempt from New York City's General Business and Financial Tax because the corporation's activities within the state constituted interstate commerce exclusively. Determining that the company's activity in New York City could be separated from its interstate commerce activities, the New York Court of Appeals held the plaintiff's gross receipts taxable.

The taxpayer's principal headquarters was in Rhode Island, where deliveries were made f.o.b. the factory. Its New York offices checked the credit of prospective purchasers, received and banked sales proceeds, arranged for advertising, issued invoices, kept inventory and sales records, directed dyeing according to customer specifications, reported to the Rhode Island home office on the fabrics required by the New York market, and solicited orders. The New York staff was authorized to reject, modify, and accept offers to buy. Accepted orders were forwarded to be filled at a plant or warehouse outside the state. Office furnishings constituted the corporation's only property in New York. Of the ninety people employed in the plaintiff's New York offices, twenty were salesmen.

In distinguishing Berkshire from United Piece Dye Works v. Joseph, where

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5 The same funds normally may be reached by calling the tax an apportioned income tax rather than a privilege tax. See Roesken, The Impact of the Spector Decision, 29 TAXES 523, 526-28 (1951).


7 NEW YORK CITY ADMINISTRATIVE CODE § B46—2.0 (1957).


the taxpayer was held exempt from the same tax, the New York Court of Appeals noted that in the latter case the New York office only promoted and solicited business, whereas Berkshire's offices consummated sales and contracts, sent bills, received payments, and exercised considerable control over production and credit. Because the Supreme Court dismissed the appeal for want of a substantial federal question, without citation or explanation, it is a matter of conjecture which activities the Court considered so substantial and separable from interstate commerce as to deprive the plaintiff of immunity from state taxation under the commerce clause of the federal Constitution.

The full Supreme Court opinion most arguably supporting the Berkshire result, and the one relied upon by the New York Court of Appeals, was delivered in Norton Co. v. Dep't of Revenue. There the foreign corporation operated an Illinois retail store which forwarded orders it could not fill from local stock. These orders were accumulated at the out-of-state factory; then shipment was made in bulk to the local outlet, saving freight charges for customers and thereby bolstering the seller's competitive advantage in the local market. The Supreme Court upheld the application of an Illinois privilege tax insofar as it related to sales in which the customer benefited from these local services, but denied the constitutionality of the tax on sales in which the order and shipment bypassed the local store entirely. The Court paid homage to the continuing vitality of the "drummer rule," but found that it was the retail store, and not mere solicitation, which was responsible for maintaining the market.

The Norton decision does not appear to be dispositive of Berkshire. In Norton the Court was impressed with the fact that no source of customer relationship other than the retail store was present. The pure solicitation activities of Berkshire in New York would seem at least as persuasive an explanation of Berkshire's New York market as would the additional non-solicitation services rendered. If Norton does not adequately support the result in Berkshire, two post-Norton per curiam decisions of the Court would seem to provide direct authority for Berkshire.

Field Enterprises v. Washington concerned the application of a Washington privilege tax to a Delaware publishing company with its principal place of business in Illinois. Field maintained a district office in Washington, where it conducted promotional meetings and classes for solicitors and displayed sets of books. About 410 salesmen worked out of the office. Employees at the office did not solicit orders. Stock was kept outside Washington and, except for the initial down payment, all payments were made to Chicago. Orders


11 Mr. Justice Whittaker and Mr. Justice Harlan were of the opinion that probable jurisdiction should be noted.


13 352 U.S. 806 (1956).
solicited in Washington were forwarded to Chicago subject to acceptance there. The books were then shipped directly to the purchaser, f.o.b. Chicago. Application of Washington's Business and Occupation Tax was upheld by the supreme courts of Washington and of the United States.

In *United States Steel Corp. v. Washington*, the opinion of the Supreme Court of Washington, from which appeal was taken, stated: "The sales are negotiated within the state of Washington, and the fact that delivery is made direct to the purchaser does not change the nature of the local transaction." There the local office performed credit functions, recorded sales transactions, kept a bank account, and handled complaints. The sales force forwarded orders to the manufacturing site for confirmation and then notified customers that their orders had been accepted. Citing *Field*, the Washington Supreme Court concluded: "[I]t appears that the sales activities of the Seattle office of appellant are decisive factors in establishing and holding the local market for its goods. Thus, it is subject to the tax." The Supreme Court dismissed an appeal.

In *Norton* the Court intimated that a local privilege tax may be sustained whenever a local activity is one of the "decisive factors in establishing and holding the market." The state courts in *Field*, *United States Steel*, and *Berkshire* appear to have applied this test and to have concluded that the local activity was the "decisive factor" in holding the market. Surely the "decisive factor" test cannot be the real basis for the *Norton* decision, for it would apply with equal force to local solicitation itself. The problems created by the test articulated in *Norton* are illustrated in its application by state courts in *Field*, *United States Steel*, and *Berkshire*. In each of these cases, solicitation would appear to have been more productive of sales than any other local activity.

If it was merely the channeling of orders through the district office in *Field* that was regarded as a separable local incident, then *Field* overruled *Cheney Bros. Co. v. Massachusetts*. If the collection activity figured strongly in the

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16 352 U.S. 806 (1956).
18 51 Wash. 2d 224, 226, 316 P.2d 1099, 1101 (1957).
19 Id. at 225, 316 P.2d at 1100.
21 340 U.S. at 538.
22 Compare International Shoe Co. v. Washington, 326 U.S. 310 (1945), declaring a foreign corporation amenable to suit in a state court on the basis of a minimum of business activity within the state. There is no reason why jurisdiction to tax and jurisdiction for purposes of service of process should necessarily be coterminous, but it may be that the same activity is now sufficient for both purposes. Cf. id. at 321, where the privilege of hiring salesmen was being taxed.
23 246 U.S. 147 (1918).
Supreme Court's affirmance of Field, then Berkshire, Field, and United States Steel can be reconciled with Cheney, where no collections were made in the taxing state. In the Court of Appeals' treatment of Berkshire, the fact was stressed that agreements of sales were closed in New York City; but, as the dissenting opinion of the Appellate Division noted, "this circumstance alone has never been made a basis for local privilege taxation." 

While it may seem regrettable that the Supreme Court did not avail itself of the opportunity in Berkshire to clarify the law with a full opinion, a different result was probably foreclosed by the Field decision upholding a local privilege tax on facts more favorable to the taxpayer than those presented in Berkshire. What is most interesting in this line of cases is that Field was disposed of by a per curiam affirmation citing Norton as its only supporting authority. The cases may be readily distinguished on the basis of the services of Norton's local store. Thus Field, where there was no store involved but only a district office, possibly represented a substantial extension of prior doctrine. Yet the Supreme Court, in effect, told the lower court to reread Norton. Perhaps it was the display of books or the classes for salesmen in Field that provided the basis for the tax; but that again is only conjecture.

Although a per curiam dismissal or affirmation cannot necessarily be regarded as an adoption of the lower court opinion, state court opinions in these cases provide the only available source of guidance to the bar. Traditionally, the law relating to commerce among the states has required close supervision by the Supreme Court. In the interests of certainty and uniformity, the Supreme Court will eventually be compelled to grant to lower courts the benefit of a considered opinion on the "solicitation plus" situation. In the meantime, there remains substantial doubt as to which factors besides solicitation and delivery will suffice to render an out-of-state seller subject to local privilege taxation.

One consequence of this line of cases may be a diminution of the distinctions between the constitutional limitations placed on income taxation and those applied to privilege taxation. Northwestern States Portland Cement Co. v. Minnesota established the constitutional validity of an apportioned state income tax upon an out-of-state company engaged solely in interstate com-

24 5 N.Y.2d at 355, 157 N.E.2d at 618.
26 Appellants in Berkshire attempted to distinguish Field on the ground that Field delivered locally. Brief for Appellants, pp. 13, 14, 361 U.S. 3. Since Field shipped f.o.b. Chicago, that distinction seems without merit. Moreover, it has been established that solicitation plus delivery in the state of destination will not deprive the out-of-state seller of the drummer rule's shield. Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389 (1952); West Point Wholesale Grocery Co. v. City of Opelika, 354 U.S. 390 (1957).
27 Ordinarily per curiam affirmation means that the Court thought the appeal entirely frivolous or else obviously controlled by a prior decision. Note, Supreme Court Per Curiam Practice: A Critique, 69 HARV. L. REV. 707, 709, 712 (1956).
28 Id. at 715.
merce. By widening the range of separable local activities which satisfy the Spector requirement, the progeny of Norton may call for increasingly similar results in cases involving a privilege tax on receipts from sales engendered by local efforts. This trend may be viewed with approval by those who regret the different standards applied to the two forms of taxation and who deplore the Court's preoccupation in Spector with the label which the state attached to its tax.

Subsequent to the decision of Northwestern Portland Cement, Congress acted to restrict the power of a state to levy income taxes on interstate commerce more severely than does the commerce clause. 15 U.S.C. §§ 381–384 (Supp. 1959).


PRICING POLICY AND CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY; SECTION 7(e) OF THE NATURAL GAS ACT

The Supreme Court, in Public Serv. Comm'n v. FPC, issued the second, and more extreme, in a series of mandates directing the Federal Power Commission to scrutinize proposed prices before issuing certificates of public convenience and necessity to producers of natural gas. Section 7(e) of the Natural Gas Act, which provides for the issuance of such certificates, does not expressly require consideration of initial price as an element of what "is or will be required by the present or future public convenience . . . ." The Commission has generally issued certificates with little or no consideration of price, and has relied upon subsequent proceedings authorized by the act to correct any unreasonable prices that might exist. The effectiveness of these subsequent proceedings may be seriously questioned, however, when it is realized that they have not halted the great rise in gas prices over the last several years.


2 52 Stat. 824 (1938), as amended, 15 U.S.C. § 717f(e) (1958). There are two other sections of the Natural Gas Act of 1938 which provide for determinations of the reasonableness of rates. Section 4(e), 52 Stat. 822, as amended, 15 U.S.C. § 717c (1958), empowers the Commission to inquire into the lawfulness (i.e. justness and reasonableness) of a proposed increase of an existing rate, the burden of proof being on the producer. Under this section, the Commission may suspend the proposed rate for five months. Beyond that time, the producer must post a bond to guarantee reimbursement to the consuming public for so much of the increase as is found to be unlawful.

Section 5(a), 52 Stat. 823, as amended, 15 U.S.C. § 717d (1958), permits the Commission to act on its own initiative to institute hearings to determine whether an existing rate is "unjust, unreasonable, unduly discriminatory, or preferential" and to fix the "just and reasonable rate . . . to be thereafter observed." This section does not provide for any temporary suspension or possible refund to the public. Furthermore, the burden of proof is on the Commission to show that the prices are unreasonable.

3 Transcontinental Gas Pipe Line Corp., 20 F.P.C. 264, mimeo. ed., pp. 1–7 (1958) (dissenting opinion); Smith, The Unnatural Problems of Natural Gas, Fortune, Sept. 1959, p. 120.
In the instant case, the Commission, acting under section 7(e), granted certificates to twenty-six gas producers who had contracted for the sale of gas produced in southern Louisiana and offshore areas to Transcontinental Gas Pipe Line Corporation (hereinafter referred to as Transco). Transco was unable to supply its customers adequately without additional sources of supply. The prices charged in these contracts were materially higher than those negotiated in Transco's prior contracts, although they were not found to establish a new "price plateau" in the area. The applicants admitted that the proposed initial price would result in an immediate general price increase of approximately two cents per thousand cubic feet, and would "trigger" many existing contracts to an amount in excess of $5 million in 1959 alone. The court of appeals upheld the order of the Commission, holding that the record demonstrated that the Commission had given proper attention to the question of price. The Supreme Court in a per curiam decision vacated the judgment of the court of appeals and remanded to the Commission for reconsideration in light of Atlantic Ref. Co. v. Public Serv. Comm'n (commonly referred to as Catco). In Catco, the FPC twice refused to issue a certificate sought under section 7(e) on the ground that the record was insufficient to support a finding that the public convenience and necessity required sale at the proposed rate. The producers then informed the Commission that they would not dedicate the gas to the interstate market unless a permanent certificate was granted unconditionally at the rate proposed. Upon rehearing, but without additional evidence, the certificate was issued. In reaching its decision, the Commission noted that "important as is the issue of price... as far as the public is concerned, the precise charge that is made initially is less important than the assurance of this great supply of gas." The Supreme Court found the order granting the certificate to be in error and directed that the case be remanded to the Commission for further proceedings.

While the Court in Catco recognized the need for assuring adequate supplies of gas to an already gas-hungry market, it indicated that the Commis-

4 Transcontinental Gas Pipe Line Corp., supra note 3.
5 The triggering of existing contracts results from the widespread use of "most favored nations" clauses.
8 360 U.S. 378 (June 22, 1959), affirning Public Serv. Comm'n v. FPC, 257 F.2d 717 (3d Cir. 1958).
11 Id. at 881.
sion’s handling of the price issue was unsatisfactory. In an attempt to ameliorate the problem of rapidly increasing gas prices, the Court placed the question of price squarely within the concept of public interest. By so doing, the Court admonished the Commission that it not only has a right to give consideration to the reasonableness of price in a section 7(e) proceeding, but that

In so deciding, the Court at last forced into retirement a rather dubious rule first promulgated in Hope Natural Gas Co., 19 F.P.C. 405 (1958), and applied in the decisions of all subsequent producer certificate proceedings. In summary, the rule provided that a producer-applicant could make out a “prima facie” case for unconditional certification at practically any initial price simply by submitting proof of the “existence of a market” for the gas at that price and of the “economic feasibility” of the project. Objections to such a rule are numerous. First, and probably foremost, it completely ignores the question of price in determining whether the standard of public convenience and necessity has been met. See the dissenting opinion of Commissioner Connole in Transco, 20 F.P.C. 264, mimeo. ed., p. 4 (1958). Second, it places the burden on an intervenor to show that the rates are unreasonable, rather than placing the burden on the applicant who hopes to benefit from such a price proposal to prove that the rates are reasonable. The inequity of such a situation is readily apparent when it is realized that “marketability” and “feasibility” are practically conclusively established before a producer even files for a certificate, thus placing a monumental burden on an intervenor to overcome the “prima facie” case. See Brief of Public Serv. Comm’n, p. 8, Public Serv. Comm’n v. FPC, 361 U.S. 195 (1959). Finally, the entire approach seems to assume that the prices agreed upon by the contracting parties were competitively determined and therefore “reasonable.” In view of the fact that eight producers control about 68% of the nation’s natural gas reserves, such an assumption may well be unwarranted. See Smith, supra note 3, at 123.

It is not completely clear whether in Transco the Commission adopted the Hope rule or not. It seemingly rejected the rule by explicitly recognizing that price is an element to be considered in determining public convenience and necessity, although “the importance of price in relation to other elements involved may be materially lessened,” and by noting that the standard of public convenience and necessity “is not a rigid absolute of unchanging content, to be mechanically applied regardless of the wide diversity of facts presented by different cases.” Transcontinental Gas Pipe Line Corp., 20 F.P.C. 264, mimeo. ed., pp. 5, 6 (1958). But when the time came to consider the price issue, the Commission accepted the findings of the presiding examiner as fully supported by the facts “which sufficiently satisfy the minimum standards of law applicable in a case of this kind.” Id. at 6. The Commission then echoed familiar refrains of the Hope rule by noting an absence in the record of any evidence to show the rates unreasonable, thus implying that the intervenors had not overcome the prima facie showing by the producer. At this point, the Commission was in a quandary. It was impracticable within the confines of a section 7 proceeding to apply the traditional rate base formula generally used in section 4 or section 5 proceedings to determine whether the rate was reasonable or not. Nor was there any evidence to establish a reasonable rate if a rate condition were deemed desirable. Id. at 7. In fact, there was great uncertainty as to whether a condition could be imposed at all due to the absence of legal authority. Id. at 8.

The Commission’s uncertainty as to its authority to impose price conditions would appear strange in light of Signal Oil & Gas Co. v. FPC, 238 F.2d 771 (3d Cir. 1956), in which issuance of a certificate conditioned on a downward rate revision was upheld. The Signal decision was based on explicit language of a 1942 amendment to section 7(e) which provided that: “The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.” There are, however, several Commission decisions, both before and after Signal, in which the Commission explicitly refused to consider the imposition of rate conditions. E.g., Re Tamborello, 11 P.U.R. 3d 413 (1955); Hope Natural Gas Co., 19 F.P.C. 405 (1958).
it has a statutory *duty* to do so owing to the inadequate protection afforded the public where relief is limited to a section 5(a) proceeding.\(^\text{14}\)

The court of appeals rendered its decision in *Transco* after the Supreme Court had decided *Catco*. Issuance of the *Transco* certificate was upheld.\(^\text{15}\) *Catco* was distinguished on the grounds that in that case there was no showing of immediate public need, and that the proposed *Catco* prices set a new price plateau. Technically, it must be conceded that the *Transco* prices did not set new price levels. But this is true only because the *Catco* price literally "became the floor"\(^\text{16}\) for subsequent negotiations, including those culminating in the instant case. In the twelve-month period from the Commission's *Catco* order to the reversal by the Supreme Court (June 1957 to June 1958), the Commission issued about six other certificates at the same price level as that authorized in *Catco*.\(^\text{17}\) Since the Commission's orders in those cases were final and no longer subject to judicial review, the prices for these other sales can be said to have established the new price level. In this respect, the *Transco* price does conform to the prevailing price level in the area. It has been suggested, however, that to confer legitimacy on a *Catco* descendant by reference to other *Catco* progeny, all of which are based on the rejected predecessor, is the epitome of the "bootstrap doctrine," and would, in effect, nullify the remand of the *Catco* case.\(^\text{18}\)

The Supreme Court in *Catco* ruled that the applicants had failed to establish that "the public served through the Tennessee Gas system is greatly in need of increased supplies of natural gas."\(^\text{19}\) On the other hand, in *Transco* the record established "a large and immediate need for more gas..."\(^\text{20}\) The question is whether this is a material distinction justifying a different disposition of the cases. If the court of appeals thought the distinction was a material one, then it seems to have misconceived the thrust of the *Catco* decision.

\(^{14}\) In the words of the Court:

"It is true that the Act does not require a determination of just and reasonable rates in a § 7 proceeding as it does in one under § 4 or § 5. Nor do we hold that a 'just and reasonable' rate hearing is a prerequisite to the issuance of producer certificates. What we do say is that the inordinate delay presently existing in the processing of § 5 proceedings requires a most careful scrutiny and responsible reaction to initial price proposals under § 7. Their proposals must be supported by evidence showing their necessity to 'the present or future convenience and necessity' before permanent certificates are issued. This is not to say that rates are the only factor bearing on the public convenience and necessity, for § 7(e) requires the Commission to evaluate all factors bearing on the public interest. The fact that prices have leaped from one plateau to the higher levels of another, as is indicated here, does make price a consideration of prime importance." 360 U.S. at 390–91.

\(^{15}\) Public Serv. Comm'n v. FPC, 269 F.2d 865 (3d Cir. Aug. 4, 1959).


\(^{17}\) *E.g.*, Southern Natural Gas Co., 19 F.P.C. 558 (1958).


\(^{20}\) Public Serv. Comm'n v. FPC, 269 F.2d at 868.
While "public need" is a factor worthy of consideration in determining public convenience and necessity, it cannot be so considered at the expense of omitting "careful scrutiny" and "responsible reaction" to the price element.

The cases do differ, however, in one important aspect: consideration accorded to price by the Commission. In *Catco*, the record of Commission proceedings seems to indicate that the Commission realized that the proposed price was unreasonable, but found other considerations to outweigh that of price. In *Transco*, the Commission explicitly recognized that price was an element to be considered in determining public convenience and necessity, but ruled that the findings of the presiding examiner that the proposed price was reasonable were supported by the facts and minimum standards of law applicable to a case of that kind. The court of appeals regarded this treatment by the Commission as sufficient to preclude judicial review of the substantive decision reached.\(^2\) It may be argued that the Supreme Court's order vacating this judgment transgressed the realm of administrative discretion.\(^2\) At least the judicial intervention here is more striking than that in *Catco*, where no finding at all was made regarding the reasonableness of price. The absence of a finding by the Commission in *Catco* provides a legitimate basis for the reversal; i.e., the Court was saying that the Commission had improperly construed the requirements of section 7(e). But the Court's reversal in *Transco*, where the Commission made a finding of reasonableness, appears to have no basis other than the Court's disagreement with the substantive decision of a specialized agency.

Perhaps this intervention was necessitated by the fact that the Commission's order in *Transco*, if permitted to stand, might nullify the effect of the Court's *Catco* rule. Having once demonstrated the degree of control which it was willing to exercise over the Commission in order to insure adequate scrutiny of price in section 7(e) proceedings, the Court may have felt it necessary to reinforce such action by even more extreme supervision. However, these practical exigencies afford justification for the Court's reversal in *Transco* only insofar as the policies of *Catco* are capable of enforcement; and it is questionable whether such policies are in fact enforceable. First, enforcement requires an agency willing to actively regulate. There are observers who feel that the

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\(^{21}\) "The weighing of the factors and the conclusions to be reached is a task for the Commission. If the necessary elements have not been considered, the error is one of law and subject to court correction. If they have been considered and the conclusion reached is not unreasonable, the conclusion stands whether it is one we should have reached or not. That, in our judgment, is the case here." *Id.* at 869.

\(^{22}\) For a discussion of the scope of review over administrative agencies generally, see DAVIS, *ADMINISTRATIVE LAW*, ch. 20 (1951); Cooper, *Administrative Law: The "Substantial Evidence" Rule*, 44 A.B.A.J. (1958). With particular reference to the FPC, see, e.g., Oklahoma Natural Gas Co. v. FPC, 257 F.2d 634 (D.C. Cir. 1958); Michigan Consol. Gas Co. v. FPC, 246 F.2d 904 (3d Cir. 1957); Signal Oil & Gas Co. v. FPC, 238 F.2d 771 (3d Cir. 1956).
FPC has demonstrated a manifest unwillingness to regulate. Smith, The Unnatural Problems of Natural Gas, Fortune, Sept. 1959, p. 122. Support for this observation may be found in the Commission's recommendation that the Natural Gas Act be amended to eliminate any requirement of certificates of public convenience and necessity for independent producers. FPC, Thirty-ninth Annual Report, pp. 18, 19 (1959). This recommendation may be unwise in view of the fact that the rapid increases in the price levels for natural gas have been brought about almost entirely by initial contracts for gas entering the market for the first time. Such contracts may not only establish new rate levels for future contracts to be made in the area but may also immediately trigger “most favored nations” clauses in already negotiated contracts containing lower prices. Thus, reliance on a subsequent section 5(a) proceeding to adjust the rate would be largely futile.

Secondly, even if the Commission proves willing to comply with the Court's policies, the nature of the market may render effective regulation impossible. The Commission's disinclination to regulate initial prices of independent producers would seem to indicate that the Commission believes the prices set by producers and pipeline corporations in their contracts to be reasonable. If there is actual competition in the market, this conclusion may be sound. It must be noted, however, that eight gas producers control approximately 68% of the nation's natural gas reserves. The Court, in its insistence on price regulation, appears to assume a non-competitive market. Yet if this assumption is correct, perhaps the market position of the dominant producers is such that they could effectively withstand Commission attempts at rate regulation. What is to prevent them from withholding their gas reserves if the Commission refuses to sanction sales at the desired price? By refusing to market the gas at lower prices and dedicating the gas, to the greatest extent possible, to intrastate markets, the producers might avoid or defer application of the Catco policies. In such a situation, it is doubtful if the Commission could remain impervious for long to the needs of a gas-hungry market. When confronted with this situation in Catco, the Commission granted a certificate at the proposed price, asserting that there were other factors which might outweigh that of price.

Developments subsequent to, and independent of, the Transco reversal indicate that enforcement of the Catco policies is now possible or at least more likely than before. The Commission has taken bold steps in initiating a new pricing policy. The radical innovation of this new policy is the establishment of a price standard for each of the gas producing areas. The emphasis on a

24 FPC, Thirty-ninth Annual Report, pp. 18, 19 (1959). This recommendation may be unwise in view of the fact that the rapid increases in the price levels for natural gas have been brought about almost entirely by initial contracts for gas entering the market for the first time. Such contracts may not only establish new rate levels for future contracts to be made in the area but may also immediately trigger “most favored nations” clauses in already negotiated contracts containing lower prices. Thus, reliance on a subsequent section 5(a) proceeding to adjust the rate would be largely futile.

25 See note 13 supra.
27 Statement of General Policy No. 61-1, issued Sept. 28, 1960, the same day the Commission rendered its decision in Phillips Petroleum Co., Opinion No. 338.
28 In deference to the pending Catco and Transco cases, the Commission did not announce the price standard for the southern Louisiana and Mississippi areas. It is likely that the Commission will reaffirm the prices certified originally, because of the certificates based on the Catco prices issued in intervening proceedings. The orders in these proceedings were not appealed and are now final.
fair price for the gas itself, rather than pricing by the traditional rate base method for each individual producer, may perhaps facilitate a more efficient and effective regulation of the gas industry. The practical applications of such a policy seem clear. From now on, a producer-applicant in a section 7(e) proceeding must file a proposed rate in conformity with the established price standard of his area in order to receive unconditional certification. If the proposed price is above the area standard, he must submit evidence to justify the rate. If the Commission is not convinced of the justifiability of the proposed rate, it will grant a certificate conditioned on the lower area rate, permitting the producer to file for an increase at some subsequent date under a section 4(e) "just and reasonable" rate hearing.

Of course the big producers may still refuse to dedicate their gas to the interstate market if their proposed price is above the area standard and they do not accede to issuance conditioned on the lower area price. However, the Commission's new area pricing policy is an indication that the Commission will be less willing than it was in the past to certify initial prices establishing a new price level. No check on rising prices will result if the Commission revises the area standard upward every time a producer proposes a higher price. But this is unlikely to happen since a prime value of the new policy to the Commission is that it should save time—a value which would be materially lessened if the area standard were frequently revised. The success with which producers may be able to withstand even the most rigorous efforts of the Commission to hold down prices must be left to speculation. The new pricing policy makes it appear likely that the Commission will resist rate increases until market needs and producer ultimatums compel acquiescence.

The combination of the Catco decision and the FPC's new pricing policy should provide the tools and framework for more effective gas regulation. Perhaps the Court, by reversing Transco, encouraged the Commission to inaugurate the area pricing method when it had been reluctant to do so earlier. If so, the Court's intervention in the Commission's decision making processes in Transco may have advanced the policies underlying the Court's decision in Catco.

The increased ease of administration may dispel the alleged reluctance by the Commission to actively regulate. The enormous backlog of cases confronting the Commission made it practically impossible to give to price the sort of attention urged in Catco in section 7(e) proceedings using the traditional rate base method.

Note the striking similarity between the new pricing policy and the "threshold method" proposed by Commissioner Connole in his dissenting opinion in Transco, 20 F.P.C. 264, mimeo. ed., p. 10 (1958).

**Eminent Domain: Interest on the Award and Just Compensation**

In a per curiam decision, the Supreme Court dismissed the case of LaPorte v. New York for want of a substantial federal question. In so doing the Court

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30 Note the striking similarity between the new pricing policy and the "threshold method" proposed by Commissioner Connole in his dissenting opinion in Transco, 20 F.P.C. 264, mimeo. ed., p. 10 (1958).
has apparently accepted the proposition that continued possession of property by a condemnee after title has passed to the condemnor negates, as a matter of law, the condemnee's right to interest, or to some other form of compensation, for delay in payment after taking.

The condemnee had appealed as a matter of right from a decision of the New York Court of Appeals affirming the Appellate Division's reversal of a Court of Claims decision which had held that to deprive the condemnee of such interest would violate his constitutional rights under both the New York and the federal constitutions. The State of New York acquired title to the condemnee's property by filing an appropriation map with the Albany County Clerk as required by the statute. The statute further required that the condemnee be personally served with a copy of the appropriation map, but this was not done until almost two years after the date of taking. The condemnee did not learn of the appropriation for approximately 21 months, and filed his claim for price and interest shortly before he was officially served with a copy of the map. Until he filed his claim, the condemnee apparently remained in undisturbed possession of the condemned property. The dispute arose under section 19(1) of the Court of Claims Act, which provides: If a claim which bears interest is not filed until more than six months after the accrual of said claim, no interest shall be allowed between the expiration of six months from the time of such accrual and the time of the filing of such claim. The state conceded that interest was due for the first six months after taking and from the date that the claim had been filed. Interest for the interim period was the subject of the controversy.

In the court of appeals, it was argued that to deprive the condemnee of interest for this interim period would violate his constitutional right to just compensation. In denying, under these circumstances, that interest as com-


3 This proposition was the touchstone of the decision in the court of appeals. Without it, constitutional justification of the result would have been impossible. “Taking” is here used in the technical sense as occurring at the time at which the owner becomes entitled to compensation. See 2 Nichols, Eminent Domain 239 (3d ed. 1950).


8 Highway Law § 347(5a).


10 See text at note 37 infra.

pensation for delay in payment after taking is a necessary element of just compensation, the Court of Appeals' decision necessarily rested on the premise that possession is the legal equivalent of interest. While it is arguable irrespective of the just compensation question, that the construction given Section 19(1) violates the condemnee's fourteenth amendment rights to "equal protection" and "due process," it is clear that, if interest under the facts of the LaPorte case were held to be an element of just compensation, that construction of the statute would fall on the ground of lack of reasonable notice alone. Thus, it is the interest question that is the crux of an evaluation of the Court's disposition of the case.

The federal government has long been restrained in its eminent domain activities by the fifth amendment. Until recent years, it appears to have been the almost universal practice of the government to make the passage of title an event contemporaneous with payment. It was not until the great increase in public works construction during the depression, and the emergency conditions caused by the World Wars, that the federal government began with any frequency to take possession of condemned property before the passage of title. The extension of federal constitutional jurisdiction over the eminent domain activities of the states under the due process clause of the fourteenth amendment has been largely the product of the last fifty years. While varie-

12 Id. at 15, 187 N.Y.S.2d at 747, 159 N.E.2d at 542-43.
13 The claimant might well have complained that he was deprived of interest by means of a construction of Section 19(1) which renders it incompatible with the equal protection clause of the fourteenth amendment. Specifically, he would have been justified in complaining that he was deprived of interest through the operation of an arbitrary classification of persons entitled to interest, i.e., those whom the state chose to notify. Under the rule of the LaPorte case, the fortunate condemnee is entitled to both interest and possession, while his less fortunate neighbor cannot complain that he, through no fault of his own, is entitled only to possession. Cf. Armour & Co. v. North Dakota, 240 U.S. 510, 517 (1916); Dominion Hotel v. Arizona, 249 U.S. 265, 268 (1919).
14 The claimant might well have had grounds to complain that his due process rights were violated by a construction of Section 19(1) which started the period of limitation running before he had reasonable notice that his claim existed. That construction demanded that he take action to protect his rights, i.e., the filing of a claim, before he had any reason to be aware of the event which made protection necessary. See Walker v. City of Hutchinson, 352 U.S. 112 (1956).
15 Ibid.
16 E.g., Bauman v. Ross, 167 U.S. 548 (1897); Shoemaker v. United States, 147 U.S. 282 (1893); Town of Hingham v. United States, 161 Fed. 295 (1st Cir. 1908); United States v. Nahant, 153 Fed. 520 (1st Cir. 1907).
18 For the purposes of discussion herein, it is assumed that the "just compensation" requirement of the due process clause of the fourteenth amendment is the same as that of the fifth amendment. See McGovern v. City of New York, 229 U.S. 363 (1913); Backus v. Fort St. Union Depot Co., 169 U.S. 557 (1898); Chicago, B. & Q. R.R. v. City of Chicago, 166 U.S. 226 (1896). As late as 1909, however, the application of the fourteenth amendment to eminent domain questions was not a settled issue, at least in the minds of the writers of the leading treatises in the field. See LEWIS, EMINENT DOMAIN 21 (1st ed. 1888); LEWIS, EMINENT
gated interest doctrines had been developed under the respective state constitutional restraints before the extension of federal jurisdiction, these appear to have been as unsophisticated as were the methods for the exercise of eminent domain of the period. As a result, it is not surprising to discover that the right to interest as an element of just compensation has not been fully defined by the Supreme Court.

Jacobs v. United States, is one of a line of cases in which the Supreme Court held that interest or some other form of compensation for delay in payment after taking is a matter of constitutional right, not of judicial discretion. Interest is generally awarded in the absence of proof as to the actual use value of the property taken. However, none of these cases make clear the theory behind the awarding of interest as opposed to some other measure of compensation.

In United States v. Rogers and Seaboard Air Lines Ry. v. United States, the Supreme Court laid down the rule that, for constitutional purposes, the condemnee's right to interest accrues upon taking. The Seaboard rule's corollary—that the right to interest does not accrue before taking—was established in Shoemaker v. United States. The grounds of the latter decision were two-fold: that there had been no taking, title and possession remaining in the condemnee; and, that while the condemnee had been subjected to some inconveniences before taking, these were presumed to have been considered and allowed for in fixing the amount of the compensation. The principle is now well settled that if payment occurs concurrently with or before taking, interest if any, is a matter of legislative grace.

The Shoemaker case, though conceding that the property owner was incon-

20 290 U.S. 13 (1933).
22 For a discussion of the confusion which persists as to the constitutional basis and rationale of interest as a measure of just compensation for delay in payment, see Note, 38 N.C.L. Rev. 89 (1959).
23 255 U.S. 163 (1921).
26 The Shoemaker case has been cited as holding that the right to interest was negated by the condemnee's continued possession after taking. E.g., 3 Nichols, Eminent Domain 111–12 (3d ed. 1950). The court of appeals in the instant case cites Shoemaker as so holding. 6 N.Y.2d at 7, 187 N.Y.S.2d at 741, 159 N.E.2d at 542. For a contrary view see Nichols, Interest on Condemnation Awards, 1 Legal Notes on Local Government 3, 4 (1936).
27 See generally 3 Nichols, op. cit. supra note 26, § 8.63 (1).
venienced merely by the filing of the condemnation action, did not consider this a decisive argument for the payment of interest. In Brown v. United States, Mr. Chief Justice Taft went further, recognizing the inconveniences to which a property owner may be put when his property has been, for practical purposes, frozen in a condemnation proceeding, and indicated that the Court could not say that interest given prior to taking was not just compensation. Although the case may be dismissed as being grounded on the Conformity Act and, thus, the result of a federal attempt to accommodate state law, Brown nonetheless serves to point up the lack of conceptual clarity regarding the rationale of interest as an element of just compensation.

Finally, the Court has expended a considerable amount of effort in attempting to clarify the rationale of the use of interest as a measure in condemnation awards. Most of this discussion has been presented against the background of the rule that interest does not run upon claims against the government in the absence of contract or statute. It has been argued that the interest that is a necessary element of just compensation is really not interest in the technical sense but a convenient way of evaluating the injury to the condemnee incident to delay in payment. United States v. Hotel Co. made the constitutional basis of the interest award clear by holding that just compensation and attendant interest were words of art only when used with regard to eminent domain questions; but when the term "just compensation" was used out of the eminent domain context it did not include interest. Furthermore, it seems clear that the statutory rate of interest does not always represent just compensation in the eminent domain context, although it would be conclusive as to the rate of interest on ordinary interest-bearing claims.

The theory has been suggested that, upon taking, the owner becomes a money creditor of the condemnor and thus is entitled to interest on the money owed to him. However, the recognized relationship between the value of use and the rate of interest seems to undermine the validity of such an analysis. A more plausible, if less elegant, explanation of the interest award is quite simply that it is a convenient measure. This view explains the general absence of a carefully discriminating choice as to the rate of interest that will compens-

28 263 U.S. 78, 86 (1923).
33 See also United States v. Tillamooks, 341 U.S. 48, 49 (1951).
It also explains the relatively unsophisticated process of mixing of measures when the condemnor is allowed to set-off rents and profits received by the condemnee during the interest period. The set-off practice and occasional substitution of a rate of interest different from the statutory or customary rate further suggests that interest, the convenient measure, is to be automatically employed only when the parties do not choose to attack its fairness.

The theory under which interest has become the recognized measure of just compensation for delay in payment is of considerable importance in considering the LaPorte decision. If interest and possession are considered legal equivalents for the purpose of determining just compensation for delay in payment it would seem to follow that continued possession after taking would negate the right to interest. The Supreme Court has never held that such possession is the automatic equivalent of interest, but even if that conclusion is accepted, the result in LaPorte appears to fall short of just compensation.

There are, to be sure, sound bases for the conclusion that beneficial use may be adequate compensation for delay in payment. Where income producing property is involved, it can readily be seen that the condemnee who received both his full rents and interest on his award might be receiving something more than just compensation. The property taken in LaPorte was a thirty foot strip of unimproved land for which the owner was admittedly entitled to fair value at the time of taking, and interest or some other form of compensation for delay in payment. No evidence was introduced on either side as to the value of the use of the property. Indeed, the fact of possession was not alleged or proved, but was determined by judicial inference. The property was not income producing, so that any value which the owner received therefrom had to come in the form of price appreciation. He was deprived of any such appreciation during the period in dispute by the fact that title had already passed to the State of New York. Thus, it would seem that the Court in LaPorte was lacking in a practical as well as legal justification for equating possession with interest in relation to the just compensation question.

However, the failure here is as such one of the form of the statute as it is of the content of the decision. The condemnation procedure followed was, no

36 Ibid.

37 Id. at 29 n.41, 30 n.42.


39 It has been argued that the absence of a judicial determination of the value of possession renders the decision inconsistent with constitutional guarantees. Note, 12 SYRACUSE L. REV. 90, 91-92 (1959).
doubt, designed to avoid many of the most discussed problems in the eminent domain field. Demands of buyers that the state’s condemnation plans be made available to them in order to prevent useless purchases of, and investments in, land about to be condemned are satisfied. Likewise owners are protected against declines in the market value of their property precipitated by the state’s announcement of its intent to purchase. The filing of the map concurrently with passage of title serves these purposes. By the same device, the state is protected against market increases in the value of property due to its announced plans, since title passes with the filing.

Prior to the adoption of the provision for passage of title upon filing of the map, the property owner was forced to bear the risk of decline in market value after filing. The filing of the map under those circumstances amounted to a declaration of intention, but certainly not a “taking” in the technical sense. Nonetheless for most practical purposes the owner’s property was frozen since the filing of the map served to inform all potential purchasers of the planned condemnation.

Thus, while LaPorte is demonstrative of one method of dealing with some of the problems created by advance planning on the part of the state, the case brings into sharp focus a number of other problems which would not have appeared had not the statute by its form sprung the technical trap of a “taking” upon the filing of the map. The question presented is one of the responsibility of the condemnor for losses incurred by the freezing for a lengthy period not only of the alienability of property, but of its use as well. In the ordinary declaration of intention situation, the property owner has no recourse against the potential condemnor. Under the New York statute, however, if the owner is given notice, he has the choice of forcing the state to pay him immediately or of remaining in possession until the state takes actual possession. The effect of LaPorte is to make it unnecessary for the state to give notice to the property owner; in the event that the state fails to do so it is not obliged to pay interest on the award, at least in the absence of a showing of damage on the part of the property owner. Yet the converse “presumption” will be found in just compensation doctrine, i.e., the property owner should receive interest in the absence of a showing of no damage by the condemnor. It is with these problems that the New York court failed to deal, and it is these same problems with which the constitutional concept of just compensation in its present form is unable to cope.

LaPorte points up that the rules for determining just compensation were

40 See text accompanying note 22 supra.

41 The New York legislature likewise demonstrated some lack of awareness of the interest problem in that the Highway Law was amended to make title pass upon filing and before notice to the condemnee. The legislature also amended the Court of Claims Act section 10(1) in order that the statute of limitations on the award would not commence to run until notice had been given the condemnee.
neither sufficiently delineated, nor sufficiently clear, to be applied readily to the situation produced by the relatively sophisticated procedure for taking employed in this case—the filing of a map. That procedure, while more sophisticated, is, nonetheless, reminiscent of procedures used in colonial America before the development of the constitutional restraints which now control the taking of private property.42 The development of the constitutional doctrine of just compensation was paralleled for the first hundred years or more by an increasing complexity in the procedures required to effect taking.43 In recent years, however, those procedures have been greatly streamlined. LaPorte, it may be argued, is demonstrative of the absence of a complementary development in the doctrine of just compensation.

43 Ibid.

III. DECISIONS EXPLAINED BY THE COURT

WRONGFUL DEATH IN ADMIRALTY AND THE “TUNGUS” DOCTRINE:
A MINORITY OF FIVE

In Goett v. Union Carbide Corp., the Supreme Court reaffirmed the doctrine of The Tungus v. Skovgaard,2 which had declared that state law governs wrongful death cases occurring upon navigable waters within the territorial jurisdiction of the states. However, the division of the Court in Goett suggests an uncertain future for the Tungus doctrine.

Union Carbide Corporation was the owner of an unmanned tank barge which was delivered to the Amherst Barge Company for repairs and improvements. Goett, an employee of Amherst, was sandblasting the deck of the barge when he fell into the Kanawha River and was drowned. The barge had no railing around its deck and carried no rescue equipment. The decedent’s administratrix brought a libel in admiralty against the owner of the barge, alleging that the lack of rescue equipment caused the decedent’s death and that the barge was unseaworthy without rescue equipment or, alternatively, that Union was negligent in delivering the barge to Amherst without such equipment. The death occurred within the navigable waters of West Virginia and the libelant relied upon that state’s Wrongful Death Act.3

The district court found that the barge was unseaworthy, that Union was

3 W. Va. Code 1955, §§ 55-7-5, 55-7-6, 55-7-8. The Jones Act, 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1958), did not apply since decedent was not an employee of the vessel; the Death on the High Seas Act, 41 Stat. 537 (1920), 46 U.S.C. § 761 (1958) did not apply because the death did not take place beyond one maritime league from the shore of any state. The administratrix had the right to compensation from decedent’s employer, Amherst, under the Longshoremen’s and Harborworkers’ Compensation Act, 44 Stat. 1424 (1927), 33 U.S.C. §§ 901-50 (1958), but could elect to sue the barge’s owner as a third-party tortfeasor.
negligent, causing the decedent's death, and that the decedent was not shown to have been guilty of contributory negligence or to have assumed the risk. The court of appeals reversed the judgment holding that it was unnecessary to decide whether a wrongful death claim could ever be based upon unseaworthiness under the West Virginia act because decedent was not entitled to the warranty of seaworthiness, and, in any case, the barge was not seaworthy; the circuit court further held that Union owed no duty to the employees of Amherst once the barge had been delivered to Amherst, whose responsibility it was to supply its own employees with a safe place to work.

Speaking per curiam, the Supreme Court vacated the judgment and remanded to the court of appeals to determine (a) whether the West Virginia Wrongful Death Act, as to a maritime tort, employs the West Virginia or the general maritime concept of negligence, (b) whether in the light of that determination, the district court's finding as to negligence is correct, and (c) whether the West Virginia Wrongful Death Act incorporates the doctrine of unseaworthiness. The case had been decided below before the decision of The Tungus. In the absence of clear expression, the Court felt that it was "highly doubtful" whether the court of appeals had applied state law.5

The division of the Court in Goett is an enigma. The Chief Justice and Justices Black, Douglas and Brennan, all of whom dissented in The Tungus, join the majority opinion in Goett "solely under compulsion of the Court's ruling" in The Tungus. They note explicitly their "continued disagreement" and "reserve their position as to whether it should be overruled."6 This leaves Mr. Justice Clark as a "majority of one,"7 i.e., the only justice to support both the result in Goett and its supposed rationale, the Tungus doctrine. Neither the dissent of Mr. Justice Harlan,8 joined by Mr. Justice Frankfurter, nor that of Mr. Justice Stewart,9 represents a change in their previous positions. They merely state that remand is pointless in the absence of any showing that West Virginia law imposes duties greater than the general maritime law. In addition, Mr. Justice Stewart finds reasons for believing that the court of appeals did apply "state law" (i.e., that the court of appeals believed that the act encompasses federal maritime law).10 Paradoxically, their dissents in Goett demonstrate continued support of The Tungus to the same extent that the vote of four of the majority demonstrate continued opposition. It is the dissent of Mr. Justice Whittaker that is surprising; although he was with the majority in The Tungus, he now takes a position that seems to depart from that ruling.

4 Union Carbide Corp. v. Goett, 256 F.2d 449 (4th Cir. 1958).
5 361 U.S. at 343.
6 361 U.S. at 344 n.5.
7 This is the second time that Mr. Justice Clark's unique view has determined the result in an admiralty case. See Maryland Casualty Co. v. Cushing, 347 U.S. 409 (1954). See also Comment, 22 U. CHI. L. REV. 550 (1955).
8 361 U.S. at 344.
9 361 U.S. at 348.
10 361 U.S. at 345.
Since *Southern Pac. Co. v. Jensen*\(^{11}\) and *Chelentis v. Luckenbach S. S. Co.*\(^{12}\) it has been well established that the constitutional grant to the federal courts of judicial power over admiralty\(^{13}\) means the supremacy of federal maritime law even when a maritime case is brought in a state court under the “saving to suitors clause” of the implementing congressional legislation.\(^{14}\) Thus in *Kermarec v. Compagnie Generale Transatlantique*\(^{15}\) the Court vacated a judgment which had employed distinctions of state law concerning licensees and invitees to deny recovery, and held that the governing federal maritime law did not employ such distinctions stating that this result would be the same even “if this action had been brought in a state court.”\(^{16}\) Long before the appearance of the federal supremacy doctrine, *The Harrisburg*\(^{17}\) had established the principle that admiralty provides no remedy for wrongful death; to fill this gap admiralty will apply the wrongful death statutes of the various states.\(^{18}\)

In *The Tungus*, Mr. Justice Stewart, writing for a majority of five, restated this traditional position. He declared that the power of the state to create a remedy includes the power to determine when the remedy shall be permitted, and that an admiralty court adopting a state remedy must apply the remedy in accordance with state law.\(^{19}\) The opinion relied upon precedent;\(^{20}\) no policy argument was made.\(^{21}\) But, for the first time in its long history, the traditional position was attacked. The “federalist minority,” Mr. Justice Brennan, joined by Justices Black and Douglas and the Chief Justice, pointed out the paradox

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\(^{11}\) 244 U.S. 205 (1917).

\(^{12}\) 247 U.S. 372 (1918).

\(^{13}\) U.S. CONST. art. III, § 2.


\(^{15}\) 358 U.S. 625 (1959).

\(^{16}\) Id. at 628.

\(^{17}\) 119 U.S. 199 (1886).

\(^{18}\) The Hamilton, 207 U.S. 398 (1907).

\(^{19}\) 358 U.S. at 593.

\(^{20}\) In addition to *The Harrisburg*, the authorities upon which Mr. Justice Stewart’s position rests are: *The Hamilton*, 207 U.S. 398 (1907); *The La Bourgogne*, 210 U.S. 95 (1908); Western Fuel Co. v. Garcia, 257 U.S. 233 (1921); Levinson v. Deupree, 345 U.S. 648 (1953).

\(^{21}\) The argument could be made that, at least in regard to non-seamen, the states have a stronger interest than maritime law in fashioning remedies and duties applicable to wrongful deaths occurring within their territorial waters. In these cases most plaintiffs and libelants would be citizens of the state whose wrongful death statute was to be applied (in sharp contrast to the beneficiaries of seamen). Mr. Justice Harlan has stated that: “Where tortious conduct causes death, the decision of a State to provide a right of action in favor of the victim’s estate or beneficiaries represents a response to considerations peculiarly within traditional state competence: providing for the victim’s family, and preventing pauperism by shifting what would otherwise be a public responsibility to those who committed the wrong. These are matters intimately concerned with the state’s interest in regulating familial relationships.” *Hess v. United States*, 361 U.S. 314, 332 (1960). See also Currie, *Federalism and the Admiralty: “The Devil’s Own Mess,”* 1 Sup. Cr. Rev. 158 (1960). But the difficulty in connecting such an interest analysis with a position based on precedent is that the same argument here used to justify the status quo in wrongful death cases could be used to justify the extension of state law to cover personal injury cases, an extension which would require a radical rearrangement of the present structure, and would clearly be contrary to established precedents. No member of the Court contends that the primary jurisdiction is not federal and that the “adoption” of the state statutes is not a matter of federal permission.
arising from the doctrine:22 If a non-seaman is injured upon the navigable waters of a state, then federal maritime law applies; but if he is killed, then state law applies. The requirement of a seaworthy ship establishes a federal maritime duty not to kill as well as a federal maritime duty not to injure. A remedy for a wrongful death occurring within admiralty jurisdiction should give the decedent's beneficiary the rights which arise from the breach of this duty. Admiralty, Mr. Justice Brennan contended, is capable of fashioning an appropriate remedy.

From the practical viewpoint of libelants, the significance of *The Tungus* is its bearing upon whether state law will be so applied as to make the decedent's contributory negligence a bar to recovery (in contrast with the admiralty doctrine of comparative negligence); and whether the various state wrongful death statutes will be interpreted to allow unseaworthiness as a basis for recovery. In *The Tungus* these questions were not directly in issue. The district court had dismissed the libel brought by the deceased harborworker's administratrix, holding that recovery could not be based upon unseaworthiness under the state wrongful death act.23 The court of appeals reversed,24 advancing the questionable proposition that the New Jersey Wrongful Death Act encompasses the federal maritime law (which in turn applies the state remedy to fill the gap in admiralty).25 The Supreme Court declined to disturb the lower court's interpretation of New Jersey law. On its facts, *Goett* could have raised such issues. The possibility has been eliminated; on remand the Fourth Circuit held that West Virginia's Wrongful Death Act also encompasses federal maritime law.26

*Goett*, along with its companion case, *Hess v. United States*,27 is the child of *The Tungus*. While *Hess* probes some of the consequences of the parent case,28

22 358 U.S. at 597 (separate opinion).
24 252 F. 2d 14 (1957).
25 Questionable or not, the proposition seems to be growing in fashion. See e.g., Union Carbide Corp. v. Goett, 278 F.2d 319 (4th Cir. 1960); Halecki v. United Pilots Ass'n, 251 F.2d 708 (2d Cir. 1958); Skovgaard v. The M/V Tungus, 252 F.2d 14 (3d Cir. 1957). However, other circuits have held that the state wrongful death acts do not furnish a cause of action under the Federal maritime law: e.g., Graham v. A. Lusi, Ltd., 206 F.2d 223 (5th Cir. 1953); Lee v. Pure Oil Co., 218 F.2d 711 (6th Cir. 1955). For technical arguments that the state death acts do not encompass federal maritime law, see Kolins & Cecil, *Maritime Torts Resulting in State Territorial Waters*, 26 INS. COUNSEL J. 567 (1959). It is often said that the state wrongful death acts create a new cause of action in the statutory beneficiaries. E.g., Prosser, *Torts* § 105 (2d ed. 1955).
26 Union Carbide Corp. v. Goett, 278 F.2d 319 (4th Cir. 1960).
28 In the *Hess* case the issue was the constitutionality of the right of action for wrongful death created by the Oregon Employers' Liability Law which created a stricter standard of duty than does the federal maritime law. Mr. Justice Stewart wrote the opinion and, following *The Tungus*, found the Oregon act constitutional. The Chief Justice and Justices Black, Douglas and Brennan joined "solely under compulsion" of *The Tungus*. Mr. Justice Harlan, joined by Mr. Justice Frankfurter, first reaffirmed his view that "where the duty imposed by
Goett, particularly in the light of Mr. Justice Whittaker's dissent, indicates that the parent case may soon be overruled.

Mr. Justice Whittaker's view is that maritime law is remedially supplemented by state wrongful death acts, but that the characteristic features of maritime law define the conditions of the remedy. The court of appeals, he concluded, properly applied the West Virginia statute in this connection. At first sight, his position is difficult to distinguish from that of the dissent in The Tungus; there seems to be a minority of five. The puzzle was dryly noticed by the court of appeals when it considered the case on remand: "This brings him [Mr. Justice Whittaker] close to the position of the four justices who dissented in [The Tungus]... and concurred 'under compulsion' in Hess and Goett. It is not for us to resolve this problem." But Mr. Justice Whittaker insists that there is not a word in the Tungus decision that is contrary to his position. Furthermore, he criticizes the position of the "federalist minority" in Tungus. Whereas he would have admiralty adopt the state wrongful death statutes, he feels that the federalist minority "said, in effect, that admiralty would merely look to see whether the state had enacted a wrongful death statute and, if it had, would... put it aside and fashion its own remedy for wrongful death."

Although his own position is somewhat vague, Mr. Justice Whittaker may have clarified the concept employed by the federalist minority. It was clear that the dissent in The Tungus did not advocate overruling The Harrisburg and either creating a new admiralty remedy, or fashioning one by analogy to the Death on the High Seas Act. But prior to Mr. Justice Whittaker's dissent in

a state death act is no greater than that already existing under federal law, the application of the statute is solely, or nearly so, a reaction to strong, localized state interests, and there is no real encroachment on federal interests." 361 U.S. at 333. But he then went on to declare that the fact that the federal maritime law permits the state to create a right of action that is not stricter than the federal maritime law, does not mean that it should permit a stricter standard to be applied. See generally Currie, supra note 21, at 186-207.

29 Union Carbide Corp. v. Goett, 278 F.2d 319, 321 (4th Cir. 1960).

30 Technically The Tungus did no more than affirm the circuit court's decision that the New Jersey statute incorporated the federal maritime law. It is difficult, however, to agree that there is "not a word" in that decision contrary to Mr. Justice Whittaker's position. The test, of course, would be the review of a decision in which a wrongful death act had been applied so as to restrict federal maritime law. Presumably Mr. Justice Whittaker would vote for reversal and Mr. Justice Stewart for affirmance.

31 361 U.S. at 348.

32 41 Stat. 537 (1920), 46 U.S.C. § 761 (1958). For the suggestion that the Court should have fashioned a remedy by analogy to the Death on the High Seas Act, see Currie, supra note 21, at 195. The Death on the High Seas Act provides that it shall not apply to deaths on waters within the territorial jurisdiction of the states. However, since Congress has established a remedy for wrongful death upon all navigable waters except the territorial waters of the states, it would indeed seem like judicial legislation for the Court to fashion a remedy for the remainder without looking to state law even for an analogy. Mr. Justice Stewart regards the Death on the High Seas Act as demonstrating concern that "the power of the States to
Goett it was not clear whether the dissent in The Tungus proposed to fashion a federal remedy by analogy to state law or to apply state statutes remedially. The federalist minority have precedent, in Textile Workers v. Lincoln Mills, for their position that federal courts can fashion a body of law by analogy to state law. Even more suggestive is the long standing admiralty practice of applying state statutes of limitation by analogy to determine whether a claim has become barred for laches, and allowing the claim even if the applicable statute has run if the delay was excusable and resulted in no prejudice to the defendant. In wrongful death cases, to fashion a remedy by analogy would seem to mean that federal maritime law would govern the cause of action but that the state scheme of beneficiaries would be utilized, thereby avoiding the necessity of overruling The Harrisburg. Neither the federalist minority nor Mr. Justice Whittaker suggests a recommended disposition of ceilings on the amount of recovery which the state wrongful death acts now impose.

Unless there is a submerged disagreement here, the two positions would seem to accomplish the same result. From the point of view of the libelant, either fashioning by analogy or the application of state acts remedially would accomplish the same result of insuring that a claim can be based upon the rights created by the federal maritime law. Therefore, the question remains: Why did not the five coalesce to form a majority?

Insurance lawyers might suspect that the new remedy which the federalist minority proposes to fashion would work to the advantage of plaintiffs and libelants; but Mr. Justice Brennan does not advance this as an argument for change. Nor does Mr. Justice Brennan develop an argument that any impor-

create actions for wrongful death in no way be affected by enactment of federal law, The Tungus v. Skovgaard, 358 U.S. at 593. Mr. Justice Brennan replies that the “effect of Congress’ action was to leave the state statutes available as remedial measures,” 358 U.S. at 608; but that it offers no guide as to what substantive law (maritime or state) is to apply under the state acts. He concludes that: “It is odd to draw restrictive inferences from a statute whose purpose was to extend recovery for wrongful death.” Ibid. Mr. Justice Harlan in his dissent in Hess v. United States, 361 U.S. 314, 330-31 (1960), joined by Mr. Justice Frankfurter, indicates that he sides with Mr. Justice Brennan on this point.

33 353 U.S. 448 (1957). It is curious to find the Court in Lincoln Mills willing to fashion a body of law by analogy in a controversial area, in the face of vigorous criticism and merely upon the authority of an obscure statute, and yet unwilling to fashion for admiralty a clear and coherent remedy for wrongful death upon the authority of a constitutional grant of jurisdiction dating from 1789. The membership of the Court was the same as in The Tungus and Goett except that Mr. Justice Stewart had not yet replaced Mr. Justice Burton. Mr. Justice Douglas wrote the opinion; Justices Burton and Harlan concurred; Mr. Justice Frankfurter dissented.

34 See Gilmore & Black, The Law of Admiralty 630–37, 296 n. 149 (1957). However, The Harrisburg itself involved a wrongful death claim barred by the state statute of limitations. The decision that a state statute of limitations was applicable since the state statute alone created the right to sue, was the beginning of all the trouble. Since that decision, laches has governed personal injuries, but statutes of limitations have been applied strictly in wrongful death cases. See Bournias v. Atlantic Maritime Co., Ltd., 220 F.2d 152 (2d Cir. 1955).
tant federal interest is violated by the application of the state wrongful death statutes. His attack upon the majority position is purely in terms of its anomalous and arbitrary character; he repeatedly expresses the offensiveness of applying federal law to personal injury cases and state law to wrongful death actions. "Admiralty law" he summarizes, "is primarily judge made law. The federal courts have a most extensive responsibility of fashioning rules of substantive law in maritime cases. . . . This responsibility places on this court the duty of assuring that the product of the effort be coherent and rational."

Perhaps uniformity in the maritime law itself is to be viewed as a federal interest apart from any consideration of the interests of the shipping industry.

It would be strange if those who advocate abandoning the present system because it is not coherent and rational would move to a position such as Mr. Justice Whittaker's, which, although similar in result, is still far from clear. To use state wrongful death acts "remedially" would be to use them as "remedies in the abstract." What would be done if a state court were to refuse to apply the death act of its own state in the remedial fashion that Mr. Justice Whittaker advocates? The power to create a remedy includes the power to determine what conduct shall give rise to a right of recovery. Also, this would subject the citizens of the states to unequal treatment under the same statute depending upon whether the tort occurred on land or water. Finally (although this objection has no political reality), the federal remedy would still be dependent upon the existence of a state remedy. To use the state acts only by analogy would avoid these conceptual difficulties.

This may explain why the federalist minority chose not to join with Mr. Justice Whittaker and make Goett the occasion for overruling The Tungus. It does not explain why he did not join them. Apparently his separate course is explainable in terms of judicial propriety; to fashion a remedy by analogy may have seemed to him too much like judicial legislation.

In regard to judicial propriety, any restraint which the Court feels in adopting any of the alternatives to the present anomalous situation would appear to be self-imposed. The constitutional grant of judicial power over admiralty would seem to authorize even the extreme act of overruling The Harrisburg. However, admiralty, which has not fashioned for itself the power of equitable relief, and which has often adopted state law to fill its "gaps," can hardly lay claim to an unqualified tradition of creativity. In the two recent cases of Halcyon Lines v. Haenn Ship Corp. and Wilburn Boat Co. v. Fireman's Fund

35 358 U.S. at 611.
36 See generally Gilmore & Black, op. cit. supra note 34, at 37-39.
37 See generally Currie, supra note 21.
38 342 U.S. 282 (1952). A shipowner was sued for personal injuries by an employee of a shorideside contractor. The shipowner brought in the contractor and urged that he be required to make contribution since he was the primary tort feasor. The Court dismissed the contribution proceedings. Mr. Justice Black stated: "To some extent courts exercising jurisdiction in maritime affairs have felt freer than common-law courts in fashioning rules, and
Ins. Co., the Court specifically refused to "fashion a remedy" for contribution between tort feasors in a non-collision case or to establish a rule regulating marine insurance contracts. Both decisions were written by Mr. Justice Black of the federalist minority which now proposes to fashion a remedy in wrongful death cases. Yet the record is not barren of creativity; the "unseaworthiness" doctrine itself was fashioned by the Court in this century.

It was the Court's free choice to adopt the state statutes; surely the Court may now abandon them. But self-imposed restraint exists. No doubt this is because the issue is not seen as a constitutional one, but simply as a matter of admiralty law, since the state death acts are adopted by admiralty and fail to infringe upon an existing federal remedy. Even the dissenters in The Tungus do not wish to overrule The Harrisburg because, however dubious the decision was, "the holding has become part and parcel of our maritime jurisprudence." Mr. Justice Brennan also speaks of "the felt necessity of having some statutory definition." Mr. Justice Whittaker in his dissent in Goett is more conservative; he advances a vague and unsatisfactory conceptualization, apparently because he feels that precedents dictate the conclusion that admiralty itself has no remedy for wrongful death, and therefore adopts the state acts.

The present unstable division does the Court little credit. The dissenters in Tungus seem to have been delighted to seize an opportunity to embarrass the majority of The Tungus by applying that ruling in ways which its proponents did not anticipate: "As long as the view of the law represented by that ruling prevails in the Court, it should be applied evenhandedly, despite the contrary views of some of those originally joining it that state law is the measure of recovery when it helps the defendant, as in The Tungus, and is not the measure we would feel free to do so here if wholly convinced that it would best serve the ends of justice. We have concluded that it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await congressional action." 342 U.S. at 285. For discussion and criticism of this decision, see Gilmore & Black, op. cit. supra note 34, at 366-374, and Currie, supra note 21, at 212-13.

39 348 U.S. 310 (1955). Mr. Justice Black remarked that although the Court could fashion a rule, "such a choice involves varied policy considerations and is obviously one which Congress is peculiarly suited to make. And we decline to undertake the task." 348 U.S. at 320. In dissent, Mr. Justice Reed said: "If uniformity is needed anywhere, it is needed in marine insurance." 348 U.S. at 333. For criticism of this decision, see Gilmore & Black, op. cit. supra note 27, at 60-63, 383, and Currie, supra note 21, at 215-19.

40 See generally Gilmore & Black, supra note 34, at 315-32.

41 In his dissent in the Hess case, supra note 27, at 335, Mr. Justice Harlan stated that "where the tort is maritime and the action brought under the 'saving clause,' state created rights may be asserted only by federal permission. That is the premise on which The Hamilton and its offspring proceeded." Of course Mr. Justice Harlan uses this point not to advocate overruling The Harrisburg, but to argue that state law need not be permitted to impose a standard stricter than the federal maritime law.

42 358 U.S. at 599.

43 358 U.S. at 604.
of recovery when it militates against the defendant.” This might be sardonic humor of high quality, but one wonders if it is responsible judicial behavior, especially since it seems probable that the federalist minority could have resolved their conceptual differences with Mr. Justice Whittaker and thereby effected a stable solution.

Of course, Mr. Justice Whittaker’s position may differ more substantially from that of the federalist minority than is apparent; his dissent in Goett is too cryptic to give grounds for certainty. It is also possible that the various Justices are frozen in their present positions. If so, one hopes that some new concept might bring about a thaw. Mr. Justice Clark, the majority of one in Goett, cited with approval in Cox v. Roth both a remark by Mr. Chief Justice Hughes in Just v. Chambers that: “The rule of the non-survival of a cause of action against a deceased tortfeasor has but a slender basis in admiralty cases in this country,” and a statement by Roscoe Pound that: “To think of recovery for wrongful causing of death as something exceptional... is an anachronism. Today we should be thinking of the death statutes as part of the general law.”

Gilmore and Black have speculated that: “Both the Just and Cox cases went to the abatement of the action on the death of the tortfeasor. Quaere, however, whether the Court might not be willing to reexamine the survivorship question from the victim’s point of view in, for example, an action by a deceased seaman’s personal representative under general maritime law for unseaworthiness.” The Court has not considered this approach to the problem. Although it is in a sense a radical approach, it is the most direct and simple way of insuring that death claims would be governed by the federal maritime law; there would be no need to wrestle with the scheme of beneficiaries created by state wrongful death acts; the claim would simply be a part of the decedent’s estate, much like a claim in contract. If the Court cannot bring itself to overrule The Harrisburg, perhaps the survival remedy should be placed alongside the remedy provided by state wrongful death acts. The Harrisburg would then rapidly wither away. If Mr. Justice Clark were to recall his earlier dictum in Cox v. Roth, he particularly might be swayed; is there any reason to draw a distinction between a deceased tort feasor and a deceased victim?

This is merely one approach that the Court does not appear to have considered. No doubt there are other solutions. One cannot but feel that the Court

44 361 U.S. at 344 n.5.
45 348 U.S. 207, 210 (1955). The decision held that under the Jones Act a right of action for wrongful death survived the death of the tortfeasors.
46 312 U.S. 383, 387 n.4 (1941).
48 GILMORE & BLACK, supra note 34, at 302 n.172.
has not devoted its best efforts to the problem despite its having been raised in four cases within the last two terms.49

The differences between the alternatives discussed were not important to the practical libelant or plaintiff until recently. *Western Fuel v. Garcia,*50 decided during the heyday of the uniformity doctrine51 was as anomalous in result as *The Tungus.* But it was not until the Court transformed unseaworthiness into a right of enormous value to a plaintiff or libelant, with the resultant torrent of litigation to obtain it,52 that the difference between the treatment of personal injury and wrongful death cases became startling.

It is difficult to predict whether the present unstable division will remain throughout another term, or whether Mr. Justice Whittaker will join with the dissenters, or the dissenters will join with him. Whichever view prevails, it is to be hoped that the very offensiveness of the anomaly in question might generate a new attitude of creativity in admiralty.

49 In addition to *Goett, Hess* and *The Tungus,* the problem was also raised in United Pilots Ass'n v. Halecki, 358 U.S. 613 (1959).
50 257 U.S. 233 (1921).
51 See text following note 11, supra.
52 Gilmore & Black, supra note 34, at 315.

**Remand to a State Supreme Court for Determination of Unsettled Questions of State Law**

*Nostrand v. Little*1 raises the question of the proper disposition by the United States Supreme Court of an unsettled issue of state law in a case coming from a state court. The State of Washington requires that every public employee subscribe to a “loyalty oath” stating that he is “not a subversive person or a member of the Communist Party or any subversive organization.”2 The act provides that refusal to subscribe to the oath “on any ground shall be cause for immediate termination of such employee’s employment.”3 Two University of Washington professors brought an action for declaratory judgment, claiming the act to be violative of the due process clause of the fourteenth amendment as well as other provisions of the federal constitution. In a unanimous decision,4 the Supreme Court of Washington upheld the constitutionality of the loyalty oath provisions of the act, reversing a contrary ruling by the trial court. On appeal, the United States Supreme Court vacated the judgment and remanded to the state court for further consideration on the ground that the state court had not passed on the claim of appellant that under

1 362 U.S. 474 (1960).
3 Ibid.
the act no hearing is afforded at which the employee can explain or defend his refusal to take the oath.

In the exercise of its jurisdiction to review state court decisions, the United States Supreme Court has seldom remanded for clarification of an issue of state law. The Court may review only federal questions raised and determined below; thus, issues of state law may be considered only when essential to a proper determination of the federal questions presented. It is to be expected that interpretations of state law which the Court judges essential for a proper determination on review will normally have been made by the state court in arriving at the decision from which an appeal was taken. That this expectation is occasionally unfulfilled may reflect a growing use of actions for declaratory judgment in which complex statutes, never before construed, are attacked on broad constitutional grounds. Under these circumstances state courts may fail to make those statutory interpretations which the Supreme Court later considers essential to review. State constructions of local statutes are, of course, binding on the federal courts. In the absence of a controlling state decision, however, the Court may rule on both state and federal questions. But it is not obliged to do so and may, under appropriate circumstances, remand to the local court for determination of the unsettled state question.

Because of the unusual costs and delays involved, it is apparent that remands for clarification of state law impose a substantial burden on litigants. Less apparent are the public interests which justify the Court's refusal to rule on state issues, when its jurisdiction to do so is established.

6 But see, e.g., Dorcy v. Kansas, 264 U.S. 286 (1924); Musser v. Utah, 333 U.S. 95 (1948).
8 See, e.g., Alabama State Fed'n of Labor v. McAdory, 325 U.S. 450 (1945); CIO v. McAdory, 325 U.S. 473 (1945); Rescue Army v. Municipal Court, 331 U.S. 549, 572-74 (1947). Although the last case involved an action for writ of prohibition, the Court stated that "in all but name the two procedures are substantially identical, for the purposes of our jurisdiction and function in review." 331 U.S. at 574.
11 This procedure is not to be confused with the more commonly employed technique of remanding to the highest state court for clarification of an ambiguous decision which appears to rest on both state and federal grounds. In the latter circumstance, the request is not for a ruling on a state issue formerly ignored, but rather for clarification of whether the state issue ruled upon may form an adequate and independent ground of the court's prior disposition of the case. See, e.g., Minnesota v. National Tea Co., 309 U.S. 551 (1940); Herb v. Pitcairn, 324 U.S. 117 (1945).
The doctrine of federal abstention from the exercise of jurisdiction in cases involving unsettled issues of state law has had its source and clearest application in cases originating in the federal courts. The likelihood of unsettled state questions being thrust upon the federal courts for determination is greater in this procedural setting than in cases coming directly from state courts. Although the abstention doctrine has not been expressly applied to cases of the latter kind, the public interests which justify refusal of the Supreme Court to rule on unsettled state issues may be the same in both settings. In the leading abstention case, *Railroad Comm'n v. Pullman Co.*, a company sought in the federal court to enjoin enforcement of an order of the Texas Railroad Commission. Alternative grounds for relief were argued, one going to the constitutionality of the order, the other to the authority of the Commission under the Texas statute to make the order in question. The Supreme Court directed the federal district court to abstain from deciding the case, but to retain jurisdiction until the parties had an opportunity to obtain from the Texas courts a ruling on the state issue involved. The evils to be avoided by abstention were "the waste of a tentative decision as well as the friction of a premature constitutional adjudication."

The first of the two arguments for abstention may be simply stated. Constructions of local statutes by federal courts are not binding on the courts of the state. Therefore, decisions based upon federal court constructions of local statutes must be considered tentative in nature. As such, they run the risk of wasted judicial effort. Only if local courts follow the statutory interpretation suggested by the federal court will the decision based thereon be of continuing

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13 Whether original federal jurisdiction is based on diversity of citizenship (28 U.S.C. § 1332 (1948), as amended, 28 U.S.C. § 1332 (1958)) or the presence of a federal question (28 U.S.C. § 1331 (1948), as amended, 28 U.S.C. § 1331 (1958); Hurst v. Oursler, 289 U.S. 238 (1933)), the jurisdiction extends to a potentially wider range of state issues than may be considered in reviewing a state court judgment. In the latter cases, the only issues which may be considered are those the resolution of which is strictly necessary to the determination of the federal issues presented.

14 Because of substantial uncertainties regarding the construction of complex statutes under constitutional attack, the Court has in several instances dismissed cases arising from state courts. E.g., *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947); *Alabama State Fed'n of Labor v. McAdory*, 325 U.S. 450 (1945). In each case, extended justifications for the dismissals have been given. Where more clearly-defined questions of statutory construction were presented, the Court has used the vacate-remand technique. In these cases little justification, whether drawn from self-styled "abstention" cases or elsewhere, has been offered. The failure to employ abstention arguments to justify remands such as in *Nostrand* may reflect the fact that remands to state courts impose much lighter burdens on litigants than do abstentions in cases originating in the federal courts. See Note, 73 HARV. L. REV. 1358 (1960).

15 312 U.S. 496 (1941).

16 Id. at 500.
The applicability of the argument to *Nostrand v. Little* is evident. For the Supreme Court to rule upon the constitutionality of the Washington loyalty oath statute, under the assumption that a hearing either is, or is not, provided, might be to run the risk of a subsequent undermining of that constitutional ruling by an alternative state construction of the statute.

It is less clear that such a constitutional ruling would increase the risks of state-federal friction, as is suggested by the second reason for abstention given in the *Pullman* decision. The applicability of the friction argument to *Nostrand*, however, may be more clearly seen from its formulation in the recent abstention case, *Harrison v. NAACP*. As in *Nostrand*, the suit involved a direct attack on the constitutionality of an ambiguous state statute. Abstention was justified as a means of avoiding "unnecessary interference by the federal courts with proper and validly administered state concerns." The "concerns" to which the Court refers appear to be the policies served by the statute under attack, rather than the general interests of local courts in interpreting state statutes. But on this reading, the rationale appears to beg the very questions at issue. If construction of the local statute and a subsequent constitutional ruling would be interference, it is not clear that they would be unnecessary interference. The adjudication which the Court declined to make had as its very purpose the determination of whether the statute formed a basis for a proper and valid administration of state concerns.

It is clear that the friction-creating interference to which the Court referred was not simply constitutional adjudication, whether by state or federal courts, but rather a possible result of adjudication, viz., the striking down of state statutes on constitutional grounds. The interference would be unnecessary insofar as statutes which might form the basis for a proper and valid administration of state concerns were overturned. The Court says, "[A]ll we hold is

17 Constructions leading to unfavorable constitutional decisions may be intrinsically less subject to waste than are favorable decisions based on alternative constructions. This results from the tendency of unfavorable rulings to cut off subsequent litigation on the statute in local courts. Therefore, if the avoidance of judicial waste were the only argument for abstention, the technique would not be employed where constructions unfavorable to constitutionality are indicated.

There are circumstances in which even constructions leading to favorable constitutional decisions contain internal checks against waste. Where two or more equally plausible interpretations of a statute are possible, one of which clearly leads to constitutionality, the others evidently raising difficult constitutional problems, the Supreme Court is likely to choose the first. Where state courts subsequently have the opportunity to examine the interpretational question, uncertainty regarding the constitutionality of alternative constructions may lead them to follow the interpretation suggested by the Supreme Court. Insofar as this type of federal influence on the construction of state statutes is to be condemned—and it is not clear that it should be—the objection will not be based on the arguments discussed in this comment. Rather, the objection will be based, presumably, on a general theory of the proper forum for the interpretation of state statutes.

18 360 U.S. 167 (1959),

19 Id. at 176,
that these enactments should be exposed to state construction or limiting interpretation before the federal courts are asked to decide upon their constitutionality, so that federal judgment will be based on something that is a complete product of the State, the enactment as phrased by its legislature and as construed by its highest court.\textsuperscript{20}

The argument may be summarized in two steps. (1) State courts may be more willing than federal courts to construe local statutes narrowly in the interest of avoiding unconstitutionality. In \textit{Alabama State Fed'n of Labor v. McAdory},\textsuperscript{21} the Court recognized that "state courts, when given the opportunity by the presentation to them for decision of an actual case or controversy, may, and often do, construe state statutes so that in their application they are not open to constitutional objections which might otherwise be addressed to them." In the federal courts, by contrast, the presumption of constitutionality is limited by the counterpressure arising from fear of a wasted decision. The narrower the federal construction of a local statute, the greater the possibility that it will subsequently be disfavored by courts of the state, and thus the more tentative and potentially wasteful will be a constitutional ruling based on the construction. (2) Consequently, out of the crucible of constitutional adjudication in state rather than federal courts may come a new "product of the state," less subject—and properly so—to the interference of an unfavorable constitutional ruling. Deference to state courts, then, in the determination of constitutional cases involving questions of statutory construction, is to be justified by a possible difference in result.

The avoidance of a judicial waste and unnecessary interference does not require that every constitutional case involving statutory ambiguities be remanded to a state court for clarification.\textsuperscript{22} Absent some doubt about the proper construction of the statute, the risk of judicial waste would be small; and if the constitutional ruling were not likely to turn on the resolution of the interpretation question, then unnecessary interference would not be at issue. The remand in \textit{Nostrand v. Little} may be subject to question on both points.

"One of the claims [of appellants]," said the Court in \textit{Nostrand}, "is that no hearing is afforded at which the employee can explain or defend his refusal to take the oath. . . . [W]e cannot say how the Supreme Court of Washington would construe the statute on the hearing point."\textsuperscript{23} The statutory provisions under attack in the case, however, were amendatory of sections 12 and 13 of Chapter 254, Laws of 1951. Section 15 of the original act clearly gives the right of judicial review to "any person discharged under the provisions of this

\textsuperscript{20} Id. at 178.

\textsuperscript{21} 325 U.S. 450, 470 (1945).

\textsuperscript{22} See Rescue Army v. Municipal Court, 331 U.S. 549, 574 (1947).

\textsuperscript{23} 362 U.S. at 475.
Nevertheless, section 15 may not control, for the per curiam opinion states that "the fact that the State's statute here under attack supplements previous statutory provisions [raises] questions concerning the applicability of the latter. . . ." In any event, the hearing issue is submerged in a deeper criticism of the remand made by Mr. Justice Douglas in his dissenting opinion. He points to the clear wording of the statute which says that refusal to take the oath "on any grounds" shall be cause for "immediate termination" of employment. He argues that under these circumstances a hearing at which an employee could explain or defend his refusal to take the oath would seem to serve no function. So long as the statute creates an irrebuttable presumption running from refusal to take the oath to unfitness for public employment, Mr. Justice Douglas suggests, the remand is for an irrelevancy.

Despite the apparent clarity of the statute, however, four factors may account for the refusal of the majority to assume that the Washington court would not, on remand, find in the statute both a required hearing and an opportunity to rebut the presumption of unfitness.

(1) When a statute is under direct constitutional attack, the element of threat implicit in a remand for statutory interpretation cannot be ignored. Unless the Supreme Court believed that the statute's constitutionality might turn on the answer given by the state court to the question of interpretation, the costs of a remand to litigants could not be justified. The remand situation emphasizes, therefore, less the state court's role as impartial arbiter over an adversary proceeding, than its role as co-agent with the legislature in effectuating state policy by creating a statute invulnerable to constitutional attack.

24 WASH. REV. CODE § 9.81.090 (1951). The pertinent part of the section reads:

"Any person discharged under the provisions of this act shall have the right within thirty days thereafter to appeal to the superior court . . . for determination by said court as to whether or not the discharge appealed from was justified under the provisions of this act. The court shall regularly hear and determine such appeals and the decisions of the superior court may be appealed to the supreme court of the state of Washington as in civil cases. Any person appealing to the superior court may be entitled to trial by jury if he or she so elects."

25 362 U.S. at 475-76.

26 WASH. REV. CODE § 9.81.070 (1955), amending LAWS OF WASH., ch. 254, § 12 (1951). The section reads in pertinent part as follows: "Every such person, board, commission . . . or other agency shall require every employee or applicant for employment to state under oath whether or not he or she is a member of the communist party or other subversive organization, and refusal to answer on any grounds shall be cause for immediate termination of such employee's employment . . . ."

27 362 U.S. at 478.

28 The thrust of the Douglas criticism does not go to the wording of the question addressed to the Washington Supreme Court. "Whether a hearing is afforded at which the employee can explain or defend his refusal to take the oath" may reasonably be read to imply a question regarding the possible usefulness of such a hearing. What the criticism must assume is that the Washington Court's answer to the presumption is a foregone conclusion because of the clear wording of the statute which makes refusal to take the oath "on any grounds" cause for dismissal.
(2) The Washington Supreme Court had already demonstrated its willingness to undertake limiting interpretation of the statute in the face of constitutional attack. As part of their case before the Washington court, appellants had attacked the absence of an “element of *scienter*” in the required loyalty oath. The attack was strongly based, both as a matter of construction and as an argument of constitutional law. In response, the Washington Supreme Court held that “as we interpret the form of oath, we find that this element [of *scienter*] is implied in every clause thereof and of the pertinent statutory provisions.”

(3) There is reason to believe that the constitutional attack, based on the irrebuttable presumption and the absence of hearing, was not clearly presented to the Washington court. In their motion to dismiss, appellees vigorously denied before the United States Supreme Court that appellants’ constitutional objection based on the absence of a hearing was “raised in, considered or passed upon by the Supreme Court of Washington.” Appellants answered that “while the wording of these Constitutional arguments as set forth in our State brief is not identical with the wording of the questions presented in the Statement as to Jurisdiction, the concepts involved in our arguments were clearly expounded to the State Supreme Court throughout our brief and Petition for Rehearing.” If the Court concluded that appellants’ hearing presumption point was not adequately presented to the Washington court, then any inferences unfavorable to a remand, which might be drawn from the failure of the state court to limit the statute on first hearing, would be vitiates.

29 The oath which was tendered to appellants contains no qualifications. It reads, in material part, as follows: “(2) That I am not a subversive person or a member of the Communist Party or any subversive organization, foreign or otherwise, which enages in or advocates, abets, advises, or teaches the overthrow, destruction or alteration of the constitutional form of the government . . . by revolution, force or violence.”

30 The constitutional argument rested primarily, it would appear, on Wieman v. Updegraff 344 U.S. 183 (1952) in which the United States Supreme Court struck down a test oath as applied to a college professor on the ground that the statute created an “indiscriminate classification of innocent with knowing activity . . .” and thus violated due process.

31 53 Wash. 2d 460, 484, 335 P.2d 10, 24 (1959).

32 Appellees’ Motion to Dismiss, p. 9, 362 U.S. 474 (1960).

33 Brief for Appellee Opposing Motion to Dismiss, p. 7, 362 U.S. 474 (1960).

34 The same conclusion, however, raises doubts concerning the jurisdiction of the Supreme Court to entertain appellants’ hearing presumption argument at all. See 28 U.S.C. § 1257 (1948); Dewey v. Des Moines, 173 U.S. 193, 197–98 (1899). Yet interestingly enough, this question, however decided, may not cast doubt on the propriety of the remand in *Nostrand*. In Musser v. Utah, 333 U.S. 95 (1948), defendant had been convicted for advocating bigamy under a state statute making it unlawful to conspire “to commit acts injurious to public morals.” The Supreme Court of Utah had upheld the conviction, without opinion, against a general attack based on the fourteenth amendment to the federal constitution. Before the United States Supreme Court, a question of unconstitutional vagueness in the statute was raised for the first time in response to suggestions from the bench. The Court
(4) The Court took judicial notice, in *Nostrand*, of a supervening decision by the Washington court which may have indicated a change in constitutional theory. In *City of Seattle v. Ross*, the state court overturned an ordinance because it established a presumption of guilt without affording the accused an opportunity of a hearing "to rebut the same." In light of this reading of *Seattle v. Ross*, the *Nostrand* Court said "we cannot say how the Supreme Court of Washington would construe the statute on the hearing point." If in *Seattle v. Ross*, however, the Washington court accepted a major premise of appellants' argument in *Nostrand*, then the state court could avoid inconsistency on remand only by overturning the statute or by construing the statute in such a way as to avoid the constitutional infirmity. The former course is unlikely, coming so soon after a unanimous decision upholding the statute. The latter choice, under all the circumstances considered, would appear to be a genuine possibility. And it is on the strength of this possibility that the disposition of *Nostrand* must finally be justified.

vacated the judgment of the state supreme court and remanded for further consideration, justifying its action on the ground that questions inherent in the appeal and involving determinations of state law had not been presented to the Utah Supreme Court, and that, perhaps, the point had therefore been waived or lost. The theory appears to have been that although the Court had no jurisdiction over the new argument on appeal, its jurisdiction over the case was sufficient to justify vacating and remanding to the state court. On remand, appellant would have the opportunity to raise his newly-found argument properly under state procedure.


36 The ordinance made it "unlawful for anyone not lawfully authorized to frequent, enter, be in, or be found in, any place where narcotics, narcotic drugs or their derivatives are unlawfully used, kept or disposed of." The ordinance was quoted in *City of Seattle v. Ross*, supra note 35, at 217.

37 362 U.S. at 475. The sole authority cited by the Court for its disposition of *Nostrand* was *Williams v. Georgia*, 349 U.S. 375 (1955). Although the relevance of *Williams* is not entirely clear, it would appear to indicate the importance which the *Nostrand* Court attached to the supervening decision in *Seattle v. Ross*. In *Williams v. Georgia*, petitioner sought reversal of a conviction for murder, on the ground of unconstitutional discrimination in the selection of the petit jury. The state supreme court below affirmed the conviction on procedural grounds, not reaching the constitutional question. Although the state had asserted before the court below that no denial of equal protection was involved in the case, it was admitted before the United States Supreme Court that petitioner had been deprived of his constitutional rights. (The significance of the state's change of position is doubtful, however, inasmuch as the state court had conceded that, but for the procedural objections, defendant's claim of constitutional infirmity in the conviction would stand. 210 Ga. 665, 669, 82 S.E.2d 217, 219 (1954).) Nevertheless, because of the change of position by the state, the Court vacated and remanded, stating that "we have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered. We may recognize such a change, which may affect the result, by setting aside the judgment and remanding the case so that the state court may be free to act." 349 U.S. at 390.
Mootness and Collateral Consequences in Criminal Appeals

In *Parker v. Ellis* the petitioner had originally been convicted, in 1954, on a charge of forgery by a Texas state court, and sentenced to seven years in prison. In 1955 his conviction was affirmed by the Court of Criminal Appeals of Texas. He then sought to obtain his release through a writ of habeas corpus, alleging *inter alia* a lack of assistance of counsel which resulted in a denial of due process of law. After a state court denial of his petition, Parker petitioned the Federal District Court, which also denied his petition, and on appeal, the Fifth Circuit Court of Appeals, in a two to one decision, affirmed, holding that Parker's trial failed to disclose any unfairness that would necessitate reversal. In March of 1959 certiorari was granted by the United States Supreme Court. Two months later, in June of 1959, Parker was released from prison after having served his full sentence. Almost a year later, in May of 1960, the Supreme Court held in a per curiam decision that upon Parker's release from prison the case had become moot, since custody is a prerequisite to habeas corpus relief. The decision was rendered by five of the Justices with four Justices dissenting. In addition to the per curiam opinion based on the custody requirement, there was a concurring opinion by Justices Harlan and Clark, and two dissenting opinions, one by Mr. Chief Justice Warren in which Justices Black, Douglas and Brennan joined, and one by Mr. Justice Douglas in which Mr. Chief Justice Warren joined. The concurring opinion considered the case moot on the further ground that there were no legal consequences of the conviction. Mr. Chief Justice Warren dissented to both the interpretation of the custody requirement by the majority, and the concurring opinion's limited consideration of only the legal consequences of a conviction. Mr. Justice Douglas in his dissent adopted the fiction of an order *nunc pro tunc* to overcome the lack of custody.

The custody requirement of the Habeas Corpus Statute is clear. Nevertheless, the question of whether one who has been released from physical custody is eligible for relief under the Habeas Corpus Statute has often been

1 362 U.S. 574 (1960).
2 276 S.W.2d 533 (1955).
3 258 F.2d 937 (5th Cir. 1958).
5 Id. at 576.
6 Id. at 577.
7 Id. at 595.
8 28 U.S.C. § 2241 (1958), provides that "The writ of habeas corpus shall not extend to a prisoner unless.... He is in custody."
9 Generally there must be an actual or physical restraint of the person for the writ of habeas corpus to issue. Mere moral restraint is not enough. Stallings v. Splain, 253 U.S. 339 (1920); Wales v. Whitney, 114 U.S. 564 (1885); Strand v. Schmittroth, 251 F.2d 590 (9th Cir. 1957); Whiting v. Chew, 273 F.2d 885 (4th Cir. 1960); Rowland v. State of Arkansas, 179 F.2d 79 (8th Cir. 1950). Accord, Hendershott v. Young, 209 Md. 257, 120 A. 2d 915 (1956); *Ex parte* Powell, 191 Wash. 152, 70 P.2d 778 (1937); *Ex parte* Ventura, 44 F. Supp. 520 (W.D. Wash. 1942). An argument can, however, be made in situations where the peti-
raised. Certainly habeas corpus relief is not available to one who has served his entire sentence, since "without restraint of liberty the writ will not issue."10 Where, for other reasons, the petitioner is no longer in the respondent's custody, petitions for writs of habeas corpus have been almost uniformly denied.11 The reasoning behind these cases seems to be that since the petitioner has been freed, the function of the writ has been served. Such a rationale would appear sufficient, in conjunction with the statutory "custody" language, to justify the result in the instant case. However, the case may be significant for its implications regarding the treatment of mootness questions presented in situations not involving a custody requirement.

Mootness problems are a segment of the broader "case or controversy" question presented by the Constitution.12 The general rule is that a criminal appeal is moot in the federal courts if the prisoner has served his sentence and has not shown that under either state or federal law further penalties or disabilities can be imposed on him as a result of a judgment that has been satisfied.13 The underlying rationale for the general rule would appear to be two-

10 McNally v. Hill, 293 U.S. 131, 138 (1934) (petitioner serving a validly imposed sentence attacking an allegedly invalid consecutive sentence to be served in the future). Accord, Hollo-

way v. Looney, 207 F.2d 433 (10th Cir. 1953).

11 Weber v. Squier, 315 U.S. 810 (1942) (petitioner paroled); Tornello v. Hudspeth, 318 U.S. 792 (1943) (petitioner released on bail); Zimmerman v. Walker, 319 U.S. 744 (1943); Johnson v. Hoy, 227 U.S. 245 (1913) (petitioner released on bail); Stallings v. Splain 253 U.S. 339 (1920) (petitioner released on bail); Wales v. Whitney, 114 U.S. 564 (1885) (petitioner released on bail). Accord, parole cases: Siercovich v. McDonald, 193 F.2d 118 (5th Cir. 1951); Adams v. Hiatt, 173 F.2d 896 (3d Cir. 1949); Factor v. Fox, 175 F.2d 626 (6th Cir. 1949); bail cases: Rowland v. State of Arkansas, 179 F.2d 709 (8th Cir. 1950); Sibray v. United States, 185 Fed. 401 (3d Cir. 1911); Veach v. Smith, 42 F. Supp. 161 (S.D. Pa. 1941); Ex Parte Musci, 1 F. Supp. 587 (S.D.N.Y. 1932). Contra, Mackenzie v. Barret, 141 Fed. 964 (7th Cir. 1905); the last-mentioned case may have been overruled by Walmer v. Titemore 61 F.2d 909 (7th Cir. 1932), where the court held that before one may successfully seek a writ of habeas corpus, he must be actually restrained. Accord, service of sentence case: Witte v. Ferber, 219 F.2d 113 (3d Cir. 1954). The court in response to the petitioner's contention that he would suffer the additional disability of losing his pension payments, stated that, "Unfortunately for the petitioner we cannot proceed to a determination of his challenging contention because his release from custody compels us to dismiss his appeal. . . ." Id. at 114.

12 Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States, Ch. 26 (Wolfson & Kurland ed. 1951).

13 Id. at 532-33.
fold: (1) the dependence of the adversary system upon self interest as the motive best suited to bring all pertinent issues to the fore, and (2) preservation of economy of judicial endeavor by preventing the courts from performing useless acts.

The landmark mootness case in the service-of-sentence area is St. Pierre v. United States,14 where the Supreme Court held the case moot because, after the petitioner had fully served his sentence, there was no longer a subject matter upon which the judgment of the Court could operate. In St. Pierre the Court implied that if certain collateral consequences of the satisfied sentence could be shown, the result might have been different.15 However, the Court stressed that legal consequences and not "the moral stigma of a judgment which no longer affects legal rights" would be necessary to present a case for appellate review.16

The first case to recognize the existence of a legal interest in a petitioner after he had served his sentence was Fiswick v. United States.17 An alien's appeal was heard because, as a collateral consequence of his conviction, he would have been subject to the further legal disability of deportation. Recognizing this possibility, the Court premised its decision on the petitioner's "substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him."18 How substantial that stake must be was a problem that remained to be decided in terms of what collateral consequences of a criminal conviction are sufficient to justify relief.

A criminal conviction opens the door to a myriad of collateral consequences: the social stigma and injury to reputation caused by a conviction, the denial of access to certain economic opportunities, the loss of civil rights, and the possibility of further disabilities under habitual criminal statutes and criminal registration statutes19—the first two of which cannot be described as legal consequences. Since Fiswick, the Supreme Court has directed its attention in service-of-sentence cases to the legal consequences of a criminal conviction, disregarding the extra-legal consequences in defining the material collateral consequences of a criminal conviction.

The two most recent Supreme Court decisions prior to the instant case illustrate the development of the legal consequence aspect of the collateral consequences doctrine in the mootness cases. The first of these cases, United States v. Morgan,20 involved a petitioner who sought review of a prior federal convic-

14 319 U.S. 41 (1943) (Sentence fully served before certiorari granted). See also Ex Parte Baez, 177 U.S. 378 (1900). In the latter case a petition for habeas corpus was not allowed where the prisoner's sentence would have been served before the writ could issue.

15 The court stated: "Nor has petitioner shown that under either state or federal law further penalties or disabilities can be imposed on him. . . ." 319 U.S. at 43.

16 Ibid.

17 329 U.S. 211 (1946).

18 Id. at 222.

19 See generally, Note, 59 Yale L.J. 786 (1930); Note, 26 So. Cal. L. Rev. 425 (1953).

tion which had been the basis for an increased sentence in a subsequent state prosecution for a different offense. Although the sentence under the federal conviction had been fully served, the Court held that the legal results of the conviction persisted, and granted the petitioner a writ of error in the nature of coram nobis to review the first conviction. Likewise, in Pollard v. United States,\(^{21}\) the fact that the petitioner had served his sentence under an embezzlement conviction was held not to preclude review.\(^{22}\) Although it is open to criticism on other grounds,\(^{23}\) the Pollard decision indicates that the legal collateral consequences doctrine is firmly established, even in those cases where the legal consequence is not made explicit. The Parker case is of special interest, however, because it casts light on the present Court’s approach to the extra-legal consequences of a criminal conviction.

The petitioner in Parker had earlier been convicted of a felony in another state. Under Texas law, the legal consequences to the petitioner would have been the same regardless of whether or not the conviction before the Court was upheld, since the other extra-state felony conviction alone would have been a sufficient basis for legal disabilities.\(^{24}\) Thus, if the instant case had not

\(^{21}\) 352 U.S. 354 (1957).

\(^{22}\) The Court stated that the “possibility of consequences collateral to the imposition of sentence is sufficiently substantial to justify our dealing with the merits.” Id. at 358. Accord, Dickson v. Castle, 244 F.2d 665 (9th Cir. 1957); Egan v. Teets, 251 F.2d 571 (9th Cir. 1957).

\(^{23}\) The Supreme Court in Pollard disregarded a custody requirement similar to the one in the Parker case. The custody requirement involved was that of 28 U.S.C. § 2255, which the lower federal courts had rigidly enforced. See Hoffman v. United States, 244 F.2d 378 (9th Cir. 1957); Oughton v. United States, 215 F.2d 578 (9th Cir. 1954); Fooshee v. United States, 203 F.2d 247 (5th Cir. 1953); United States v. McGann, 245 F.2d 670 (2d Cir. 1957); United States v. Bradford, 194 F.2d 197 (2d Cir. 1957). The Pollard case, although not expressly overruled on the custody point, must be considered as having limited precedential value in view of the Supreme Court’s decision in Heflin v. United States, 358 U.S. 415 (1959). The majority of the Court in Heflin explicitly stated, in a special concurring opinion: “It is clear that a motion for relief under 28 U.S.C. § 2255 [Federal Habeas Corpus Statute] is available only to attack a sentence under which a prisoner is in custody.” Id. at 420. The court in the Heflin case did, however, allow a prisoner to attack a sentence which he had not yet begun to serve, under Rule 35 of the Federal Rules of Criminal Procedure, which provides that the court may correct an illegal sentence at any time. Sentences subject to review under this rule are limited to those that the conviction did not authorize. United States v. Morgan, 346 U.S. 502, 506 (1954); United States v. Bradford, supra at 201.

\(^{24}\) Harwell v. Morris, 143 S.W.2d (1940). This case held that a felon convicted in another state lost his right to vote in a Texas election. The strength of this holding is somewhat diminished by the fact that the case was not reviewed by the Texas Supreme Court, and that in an earlier Texas case it was stated that “at common law and on general principles of jurisprudence when not controlled by express statute... such conviction of another state can have no effect by way of penalty beyond the limits of the State in which it is rendered.” Logan v. United States, 144 U.S. 263, 303 (1892). Under § 78 of the Texas Probate Code convicted felons of other states are expressly disqualified from serving as executors and administrators; and under the Texas Habitual Criminal Statute [Tex. Pen. Code art. 63 (1948)] out of state felony convictions will support an increase of the penalty. García v. State, 140 Tex. Crim. 340, 145 S.W.2d 180 (1950). Further possible disabilities involve the right to hold office and to serve on juries. Tex. Pen. Code art. 52 (1948).
been held moot, the Court's decision would have turned on a consideration of the extra-legal consequences of Parker's conviction. This view is reflected in Mr. Chief Justice Warren's dissent, in which, having disposed of the "in custody" problem, he explicitly adopts the extra-legal consequences theory. The extra-legal consequences theory represents the minority position of jurisdictions in the United States. Such jurisdictions consider the disgrace and moral stigma which accompany conviction of a crime to be a sufficient interest to prevent a case from being declared moot. The majority of jurisdictions follow the rule that one who has paid his fine or served his full prison term cannot prosecute an appeal of his conviction. The strictness of the latter approach is considerably mitigated by the collateral legal consequences doctrine, but the majority rule would be almost completely nullified if the Supreme Court were to adopt the dissenting view expressed in the instant case.

The issue of whether or not extra-legal consequences will be sufficient to

25 The Chief Justice considered the custody requirement irrelevant "because the function of the writ—to provide and to facilitate inquiry into the validity of the applicant's claim—has already fully been served." Parker v. Ellis, 362 U.S. 574, 582 (1960) (dissenting opinion). He also asserted that "the statute does not impose this same restriction [custody] upon the grant of relief. Rather, the federal courts are given a broad grant of authority to 'dispose of the matter as law and justice require.'" Ibid.

26 "Aside from these considerations [legal consequences], however, there is something fundamentally wrong with the theory that mootness should turn upon whether or not a convicted person can run for office or cast a ballot. . . . Five years of law abiding life in a new community give Parker a significant enough stake in the outcome of this adjudication to preclude a finding of mootness." Id. at 592-94.

27 Roby v. State, 96 Wis. 667, 71 N.W. 1046 (1897); Lopez v. Killigrew, 202 Ind. 397, 174 N.E. 808 (1931). Although a legal consequence was involved in the Lopez case, both Lopez and Roby rely on extra-legal consequences to enable a petitioner, who has fully served his sentence, to prosecute an appeal of his conviction. Ex parte Byrnes, 26 Cal.2d 824, 161 P.2d 376 (1945); People v. Becker, 108 Cal. App.2d 764, 239 P.2d 898 (1952); People v. Channness, 109 Cal. App. 778, 288 Pac. 20 (1930); Accord, Roby v. State, 96 Wis. 667, 71 N.W. 1046 (1897); Lopez v. Killigrew, 202 Ind. 397, 174 N.E. 808 (1931).

28 The view taken in the majority of jurisdictions is that the payment of a fine precludes a review of the conviction. Bergdoll v. United States, 279 Fed. 404 (3d Cir. 1922); Government of the Virgin Islands v. Ferrer, 275 F.2d 497 (3d Cir. 1960); Hanback v. District of Columbia, 35 A.2d 189 (D.C. Mun. App. 1943); Gillen v. United States 199 F.2d 454 (9th Cir. 1952) (expressly rejects the minority view that reputation and social stigma should be taken into account in determining mootness); Pennywell v. McCarrey 255 F.2d 735 (9th Cir. 1952); 18 A.L.R. 867 (1922); 74 A.L.R. 638 (1931); 24 C.J.S. Criminal Law § 1668 (1941); 2 Am. Jur. Appeal & Error § 231 (1936). In a minority of jurisdictions payment of a fine does not impair a defendant's right to appeal. Johnson v. State, 172 Ala. 424, 55 So. 226 (1911); Commonwealth v. Fleckner, 167 Mass. 13, 44 N.E. 1055 (1896). In the analogous situation where the prisoner has served his sentence prior to the determination of his appeal, the appeal has, in the majority of jurisdictions, been held moot. St. Pierre v. United States, 319 U.S. 41 (1943); Williams v. United States, 261 F.2d 224 (9th Cir. 1958); City of Seldovia v. Lund, 138 F. Supp. 382 (D.C. Alaska 1956); Hill v. United States, 75 A.2d 138 (D.C. Munic. App. 1950); State v. Cohen, 45 Nev. 266, 201 Pac. 1026 (1921). Contra, Roby v. State, 202 Ind. 397, 174 N.E. 808 (1931); Lopez v. Killigrew, 97 Wis. 667, 71 N.W. 1046 (1897).
prevent a case from being held moot where the petitioner's sentence has been served was not squarely faced by the majority in *Parker* due to the ruling on the custody requirement in the Habeas Corpus Statute. A result which would have disregarded the custody requirement would have defied precedent and materially altered the application of the Habeas Corpus Statute. Where there is no custody requirement, as in the *St. Pierre* case or in a case involving a writ of error coram nobis, the Supreme Court will have to weigh the extra-legal aspects of a criminal conviction against a background of cases which have not chosen to adopt this approach.

The dissenting opinion of Mr. Chief Justice Warren in *Parker* appears to be the first important introduction of the extra-legal consequences doctrine into the mootness cases. Adoption of the extra-legal consequences doctrine by the four dissenting Justices, and its express rejection by only two of the Justices, casts doubt on the Court's strict adherence in future cases to the more limited legal consequences doctrine.

29 Mr. Justice Douglas is willing to indulge in a fiction to overcome the custody requirement. He suggests that an order *nunc pro tunc* be issued which would grant the writ as of the time that petitioner was still in custody (at the time that certiorari was granted). He admits, however, that the cases he relies on are not directly in point, since they deal with the situation in civil suits where one of the parties to the litigation has died.


31 Justices Harlan and Clark in their concurring opinion take the position that since the petitioner had already lost his civil rights, the instant case did not present a "case or controversy" within the constitutional meaning of that term. It is this position that Mr. Chief Justice Warren sharply attacks in his dissent. Mr. Justice Douglas' position is somewhat ambiguous, but in view of his concurrence in the Warren dissent, it would seem that he too would subscribe to the extra-legal consequence theory. The other three Justices who based their decision strictly on the custody requirement cannot be considered as having spoken on the extra-legal consequences theory.

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**Appellate Review of Competency To Stand Trial in the Federal Courts**

Serious questions concerning appellate review of the issue of competency to stand trial are raised by the per curiam opinion in *Dusky v. United States.* The Supreme Court there reversed the defendant's conviction for violation of the Mann Act.

2 On motion of the defense, and pursuant to Section 4244 of the Federal Criminal Code, the defendant was committed to the United States Medical


2 18 U.S.C. § 1201 (1958). The defendant was found guilty under an indictment charging him with unlawfully transporting across state lines a kidnapped girl.

3 18 U.S.C. § 4244 (1958). This section provides that either the United States Attorney, defense counsel or the court itself may move for a judicial determination of competency to stand trial at any time prior to sentencing, if there is reasonable cause to believe that the accused is incompetent. Provision is made for either a medical examination or commitment to an institution for a medical determination of competency, followed by a judicial hearing.
Center for Federal Prisoners for determination of his competency to stand trial. The Center's psychiatric staff found him incompetent. One of the doctors, the only witness to appear at the subsequent hearing, so testified; but the district judge reached the opposite conclusion. The defendant then pleaded guilty, and was tried and convicted. The Court of Appeals for the Eighth Circuit affirmed the finding of competency, refusing to overturn the trial court's decision in the absence of any indication that it was clearly erroneous. The Supreme Court reversed the judgment on the ground that there was insufficient evidence to support the finding of competency. The Court remanded the case for a hearing as to the defendant's present competency to stand trial and for a new trial if he were to be found competent.

The first of two significant aspects of this case is the Supreme Court's supervision of the trial judge's traditional discretionary power to determine competency. Appellate courts have frequently stated that a trial judge will not be reversed unless his findings are "clearly erroneous," "unsupported by substantial evidence," or against "the clear weight of the evidence." The Court reversed in this case because, applying the statutory standard, it found no substantial evidence to support the finding of competency. A review of prior decisions has failed to disclose another instance in which, after a statutory hearing, a trial judge has been reversed on his finding of competency. The Court appears to have been influenced greatly in reaching its decision by the Solicitor General's argument for remand, which was explicitly accepted. He had urged that it was unclear whether the trial judge had applied the statutory standard.

4 271 F.2d 385 (8th Cir. 1959).
5 See, e.g., Krupnick v. United States, 264 F.2d 213, 217 (8th Cir. 1959): "[A] finding made and becoming final that the accused is able to understand the proceedings against him and properly to assist in his own defense, and so is competent to stand trial, will ordinarily be res judicata of that question."
7 E.g., Engstrom v. Wiley, 191 F.2d 684, 686 (9th Cir. 1951).
8 E.g., Cleo Syrup Corp. v. Coca-Cola Co., 139 F.2d 416, 418 (8th Cir. 1943). It is clear, however, that the limitations on judicial review of findings of a trial court sitting without a jury are not as rigid as are those on the review of similar findings by a jury, and that the standard applied to a judge sitting alone depends upon the type of evidence on which his findings are based. United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948); Orvis v. Higgins, 180 F.2d 537, 539-40 (2d Cir. 1950).
9 18 U.S.C. § 4244 (1958): If there is cause to believe that a person is "so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense . . .," the trial judge shall hold a hearing to determine competency to stand trial. This was also the test of competency prior to the statute. See McIntosh v. Pescor, 175 F.2d 95, 98 (6th Cir. 1949). The common law rule and, with minor variations in wording, the rule in other jurisdictions, is identical with the statutory requirement. See WIEHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE, 430-31 (1954).
10 362 U.S. 402.
11 Brief for the Solicitor General, p. 10, Dusky v. United States, 362 U.S. 402 (1960) (mimeographed brief). Dr. Sturgell, testifying at the competency hearing, stated that the
The statute does not specify the quantum or type of evidence necessary to support the court’s determination of competency; nor does it attempt to allocate the burden of proof: “If the [preliminary] report of the psychiatrist indicates a state of present insanity or such mental incompetency in the accused, the court shall hold a hearing . . . and make a finding with respect thereto.”

The courts of appeals have not interpreted this statute to limit the trial judge to consideration of medical testimony; documentary evidence may be received; the accused may be heard and the court’s observation of him may overcome the effect of contrary medical testimony. Even defense counsel’s belief that his client is competent is admissible. The action of the Court in *Dusky*, however, indicates clearly that a trial judge cannot ignore overwhelming psychological evidence in reaching his decision. It may be that the thrust of the opinion is broader than this: perhaps the Supreme Court is directing the lower courts to give greater weight to psychiatric evidence than such evidence has heretofore been accorded. But more important still, the Court may also have included a subtle direction concerning the burden of proof. The Court in *Dusky* rejected the apparent view of the court of appeals that there must be substantial, unequivocal evidence of incompetency advanced by the defense; perhaps the Court is now saying that the burden is on the government to advance substantial evidence of competency.

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defendant “was oriented as to time, place and person,”—a statement seized upon by the trial judge as a basis for his finding. But the doctor was emphatic in his confirmation of the Medical Center’s report, and its conclusion that Dusky was unable to understand the proceedings against him and to assist in his own defense. Dr. Sturgell’s testimony could not reasonably be taken to support any conclusion other than that the defendant was incompetent to stand trial. See Brief for the Solicitor General, pp. 10–12, *supra*, and *Dusky* v. United States, 271 F.2d 385, 397 (8th Cir. 1959).


13 “While, of course, expert psychiatric judgment is relevant on this question [competency to stand trial], it cannot be controlling. Resolution of this issue requires not only a clinical psychiatric judgment but also a judgment based upon a knowledge of criminal trial proceedings that is peculiarly within the competence of the trial judge.” Gunther v. United States, 215 F.2d 493, 496–97 (D.C. Cir. 1954). Compare the discussion of the difference between the standards for psychiatric examination of an accused and the “moral judgment” which a jury must make when there is a defense of insanity at the time of the crime in Holloway v. United States, 148 F.2d 665 (D.C. Cir. 1945).


17 Cf. Fielding v. United States, 251 F.2d 878 (D.C. Cir. 1957), where, after a jury trial, the court of appeals reversed the denial of a motion for acquittal by reason of insanity notwithstanding the verdict of guilty. All of the psychiatric testimony indicated insanity at the time of the crime and the only contrary testimony was that of a policeman on the scene of the arrest.

18 The Court of Appeals for the District of Columbia has suggested that the preliminary psychiatric report affords *prima facie* evidence of the validity of the report’s conclusion. Fooks v. United States, 246 F.2d 629 (D.C. Cir. 1956). If the conclusion of that report is that
However, resolution of these questions must await interpretation of this case by the lower courts, or a clearer statement by the Supreme Court itself, since this case shows such a preponderance of evidence on one side of the issue that it is impossible to extract a certain and definitive holding from the Court's per curiam opinion. Not only was there no evidence presented to rebut the testimony of the psychiatrist, but the trial judge did not hear the defendant testify, and had no sufficient opportunity to observe him in the courtroom.

The second significant issue raised by Dusky involves the Court's ultimate disposition of the case. Instead of remanding the case to the district court for further consideration of the defendant's competency at the time of trial and leaving the feasibility of a nunc pro tunc determination within the discretion of the trial judge, as the Solicitor General had urged, the Supreme Court remanded "for a new hearing to determine defendant's present competency to stand trial, and for a new trial if defendant is found competent." This disposition was ordered because of the "doubts and ambiguities regarding the legal significance of the psychiatric testimony in this case and the resulting difficulties of retrospectively determining the petitioner's competency as of more than a year ago."

As has been noted, no other case has been found in which a trial court's determination of competency has been overturned. The Court of Appeals for the District of Columbia has, however, reversed several convictions because no formal competency hearing had been held. In Lloyd v. United States, the court attempted to distinguish the disposition of these appeals: in those cases which have arisen on direct appeal the court has granted a new trial; while in those cases which have arisen on motions to vacate sentence the court has remanded for nunc pro tunc determinations of the defendant's incompetency. Then, it would seem that the burden should shift to the prosecution. Professor Weihofen states the federal rule to be that the prosecution must "prove beyond a reasonable doubt that the defendant is sane enough to stand trial...." Weihofen, op. cit. supra note 9, at 435, citing United States v. Chisholm, 149 Fed. 284 (1906). In the past, however, the courts of appeals seem to have required only a preponderance of the evidence. It would appear to follow from some of the statements made by the courts that if the trial judge has anything at all on which to base a judgment, that will suffice. See, e.g., Hill v. United States, 223 F.2d 699 (6th Cir. 1955); McIntosh v. Pescor, 175 F.2d 95 (6th Cir. 1949).

20 Brief for the Solicitor General, pp. 12–13, supra note 11.
21 362 U.S. at 403. (Emphasis added.)
22 Ibid.
23 247 F.2d 522 (D.C. Cir. 1957).
25 28 U.S.C. § 2255 (1958). But this section does not require the reviewing court to remand a case for further findings if the findings are found to be insufficient; a new trial may also be ordered.
competency as of the time of trial. But two more recent decisions by that court belie this distinction. Indeed, a new trial has not been ordered in a case of this type since the Lloyd decision in 1954. Thus has been laid to rest, at least temporarily, the conclusion of the Court in Kelley v. United States that the statutory sequence requires that the competency of an accused be determined before his trial, since “otherwise the determination would be made . . . long after the event which it was intended to precede.”

Two cases involving competency to stand trial reached the Supreme Court prior to the Dusky case; both were also decided per curiam. These two cases arose on motions to vacate the sentences. In neither case had a formal competency hearing been held; but in both there was evidence sufficient to raise a question as to the competency of the accused. The first case was Frame v. Hudspeth, which the Court remanded “for the purpose of making a full inquiry into the mental status of the petitioner at the time he entered the pleas of guilty”—more than three years prior to the decision of the Supreme Court. In the second case, Bishop v. United States, the Court also remanded for a nunc pro tunc determination of competency. In that case the trial had taken place eighteen years prior to the Court’s order.

The reasons given by the Court in Dusky for ordering a hearing to determine the defendant’s present competency and for a possible second trial are not sustained by the previous cases. There is substantial difficulty in retrospectively determining competency; but the Court was faced with much longer time lapses in both Frame and Bishop. Yet in neither case did the Court provide for a determination of present competency. Moreover, this precise problem is involved in the many cases in which the defense of insanity at the time of the crime is raised and the jury is asked to determine retrospectively the mental condition of the accused. “[E]xaminations designed to reveal a person’s mental condition at a past date are not only standard practice, but are often essential to the proper administration of justice.” Also, it would be difficult to contend that, despite ambiguities “regarding the legal significance

26 See, e.g., Krupnick v. United States, 264 F.2d 213 (8th Cir. 1959); Seidner v. United States, 260 F.2d 732 (D.C. Cir. 1958); Lloyd v. United States, 247 F.2d 522 (D.C. Cir. 1957).

27 Wells v. United States, 239 F.2d 931 (D.C. Cir. 1956); Gunther v. United States, 215 F.2d 493 (D.C. Cir. 1954). Both cases were brought on direct appeal; both were remanded for nunc pro tunc determinations.

28 221 F.2d 822, 825 (D.C. Cir. 1954). See Contee v. United States, 215 F.2d 324, 329 (D.C. Cir. 1954) (dissenting opinion), where it is pointed out that remanding a case for a nunc pro tunc determination assimilates proceedings under 18 U.S.C. § 4244 (1958) to those under 18 U.S.C. § 4245 (1958), the procedural section for a prisoner who has been convicted and is serving his sentence. Section 4245 provides for a nunc pro tunc determination of competency, if the issue has not previously been raised, upon certification by the Director of the Bureau of Prisons that there is probable cause to believe that a person convicted of an offense against the United States was mentally incompetent at the time of trial.

29 309 U.S. 632 (1940). (Emphasis added.)

30 350 U.S. 961 (1956). (Per curiam.)

of the psychiatric testimony," a retrospective determination would have been more difficult in *Dusky*, where thorough records of the psychiatric investigation were available, than in *Frame* and *Bishop*, where no previous competency hearing was held.

It is possible that the real reason for the decision in this case is that the Supreme Court itself concluded from the uncontroverted medical testimony that the defendant was in fact incompetent at the time of his trial. On this assumption, it would be superfluous to remand for a *nunc pro tunc* determination of competency, since the result of such a proceeding would be obvious. If such is the case, the opinion is of little value as precedent or as a guide to the lower courts, for it is unlikely that future cases will arise with facts pointing so clearly to one conclusion.

On the other hand, it is possible that there is another, and more far-reaching basis for the Court's action. Retrospective determination of sanity at the time a crime was committed is unavoidable, since only as of that time is the question material. But there is no corresponding necessity for retrospective determination of competency to stand trial. Competency to stand trial is presently ascertainable, and it is an important element in the administration of criminal justice. Ideally, no person should be tried without a formal competency hearing, if there is reason to suspect his ability to aid in his own defense. If there is cause to question the competency of a person already convicted, when either no formal hearing has been held, or when there was error in a prior determination, then the accused should have the benefit of a new hearing and, if necessary, a new trial.

But weighed against this ideal are the practical problems of criminal administration. If the accused were found presently competent to be tried anew for a crime committed many years before, severe difficulties concerning availability and credibility of witnesses to the crime would be raised. It may be that the Court in *Dusky* weighed the ideal against these practical considerations and found the balance in favor of determination of present competency. This would also help to explain *Bishop* and *Frame*. There the "difficulties of retrospectively determining" competency may have been outweighed by the need for effective criminal administration, since the time lapses between trial and appeal were much greater.

It may be, however, that the Court, in remanding for determination of present competency, was motivated by an entirely different concern. The argument based on the prescribed statutory sequence, for example, has never

32 Compare *Dusky* with Mesarosh v. United States, 352 U.S. 1 (1956), and *Communist Party* v. Subversive Activities Control Bd., 351 U.S. 115 (1956). In both of these cases the Court's view as to the ultimate issue seems to have influenced the disposition of the case, even though that view was not, as it was not here, articulated in the opinion of the Court.

33 In *Bishop* the credibility of witnesses testifying to an occurrence which happened eighteen years before could certainly be questioned.

34 See text at note 28 supra.
been satisfactorily rebutted. Whatever the reason for this disposition, the Court could have been more explicit. Whatever the reason for the reversal itself? Was it based solely on the preponderance of the evidence on one side of the issue? Or is there also in the opinion a subtle direction to the lower courts to change their perspective as to burden of proof on the question of competency? Is psychiatric evidence hereafter to be given greater weight? The per curiam disposition of *Dusky* leaves these questions unanswered.

Assuming the validity of the balancing of the ideal with the practical as a basis for the decision in this case, the use of the per curiam opinion may be explained by the Court's reluctance to assume the virtually impossible task of announcing a rule which would apply in all situations. But in this event the Court should at least have articulated a test which the lower courts could apply in future cases. On the other hand, if the assumption is correct that the preponderance of the evidence on one side of the issue makes this case *sui generis*, then the Court is putting the per curiam opinion to good use.

**BURDEN OF PROOF OF ELIGIBILITY FOR RELIEF FROM DEPORTATION**

In *Kimm v. Rosenberg*, a five-to-four per curiam decision, the Supreme Court upheld the administrative denial of discretionary relief to an alien who sought to mitigate some of the adverse effects of deportation. The alien, a Korean, had been admitted as a student in 1928. He subsequently violated his exempt status by terminating his studies, and became subject to deportation. After proceedings had been opened in 1948, the alien filed for suspension of the proceedings or, in the alternative, for permission to depart voluntarily to avoid deportation. Section 19(c) of the Immigration Act of 1917 authorized the Attorney General, at his discretion, to grant such relief "in the case of any alien (other than one to whom subsection (d) of this section is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years. . . ." 

While attempting to establish the required good moral character, the alien asserted the fifth amendment protection against self-incrimination and refused to answer questions regarding Communist affiliations subsequent to his arrival in the United States. Despite continued queries and admonitions by the immigration officials and the hearing officer, the petitioner persisted in his

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1 363 U.S. 405 (1960).


3 The advantages of voluntary departure are significant. The stigma of compulsory ejection is avoided; barriers to the possibility and speed of a subsequent return to the United States are removed; and the alien can select his own destination. GORDON & ROSENFELD, IMMIGRATION LAW AND PROCEDURE § 7.2 (1959).

refusal, whereupon the hearing officer found that "as a matter of administrative discretion, the facts and circumstances in this case do not warrant the exercise of discretionary relief." The Board of Immigration Appeals concluded that Kimm was "not entitled to any form of discretionary relief." On appeal, the district court ruled that the issue before it was not the implementation of administrative discretion, but rather the determination of petitioner's eligibility therefor. Both the district court and the Court of Appeals for the Ninth Circuit affirmed the Board's ruling that the petitioner was ineligible for discretionary relief on the grounds that he had failed to prove that he was a person of good moral character and that he had not established non-deportability under section 19(d) of the Immigration Act of 1917.

Section 19(d) of the Immigration Act of 1917 provided that "the provisions of subsection (c) shall not be applicable in the case of any alien who is deportable" for violation of the sections listed. Violation of the student visa provisions, with which the petitioner in Kimm was charged, was not one of those enumerated in section 19(d). Deportability because of membership in, or affiliation with, the Communist Party and other parties committed to totalitarian government was, however, incorporated in section 19(d) as a violation precluding relief under section 19(c) by the Internal Security Act of 1950.

The Supreme Court's decision was based upon an interpretation of a ruling, issued by the Immigration and Naturalization Service to provide for the administration of discretionary relief measures, which included a provision that the alien must sustain the burden of demonstrating eligibility for the discretionary relief. The Court held that the burden of proof imposed by the administrative regulations required that the alien not only show that he had been

8 The question of eligibility for discretionary relief may involve determinations of fact and law, and is subject to judicial review. Gordon & Rosenfeld, op. cit. supra note 3, § 7.1.
10 62 Stat. 1206 (1948). These provisions have been replaced by the Immigration and Nationality Act of 1952, supra note 4.
11 Aliens deportable under the Act of October 16, 1918, 40 Stat. 1012, entitled "An Act to exclude and expel from the United States aliens who are members of the anarchistic and similar classes," as amended, were among those precluded from obtaining discretionary relief under section 19(d). Section 22 of the Internal Security Act of 1950, 64 Stat. 987, 1006, amended the Act of 1918 to include Communist affiliates. These provisions have been replaced by the Immigration and Nationality Act of 1952, 66 Stat. 182, 8 U.S.C. § 1182(a) (28) (1958).
12 15 Fed. Reg. 7638 (1949). "The burden of establishing that the alien meets the statutory requirements precedent to the exercise of discretionary relief shall be upon the alien."
of good moral character for the required period, but also that he prove non-deportability under the provisions of section 19(d). The lower court decision adverse to the alien was affirmed on the ground that the alien was not eligible for discretionary relief under section 19(c) because he had failed to prove that he was not deportable under the provisions pertaining to affiliation with the Communist Party.\textsuperscript{13} It was not necessary, therefore, to consider the adequacy of evidence submitted to prove good moral character.

Mr. Justice Douglas, with whom the Chief Justice and Mr. Justice Black concurred, dissented on the ground that a ruling against the petitioner implied that the assertion of a constitutional right demonstrated bad moral character.\textsuperscript{14} Mr. Justice Brennan, with whom the Chief Justice and Mr. Justice Douglas joined, dissented on the ground that the majority ruling was an unwarranted extension of the statutory burden of proof required of a petitioning alien.\textsuperscript{15}

Previous decisions interpreting the statute had turned not on the extent of the burden, but on the question of what constituted good moral character.\textsuperscript{16} The \textit{Kimm} case held that the alien must prove not only that he has satisfied the moral character requirements, but also that section 19(d) was not applicable to him. Since section 19(d) stated that "the provisions of subsection (c) shall not be applicable in the case of any alien who"\textsuperscript{17} comes within the scope of subsection (d), the effect of this new proof requirement was to charge the petitioning alien with the task of demonstrating that section 19(c) is not "not applicable" to him. In reaching this curious conclusion, the Court appears to have ignored several factors which may justify placing on the government the burden of proving the applicability of section 19(d) before the petitioner is declared ineligible for relief under section 19(c).\textsuperscript{18}

Since deportation proceedings are of a civil rather than criminal nature,\textsuperscript{19}

\textsuperscript{13} Although the proceedings were commenced prior to the enactment of the statutes adding Communist affiliation to the violations in section 19(d), the petitioner was subject to the provisions of the subsequent enactment. For other cases where legislation has resulted in deportation for an alien's acts committed prior to the enactment of the statute, see Marcello v. Bonds, 349 U.S. 302 (1955), and Galvan v. Press, 347 U.S. 522 (1954).

\textsuperscript{14} 363 U.S. at 408. See text at note 36 infra.

\textsuperscript{15} 363 U.S. at 411. See note 28 infra.

\textsuperscript{16} Good moral character, as interpreted under the 1917 Act, was "an amorphous term, and its orbit was charted by assessing the current mores of the community." \textsc{Gordon \\& Rosenfeld}, \textit{op. cit. supra} note 3, § 7.1. Moral excellence was not demanded; adherence only to the moral standards of the average person was required. Matter of C-, 3 I.N. 833 (1950).

\textsuperscript{17} See note 10 supra.

\textsuperscript{18} Counsel for the alien petitioner asserted that the party claiming the exception to a general body of law must demonstrate the applicability of the exception to the present proceedings, relying on Javierre v. Central Altagracia, 217 U.S. 502 (1910), and Schlemmer v. Buffalo, R. \\& P. Ry., 205 U.S. 1, 10 (1907). The Court, however, declined to rule that the parenthetical reservation in 19(c) was such an exception to the remainder of the section. See text at note 4 supra.

\textsuperscript{19} United States \textit{ex rel. Bilokumsky v. Tod}, 263 U.S. 149 (1923).
aliens have been charged with the burden of establishing their right to remain in the United States where unlawful entry has been alleged.\(^{20}\) But where an alien has been charged with deportation based upon his conduct subsequent to a lawful entry, it had previously been held that a presumption of innocence obtains, and, under the due process clause, the burden is on the government to demonstrate the reasons for deportation.\(^{21}\)

The *Kimmm* decision places upon the alien, for the first time, the burden of proving non-deportability for acts subsequent to a lawful entry. The Court seems to explain this result by pointing out that deportability involves the loss of rights while discretionary relief is a privilege;\(^{22}\) and those seeking the privilege must prove eligibility therefor.\(^{23}\) Although, admittedly, the relief itself is a privilege, applicants have, by statute, been granted the right to a determination of eligibility for that privilege.\(^{24}\) Any alien who is not deportable under section 19(d) is entitled to a positive determination of eligibility by proving good moral character. If the prior lawful entry cases which held that the government must sustain the burden of proving deportability for activities subsequent to entry\(^{25}\) are correct, then all aliens against whom such proof has not been brought are not deportable under 19(d). They, therefore, have a statutory right to an affirmative determination of eligibility by establishing the requisite good moral character. Yet the *Kimmm* result requires, in addition, that non-deportability under section 19(d) be established by the alien—a result seemingly inconsistent with prior cases involving conduct subsequent to lawful entry, and not justifiable merely by asserting that a privilege rather than a right is involved.

In view of the overwhelming significance attributed to one administrative regulation,\(^{26}\) a further basis for analysis of the Supreme Court’s reasoning may be provided by a collateral regulation of the Immigration and Naturalization Service. This regulation, describing the procedure for granting the privilege of voluntary departure, enabled the administrative officer to exercise the authority conferred upon him by section 19(e) in favor of “aliens charged with being subject to deportation upon any ground other than those set forth in 19(d). . . .”\(^{27}\)

\(^{20}\) *Werrmann v. Perkins*, 79 F.2d 467 (7th Cir. 1935).

\(^{21}\) *Hughes v. Tropello*, 296 Fed. 306 (3d Cir. 1924); *Gordon & Rosenfeld*, *op. cit. supra* note 3, § 5.10(b).

\(^{22}\) 363 U.S. at 408.


\(^{24}\) *Gordon & Rosenfeld*, *op. cit. supra* note 3, § 7.1(b).

\(^{25}\) See text at note 21 *supra*.

\(^{26}\) See text at note 12 *supra*.

\(^{27}\) 15 Fed. Reg. 7636 (1949) (emphasis supplied): “Voluntary departure; special procedure. a) Notwithstanding any other provisions of this part, . . . the hearing officer, at any
Kimm had been "charged with being subject to deportation" upon a ground not set forth in 19(d). One would normally conclude that Kimm, therefore, was among those in whose favor the immigration officials could grant relief if the statutory requirement of good moral character was fulfilled. If this collateral regulation was to be meaningful, it would seem to have been an attempt to remove considerations of deportability under 19(d) where such deportability was never charged. The Kimm decision, however, precludes such an interpretation.

The Court's ruling might be defended by asserting that this collateral regulation was only a restatement of the statute and, therefore, the meaning of the regulation depended upon the interpretation of the statute. After the Kimm decision, the regulation meant that those charged with 19(d) violations were immediately precluded from relief, and that all others had to rebut the presumption that they are deportable under 19(d), in addition to establishing good moral character. If everyone who applied for discretionary relief had to prove non-deportability under section 19(d), the application for relief automatically charged him, in effect, with deportation under that section. Until this presumptive charge was disproved, an applicant would not be eligible to have discretion exercised in his favor. The words "aliens charged with being subject to deportation upon any ground other than set forth in 19(d)" thus come to mean "aliens who have proved that they could not be deported for a ground set forth in 19(d)." The problems of such a construction are readily apparent.

Finally, it should be noted that alternative grounds were available upon which the petitioner's request for discretionary relief might originally have been denied without increasing the burden of proof imposed upon an alien to establish statutory eligibility. It is well established that the Attorney General, at his discretion, may choose to deny relief to eligible applicants. Such discretion is an administrative matter, not judicially reviewable unless an abuse of discretion is alleged. Where the reasons for denying relief to an eligible per-

time during the hearing, and before the record of hearing is submitted to the Commissioner, may exercise the authority conferred upon the Attorney General by section 19(c)(1) of the Immigration Act of 1917... to permit an alien to depart from the United States to any country of his choice at his own expense if (1) the alien is charged with being subject to deportation upon any ground other than those set forth in section 19(d) of the Immigration Act of February 5, 1917, as amended. ..."

28 It is interesting to note that if the regulations had been consistently read as mere restatements of the statute, the burden of proof levied in the regulation applied by the Court would go only to the proof required by the statute: Petitioner "... must prove good moral character." See dissent by Mr. Justice Brennan, 363 U.S. at 411, 414 n.3.


son are neither arbitrary nor capricious, abuse of discretion will not be found. In the Kimm case, the hearing officer denied relief as an exercise of his discretionary powers. The Board of Immigration Appeals, in another case, has held that an alien's refusal to answer questions on the ground that his answers might be self-incriminating demonstrates that he is not a desirable resident in whose favor discretionary relief should be granted. It is not likely that a denial of relief as an exercise of the Attorney General's discretion could be termed an abuse of that discretion where, as in Kimm, the petitioner refused to cooperate in determining the facts which were to govern the disposition of his petition. This question was not before the Court, however, because the interpretation given to the decision of the Board of Immigration Appeals was that there had been no exercise of administrative discretion.

On the other hand, the Supreme Court, in reaching its decision, might have relied on the inadequacy of the petitioner's demonstration of moral character. Under similar circumstances, relief has been denied to an alien who refused to answer questions regarding his activities during the period of asserted good moral character. The rationale for such a result appears to be that recalcitrance of this nature places an alien outside the ambit of the good moral character requirement.

The Immigration Act of 1917 and the amendments thereto were substantially repealed by the Immigration and Nationality Act of 1952. While Kimm was decided under the 1917 Act, most cases will henceforth be determined

32 Id. at 77.
33 In the Matter of M-, 5 I.N. 261 (1953).
34 Discretionary rulings denying relief to eligible applicants have been judicially affirmed despite seemingly slight grounds for denial. The failure of an alien to avail himself of the privilege of voluntary departure within the stipulated time period has been the basis for rejection of a second application for relief. United States ex rel. Bartsch v. Watkins, 175 F.2d 245 (2d Cir. 1949). A deportable seaman's petition has been rejected so that other alien sailors would be deterred from attempting to transgress the immigration laws by clandestine entries. United States ex rel. Ciannamea v. Neely, 202 F.2d 289 (7th Cir. 1953). But where the alien's violation was the result of an inadvertent error caused by differing dates on a permit and a visa, the denial of relief has been held an abuse of discretion. Hegerich v. Del Guercio, 255 F.2d 701 (9th Cir. 1958).
35 See text at note 7 supra.
36 But see dissent by Mr. Justice Douglas, 363 U.S. at 408.
37 See Jimenez v. Barber, 226 F.2d 449 (9th Cir. 1955), where a stay of deportation was ordered after the petitioner had been ruled ineligible for discretionary relief because of his refusal to answer questions regarding memberships, associations, and beliefs during the period in which good moral character had been asserted. At the subsequent hearing, the court affirmed the administrative finding. 235 F.2d 922 (9th Cir. 1956).
38 The savings clause of the 1952 Act provided that cases such as Kimm, pending on the effective date, should be decided under the old act. The petitioner may have been able to prove eligibility for voluntary departure if his case had come under the 1952 Act. Section 244(e) includes a provision that persons who have been found deportable for membership in subversive groups can demonstrate eligibility for voluntary departure by meeting more stringent requirements of duration of residency and good moral character. 66 Stat. 214,
under the new statute. Whatever may be the future application of this case in the interpretation of the provisions of the new act, the rationale which the Court adopted in reaching its conclusion is open to question in the light of prior rulings on the burden of proof in deportation cases.


The 1952 Act enables the Attorney General to "permit any alien under deportation proceedings, other than an alien within the provisions" of certain paragraphs which list particular violations, to depart voluntarily if the required good moral character has been demonstrated. 66 Stat. 214, 8 U.S.C. § 1254(e) (1958). It can reasonably be concluded that, to sustain the burden of proving the non-applicability of the exception, a petitioner need prove only that he is an alien not "under deportation proceedings . . . within the provisions" of the excepted sections. If he is to be forced to show non-deportability on the excepted grounds, his deportation proceedings must be brought within the provisions of the statute which state those grounds. Cf. In the Matter of T-, 5 I.N. 459 (1953).

LONG STANDING AS TEST TO DETERMINE VALIDITY OF REVENUE RULINGS

In a tax refund suit the Government may raise any defense which a private party would be entitled to assert. This prerogative has included the defense that a ruling issued by the Commissioner of Internal Revenue or a regulation promulgated by the Secretary of the Treasury, on which the taxpayer's claim is based, is invalid. Cory Corp. v. Sauber suggests that the Government may not successfully assert this defense when the ruling or regulation in question is one of long continued and uniform application, even though the Court may disagree with the propriety of the Service interpretation.

Plaintiff corporation, a manufacturer of refrigeration equipment, sold two air-conditioning units, one in May of 1954, the other in August of 1955. Under section 3405(c) of the 1939 Internal Revenue Code and section 4111 of the 1954 Code applying to self-contained air-conditioning units, the district direc-

1 "It was generally supposed that the collection of taxes and consequent litigation presented issues no different in kind from those reflected by an ordinary private suit in which the outcome depends on the meaning of statutory language." Eisenstein, Some Iconoclastic Reflections on Tax Administration, 58 Harv. L. Rev. 477, 506 (1945). See Dobson v. Commissioner, 320 U.S. 489 (1943).


4 The relevant parts of the 1939 Code under which the first sale was made are as follows: "Section 3405. Tax on mechanical refrigerators, quick-freeze units, and self-contained air-conditioning units. There shall be imposed on the following articles . . . sold by the manufacturer, producer, or importer a tax equivalent to 5 per centum (10 per centum in the case
tor assessed on each sale a ten percent manufacturer's excise tax. The corporation filed a claim for refund to determine the taxability of some 50,000 similar units. It relied on published Service rulings which construed the provisions as applying only to household-type units and construed such units as those having one or less "total motor horsepower." In the district court the taxpayer maintained that "total motor horsepower" as used in the rulings meant total actual horsepower; the Government urged that the term referred to rated horsepower or nominal horsepower. The units had an actual horsepower greater than one, but had a nominal rating of only three-quarters. The court interpreted the rulings as referring to actual horsepower, thus holding that the units were exempt from taxation.

In the court of appeals the Government urged that the rulings, as construed by the lower court, were contrary to the intent of the statutes and, therefore, void. The Seventh Circuit accepted this argument.

The Supreme Court, however, held that the Commissioner's rulings were valid. It found that "there is indeed evidence that the less-than-one horsepower test was designed to draw the line between household and commercial types of air-conditioning equipment." The Court observed:

The commissioner consistently adhered to the horsepower test for more than 10 years, and Congress did not change the statute though it was specifically advised in 1956 that that was the test which was being applied. We cannot say that such a


6 Actual horsepower is that which a motor will deliver continuously under its full normal load. Rated horsepower is that which is determined by computation of the breakdown torque of the motor, in this case by applying the tests of the National Electrical Manufacturers Association. Nominal horsepower is that which is arbitrarily assigned to a motor by the manufacturer and has little, if any, relationship to the actual horsepower capacity of the motor. In this case, the nominal horsepower of the motors was three-quarters, while the actual and rated horsepower exceeded one.

7 Cory Corp. v. Sauber, 266 F.2d 58, 62 (7th Cir. 1959), rehearing denied, 267 F.2d 802 (1959). In lieu of the horsepower test, the court substituted the "housewife test": "An air conditioner is of the household-type when it is made to meet the needs of a household. If a housewife enters a store of an air conditioner dealer and expresses a desire to buy an air conditioner for her home, she will be furnished with an air conditioner of the household-type, i.e. one adapted to the home space which she seeks to air condition. Such an air conditioner is the type mentioned in subparagraph (c) of the sections of the code now under discussion." Ibid.

8 363 U.S. at 711.
construction was not a permissible one... especially where it continued without deviation for over a decade.9

Whenever the Court is called upon to construe a statute, its determination of the statutory meaning is automatically retroactive to the date of the statute's enactment.10 This retroactivity is the logical result of the concept that the Court simply gives effect to the congressional intent which was present at the date of the statute's enactment.11 This retroactive determination ordinarily involves no unfairness to a litigant when the Court construes a statute which has not previously been interpreted by an administrative agency. Here the litigant is aware of the statute's indefinite content. But when the Court determines the content of a Code provision which previously has been interpreted by the Service, it is dealing not with an unresolved question, but with an established interpretation—at least as to those to whom the Service interpretation was addressed. In this situation, invalidation of the Service interpretation, with its consequent retrospective determination of tax liability, may often result in unfairness to the taxpayer who has relied upon the ruling or regulation.12 The question presented to the Court is under what circumstances shall the administrative interpretation be overturned or sustained, or phrased conventionally, what weight shall be given to the administrative interpretation in determining the meaning of the statute.

A long line of cases indicates that little, if any, weight will be accorded Service rulings of the Commissioner, as distinguished from regulations (and Treasury Decisions) of the Secretary of the Treasury or his delegate.13 Where-as regulations set forth general policy and procedure of the Service, rulings determine the taxability of a particular transaction or series of transactions.14

9 Id. at 712. Mr. Justice Clark, dissenting (with whom the Chief Justice and Mr. Justice Black joined), maintained that the tax applied to all self-contained units, not merely those of the household-type. Id. at 714. Mr. Justice Frankfurter dissented in a separate opinion. Id. at 712.

10 This factor is pointed out by Mr. Justice Frankfurter, dissenting, in Cory.

11 United States v. Butler, 297 U.S. 1 (1936). This position that the Court is doing nothing more than expressing legislative intent present at the time of the statute's passage is a gross oversimplification. See Western Union Tel. Co. v. Lenroot, 323 U.S. 490 (1945); Estate of Sanford v. Commissioner, 308 U.S. 39 (1939). See also Eisenstein, supra note 1, at 509; Radin, A Case Study in Statutory Interpretation: Western Union Co. v. Lenroot, 33 CALIF. L. REV. 219 (1945).


13 E.g., Higgins v. Commissioner, 312 U.S. 212 (1941); Biddle v. Commissioner, 302 U.S. 573 (1938); Helvering v. New York Trust Co., 292 U.S. 455 (1934); Sims v. United States, 252 F.2d 434 (4th Cir. 1958). Mr. Justice Clark, dissenting in Cory, observed: "Finally, these rulings do not have the force of regulations, and, as petitioners admit, they cannot 'overrule a statute.'" 363 U.S. at 717.

14 Only the more important rulings are published in the Internal Revenue Bulletin; the remainder take the form of private letters. For a discussion of Service procedure in regard to
Each issue of the Internal Revenue Bulletin states that "rulings . . . have none of the force or effect of Treasury Decisions and do not commit the Department to any interpretation of the law which has not been formally approved and promulgated by the Treasury." In view of this cautionary statement, the Court has often refused to give rulings any weight. These decisions have led one commentator to remark that "as a practical matter, such rulings do not mean very much if either the Bureau or taxpayer chooses to disregard them."

Another line of cases indicates that the form which Service interpretations take does not affect the degree of authoritative force which will be accorded them. Cory appears to reinforce this approach. The Court, declining to comment on the point that mere rulings were involved, treated the rulings as it would regulations. This seems to be the better reasoned approach: to draw distinctions based solely on form is highly questionable and arbitrary.

The Court has formulated three criteria which tend to give the Service interpretations greater weight or authoritative effect: (1) when the interpretation was formulated contemporaneously with the enactment of the statute, (2) when the statute which the ruling or regulation interprets has been re-enacted by Congress with the interpretation in effect, and (3) when the interpretation is of long-standing and uniform application. Although contemporaneous and re-enactment may serve as a guide to congressional intent, neither bears

the issuance of rulings, see Sugarman, Federal Tax Rulings Practice, 10 TAX L. REV. 1 (1954); Tannenbaum, How to Obtain Treasury Department Rulings, 33 TAXES 346 (1955).

15 See cases cited, supra note 13.

16 Eisenstein, supra note 1, at 480.


18 As Dean Griswold has pointed out, "Bureau practice is Bureau practice, and when it clearly appears and has been long-continued, it should be given effect regardless of the form in which it appears." Griswold, supra note 12 at 418, n. 60.


20 The "re-enactment doctrine" may be traced to United States v. G. Falk & Brother, 204 U.S. 143 (1907). The classic statement of the rule is found in Helvering v. R. J. Reynolds Tobacco Co., 306 U.S. 110, 115 (1939): "Under the established rule Congress must be taken to have approved the administrative construction and thereby to have given it the force of law."

The fictitious theory upon which the doctrine is based has been roundly criticized. See Brown, Regulations, Reenactment, and the Revenue Acts, 54 HARV. L. REV. 377 (1941); Feller, Addendum to the Regulations Problem, 54 HARV. L. REV. 1311 (1941); Griswold, A Summary of the Regulations Problem, 54 HARV. L. REV. 398 (1941); Paul, Use and Abuse of Tax Regulations in Statutory Construction, 49 YALE L. J. 660 (1940); Alvord, Treasury Regulations and the Wilshire Oil Case, 40 COLUM. L. REV. 252 (1940).

on the question of unfairness by retroactive statutory construction. Thus, it has been argued that the third is the only criterion that should be considered by the Court, and that once the Service interpretation has been in effect for several years and has been consistently applied, it should not be overturned.22 The argument is that invalidation of long continued determinations of taxability destroys the fundamental goals of certainty, predictability and reliability, and that retroactive determination of tax liability "violate[s] fundamental American concepts of fairness and justice . . .".23

It seems clear that it is not duration of an interpretation itself which should call for the Court's approval of the ruling or regulation, but the detrimental retroactive effect to the taxpayer which results from invalidation. Accordingly, when the Court states that it will not overturn an administrative interpretation which has "continued without deviation for over a decade,"24 it is stating that it will not sanction the retroactive determination of taxability which would follow from a holding of invalidity. In many instances, however, the Court has overturned long-standing Service interpretations.25 And the Service has issued interpretations retroactive in effect with the Court's approval.26 In Automobile Club of Michigan v. Commissioner27 the Court indicated that although the Commissioner has authority to issue retroactive interpretations, they would not be upheld if such retroactive determination constituted abuse of discretion.28 Thus, the Commissioner may issue a retroactive ruling only when he


24 363 U.S. at 712.


26 Couzens v. Commissioner, 11 B.T.A. 1040 (1928) firmly established the power of the Commissioner and Secretary to issue interpretations retroactive in application. See also Manhattan Gen. Equipment Co. v. Commissioner, supra note 25, and cases collected in 1 L. Ed. 2d 2051.


28 See Lesavoy Foundation v. Commissioner, 238 F.2d 589 (3d Cir. 1956); H.S.D. Co. v. Kavanagh, 191 F.2d 831 (6th Cir. 1951); Woodworth v. Kales, 26 F.2d 178 (6th Cir. 1938); Guggenheim v. Rasquin, 28 F. Supp. 322 (E.D.N.Y. 1939), rev'd on other grounds, 110 F.2d 371 (2d Cir. 1940), aff’d, 312 U.S. 254 (1941). But see, Knapp-Monarch Co. v. Commissioner, 139 F.2d 863 (8th Cir. 1944); Stearns Coal & Lumber Co. v. Glenn, 42 F. Supp. 28 (W.D. Ky. 1941).

Congress has expressly delegated the authority to interpret the Code to the Secretary and the Commissioner in section 7805(a) of the 1954 Code. Recognizing that retroactive determinations of taxability may often produce inequitable results to the taxpayer, Congress also has authorized the Secretary and the Commissioner to issue regulations and rulings prospective in application. The present provision is section 7805(b): "Retroactivity of Regulations or Rulings—The Secretary or his delegate may prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroac-
does not violate the discretionary power delegated to him by Congress. Issuing a retroactive ruling or regulation by the Service or Treasury has the same practical effect as holding a ruling or regulation invalid by a court. It is suggested, then, that the Government may challenge a long-standing Service interpretation of the Code in court only when a Service ruling or regulation, retroactive in application, could be issued by the Service to supersede the original interpretation. The test of validity or invalidity of a ruling or regulation now becomes whether the result of a holding of invalidity would produce a retroactive result sufficient to constitute an abuse of discretion.

Two examples may serve to illustrate this conclusion. In example one, a Code provision states that \(X\) is taxable. \(X\) is composed of \(A\)'s and \(B\)'s; \(i.e., \ X\) is an entity which may be ascertained without reference to the Code or Treasury regulations. The Commissioner issues a ruling stating that \(X\) includes only \(A\)'s. Several years later he issues a ruling stating that \(X\) includes \(B\)'s as well, and applies this interpretation retroactively. It seems that this second ruling would not be considered an abuse of discretion; by definition, \(B\)'s should have been taxed from the outset. These interpretations may be described as purely interpretive. Because the Code provision is specific, the practical application of the statute by the Service should involve no element of discretion. Therefore, the Government could successfully challenge the validity of the first ruling in court. Here the court would apply the rubric that the Commissioner is not bound by a mistake of law.

In the second example, a Code provision similar to that in example one states that \(Y\) is taxable. However, \(Y\) may be composed of \(C\)'s and \(D\)'s; \(i.e., \ Y\) is an entity which has no meaning or definition outside of the Code or Treasury regulations. The Commissioner issues a ruling stating that \(Y\) includes only \(C\)'s. He subsequently issues a new ruling including \(D\)'s in the taxable class, and applies the construction retroactively. The Commissioner's action may now be deemed an abuse of discretion. The rulings here may be termed quasi-legislative: the first interpretation also determines the content of the statute. The

tive effect." A similar provision appeared in the Revenue Act of 1921, § 1314, 42 Stat. 314. The 1934 provision was accompanied with this congressional statement: "[I]N some cases the application of regulations, Treasury Decisions, and rulings to past transactions which have been closed by taxpayers in reliance upon existing practice, will work such inequitable results that it is believed desirable to lodge in the Treasury Department the power to avoid these results by applying certain regulations, Treasury Decisions, and rulings with prospective effect only." H.R. Rep. No. 704, 73d Cong., 2d Sess. 38 (1934).


31 Interpretive rulings and regulations may create "new law" and thus contain legislative aspects. See 1 Davis, Administrative Law § 5.09 at 347–54 (1958).
interpretation necessarily involves an aspect of discretion on the part of the Commissioner. The later retroactive expansion of the taxable class is inconsistent with the original discretionary determination of the class. It follows that the Government could not successfully attack the validity of the first permissible ruling in court by urging a second permissible interpretation, although the court may agree that the second is a more desirable one.

In the second example, unfairness to the taxpayer who has arranged his affairs in accordance with the Service interpretation seems to outweigh the desire to tax to the full extent authorized by Congress. However, unfairness to the taxpayer in example one may be equally harsh. In this situation, the only protection accorded the taxpayer is the statute of limitations and the general Service policy of honoring the validity of rulings and regulations.

It has been argued that to completely protect the taxpayer who has relied on the Service interpretation, the Government should be estopped from denying the validity of the ruling or regulation. There is at least one situation where application of equitable estoppel may not be sound. The Service has interpreted a Code provision to mean that only A's are taxable. After the interpretation has been in effect for a substantial period of time, one of the class of A's brings a suit, maintaining that under the statute only B's are taxable. The lower court agrees, holding that the correct interpretation of the Code at the time of enactment was only B's are taxable. B's now bring suit urging that the first court erred, and that the correct interpretation is only A's are taxable. In this second suit should the Government be estopped from urging the "correct" interpretation as held by the first court, and thereby denying the validity of the original Service interpretation? If so, there will be inconsistent holdings in the district courts. The remainder of the class of A's may now bring suit

32 The statute of limitations may prove to be a hollow safeguard, for it does not start to run until a return is filed by the taxpayer. Thus, if a taxpayer relies on a ruling stating that he is subject to no tax in respect to a certain matter, thereby filing no return, the statute will not run. Automobile Club of Michigan v. Commissioner, 353 U.S. 180 (1957).

33 The Service has set forth this policy in Rev. Rul. 54-172, § 12.05, 1954-1 Cum. Bull. 401. The Treasury Department has yet to issue any definitive statement of its policy as respects retroactivity in regulations. See Sugarman, supra note 14.

34 Berger, Estoppel Against the Government, 21 U. Chi. L. Rev. 680 (1954). The doctrine of equitable estoppel does not apply to the Government. This immunity has often been criticized by the courts. See Walker Hill Co. v. United States, 162 F.2d 259, 263 (7th Cir. 1947); Prettyman, J., dissenting in Stockstrom v. Commissioner, 190 F.2d 283, 289 (D.C. Cir. 1951).

In this connection, note Mr. Justice Frankfurter's dissent in Cory where he argues that the taxpayer would be protected from retroactive judicial determination of the content of the Code provision by § 1108(b) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 114, which would produce the same effect as estoppel. "No tax shall be levied, assessed, or collected . . . on any article sold or leased by the manufacturer . . . if at the time of the sale or lease there was an existing ruling, regulation, or Treasury decision holding that the sale or lease of such article was not taxable, and the manufacturer . . . parted with possession or ownership of such article, relying upon the ruling, regulation, or Treasury decision."

relying on the first holding, correctly asserting that if that decision is not applied to them, unfair discrimination within a class of taxpayers will result. If the class of A's is successful, the result is that the Treasury will have no revenue from either A's or B's for the taxable period involved. If the primary goal is the protection of taxpayers from retroactive changes in the law while maintaining revenues, perhaps the solution in this situation as well as example one, above, is the exercise by the courts of the prerogative to apply an interpretation of a statute prospectively only.36

Application of the long-standing test to permissible Service interpretations such as those in Cory produces the desirable results of uniformity and stability in tax administration. By approaching the question of unfairness in this manner, however, the Court must resolve the difficult question whether the Code provision definitely establishes the taxable class or creates a class which must be defined by the Service or Treasury. If the latter, the Service interpretation may then be considered a permissible construction of the statute and will not be invalidated if in effect for a substantial period; if the former, a Service interpretation not in harmony with the statute will be invalidated, even though the interpretation has been in effect for many years and its invalidation may produce detrimental retroactive effects to the taxpayer.

36 This position is advanced by Professor Davis. 1 Davis, op. cit. supra note 31, at 352. See Durham v. United States, 214 F.2d 862 (1954): “[I]n adopting a new test, we invoke our inherent power to make the change prospectively. The rule we now hold must be applied on the retrial of this case and in future cases.”