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THE CASE-CONCEPT AND SOME RECENT INDIRECT PROCEDURES FOR ATTACKING THE CONSTITUTIONALITY OF FEDERAL REGULATORY STATUTES

STOCKHOLDERS' suits[1] and cases framed in reorganization proceedings[2] have been conspicuous weapons in recent phases of the constitutional battle between business and the New Deal. These indirect suits, and others presenting similar problems,[3] have exhibited strategic ingenuity in endeavoring both to antici-

1. Ashwander v. T. V. A., 78 F. (2d) 578 (C. C. A. 5th, 1935), cert. granted, 56 Sup. Ct. 145 (1935); Carter v. Carter Coal Co., (Sup. Ct. D. C. 1935), 3 U. S. L. W. 225, 233; Tway v. Glenn (W. D. Ky. 1935), 3 U. S. L. W. 219, cert. granted, 56 Sup. Ct. 371 (1935); Public Utility Inv. Corp. v. Utilities Power and Light Corp., E. D. Va., Dec. 17, 1935.

2. Continental Bank v. Chicago R. I. & P. Ry. Co., 294 U. S. 648 (1935); Norman v. Baltimore & O. Rr. Co., 294 U. S. 240, 294 (1935); United States v. Butler, 56 Sup. Ct. 312 (1936); In the Matter of American States Public Service Co., 12 F. Supp. 667 (D. Md. 1935); In the Matter of Central West Public Service Co. (D. Del. 1935), 3 U. S. L. W. 232; Tway v. Glenn (W. D. Ky. 1935), 3 U. S. L. W. 219, cert. granted, 56 Sup. Ct. 371 (1935); In re Public Utilities Securities Corp., N. D. Ill., Nov. 27, 1935.

3. Cf. Moor v. Texas & N. O. Rr. Co., 80 L. Ed. 358 (1936); the PWA cases listed in note 46 *infra;* and Bookbinders' Trade Assn. v. Book Mfgrs. Inst., 7 F. Supp. 847 (S. D. N. Y. 1934).

pate procedural delays and to maximize the difficulties of the government's defensive position, even to the extent, in some cases, of avoiding the government or its officers as parties to the action. They sharply project, as an issue of political policy, the question of how strictly the judges should apply the simple fiction of judicial review, that the courts settle cases and do not as such declare the constitutionality of acts of government. For in certain of these suits there is distinct possibility of conflict between the results sought and two basic constitutional maxims: first, that the constitutionality of an act of government[4] can be decided only when raised as a justiciable issue[5] between adverse[6] and presently[7] interested[8] parties in a case or controversy,[9] within which a settlement of the private rights of the litigants is impossible without deciding the constitutional validity of the act;[10] and second, that no

4. Texas v. Interstate Commerce Commission, 258 U. S. 158 (1922); Liverpool N. Y. & P. Steamship Co. v. Commissioners, 113 U. S. 33 (1885); Muskrat v. United States, 219 U. S. 346 (1911); Eakin v. Raub, 12 Serg. & Rawles 330 (Penn. 1825); Kamper v. Hawkins, 1 Va. Cas. 20 (1793).

5. The definitions of justiciability are historical; problems and conflicts which courts have traditionally decided are susceptible to the exercise of judicial power. In re Pacific Ry. Commission, 32 Fed. 241, 255 (C. C. N. D. Cal. 1887); Luther v. Borden, 7 How. 1 (U. S. 1849); Georgia v. Stanton, 6 Wall. 50 (U. S. 1867); Pacific States T. & T. Co. v. Clark, 223 U. S. 118 (1912); Keller v. Potomac Power Co., 261 U. S. 428, 444 (1923); New Jersey v. Sargent, 269 U. S. 328 (1926); Federal Radio Commission v. General Electric Co., 281 U. S. 464 (1930). Finkelstein, *Judicial Self-Limitation* (1924) 37 HARV. L. REV. 338; Weston, *Political Questions* (1925) 38 HARV. L. REV. 296.

6. Chicago & Grand Trunk Ry. Co. v. Wellman, 143 U. S. 339 (1892); Stearns v. Wood, 236 U. S. 75 (1915); Muskrat v. United States, 219 U. S. 346, 361 (1911); Shearer v. Backer, 207 Ky. 455, 269 S. W. 543 (1925); Moritz v. United Brethrens Church, 244 App. Div. 121, 278 N. Y. Supp. 342 (2d Dep't 1935).

7. Bartemeyer v. Iowa, 18 Wall. 129 (U. S. 1873); California v. San Pablo & Tulare Rr. Co., 149 U. S. 308 (1893); Richardson v. McChesney, 218 U. S. 487 (1910); Sprunt v. United States, 281 U. S. 249, 257 (1930); Abrams v. Van Schaick, 293 U. S. 188 (1934); Dahlgren v. Pierce, 270 Fed. 507 (C. C. A. 6th, 1921), cert. denied, 256 U. S. 692 (1921); Faris v. Helvering, 71 F. (2d) 610 (C. C. A. 9th, 1934); United States Nat. Bank v. Pamp, 77 F. (2d) 9 (C. C. A. 8th, 1935).

8. Giles v. Harris, 189 U. S. 475 (1903); Fairchild v. Hughes, 258 U. S. 126 (1922); Frothingham v. Mellon, 262 U. S. 447 (1923); Stearns v. Wood, 236 U. S. 75 (1915); Liberty Warehouse v. Grannis, 273 U. S. 70 (1927); Sprunt v. United States, 281 U. S. 249 (1930); City of Allegen v. Consumer's Power Co., 71 F. (2d) 477 (C. C. A. 6th, 1934); Arkansas-Missouri Power Co. v. City of Kennett, 78 F. (2d) 911 (C. C. A. 8th, 1935); Ramsey v. Hamilton, 182 S. E. 392 (Ga. 1935); Comment (1928) 38 YALE L. J. 104.

9. U. S. CONST., Art. III, Sec. 1; Cohens v. Virginia, 6 Wheat. 264, 405 (U. S. 1821); Hayburn's Case, 2 Dall. 409 (U. S. 1792); United States v. Ferriera, 13 How. 40 (U. S. 1851) (note by Taney, C. J., at 52); Gordon v. United States, 117 U. S. 697 (1864); Muskrat v. United States, 219 U. S. 346 (1911); Nashville C. & St. L. Ry. v. Wallace, 288 U. S. 249 (1933); Old Colony Trust Co. v. Commissioner of Internal Revenue, 279 U. S. 716 (1929); United States v. West Virginia, 295 U. S. 463 (1935). See BORCHARD, DECLARATORY JUDGMENTS (1934) 26-62, for exhaustive treatment of the elements which enter into the concept of a case in controversy.

10. Liverpool, N. Y. & P. S. S. Co. v. Commissioners, 113 U. S. 33, 39 (1885); San Bernadino County v. Southern Pac. Rr. Co., 118 U. S. 417, 423 (1886); Adkins v. Children's Hospital, 261 U. S. 525, 544 (1923); Ex parte Randolph, 20 Fed. Cas. No. 11,558 at 254 (C. C. Va. 1833).

case can support an adjudication of issues beyond the "cause of action" presented by its facts.[11] The recent indirect challenges to the constitutionality of federal regulatory statutes prompt a re-inquiry into the importance and desirability of the case-concept in the contemporary process of judicial review.

While it is constantly repeated that constitutional issues are judicially decided only in proper cases, and then settle only the rights of litigants before the court, it is unthinkable that the government could treat the concept too seriously, and continue to enforce statutes declared unconstitutional as if the declaration bound only the parties to the case, even where further suits against the statute would be almost impossible.[12] But if they have not been regarded thus literally, the rules associated with the requirements of a proper case as the condition precedent to an exercise of judicial power have had two important consequences. Recourse to the Supreme Court has been difficult, and these rules have confined constitutional decisions both in number and in scope. In the second place, many constitutional problems so far have not been compressed within the historical[13] boundaries of "a case in controversy," and, in those fields hitherto inaccessible to judicial review, the preservation of constitutional limits on power has been assured the nation by the constitutional decisions of Congress and the Executive, without benefit of judicial review.[14] But both phases of the case-limitation on judicial review have been weakened during the last two generations, and the recent rush to the courts to contest the validity of acts of Congress seems likely to intensify the process. Ingeniously framed suits attempt to obtain decisions on the constitutionality of federal statutes almost before the statutes become operative, and so frequently as to make the Supreme Court more and more a third chamber of the legislature, and correspondingly less a forum in which individual grievances are heard as they become urgent. And furthermore, the recent cases have presented for adjudication issues of constitutional power never hitherto successfully submitted for judicial action.[15]

The place of indirect suits in this expansion of judicial review has been

11. See Goodhart, *Determining the Ratio Decidendi of a Case* (1930) 40 YALE L. J. 161; Arnold, *The Code Cause of Action* (1933) 19 A. B. A. J. 215; Clark, *The Cause of Action* (1934) 82 U. OF PA. L. REV. 354; Gavit, *A Pragmatic Definition of the Cause of Action* (1934) 82 U. OF PA. L. REV. 129, 695; Shulman and Jaegerman, *Jurisdictional Limitations on Federal Procedure* (1936) 45 YALE L. J. 393, 397.

12. As, for example, if the A. A. A. were to be supported from general funds in the Treasury. But, paradoxically enough, the Gold Clause Resolution, despite the court's unequivocal declaration of its unconstitutionality as to government bonds [Perry v. United States, 294 U. S. 330, 354 (1935)] continues to be a foundation of government finance.

13. Cohens v. Virginia, 6 Wheat. 264, 405 (U. S. 1821); Missouri v. Holland, 252 U. S. 416, 433 (1920); Massachusetts v. Mellon, 262 U. S. 447 (1923); and cases in note 5 *supra*. Cf. CORWIN, THE TWILIGHT OF THE SUPREME COURT (1934) 177.

14. The contrary view, that judicial supremacy is the indispensable characteristic of constitutional government, is forcefully summarized by Prof. McIlwain, *Government by Law* (1936) 14 FOREIGN AFFAIRS 185, 196.

15. Cf. United States v. Constantine, 56 Sup. Ct. 223 (1935); United States v. Butler, 56 Sup. Ct. 312 (1936); Panama Refining Co. v. Ryan, 293 U. S. 388 (1935); Comment (1936) 34 MICH. L. REV. 366.

historically of some prominence. Stockholders' suits, the most conspicuous of the indirect suits, were used originally merely to bring constitutional cases into the federal courts by diversity of citizenship[16] when other grounds were unavailable, especially before "a federal question" was made a ground of federal jurisdiction.[17] Later they were widely employed to circumvent the statute forbidding injunctions against a tax;[18] and more recently, along with a few other indirect forms of action they have been used to test issues which might otherwise have been difficult to reduce to justiciable form. Thus, in the *Federal Land Bank* case,[19] a stockholder's suit, the validity of federal expenditure was passed upon although the corporation from which its stockholders derived right to sue was not in position to prosecute an action on the point; and suits by power companies against municipalities to enjoin WPA expenditure may establish another indirect device for challenging the national government's spending power.[20] Recently an attempt has been made to utilize the fiduciary's bill for instructions as a quick and practicable way of presenting constitutional questions to the court, especially in reorganization proceedings.

Instructions to Trustees in Reorganization

The trustee's bill for instructions is an equitable remedy available to the trustee to protect him against liability for administrative mistakes.[21] Although it is doubtful whether compliance with a statute would subject a trustee to liability for mismanagement, it is said that the discretion of an equity receiver or a reorganization trustee to act without orders from the court is narrowly circumscribed,[22] and that he is privileged (perhaps required)[23] to petition

16. Dodge v. Woolsey, 18 How. 331 (U. S. 1856); Hawes v. Oakland, 104 U. S. 450, 459 (1881); Foote v. Linck, 9 Fed. Cas. No. 4,913, 366 (C. C. D. Ohio 1853); Paine v. Wright, 18 Fed. Cas. No. 10,676, 1010 (C. C. D. Ind. 1855); Parmeley v. St. Louis, etc. Rr. Co. 18 Fed. Cas. No. 10,767, 1223 (C. C. E. D. Mo. 1874).

17. And before the full usefulness of the Fourteenth Amendment became apparent. Cf. Ex parte Young, 209 U. S. 123, 144 (1909).

18. Pollock v. Farmer's Bank & Trust Co., 157 U. S. 429 (1895); Brushaber v. Union Pac. Rr. Co., 240 U. S. 1 (1916); Stanton v. Baltic Mining Co., 240 U. S. 103 (1916).

19. Smith v. Kansas City Title Co., 255 U. S. 180, 208 (1921). The exact grounds of the decision are uncertain, despite a delay of more than a year before the case was decided.

20. Cf. cases in notes 47 and 48, *infra*.

21. Missouri Pac. Ry. Co. v. Texas & P. Ry. Co., 31 Fed. 862 (C. C. E. D. La. 1887); Missouri & K. I. Ry. Co. v. Edson, 198 Fed. 819 (C. C. A. 8th, 1912); Haines v. Buckeye Wheel Co., 224 Fed. 289 (C. C. A. 6th, 1915); In re Angell, 131 Mich. 345, 351, 91 N. W. 611, 612 (1902). *Contra:* Birmingham Trust Co. v. Atlanta Ry. Co., 271 Fed. 731, 739 (N. D. Ga. 1921). For a comprehensive treatment of the problems of trustees' and executors' bills for instructions, see Comment (1935) 44 YALE L. J. 1433.

22. The status of a reorganization trustee under 77B is expressly that of an equity receiver [48 STAT. 912, 11 U. S. C. A. § 207(a) (1934)] and the general problems of the action are the same in either form, GLENN ON LIQUIDATION (1935) 606. The discretion of an equity receiver is narrow [2 STORY, EQUITY JURISPRUDENCE (14th ed. 1918) § 1150; 4 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) § 1620], perhaps narrower than that of a bankruptcy trustee, whose status is of course different. [Compare Davis v. Gray, 16 Wall. 203 (U. S. 1872) with Johnson v. Stimpson Co., 2 F. (2d) 699 (C. C. A. 6th, 1924)].

23. See Ex parte Chamberlain, 55 Fed. 704, 706 (C. C. D. S. C. 1893); Scott v. West-

to the court for instructions as to compliance with any statute purporting to control the property he is administering, when in doubt either as to its scope or validity.[24]

But the mere filing of a petition for instructions does not present a "controversy,"[25] which would satisfy either the constitutional requirement that the constitutionality of a statute be determined only in a justiciable controversy, or the rules of jurisdiction under Section 77B of the Bankruptcy Act. Under Section 77B the reorganization court has exclusive jurisdiction over the debtor and its property, wherever located, for the purposes of the reorganization,[26] and the bearing of a regulatory statute on the administration of the estate is presumably a problem within that jurisdiction, if properly submitted.[27]

ern Pac. Rr. Co., 246 Fed. 545 (C. C. A. 9th, 1917); Northern Finance Co. v. Byrnes, 5 F. (2d) 11, 12 (C. C. A. 8th, 1925). On the scope of a receiver's privilege to seek instructions, see Grant v. Phoenix Life Ins. Co., 121 U. S. 118 (1887); American Brake Shoe Co. v. New York Rys. Co., 278 Fed. 842 (S. D. N. Y. 1922); Traphagen v. Levy, 45 N. J. Eq. 448, 18 Atl. 222 (1889).

24. Ledoux v. La Bee, 83 Fed. 761 (C. C. S. D. 1897); Birmingham Trust Co. v. Atlanta B. & A. Ry. Co., 271 Fed. 731 (N. D. Ga. 1921); Pennsylvania Cement Co. v. Bradley, 274 Fed. 1003 (S. D. N. Y. 1920); New York Trust Co. v. Island Oil & Transport Co., 11 F. (2d) 698 (C. C. A. 2d, 1926), aff'g 7 F. (2d) 416 (S. D. N. Y. 1925); In re American Public Service Co., 12 F. Supp. 667 (D. Md. 1935).

25. Thus the courts apply the same criteria of a "case" to proceedings instituted by this petition as to any other; they refuse to determine issues not before the court [Dahlgren v. Pierce, 270 Fed. 507, 517 (C. C. A. 6th, 1921), cert. denied 256 U. S. 692 (1921), appeal dismissed, 256 U. S. 682 (1921)], or issues not adversely argued by interested parties (cf. cases in note 39 *infra*). Most orders given as instructions are administrative or advisory, and are not considered final decrees. Comment (1935) 44 YALE L. J. 1433, 1436.

26. 48 STAT. 912, 11 U. S. C. A. § 207(a) (1934). The jurisdiction is analogous to the exclusive jurisdiction discussed in Wiswall v. Sampson, 14 How. 52 (U. S. 1852); Wabash Rr. Co. v. Adelbert College, 208 U. S. 38 (1908); Isaacs v. Hobbs Tie Co., 282 U. S. 734 (1931); United States v. Bank of N. Y. and Trust Co., 77 F. (2d) 866 (C. C. A. 2d, 1935); note (1935) 35 COL. L. REV. 1308. For a limitation on the doctrine, cf. Lubbock Hotel Co. v. Guarantee Trust Co., 77 F. (2d) 152 (C. C. A. 5th, 1935); note (1935) 49 HARV. L. REV. 338.

27. The important procedural issue in that submission is probably not whether the form of suit is "plenary" or "summary," but whether the parties were assured a full opportunity, on reasonable notice, to appear and present their case. Bankruptcy courts sometimes settle adverse claims as to property in their possession in plenary suits, Whitney v. Wenman, 198 U. S. 539 (1905); Clements v. Conyers, 31 F. (2d) 563 (C. C. A. 7th, 1928); and see Murphy v. Hofman, 211 U. S. 562, 569 (1909); Central Republic Bank & Trust Co. v. Caldwell, 58 F. (2d) 721 (C. C. A. 8th, 1932). It may be more proper to require plenary procedure [GILBERT'S COLLIER ON BANKRUPTCY (1934) 470; 4 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) § 1620; Miner, *Summary Proceedings in Court Receiverships* (1934) 12 CHICAGO KENT LAW REV. 233], but the distinction between "summary" and "plenary" procedure is blurred when the court has possession of the property [GILBERT'S COLLIER ON BANKRUPTCY (1934) 470; Clements v. Conyers, 31 F. (2d) 563 (C. C. A. 7th, 1928); Central Republic Bank v. Caldwell, 58 F. (2d) 721, 731 (C. C. A. 8th, 1932); Beeler v. Schumacher, 71 F. (2d) 831 (C. C. A. 6th, 1934), cert. granted, 55 Sup. Ct. 95 (1935)] and bankruptcy courts settle controversies in respect to property in their hands in summary proceedings. See Taubel-Scott-Kitzmiller v. Fox, 264 U. S. 426, 433 (1924); McDonald v. Plymouth County, 286 U. S. 263, 267 (1932); Rahway National

The basic rule of that submission is that every contest within the administration of the estate be presented in an orderly trial with an adequate occasion for the examination of facts.[28] The Bankruptcy Act distinguishes *proceedings* in bankruptcy, which are non-controversial and administrative in scope, and *controversies* arising in the course of bankruptcy, which present adverse claims to title, or problems of law remote from the usual course of the bankruptcy itself.[29] It is clear that this distinction should require that the case against a regulatory statute be presented in a "controversy arising during bankruptcy," not a non-adversary "proceeding."[30] The difference between them is one of substance and not of procedural form.[31] Thus an ex parte answer to a trustee's petition for instructions, given without hearing other parties, would not be the settlement of a controversy; such an order advising the trustee of the constitutionality of the act, would "adjudicate

Bank v. Thompson, 7 F. (2d) 419 (C. C. A. 3d, 1925); Page v. Arkansas Nat. Gas Corp., 53 F. (2d) 27, 34 (C. C. A. 8th, 1931). That summary jurisdiction is limited, now more closely than before, to questions of the control, ownership, and possession of the debtor's property, see Schroder Banking Corp. v. Brach Mfg. Corp., 78 F. (2d) 530 (C. C. A. 7th, 1935). Gerdes, *Jurisdiction of the Courts in Proceedings under Section 77B* (1935) 4 BROOKLYN L. REV. 237; note (1935) 12 N. Y. U. L. Q. REV. 509.

28. National Surety Co. v. Coriell, 289 U. S. 426, 435 (1933); First National Bank v. Flershem, 290 U. S. 504, 525 (1934); Nisbet v. Federal Title & Trust Co., 229 Fed. 644, 648 (C. C. A. 8th, 1915).

29. On the distinction between a proceeding and a controversy see Taylor v. Voss, 271 U. S. 176 (1926); Hirschfield v. McKinley, 78 F. (2d) 124 (C. C. A. 9th, 1935); Humphrey v. Bankers Mtge. Co., 79 F. (2d) 345 (C. C. A. 10th, 1935). But see Vitagraph v. St. Louis Prop. Corp., 77 F. (2d) 590, 594 (C. C. A. 8th, 1935), where it was held that summary proceedings could not be "controversies." Cf. note 27, *supra*.

30. The alternative argument is that the original controversy culminating in the reorganization satisfies the requirement of a case, permitting the issue of constitutionality to be settled as an ancillary question in "proceedings" within the general controversy. (Vitagraph v. St. Louis Prop. Corp., 77 F. (2d) 590, 592 (C. C. A. 8th, 1935); In re American States Public Service Co., 12 F. Supp. 667, 678 (D. Md. 1935). This procedure might be correct if the original controversy between the debtor and its creditors, or between the assenting and non-assenting creditors, properly presented the constitutional issue, as in Continental Bank v. Chicago R. I. & P. Ry. Co., 294 U. S. 648 (1935). But if the constitutional issue to be settled is not implicit in the existing reorganization action, it would seem that separate adversary proceedings sufficient in substance to constitute a case in controversy are necessary to present it to the bankruptcy court having exclusive jurisdiction of the property. See Norman v. Balt. & Ohio Rr. Co., 294 U. S. 240, 294 (1935); United States v. Butler, 56 Sup. Ct. 312 (1936).

31. The best illustration is the fact that there is an almost universal practice of taking both an appeal, under § 24a of the Bankruptcy Act, 43 STAT. 936 (1925), 11 U. S. C. A. § 47a (1927), allowable by the District Court as of right from controversies, and a petition to the Circuit Court of Appeals to revise in matters of law under § 24b, applicable to proceedings from almost every disputed order in bankruptcy. The appellate court usually decides which was the proper form of review only after it has determined the merits of the case. Cf. Continental Bank v. Chicago, R. I. & P. Ry. Co., 294 U. S. 648, 650 (1935); In re Goldman, 62 F. (2d) 421 (C. C. A. 1st, 1932); Central Republic Bank & Trust Co. v. Caldwell, 58 F. (2d) 721 (C. C. A. 8th, 1932) (litigation held a controversy, summary procedure followed throughout).

nothing,"[32] bind no one but the trustee,[21] and could be vacated or modified on motion by interested intervenors.[33] Such ex parte settlement of substantial problems has been considered beyond the capacity or discretion of the court,[34] and substantial legal interests have been settled in proceedings initiated by fiduciaries' bills for instructions only on subsequent appearance of all parties requisite to the cause of action in which the fiduciary asserts an interest.[35]

A technique for satisfying this preliminary requirement of a "controversy" as the proper setting for a constitutional case in reorganization proceedings is to secure the intervention, after the trustee has petitioned for instructions, of one creditor to assert and another to deny the constitutionality of the regulatory statute, each one claiming a justiciable interest in its application.[36] The action which results thus seems to have the conventional apparatus of a "case in controversy," justifying the court in an order instructing the trustee either to comply or not to comply with the statute, and, further, to defend that course of conduct in suits by objecting creditors. Groups planning a constitutional attack on a federal statute have attempted to use the receivership suit constructed on this model as a strategic device for raising the constitutional issue quickly. Those preparing the attack, by selecting the trustee or receiver who is to initiate the action, have the important preliminary advantage of choosing the court, and the firm whose affairs will be the subject-matter of the suit. Since suits to which a trustee or receiver is party are often given calendar preference,[37] it may be possible to obtain a ruling on the constitutionality of a statute more quickly in reorganization than otherwise. Moreover, suits in this form seem somewhat less vulnerable than others to defenses of prematurity[38] and the statutory rule prohibiting injunctions against a tax.[39] But the underlying advantage of the reorganization court as a forum in which to make a constitutional case is that even when ex parte instructions to receivers

32. Birmingham Trust Co. v. Atlanta Ry. Co., 271 Fed. 731, 739 (N. D. Ga. 1921).

33. Birmingham Trust Co. v. Atlanta Ry. Co., 271 Fed. 731 (N. D. Ga. 1921); Libby v. Rosekrans, 55 Barb. 202 (N. Y. Sup. Ct. 1869); Weeks v. Weeks, 106 N. Y. 626, 13 N. E. 96 (1887).

34. In re McElrath, 16 Fed. Cas. No. 8,780, 72, 73 (C. C. D. Minn., 1873); McComb v. U. S. Housing Corp., 264 Fed. 589, 592 (D. Del. 1920); In re Central West Public Service Co., (D. Del., 1935), 3 U. S. L. W. 232; Missouri Pac. Ry. Co. v. Texas & P. Ry. Co., 31 Fed. 862 (C. C. E. D. La., 1887); Penn. Steel Co. v. New York City Rys. Co., 176 Fed. 471 (C. C. S. D. N. Y., 1910); Penn. Cement Co. v. Bradley, 274 Fed. 1003 (S. D. N. Y. 1920).

35. Grant v. Phoenix Life Ins. Co., 121 U. S. 118 (1887); Ledoux v. LaBee, 83 Fed. 761 (C. C. S. D. 1897); American Brake Shoe Co. v. New York Ry. Co., 278 Fed. 842 (S. D. N. Y. 1922); New York Trust Co. v. Island Oil & Transport Co., 11 F. (2d) 696 (C. C. A. 2d, 1926), aff'g 7 F. (2d) 416 (S. D. N. Y. 1925); and see cases notes 23, 24, *supra*.

36. Cf. In re American States Public Service Co., 12 F. Supp. 667 (D. Md. 1935).

37. See, e.g., Rules of the District Court, Southern District of New York (1913) § 12 (3).

38. In re American Public Service Co., 12 F. Supp. 667, 690 (D. Md. 1935).

39. Ex parte Chamberlain, 55 Fed. 704 (C. C., D. S. C. 1893), aff'd, Ex parte Tyler, 149 U. S. 164 (1893); Scott v. Western Pacific Rr. Co., 246 Fed. 545, 564 (C. C. A. 9th, 1917) (instructions ordering receiver not to pay invalid tax not an injunction against a tax).

as to the validity of the act will not be granted, the petition for instructions may provoke suits on the constitutional issue between intervening creditors who are basically friendly, if not collusive or technically non-combatative. Thus the defense of the act may be perfunctory, and the presentation of facts controlled by parties interested in attacking the statute, with stipulations frequently displacing contested examination of crucial facts. Even if the government is allowed to intervene as an interested party,[40] it cannot question the good faith of the parties[41] nor perhaps even the jurisdiction of the court,[42] and it is said to take the theory of the case as it finds it.[43] If, on the other hand, the government appears to argue as amicus curiae on such issues as the court chooses to hear, its trial position depends entirely on the court's discretion; it has few resources for influencing the record,[44] and no recognized appellate rights.

Despite its tactical appeal, however, this effort to obtain a quick ruling on the constitutionality of a statute seems vulnerable on procedural grounds. Assuming that the statute is unconstitutional, and assuming further that the consequent injury to the debtor's estate affects a creditor's interest in the estate, it remains questionable whether the creditor's complaint presents the constitutional question at all. Although the objecting creditor fears injury if the statute is applied to the debtor's estate, the person threatening the creditor's security is not the trustee but the officer instructed to enforce the statute against the debtor. Granted the discretionary nature of equitable remedies, it is hard to see why the danger of the injury committed by the officers against the estate should be settled in a suit to which the officers are not parties, simply by treating the issue as one for an injunction restraining the trustee

40. In re Tyler, 149 U. S. 164, 187 (1893); In re Engelhard, 231 U. S. 646 (1914); Brinckerhoff v. Holland Trust Co., 146 Fed. 203 (C. C. S. D. N. Y. 1906); North Carolina v. Southern Ry. Co., 30 F. (2d) 204 (C. C. A. 4th, 1929), cert. denied, 279 U. S. 858 (1929); Comment (1933) 43 YALE L. J. 127.

41. Equity Rule 37, 226 U. S. 659 (1912), 28 U. S. C. A. § 21.

42. King v. Barr, 262 Fed. 56 (C. C. A. 9th, 1920), cert. denied, 253 U. S. 484 (1920); Witchita Rr. & Light Co. v. Public Utilities Commission, 260 U. S. 48, 54 (1922); In re Veach, 4 F. (2d) 334 (C. C. A. 8th, 1925); Union Trust Co. v. Jones, 16 F. (2d) 236 (C. C. A. 4th, 1926); United States v. Columbia River Packers' Ass'n, 11 F. Supp. 675 (D. Ore. 1935); Livingston v. Southern Surety Co., 262 Mich. 438, 247 N. W. 712 (1933). But see Johnson v. Manhattan Ry. Co., 289 U. S. 479, 496 (1933).

43. Hill v. Wilson, 210 Fed. 200 (C. C. A. 5th, 1914); Leaver v. K. & L. Box Co., 6 F. (2d) 666 (N. D. Cal. 1925); Weatherby v. Kent Circuit Judge, 194 Mich. 46, 160 N. W. 611 (1916); Fleming v. Larkin, 197 App. Div. 624, 189 N. Y. Supp. 412 (1st Dep't, 1921).

44. The amicus curiae, ancient figure in courts of law [Count of Warwick's Case, Y. B. Hil. 4 Hen. VI, 16 (1426); The Prince's Case, 8 Co. 1, 15a, 29a (1606)] has become increasingly important in reconciling the theory of a constitutional law pricked out in private cases with the manifest interest of the government in the constitutionality of its statutes. Cf. cases cited in In re American States Public Service Co., 12 F. Supp. 667, 677 (D. Md. 1935); Brooks v. Southern Pac. Rr. Co., 148 Fed. 986 (C. C. W. D. Kan., 1906); Ex parte Randolph, 20 Fed. Cas. No. 11,558, 242 (C. C. Va. 1833). And see Florida v. Georgia, 17 How. 478, 495 (U. S. 1854). In United States v. Lee, 106 U. S. 196, 197 (1882), an amicus curiae was apparently allowed to take an appeal. But for the general limitations of amicus curiae's status, see note 109, *infra*.

from expending the debtor's assets in compliance with an unconstitutional statute. Furthermore, the danger of anticipated injury to the creditor from the trustee's failure to resist the statute would be avoided by an instruction to the trustee to prosecute the debtor's cause of action against the enforcing officers. The problem of distinguishing conceptually between one cause of action which the creditor asserts against the trustee, and another which the trustee could assert against an administrative officer is collaterally illustrated in the indirect suits directed against PWA expenditure.[45] The typical form of such actions is that a power company sues as taxpayer or franchise holder to enjoin a municipality from accepting funds from the PWA to build a competing power plant, on the ground that the federal spending is unconstitutional under the "general welfare" clause of Art. I, Sec. 8, Cl. 1, of the Constitution, and the Tenth Amendment. Where the administrator of Public Works was not joined as party defendant in such suits, two Circuit Courts of Appeal have held that the legality of the loan or gift from the PWA to the municipality cannot be challenged,[46] the possible impact of the illegal spending on the complainant power company being "indirect" insofar as it affects the suit between the power company and the municipality, which is usually based on the theory of a franchise-holder's immunity against illegal competition.[47]

But even if, in the reorganization cases, a creditor's bill against the trustee could, in proper circumstances, question the legality of proposed action by a government officer against the trustee, it is not at all clear that a creditor's interest in the debtor's estate would be justiciably affected by a reorganization plan based on compliance with a regulatory statute like the Guffey Coal Bill[48] or the Public Utility Holding Company Act.[49] To be qualified to raise the constitutional question, the plaintiff-creditor must indicate an unmistakable and legally protected interest adversely affected by the application of the regulatory statute to the debtor's estate. If qualified to intervene as an interested creditor of a firm in reorganization under the Bankruptcy Act,[50] the plaintiff

45. The results of these suits are tabulated in PWA Release 1507, July 20, 1935 (Pren. Hall. Trade and Industry Service, Par. 40,024), and discussed in (1934) 34 Col. L. Rev. 1359; (1934) 48 Harv. L. Rev. 89; (1934) 12 N. Y. U. L. Q. Rev. 107; (1935) 2 U. of Chi. L. Rev. 470; (1935) 35 Col. L. Rev. 790; (1935) 3 Geo. Wash. L. Rev. 218.

46. City of Allegen v. Consumers Power Co., 71 F. (2d) 477 (C. C. A. 6th, 1934), cert. denied, 293 U. S. 586 (1934); Arkansas-Missouri Power Co. v. City of Kennett, 78 F. (2d) 911 (C. C. A. 8th, 1935); Kansas Utilities Co. v. City of Burlington, 141 Kan. 926, 44 P. (2d) 223 (1935). But see Kansas Gas & Electric Co. v. City of Independence, 79 F. (2d) 32 (C. C. A. 10th, 1935) [on rehearing, the court made clear that it would not discuss the legality of the administrator's conduct until he was made a party to the action. 79 F. (2d) 638]; Missouri Public Service Co. v. City of Concordia, 8 F. Supp. 1 (W. D. Mo., 1934).

And further, even where the administrator of public works was joined as defendant, Missouri Utilities Co. v. City of California, 8 F. Supp. 454 (W. D. Mo. 1934), appeal dismissed, 79 F. (2d) 1003 (C. C. A. 8th, 1935); Washington Power Co. v. City of Coeur d'Alene, 9 F. Supp. 263 (D. Ida. 1934).

47. Under the doctrine of Frost v. Corporation Commission, 278 U. S. 515 (1929); City of Campbell v. Arkansas-Missouri Power Co., 55 F. (2d) 560 (C. C. A. 8th, 1932).

48. 49 Stat. 991, 15 U. S. C. A. § 801 (1935); Comment (1935) 45 Yale L. J. 293.

49. 49 Stat. 838, 15 U. S. C. A. § 79 (1935); Comment (1936) 45 Yale L. J. 468.

50. 48 Stat. 912, 11 U. S. C. A. § 207(f), (d), (e), (i) (1934).

can claim the Act's protection against discrimination and dissipation of assets. But since no regulatory statute on its face requires discrimination against any class of creditors, the plaintiff could not obtain an order settling the legality of the statute on grounds of discrimination in advance of the approval by the creditors and the court of a reorganization plan founded on compliance with the statute;[51] afterwards he is bound by that approval, unless it constitutes a gross abuse of the trial court's discretion, and can contest the result only by collateral argument.[52] If the plaintiff-creditor bases his initial intervention, however, on a complaint that compliance with the regulatory act would so reduce the value of the reorganized company as a going concern that the security of creditors' claims against it would be directly impaired, he is alleging an injury to a right protected by the Bankruptcy Act; but it is an injury which may not exist at all, and will be difficult to prove if it does exist.[53] The injury of which plaintiff-creditors most strenuously complained in the *American States Public Service Co.*[54] suit, constructed on this model, was that the Public Utility Holding Company Bill was an unwarrantable restriction upon the commercial freedom of the firm. But creditors are probably not in a position to make the complaint. The Bankruptcy Act protects them against discrimination and dissipation of assets, but it does not alter their status in the corporation,[55] at least until a reorganization scheme has been effected, and accordingly does not entitle them to assert rights, such as the right, if any, to protection against an unconstitutional statute, which are to be claimed normally by the corporation itself or by its stockholders.[56]

51. In Abrams v. Van Schaick, 293 U. S. 188 (1934), where objection was made on grounds of unconstitutionality to a statute empowering the New York State Superintendent of Insurance, under judicial supervision, to promulgate reorganization plans for insolvent guaranteed mortgage companies, it was said: "whether, if a plan of reorganization is promulgated by the superintendent, it will be approved by the court as required by statute, or whether, if so approved, it will be opposed by certificate holders, or will receive the assent of present appellants, or will operate to deprive them of any asserted constitutional right, are matters of conjecture"; and see Pacific Tel. and Tel. Co. v. Seattle, 291 U. S. 300, 304 (1934).

52. § 77B(g). An order confirming a plan as fair is reviewable by petition to revise in law [Campbell v. Alleghany Corp., 75 F. (2d) 947 (C. C. A. 4th, 1935)] and, if all the terms of the statute are complied with, the trial court's finding of fairness is final. In re Central Funding Corp., 75 F. (2d) 256 (C. C. A. 2d, 1935). Gerdes, *A Fair Plan of Reorganization* (1934) 12 N. Y. U. L. Q. REV. 1; Gerdes, *Constitutionality of Section 77B* (1934) 12 N. Y. U. L. Q. REV. 106.

53. Thus it can be argued that both the Holding Company Act and the Guffey Coal Bill (cf. notes 48, 49 *supra*) would enhance the value of the property securing a bondholder's debt; the Guffey Bill by permitting restriction of output and price-fixing, and the Holding Company Act by strengthening the financial position, and improving the operating structure, of the utility companies. At best, however, the injury would seem conjectural, under the *Abrams* and *Seattle* cases, note 51, *supra*.

54. 12 F. Supp. 667 (D. Md. 1935).

55. For examples of the strictness with which statutory limits on the creditors' interests in the affairs of a debtor corporation are construed, see Commerce Trust Co. v. Woodbury, 77 F. (2d) 478, 488 (C. C. A. 8th, 1935); Matter of Fox Metropolitan Playhouses, 74 F. (2d) 722 (C. C. A. 2d, 1935); Matter of Syndicate Oil Corp., 9 F. Supp. 217 (W. D. N. Y. 1934); In re Prairie Ave. Bldg. Corp., 11 F. Supp. 125 (E. D. Ill. 1935).

56. If the trustee proposes not to comply with the regulatory statute under attack,

And further, even if intervening creditors are accepted as adverse claimants having a sufficient interest to contest and defend the constitutionality of a regulatory act, the resulting suit may be dismissed under the rule of *Chicago & Grand Trunk Ry. Co. v. Wellman*,[57] for the absence of "an honest and antagonistic assertion of rights," if the court feels that the evidence accumulated in the trial represents an inadequate presentation of the facts,[58] or if, on the record, the parties seem unduly friendly,[59] though nominally adverse in interest.[60]

Proper representation of the government would obviate this danger under most circumstances, and the place of the government at trial is the key procedural problem of cases between creditors in this pattern. There are three possible positions in which the government might be represented: as a necessary party,[61] who must be joined; as an interested party who may be allowed

a creditor has a more manifest interest in raising the constitutional issue. He can seek to compel the trustee to comply with the statute on the basis of an imminent and direct loss to the corporation, and the consequent diminution in the value of his securities which would result from non-compliance, through the imposition of fines, taxes, or penalties. Tway v. Glenn, *supra* note 1. But his position, though interested, might still be vulnerable in equity on the ground that a creditor of such standing is not sufficiently interested in the validity of the regulatory statute to be heard as the sole proponent of its validity. Cf. Moor v. Texas & N. O. Rr. Co., 75 F. (2d) 386, 390 (C. C. A. 5th, 1935), cert. dismissed, 80 L. Ed. 358 (1936).

57. 143 U. S. 339, 345 (1892), where it was said that determination of the constitutionality of an act of the legislature, "the ultimate and supreme function of the courts . . ," is "legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversies between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an enquiry as to the constitutionality of the legislative act." Cf. also Corbus v. Alaska Gold Mining Co., 187 U. S. 455, 465 (1903).

58. See Chastleton Corp. v. Sinclair, 264 U. S. 543 (1924); Cincinnati v. Vester, 281 U. S. 439, 448 (1930); Pacific Tel. & Tel. Co. v. Seattle, 291 U. S. 300, 304 (1934); Borden's Co. v. Baldwin, 293 U. S. 194, 213 (1934); Wilshire Oil Co. v. United States, 295 U. S. 100 (1935); Moor v. Texas & N. O. Ry. Co., 80 L. Ed. 358 (1936); Sparks v. Hart Coal Corp., 74 F. (2d) 697 (C. C. A. 6th, 1934); note (1936) 49 HARV. L. REV. 631.

59. Bartemeyer v. Iowa, 18 Wall. 129 (U. S. 1873); Chicago & Grand Trunk Ry. Co. v. Wellman, 143 U. S. 339 (1892); South Spring Hill Gold Mining Co. v. Amador Medean Co., 145 U. S. 300 (1892); California v. San Pablo & Tulare Rr. Co., 149 U. S. 308 (1893); Stearns v. Wood, 236 U. S. 75 (1915); United States v. Hamburg-American Line, 239 U. S. 466 (1916); Moritz v. United Brethrens Church, 244 App. Div. 121, 278 N. Y. Supp. 342 (2d Dept., 1935).

60. Thus, in the *American States Public Service Co.* suit, 12 F. Supp. 667 (D. Md. 1935), a variety of evidence pointing toward the collusiveness of the proceeding appears in the record. The intervening creditor who nominally objected to the expenditure of funds for registration under the Holding Company Act did not even understand that he was party to the action, nor had he ever met Mr. John W. Davis, his attorney. See testimony, Transcript of Record, in C. C. A. 4th, 303-305.

61. Parties are considered necessary to the maintenance of a suit if they have an inseparable property interest is the subject matter, Shields v. Barrows, 17 How. 130, 142 (U. S. 1854); California v. Southern Pac. Ry. Co., 157 U. S. 229, 237 (1895); if a decree in the suit cannot be effective unless they are bound by it, Barney v. Baltimore Court, 6 Wall. 280, 285 (U. S. 1867); McArthur v. Scott, 113 U. S. 340, 392 (1885); if they

to intervene,[62] but who would then be substantially limited in its conduct of the defense;[63] or as an amicus curiae, heard at the discretion of the court.[44] A conclusion that the government is a necessary party in such actions would be the best assurance that these constitutional cases will be tried on a record made under the pressure of a vigorous assertion at trial that the statute is constitutional.

It has recently been held that an administrative officer has a legal interest in the question "of whether or not a court will order him to refrain from performing a duty apparently prescribed by statute,"[64] sufficient to make him a necessary party to a suit raising the question, either because he represents a property interest in the subject matter of the suit (as for example, a tax collector in a suit against a tax) or is necessary to an effective decree.[65] An administrative officer would not, however, be necessary to an effective order directed to the trustee not to comply with a statute, if the order be conceived merely as a measure to conserve the debtor's estate and to concern in the first instance merely the creditors and the trustee, the incidental or subsequent rights of others being protected by their privilege on petition to appear later in the receivership court.[66] But such a view of the issues of the suit is not, in equity, decisive as to whether or not the United States or its officers are necessary parties in suits to overthrow statutes conferring duties of intimate and continued control on administrative bodies. A decree ordering a trustee not to comply with such a statute directly affects the enforcing officers by enjoining the performance of their statutory duties as to the trustee. Accordingly, they should be deemed necessary parties in terms of the rule, as parties directly affected by an adverse decree.[67] But apart from that interest, administrative officers under such statutes should be considered necessary parties if the court is to have a satisfactory factual notion of the impact of the statute on the complainant's affairs. The issue is finally one of "the presence

would necessarily be affected by a decree, Minnesota v. Northern Securities Co., 184 U. S. 199, 245 (1902); Texas v. Interstate Commerce Commission, 258 U. S. 158, 163 (1922); Himes v. Schmehl, 257 Fed. 69 (C. C. A. 3d, 1919); Perez v. Canadian Land & Fur Co., 14 F. (2d) 181 (E. D. La. 1926); or if an adequate presentation of the facts of the case is impossible or impracticable without them, so that it would not be equitable to hear the suit. Commonwealth Trust Co. v. Smith, 266 U. S. 152, 159 (1924).

62. Cole v. Ralph, 252 U. S. 286, 291-292 (1920); United States v. Macintosh, 283 U. S. 605, 615 (1931); see Note (1935) 48 HARV. L. REV. 995.

63. See notes 40-43, *supra*.

64. Chicago M. & St. P. Rr. Co. v. Adams County, 72 F. (2d) 816, 819 (C. C. A. 9th, 1934); and see Bookbinders' Trade Assn. v. Book Mfgrs. Inst., 7 F. Supp. 847 (S. D. N. Y. 1934).

65. Lambert Co. v. Balt. & Ohio Rr. Co., 258 U. S. 377, 382-383 (1922); Venner v. Mich. Cent. Rr. Co., 271 U. S. 127, 130 (1926); Skagit County v. Northern Pac. Ry. Co., 61 F. (2d) 638, 643 (C. C. A. 9th, 1932); Chicago M. & St. P. & P. Rr. Co. v. Adams County, 72 F. (2d) 816 (C. C. A. 9th, 1934).

66. Bosworth v. Terminal Assoc., 174 U. S. 182 (1899); Hoffman v. McClelland, 264 U. S. 552 (1924); Boynton v. Fox West Coast Theatres Corp., 60 F. (2d) 855 (C. C. A. 10th, 1932); Note (1933) 31 MICH. L. REV. 851.

67. Cf. discussion in Waterman v. Canal-Louisiana Bank Co., 215 U. S. 33, 48-49 (1909); Lambert Co. v. Balt. & Ohio Rr. Co., 258 U. S. 377 (1922); Texas v. Interstate Commerce Commission, 258 U. S. 158 (1922).

or absence of equity,"[68] to be settled by a distinction between statutes which are reasonably clear and complete on their face, and statutes whose significance becomes evident only after a considerable exercise of administrative discretion. In cases of this type against complicated regulatory statutes which delegate considerable legislative power to administrative boards, and which, perhaps, either in terms or by implication require findings of fact[69] before exercise of the administrative authority, it would seem reasonable that administrative officers be considered "necessary" to a full presentation and defense of the underlying facts.

The result of *Moor v. Texas and New Orleans Rr. Co.*[70] strongly supports the policy of this contention. There a farmer attacked the validity of the Bankhead Cotton Control Act by seeking a mandatory injunction in his favor against the local railroad, charged under the Bankhead Act with the duty of accepting for shipment only cotton produced in compliance with the act. The Supreme Court upheld the lower courts in denying the injunction, not on the ground that the act was constitutional, but rather because it was considered within the discretion of a court of equity to refuse a mandatory injunction in a suit loosely pleaded and presented upon an inadequate showing of injury and other facts. The Circuit Court of Appeals, in its refusal to reverse the trial court's dismissal of the bill, had given weight to "the absence from the suit of any party defendant having a beneficial interest in resisting the claim asserted, with the probable result of the court being deprived of the benefit of reasonably controversial objections to the granting of the relief sought."[71]

If it is conceded that an equitable decree as to the debtor's right to immunity from an unconstitutional regulatory statute should not be issued without the joinder of the United States or its administrative officers as necessary parties, the elaborate indirection of a suit between creditors as a technique for attacking the statute becomes largely futile. If the conclusion is tenable, at least as to statutes of complicated industrial regulation, the controversy necessary to raise the constitutional question in reorganization must be a controversy against the government. Under this view, the proper answer to the trustee's original petition for instructions is to order him to bring suit against the act, like any other litigant aggrieved by the statute, in a district where service on the appropriate enforcing agents can be conveniently obtained; or to condition further hearings in the reorganization court on the citation of proper administrators.[72]

68. See Niles-Bement-Pond Co. v. Local No. 68, 254 U. S. 77, 80 (1920); Davis v. Henry, 266 Fed. 261, 266 (C. C. A. 6th, 1920).

69. See Mahler v. Eby, 264 U. S. 32, 44 (1924); Wichita Rr. & Light Co. v. Public Utilities Comm., 260 U. S. 48 (1922); Panama Ref. Co. v. Ryan, 293 U. S. 388, 432-433, and Cardozo, J. dissenting at 444-448 (1935). But see Pacific States Box and Basket Co. v. White, 56 Sup. Ct. 159 (1935).

70. 80 L. Ed. 358 (1936), dismissing cert. to 75 F. (2d) 386 (C. C. A. 5th, 1935).

71. 75 F. (2d) 386, at 390 (C. C. A. 5th, 1935); note further Bookbinders' Trade Assn. v. Book Mfgrs. Inst., 7 F. Supp. 847 (S. D. N. Y. 1934).

72. It is now clearly possible for the reorganization court to issue its process over the entire country in order to marshal the debtor's property, and to settle colorable claims to it. Continental Ill. Bank v. Chi. R. I. & P. Ry. Co., 294 U. S. 648, 682 (1935);

But there are possible weaknesses in the reorganization suit as a vehicle for attacking the constitutionality of a regulatory statute more fundamental than collusiveness, absence of necessary parties, or technical frailty of the contesting parties' positions. These generic defects of the reorganization suit are not procedural bars preventing the constitutional question from being raised, but limitations of standing which might confine the scope of the decision in a properly presented suit, and apply with equal force whether the suit is brought as a controversy between creditors or as a direct attack by the trustee against the government.

The Public Utility Holding Company Act of 1935,[73] for example, requires that the plan of reorganization of a holding company in trusteeship under Section 77B of the Bankruptcy Act be approved by the Securities and Exchange Commission, according to criteria of policy set out in the Holding Company Act, before submission to the court. Counsel for the government, as amicus curiae, are arguing in the *American States Public Service Co.* suit that a controversy arising in the course of reorganization proceedings, even if acceptable as a case in controversy, can challenge the propriety of this requirement only as a regulation of reorganization under Art. I, Sec. 8, Clause 4, of the Constitution, and of the federal courts' jurisdiction in reorganization under Art. III, Sec. 1, and not as a regulation of solvent holding companies under Congress' power to regulate interstate commerce.[74] While in its present

In re Greyling Realty Corp., 74 F. (2d) 734 (C. C. A. 2d, 1935), cert. den. sub. nom. Troutman v. Compton, 294 U. S. 725 (1935). But it is not at all clear whether a reorganization court, having possession of the property, and having before it what is in effect a suit for an injunction against the prospective enforcement by government officers of a federal statute, could issue process against persons outside its district in order to settle that incidental controversy affecting the property. No express extension of the jurisdiction to those so placed is evident in the reorganization act, which confers jurisdiction only of the debtor and its property on the reorganization court for "the purposes of the act." If the court cannot serve such persons beyond its district, and if it considers adjudication of the merits impossible without them, its proper conclusion is to order the trustee to sue where service can be obtained on the absent parties. Missouri Pac. Ry. Co. v. Texas & P. Ry. Co., 31 Fed. 862 (C. C. E. D. La. 1887).

73. 49 STAT. 820 [§ 11(b)], 15 U. S. C. A. § 79 K. (f) (1935), interpreted to apply only to companies registered with the S. E. C. before the date on which a receiver or trustee in reorganization is first appointed (S. E. C. Utilities Holding Company Release No. 54, N. Y. Times, Dec. 24, 1935, p. 23, at col. 6), and apparently not requiring that reorganization plans drawn up now comply fully to the ideal of integration which is the central theme of the statute.

74. Cf. Brief of the United States and the Securities and Exchange Commission, Burco v. Whitworth, C. C. A. 4th, Jan. 1936, pp. 136-156. Thus they argue that the relevant parts of the Holding Company Act constitute legislation on the subject of reorganization, to be fitted into the reorganization law, United States v. Jefferson Electric Mfg. Co., 291 U. S. 386, 396 (1934).

Translating the controversy into an argument on the scope of Congress' bankruptcy power does not deny the complainant his ultimate protection of due process. Louisville Bank v. Radford, 295 U. S. 555 (1935). But the requirements that bituminous coal companies in reorganization comply with the Guffey Coal Bill, or that the reorganization plans of holding companies be approved by the Securities and Exchange Commission, seem to be readily defensible as regulations of commercial policy to guide the reorganizaform the Holding Company Act is general and its provisions inseparable, so that it would be proper to annul the parts applying to holding companies in reorganization if in a proper suit it is decided that the statute is unconstitutional in its general application, it does not follow, they contend, that the validity of the statute as a whole under the commerce clause should be settled in a suit whose facts reduce only a minute segment of the act to justiciable form.[75] And since one of the main objects of bringing these suits is decisively to narrow the scope of the interstate commerce clause as a sanction for federal regulation of business and finance, this argument, if tenable,[76] seems a formidable objection to the use of such suits to attack the constitutionality of federal regulatory legislation.

The second generic weakness of a constitutional case raised in reorganization proceedings is in its vulnerability to an answer of estoppel.[77] A person can be estopped to deny the constitutionality of a statute which he has successfully invoked,[78] or under which he has actively accepted benefits.[79] If the

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tion courts in their novel problems of business administration, like sections 77(d), (e), and (f) of the Bankruptcy Act [47 STAT. 1474, 11 U. S. C. A. § 205 (1933)] which give the I. C. C. jurisdiction over reorganization plans for railroads; Section 77 B(e) 2 [48 STAT. 912, 11 U. S. C. A. § 207 (1934)], requiring the approval of state regulatory commissions for the reorganization plans of utility operating companies over which they have jurisdiction; sections 77(o), (p), and (q), and 77 B (l) and (m) which prescribe labor policy for firms in reorganization. The validity of these requirements does not depend on Congress' capacity under the interstate commerce clause to outlaw yellow dog contracts; to guarantee workers freedom to join unions of their choice; or to regulate the affairs of intrastate utility companies. These clauses are clearly regulations of the reorganization process. In re Cleveland & Sandusky Brewing Co., 11 F. Supp. 198 (N. D. Ohio 1935); (1935) 35 COL. L. REV. 1140; (1935) 49 HARV. L. REV. 341; (1935) 45 YALE L. J. 372.

75. Compare Civil Rights cases, 109 U. S. 3 (1883), with Butts v. Merchant's & Miner's Transportation Co., 230 U. S. 126 (1913); and The Employers' Liability Cases, 207 U. S. 463 (1908), with El Paso & Northeastern Ry. Co. v. Gutierrez, 215 U. S. 87 (1909).

76. But in the Employer's Liability cases, although the person injured was injured when engaged in interstate commerce, the act was held invalid because it concerned those not in interstate commerce as well. 207 U. S. 463, 489 (1908). Similarly, the issue of constitutionality was decided when the complainant was not injured by the alleged unconstitutionality of the statute, in Truax v. Corrigan, 257 U. S. 312, 350 (1921); United States v. Butler, 56 Sup. Ct. 312 (1936) (tax bad on complaint of taxpayer for its restrictive consequences upon the farmers to whom the tax receipts were given).

77. See Note (1934) 34 COL. L. REV. 1495; Note (1934) 48 HARV. L. REV. 988, for general discussion of estoppel to raise a constitutional issue.

78. Hurley v. Commission of Fisheries, 257 U. S. 223 (1921); Booth Fisheries v. Industrial Commission, 271 U. S. 208, 211 (1926); United Fuel Gas Co. v. Railroad Commission, 278 U. S. 300 (1929); Buck v. Kuykendall, 267 U. S. 307, 316 (1925) (unsuccessful effort to invoke statute does not estop attack on its constitutionality); see also Moor v. Texas & N. D. Rr. Co., 75 F. (2d) 386, 389 (C. C. A. 5th, 1935), cert. dismissed, 80 L. Ed. 358 (1936). *Contra:* Abie State Bank v. Bryan, 282 U. S. 765, 776 (1931).

The S. E. C. has ruled that registration under the Holding Company Act will not be considered a waiver of constitutional rights. S. E. C., Holding Company Act Rule 4, Oct. 9, 1935, amended Nov. 22, 1935.

79. St. Louis Malleable Casting Co. v. Prendergast Construction Co., 260 U. S. 469 (1923); Buck v. Kuykendall, 267 U. S. 307, 317 (1925); United States v. McIntosh, 2 F.

sections of a regulatory statute applying to reorganization, and challenged in the course of reorganization proceedings, be accepted as legislation on the subject of reorganization supplementary to Section 77B,[80] estoppel may be an available defense against any plaintiffs who have actively submitted their interests to the reorganization proceedings. The estoppel rule requires those who have sought and accepted the benefits of the reorganization statute to accede to the terms on which Congress has offered them the privilege.

But while invocation and benefit are two accepted bases for a valid estoppel, the rejoinder is available that the regulatory statute under attack, if an act on the subject of reorganization, is separable from the statutes on the subject which have been invoked, and under which benefits have been accepted. The precedent of *Frost v. Corporation Commission*[81] may allow the separability argument to defeat the estoppel, in cases in which the petition in reorganization had been allowed before the regulatory statute became operative. It would seem, however, that the plaintiffs, having submitted to the reorganization jurisdiction of the federal courts, are not in position to complain of changes in their remedies duuring trial.[82] And when the adjudication in bankruptcy comes after the regulatory statute has gone into effect, the answer of separability may be even less effective in blocking an estoppel, for there are cases strongly stated which reject the answer of separability, and deny complainants the right to attack scattered parts of a regulation which they have invoked for other purposes.[83] Nor could complainants in these circumstances invoke the authority of recognized exceptions to the rule of estoppel, like the foreign corporation cases,[84] where it has been held that corporations are not estopped from attacking, as separable, conditions imposed upon them by local statutes for the privilege of doing business within a state. The reason for the exception in those cases seems to be that action by others of better standing is unlikely or impossible.[85] Since the recent federal statutes of industrial regulation can easily be presented for adjudication in other suits, estoppel to deny the constitutionality of the regulatory statute despite a defense of separability would seem a plausible result against plaintiffs who have actively accepted the jurisdiction of the court for other purposes. An independent cred-

Supp. 244, 253-257 (E. D. Va. 1932) app. dismissed, 70 F. (2d) 507 (C. C. A. 4th, 1934); Shepherd v. Mount Vernon Trust Co., 269 N. Y. 234, 244, 199 N. E. 201, 204 (1935).

80. See Note 74, *supra*.

81. 278 U. S. 515, 527 (1929). But see Oregon & C. Rr. Co. v. United States, 238 U. S. 393, 424 (1915).

82. Baltimore Co. v. Nesbitt, 10 How. 395, 400-401 (U. S. 1850); South Carolina ex. rel. Trenholm v. Gaillard, 101 U. S. 433 (1879); Flanigan v. Sierra County, 196 U. S. 553 (1905); Louisville & N. R. Co. v. Western Union Tel. Co., 268 Fed. 4 (C. C. A. 6th, 1920), cert. denied, 254 U. S. 650 (1920).

83. Electric Co. v. Dow, 166 U. S. 489 (1897); Grand Rapids & Ind. Ry. v. Osborn, 193 U. S. 17 (1904); Pullman Co. v. Kansas, 216 U. S. 56, 67 (1910).

84. Looney v. Crane Co., 245 U. S. 178, 188 (1917); Hanover Ins. Co. v. Harding, 272 U. S. 494 (1926); Power Mfg. Co. v. Saunders, 274 U. S. 490 (1927); Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389, 400 (1928). See Merrill, *Unconstitutional Conditions* (1929) 77 U. OF PA. L. REV. 879; Note (1929) 42 HARV. L. REV. 676.

85. See Note (1935) 48 HARV. L. REV. 988, 994.

itor moving the dismissal of the whole proceeding, however, might not be so estopped.[86]

Compulsion is also a good rejoinder to a plea of estoppel when the alternative to compliance is so dangerous or so costly that invoking the statute before attacking it can be excused on grounds of duress.[87] While there are undoubtedly situations in which compulsion would excuse a measure of compliance with recent coercively expensive regulatory statutes,[88] the argument is not available to those whose sole act of invocation has been to enter upon reorganization proceedings. The alternative to accepting reorganization on the terms proffered by Congress was not a destructive loss in fines or taxes, but a choice among the other insolvency remedies.[89]

Stockholders' Suits

The basic legal problems of the stockholders' suit and the barriers which make it an uncertain instrument for obtaining an opinion on the constitutionality of a statute purporting to regulate the corporation, inhere in the general theory of the stockholder's rights of suit. The doctrine usually stated is that stockholders in corporations can on proper averments[90] assert three kinds of justiciable rights against it: (a) an individual right,[91] arising out of a direct breach by the corporation of contractual obligations to the individual shareholder, as for refusal to allow inspection of the corporate books, denial of the right to vote, failure to pay declared dividends, or prospective ultra vires acts;[92] (b) the second is a minority right asserted by representative stockholders in a class suit,[93] founded on a breach by the management of its fiduciary obligation to the minority, as for intra-corporate discriminations against the minority interest;[94] (c) the third, and for this discussion the most important, is a deriva-

86. Cf. Shepherd v. Mount Vernon Trust Co., 269 N. Y. 234, 199 N. E. 201 (1935).

87. See Union Pac. Rr. Co. v. Public Service Comm., 248 U. S. 67 (1918); Abie State Bank v. Bryan, 282 U. S. 765 (1931); (1919) 32 HARV. L. REV. 579.

88. See e.g. the Guffey Coal Bill, 49 STAT. 993, 15 U. S. C. A. § 804 (1935); and the Holding Company Act, 49 STAT. 812, 15 U. S. C. A. § 79d (1935).

89. Not only bankruptcy or equity receivership, but liquidation under Section 77B(k).

90. Equity Rule 27, 226 U. S. 656 (1912), 28 U. S. C. A. 17 (1928), following old Equity Rule 94, 104 U. S. ix (1882); Hawes v. Oakland, 104 U. S. 450, 461 (1882); Wathen v. Jackson Oil Co., 235 U. S. 635 (1915); United Copper Co. v. Amalgamated Copper Co., 244 U. S. 261, 264 (1917); Watts v. Vanderbilt, 45 F. (2d) 968 (C. C. A. 2d, 1930).

91. See Cheatham v. Wheeling & L. E. Ry. Co., 37 F. (2d) 593 (S. D. N. Y. 1930); Brown v. Irving Pitt Mfg. Co., 316 Mo. 1023, 292 S. W. 1023 (1927); Travis v. Knox Terpezone Co., 215 N. Y. 259, 109 N. E. 250 (1915); ROHRLICH, LAW AND PRACTICE IN CORPORATE CONTROL (1933) 142. The distinction between a personal and a derivative action has been much discussed. (1929) 42 HARV. L. REV. 705; Comment (1929) 38 YALE L. J. 965.

92. General Inv. Co. v. Lake Shore & M. S. Ry. Co., 250 Fed. 160 (C. C. A. 6th, 1918); 3 COOK ON CORPORATIONS (8th ed. 1923) § 680. But see Continental Securities Co. v. Interborough Rapid Transit Co., 207 Fed. 467, 472 (S. D. N. Y. 1913).

93. 3 COOK ON CORPORATIONS (8th ed. 1923) § 662; cf. Dresdner v. Goldman Sachs Corp., 240 App. Div. 242, 269 N. Y. Supp. 360 (2d Dep't, 1934).

94. Southern Pac. Co. v. Bogert, 250 U. S. 483 (1919); Keith v. Radway, 220 Mass. 532, 108 N. E. 498 (1915); Barnett v. Ground, 304 Mo. 593, 263 S. W. 836 (1924).

tive or corporate right of action asserted for the corporation by a minority, as representatives of the entire corporate body, and recognized, in equity,[95] as based on a breach of trust by the management to the whole corporation in failing to prosecute certain corporate causes of action, either against fraudulent officers[96] or against persons outside the corporation.[97] The derivative action represents a controversy between three groups of parties: the dissenting stockholders, the beneficiary corporation, and the third persons against whom the stockholders are allowed to litigate the corporate right. Two sets of issues are presented: (a) a breach of trust by the management towards the corporation in failing to assert the corporate claim; and (b) the validity of that claim against third persons.

If the decision not to litigate the corporate right is considered a matter of business discretion, and not a breach of trust, the judgment of the majority, even if in error, binds the minority.[98] Conversely, it has been held that the directors were guilty of a breach of trust in failing to press a questionable right of action, and the stockholders held able to assert the corporate claim, although final adjudication revealed that the directors were right in viewing the corporate claim as invalid.[99] The distinction between business discretion and breach of trust seems to be based on what might reasonably have been anticipated as a consequence of the decision not to sue. If that decision inevitably involved uncompensated losses to the corporation,[100] it is classed as a breach of trust; if the directors could reasonably have believed that their decision not to sue did not on its face carry with it substantial losses to the corporation, or if there was a sensible expectation that a loss might be justified by a subsequent gain of money or good will,[101] the decision not to assert an apparent right of action is considered honest error at worst, not breach of trust, and cannot be corrected by a stockholder's suit. Thus, refusal to test the constitutionality of questionable statutes has been called a breach of trust to the corporation,[102] although refusal to litigate a questionable or even an assured right of action at private law is an exercise of sound business acumen.[103]

95. United Copper Securities Co. v. Amalgamated Copper Co., 244 U. S. 261, 264 (1917); Glenn, *The Stockholder's Suit* (1924) 33 YALE L. J. 580, 582.

96. Rogers v. Hill, 289 U. S. 582 (1933); Watts v. Vanderbilt, 45 F. (2d) 968 (C. C. A. 2d, 1930); Dresdner v. Goldman Sachs Co., 240 App. Div. 242, 269 N. Y. Supp. 360 (2d Dept., 1934).

97. Hawes v. Oakland, 104 U. S. 450 (1881); Del. & Hudson Co. v. Albany & Susquehanna Rr. Co., 213 U. S. 435 (1909); Isaac v. Marcus, 258 N. Y. 257, 179 N. E. 487 (1932); cf. cases in notes 16-19, *supra.*

98. Hawes v. Oakland, 104 U. S. 450, 462 (1881); Corbus v. Alaska Gold Mining Co., 187 U. S. 455 (1903); Post v. Buck's Stove & Range Co., 200 Fed. 918 (C. C. A. 8th, 1912). And see Brandeis, J., concurring in Hill v. Wallace, 259 U. S. 44, 73 (1922).

99. Brushaber v. Union Pac. Rr. Co., 240 U. S. 1 (1916); Smith v. Kansas City Title Co., 255 U. S. 180 (1920); Ashwander v. T. V. A., 78 F. (2d) 578 (C. C. A. 5th, 1935).

100. Greenwood v. Freight Co., 105 U. S. 13, 16 (1881).

101. Hawes v. Oakland, 104 U. S. 450 (1881); and see Hill v. Wallace, 259 U. S. 44, 74 (1922).

102. Cf. cases listed in notes 16, 18, 99, *supra.*

103. United Copper Securities Co. v. Amalgamated Copper Co., 244 U. S. 261, 263-264 (1917); Post v. Buck's Stove & Range Co., 200 Fed. 918 (C. C. A. 8th, 1912).

So far, stockholders' derivative suits of this type have been recognized on the failure of corporations to contest the constitutionality of taxes, or of federal expenditure. The question which recent cases suggest is whether the doctrine will be extended to permit such suits to question the validity of regulatory or proprietary programs from which the injury to the corporation is less tangible than the payment of a tax, and is more manifestly balanced by advantages accruing from compliance with the disputed statute. Those defending the Guffey Bill[104] in a stockholder's suit, for example, can argue that compliance would benefit the corporation by the assurance of high, stable prices and more pacific relations with its employees. If the court agrees that the directors in good faith and by the exercise of reasonable intelligence could have anticipated such a result, it can call their decision to waive a possible constitutional immunity from regulation[105] a matter of business discretion, and refuse to decide the constitutional question.

But even in circumstances where the corporate decision to submit to an unconstitutional regulatory statute is acknowledged to be a breach of trust, the resulting stockholder's suit resisting the statute faces jurisdictional barriers before the constitutional issue can be discussed.

The most considerable of these barriers is the problem of parties. The right which stockholders are asserting in their attack on an unconstitutional statute is a corporate right, and their suit therefore is derivative in substance,[106] requiring two groups of necessary defendants, the corporation itself, defendant as to its breach of trust, but beneficiary of any victory by the plaintiffs;[107] and the parties against whom the corporation has a right of action,—defaulting officers of the corporation, if the case can be considered an intra-corporate controversy, or administrative officers of the government, if the derived corporate right at the heart of the controversy is viewed realistically as one against government officers for protection or a declaration of rights. The assertion is that by failing to resist the statute the directors propose a misappropriation of corporate funds or powers; the element of illegality in the situation is not that the plan of behavior is ultra vires the corporation itself,[108] but that

104. See notes 48, 53, *supra*.

105. Cf. discussion of estoppel, pp. 663-665 *supra*.

106. Wathen v. Jackson Oil & Refining Co., 235 U. S. 635, 639 (1915).

107. Davenport v. Dows, 18 Wall. 626 (U. S. 1873); Geer v. Mathieson Alkali Works, 190 U. S. 428 (1903); McNeely v. DuPont de Nemours Powder Co., 263 Fed. 252 (D. Del. 1920). See Winer, *Jurisdiction over Beneficiary Corporation in Stockholders' Suits* (1935) 22 VA. L. REV. 153.

108. The usual ultra vires problem is treated in the cases listed in note 92, *supra*. In the T. V. A. case, however, [Ashwander v. T. V. A., 78 F. (2d) 578 (C. C. A. 5th, 1935)] preferred stockholders sued the Alabama Power Corp. and the T. V. A., parties to an executory contract for the sale of transmission lines, for rescission of the contract, on the ground that the T. V. A. had no power to make it. This unusual use of the ultra vires concept [see Connolly v. Union Sewer Pipe Co., 184 U. S. 540 (1902); Kerfoot v. Farmers' Bank, 218 U. S. 281 (1910); Cleveland Ry. Co. v. United States, 275 U. S. 404, 414 (1928); Hinds County v. Natchez T. & C. Rr. Co., 85 Miss. 599, 38 So. 189 (1905); Hitchcock v. Mortgage Securities Corp., 95 Fla. 14, 116 So. 244 (1928). *Contra:* National Finance Co. v. Creamer, 156 Minn. 79, 194 N. W. 108 (1923)] is the basis of the corporate

the claim which, under an act of Congress, administrative officers are threatening to assert to the funds or powers at issue is invalid.

Both the *Income Tax Case*[109] and *Brushaber v. The Union Pacific Rr. Co.*[110] were squeezed into the form of intra-corporate controversies, and in those cases the constitutional question was decided by indirection with the United States in court as amicus curiae and not as defendant.[111] In both these cases the court explained, rather weakly, that the relief sought was only a restraint on voluntary payment of the unconstitutional tax by the corporation, not on "the assessment and collection themselves."[112] If the court in these cases had ordered the corporation to contest the tax in proper form, the relief would have been appropriate to the facts and theory of the action; but the opinion in each case settled the constitutionality of the tax, thus enjoining the tax collector by stare decisis, despite his absence as a party. The paradoxical results can be explained either on grounds of expediency, the court and the country being anxious for an adjudication, or on the ground that the government, by express waiver of jurisdictional objections,[113] was in effect consenting to be sued. For in those cases the government argued its side fully, and specifically waived its objections to any jurisdictional defects in the cases; all relevant facts and issues were canvassed before the court, and there was no question of the court's being adequately informed as to the problems of the case.

It seems unlikely that stockholders will be supported by these precedents in an effort to settle the constitutionality of a regulatory statute by an intra-corporate stockholder's suit, without the government as a party,[114] if the government does not come into court and consent to trying the issues in that suit.

right of action which the plaintiffs are asserting. The usual question of breach of trust is perhaps further complicated in this case by the fact that complainants are preferred and not common stockholders.

109. 157 U. S. 429 (1895). The court further remarked that the adequacy of the remedy at law, payment under protest, urged by the government as amicus curiae (469), was not presented below, nor now presented by a party to the suit, and doubted (554) whether it could be entertained at all at that stage of the proceeding. "Under these circumstances, we should not be justified in declining to proceed to judgment upon the merits." Payment under protest, however, is usually considered an adequate remedy at law in a suit for an injunction against a tax. Stratton v. St. Louis S. W. Ry. Co., 284 U. S. 530 (1932).

110. 240 U. S. 1 (1916). And see Stanton v. Baltic Mining Co., 240 U. S. 103 (1916).

111. But the Supreme Court has refused to hear cases when an indispensable party appeared as amicus curiae and earnestly sought an adjudication of rights. California v. Southern Pac. Co., 157 U. S. 229, 237, 262 (1895).

112. Pollock v. Farmers' Trust Co., 157 U. S. 429, 554 (1895).

113. Ibid, 469, 500, 554.

114. Bookbinders' Trade Assn. v. Book Mfgrs. Inst., 7 F. Supp. 847 (S. D. N. Y. 1934). In the following stockholders' suits, representatives of the government's view were parties to the suit: Dodge v. Woolsey, 18 How. 331 (U. S. 1856); Hawes v. Oakland, 104 U. S. 450 (1881); Greenwood v. Freight Co., 105 U. S. 13 (1881); Smith v. Kansas City Title Co., 255 U. S. 180 (1921) (Federal Land Bank intervened); Hill v. Wallace, 259 U. S. 44 (1922); Foote v. Linck, 9 Fed. Cas. No. 4,913, 366 (C. C. D. Ohio, 1853); Paine v. Wright, 18 Fed. Cas. No. 10,676, 1010 (C. C. D. Ind. 1855); Parmley v. St. Louis, I. M. & S. Rr. Co., 18 Fed. Cas. No. 10,767, 1223 (C. C. E. D. Mo. 1874); Dinsmore v. Southern Exp. Co., 92 Fed. 714 (S. D. Ga. 1899).

For the arguments of doctrine and policy against the adjudication of cases on records made without full representation at trial of indispensable parties are directly applicable to suits against regulatory statutes. Trial and the trial record may be of less importance in a suit against some types of tax than in one against a statute of industrial regulation. The constitutionality of the tax may sometimes well be decided by a verbal comparison of the tax statute with the Constitution;[115] but where the question in issue at trial and on appeal is the validity of a comprehensive regulatory statute as a reasonable regulation of interstate commerce, the decision must be powerfully influenced by facts about the business regulated, the detail of administrative practice, and the exercise of administrative discretion. Under such circumstances stockholders' suits should be treated strictly as raising two rights of action, the stockholder's against the corporation for breach of trust in failing to sue, and the corporation's against government officials for relief from an unconstitutional statute; hence full joinder from the beginning of the proper administrative officers should be required.

But if the theory of a derivative suit is to be enforced in stockholders' attacks on the constitutionality of statutes, jurisdiction would have to be obtained over the government as well as the corporation. The two groups of defendants may be in different districts, and if they are unwilling to cooperate in a test case, the suit fails for want of service. But in most such stockholders' suits the beneficiary corporation will accompany the stockholders to a district where service on proper governmental defendants can be secured. The problem of jurisdiction in these cases is a common one in suits against government officials. Under the familiar circular rule, if the statute is unconstitutional, service on a responsible administrator is sufficient,[116] although suit is against the United States; and it fails for lack of consent, if the officers are acting within the scope of their authority under a constitutional statute.[117] In many instances, the District of Columbia is the only district in which to bring suit against statutes in advance of their enforcement, unless local officers, like tax collectors and district attorneys, are given duties under them.[118]

A further jurisdictional pitfall of stockholders' suits, even when the government is joined as a party, is their propensity to go off on a question of corporate power under state law,[119] especially when determining whether or not

115. But see dissent by Mr. Justice Stone in Heiner v. Donnan, 285 U. S. 312, 332 (1932), and compare with the statement in United States v. Butler, 56 Sup. Ct. 312, 318 (1936), by Mr. Justice Roberts: "When an act of congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the Statute which is challenged and to decide whether the latter squares with the former."

116. Colorado v. Toll, 268 U. S. 228 (1925); see Ex parte La Prade, 289 U. S. 444 (1933); comment (1936) 22 VA. L. REV. 316.

117. Ferris v. Wilbur, 27 F. (2d) 262 (C. C. A. 4th, 1928).

118. Hill v. Wallace, 259 U. S. 44 (1922). But see Judge Caffey's decision in Consolidated Gas Co. v. Securities Exchange Commission, N. Y. Times, Jan. 4, 1936, p. 23 at col. 5.

119. Cf. dissent, per Holmes, J., in Smith v. Kansas City Title Co., 255 U. S. 180, 213-215 (1921).

the directors committed a breach of trust in complying with the act. Thus, by basing the decision on an unnoticed clause of the state corporation law, the court avoids the constitutional question altogether.[120] Moreover, if the supreme court of the state of corporate domicile, (assuming it to be different than the state in which suit is brought) has not yet passed upon the problem, and the matter can be called novel or complicated, the case is dismissed,[121] and left in an impasse until all its jurisdictional elements can be recombined in a proper district.

Despite a rather superficial strategic appeal of the form of action, there seems now[122] to be no cogent reason for bringing an attack against a federal regulatory statute in a stockholder's suit. Straightforward injunction[123] or declaratory judgment[124] proceedings brought by the corporation against the government would raise the issue as quickly, and with considerably less risk of procedural dismissal.

Conclusion

The limitations which the traditional case-concept may impose on the institution of judicial review are apparent in the recent crop of indirect attacks on the constitutionality of federal statutes. While the problem of adequate representation for the government in these suits might be solved by including at the end of such statutes, as separability clauses, now are inserted, provisions prescribing the place and the proper party defendant for all actions involving the statute,[125] there would even then remain the larger question of the place in public constitutional law of private-law concepts like "interest," "controversy," and "cause of action."[126] Although one function of the rules is to assure the courts an adequate presentation of facts and issues in each case, they operate paradoxically to prevent settlement of the constitutional

120. As in Santa Clara County v. Southern Pac. Rr. Co., 118 U. S. 394 (1886); San Bernadino County v. Southern Pac. Ry. Co., 118 U. S. 417 (1886). Cf. concurring opinion by Mr. Justice Field, at 422.

121. Rogers v. Guaranty Trust Co., 288 U. S. 123 (1933).

122. Rickert Rice Mills v. Fontenot, 56 Sup. Ct. 374 (1936). Field, *Recovery of Illegal and Unconstitutional Taxes* (1932) 45 HARV. L. REV. 501; Lewinson, *Restraining the Collection and Assessment of a Federal Tax* (1926) 14 CALIF. L. REV. 461; Miller, *Restraining the Collection of Federal Taxes and Penalties* (1923) 71 U. OF PA. L. REV. 318; (1923) 37 HARV. L. REV. 255; (1932) 45 HARV. L. REV. 1221; (1928) 38 YALE L. J. 122.

123. Hume Sinclair Coal Co. v. Nee, 12 F. Supp. 801 (W. D. Mo., 1935); Tway v. Glenn (W. D. Ky. 1935), 3 U. S. L. W. 219, cert. granted, 56 Sup. Ct. 371 (1936); Royal Farms Dairy v. Wallace, 8 F. Supp. 975 (D. Md. 1934); Columbus Milk Producers' Coop. v. Wallace, 8 F. Supp. 1014 (N. D. Ill. 1934); Stout v. Pratt, 12 F. Supp. 864 (W. D. Mo. 1935); Lockwood, Maw, and Rosenberry, *The Use of the Federal Injunction in Constitutional Litigation* (1930) 43 HARV. L. REV. 426.

124. Black v. Little, 8 F. Supp. 867 (E. D. Mich. 1934); Penn Bros. v. Glenn, 10 F. Supp. 483 (W. D. Ky. 1935); (1935) 44 YALE L. J. 1451; Note (1932) 45 HARV. L. REV. 1089; Comment (1932) 42 YALE L. J. 1195.

125. Compare 38 STAT. 208, 220 (1913), 28 U. S. C. A. § 208, § 211. Lambert Co. v. Balt. & Ohio Rr. Co., 258 U. S. 377, 381-382 (1922); Texas v. Interstate Commerce Commission, 258 U. S. 158 (1922). The question might remain, however, whether such a clause would bind the courts in considering the constitutional validity of the statute, rather than the statutory validity of subsequent administrative conduct.

126. Cf. FIELD, EFFECT OF AN UNCONSTITUTIONAL STATUTE (1935) ch. XII.

problem when information is fully before the court, and when all parties are eager for a decision.[127]

In the adaptation of society to the aggressive and expanding power of judicial review, the first problem requiring judicial and political decision is what to do about the constitutional rule that the courts can pass on the constitutionality of governmental conduct only as an incident of their judicial capacity to settle cases. The impatience of common sense[128] demands that the Supreme Court be treated openly as a Supreme Council of government with final veto power, and required to give quick, informal, and perhaps advisory opinions on constitutional questions, as an obvious antidote for the confusion of recent history. This policy demands clarity of constitutional power at any price, a position likely to provoke more problems than it could solve. The advisory opinion has not been conspicuously satisfactory where tried;[129] it strains judicial imagination to contemplate a statute outside a familiar context of tangible facts, and the result of advisory holdings might be more adverse to governmental authority than if the courts waited for several years while the statute under attack took on meaning and vitality from its administrative application. Moreover, adverse advisory opinions, coming before the country could make up its mind about the desirability of statutes, would leave a sense of public frustration more resentful than the present response to the Supreme Court's New Deal decisions, and might provoke a more violent movement to curb the political powers of the Supreme Court. A middle opinion advocates a continuance of the present practice, regarding the familiar rules of judicial review as convenient instruments of discretion to excuse the dismissal of structurally doubtful cases which the court prefers not to decide. But a considerable group of liberals finds in a scrupulously conservative adherence to rules of procedure, jurisdiction, and judicial self-restraint a substantial protection against excessive intervention by the judges into areas hitherto reserved to political decision.[130] The classical theory of judicial review, confining opinions strictly to the technical limits of each case, is warmly defended as necessary to a discreet and tolerable exercise by the courts of their supremacy in the American political system. Events may require a choice among the competing policies if judicial power continues its present tendency to expand.

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127. Santa Clara County v. Southern Pacific Ry. Co., 118 U. S. 394 (1886); San Bernadino County v. Southern Pacific Ry. Co., 118 U. S. 417 (1886); California v. Southern Pacific Ry. Co., 157 U. S. 229 (1895); United States v. Anchor Coal Co., 279 U. S. 812 (1929); Abrams v. Van Schaick, 293 U. S. 188 (1934). But see Crane v. Helvering, 76 F. (2d) 99 (C. C. A. 2d, 1935).

128. Cf. Arnold, *Trial by Combat and the New Deal* (1934) 47 Harv. L. Rev. 913, 944; Field, op. cit. *supra* note 126, ch. XII.

129. See Clovis and Updegraff, *Advisory Opinions* (1928) 13 Iowa L. Rev. 188; Hudson, *Advisory Opinions in National and International Law* (1924) 37 Harv. L. Rev. 970; Comment (1936) 5 Ford. L. Rev. 94.

130. See Frankfurter and Hart, *The Business of the Supreme Court at October Term, 1934* (1935) 49 Harv. L. Rev. 68, 90; Corwin, *The Schechter Case, Landmark or What?* (1936) 13 N. Y. U. L. Q. Rev. 151; Powell, *Commerce, Pensions, and Codes* (1935) 49 Harv. L. Rev. 1, 193. Further, Elliott, The Need for Constitutional Reform (1935) ch. IX; Lewinson, *Limiting Judicial Review by Act of Congress* (1935) 23 Calif. L. Rev. 591.

RESALE PRICE MAINTENANCE UNDER STATE STATUTE

SINCE his release from code requirements under the NRA,[1] the retail price-cutter has been subjected to new restrictions by several states under the so-called "Fair Trade Acts," which purport to legalize the maintenance of resale prices by producers.[2] These statutes, uniformly worded in nine of the eleven states in which they have been passed, include two main features.[3] In the first place, they provide that contracts shall not be invalid so far as state laws are concerned because they require the vendee to resell at prices stipulated by the vendor or to sell only to such persons as will contract in turn to sell only at those prices.[4] Such contracts, however, must relate to trademarked or branded commodities which are "in fair and open competition with other commodities of the same general class produced by others," and are not operative in cases of liquidation sales, sales of damaged goods, or forced sales by court officers.[5]

1. Under NRA, price cutting "below cost" and the use of "loss-leaders" were regulated. General Code of Fair Competition For The Retail Trade Art. IX, 1 (c), Art. VIII. Most of the industrial codes drafted thereunder provided elaborately for the determination of costs and fixed percentages above cost, below which retail sales could not be made. This policy proved impracticable and difficult of enforcement. See Chicago Flexible Shaft Co. v. Katz Drug Co., 6 F. Supp. 193 (D. Del. 1934). See also HARING, RETAIL PRICE CUTTING (1935) 83-84, 216-224. Only a few of the industrial codes provided for actual price maintenance. MAYERS, A HANDBOOK OF NRA (2d ed. 1934).

2. A number of attempts to get similar legislation passed by Congress have been made. See Miller, *The Maintenance of Uniform Resale Prices* (1914) 63 U. OF PA. L. REV. 22. The most important was the Capper-Kelley bill introduced in the 71st Congress, 1926, which was quite similar to the acts here under discussion except that the compulsory features of the present acts were not involved. See HARING, RETAIL PRICE CUTTING (1935) Appendix B; NOTE (1933) 10 N. Y. U. L. Q. REV. 502.

3. CAL. GEN. LAWS (Deering, 1931) Vol. III, Act. 8782, §§ 1-5, amended by CAL. GEN. LAWS (Deering, Supp. 1933) § 1½; ILL. REV. STAT. (1935) c. 140, §§ 8-11; Iowa Sess. Laws 1935, c. 106, §§ 1-6; Md. Sess. LAWS 1935, c. 212, §§ 106-9; N. J. Sess. Laws 1935, c. 58, §§ 1-6; N. Y. Sess. Laws 1935, c. 976, §§ 1-6; Ore. Sess. Laws 1935, c. 295, §§ 1-7; Pa. Sess. Laws 1935, No. 155, §§ 1-6; Wash. Sess. Laws 1935, c. 177 §§ 1-7. The latter statute contains a preamble reciting the purposes of the act. CONN. GEN. STAT. ANN., c. 135a, § 962, a law passed in 1935, makes it unfair competition for retail druggists to sell any drug sundries below the manufacturer's list price except in certain enumerated instances. Wis. Sess. Laws 1935, c. 52, §§ 1-8 has annexed to it a provision allowing complaints to be made as to the unreasonableness of any price fixed by a producer under the "Fair Trade Act." Such complaints may be heard and adjudged by the Department of Agriculture and Markets. For a general discussion of these statutes, see Legislation (1936) 36 COL. L. REV. 293.

4. The latter clause in the statutes reads as follows: that a contract shall not be illegal which provides "That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee". Obviously the provision was erroneously drafted. See Martin, *The Fair Trade Act* (1936) 5 FORD. L. REV. 50.

5. The General Code of Fair Competition for the Retail Trade under the NIRA specified a number of other circumstances which would permit a merchant to dispose of his goods at less than the stipulated price level. See Art. VIII, § 2a. Compare the Connecticut law, *supra* note 3. The present acts have been criticized as not leaving enough leeway to a retailer to enable him to realize cash in cases of emergencies by turning over his stock at cut prices.

In the second place, the statutes impose adherence to such prices on non-contracting parties by providing that "Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision [summarized above] whether the person so advertising, offering for sale or selling is or is not a party to such a contract is unfair competition and is actionable at the suit of any person damaged thereby."[6]

I

The first provision raises relatively few and minor problems. In the absence of statute, there has been a difference of judicial opinion as to whether such contracts are valid.[7] State anti-trust laws caused further diversity of results.[8] While the common law early developed a policy disfavoring restraints on alienation,[9] a vendor was allowed to impose reasonable restraints on a vendee's use of the property sold. A restraint was considered reasonable if it was merely collateral in purpose to the protection of a property right of the vendor.[10] Thus,

6. Distributors in contract relations with the producer may be damaged by being undersold, in that, being bound by their contracts, they are unable to meet the competition. But the producer is also a proper party to bring the action, and so far all the actions which have been brought under the statutes have been brought by producers. See note 26, *infra*. That the use of the term "unfair competition" is proper, however, as applied to price cutting in its effect on the producer see Rogers, *Predatory Price Cutting as Unfair Trade* (1913) 27 HARV. L. REV. 139. Compare the opposite view to the effect that price maintenance is unfair competition. Stevens, *Resale Price Maintenance As Unfair Competition* (1919) 19 COL. L. REV. 265.

7. That such contracts are valid at common law, see Grogan v. Chaffee 156 Cal. 611, 105 Pac. 745 (1909); Ghirardelli Co. v. Hunsicker, 164 Cal. 355, 128 Pac. 1041 (1912); Rawleigh Medical Co. v. Osborne, 177 Iowa 208, 158 N. W. 566 (1916); Commonwealth v. Grinstead, 111 Ky. 203, 63 S. W. 427 (1901); Garst v. Harris, 177 Mass. 72, 58 N. E. 174 (1900); Quinlivan v. Brown Oil Co., 96 Mont. 147, 29 P. (2d) 374 (1934); Marsich v. Eastman Kodak Co., 244 App. Div. 295, 279 N. Y. Supp. 140 (2d Dep't, 1935); Fisher Flouring Mills v. Swanson, 76 Wash. 649, 137 Pac. 144 (1913). *Contra:* Rawleigh Medical Co. v. Walker, 16 Ala. App. 232, 77 So. 70 (1917); Allen v. Parks, 196 Iowa 943, 195 N. W. 745 (1923); Hill v. Gray & Worcester, 163 Mich. 12, 127 N. W. 803 (1910); Freeman v. Miller, 9 Ohio N. P. N. S. 26 (1909); Stewart v. Rawleigh Medical Co., 58 Okla. 344, 159 Pac. 1187 (1916).

8. State anti-trust laws have in some instances influenced decisions adverse to the validity of such contracts. Mills v. Ordnance Co., 113 Kan. 479, 215 Pac. 314 (1923); Butterick Pub. Co. v. Mistrot-Munn Co. 167 App. Div. 632, 153 N. Y. Supp. 61 (1st Dep't, 1915); Rawleigh Medical Co. v. Mayberry, 193 S. W. 199 (Tex. Civ. App. 1917). But see Grogan v. Chaffee, 156 Cal. 611, 105 Pac. 745 (1909); Rawleigh Medical Co. v. Osborne, 177 Iowa 208, 158 N. W. 566 (1916); Commonwealth v. Grinstead, 111 Ky. 203, 63 S. W. 427 (1901); Marsich v. Eastman Kodak Co., 244 App. Div. 295, 279 N. Y. Supp. 140 (2d Dep't, 1935).

9. "A condition or conditional limitation on alienation attached to a transfer of the entire interest in personalty is as void as if attached to a fee simple in land" GRAY, RESTRAINTS ON ALIENATION OF PROPERTY (2d ed. 1895) §§ 27, 28. See also COKE ON LITT. (J. H. Thomas ed.) Art. 360, Vol. II, 26.

10. Fowle v. Park, 131 U. S. 88 (1889); Whitwell v. Continental Tobacco Co., 125 Fed. 454 (C. C. A. 8th, 1903); Hartman v. J. D. Park & Sons, 145 Fed. 358 (C. C. E. D.

contracts not to sell below a stipulated price, where sustained, have been sustained on the ground that the restraint thus imposed is reasonable because designed for the protection of the producer's reputation and goodwill established with the consumer by the quality of the producer's identified product or by advertising.[11] The decisions to the contrary have in effect repudiated the notion that the producer has a sufficient property interest to justify the restraint imposed by a price maintenance contract, although the economic value to the producer of the "goodwill" of consumers is easily demonstrable.[12] The federal decisions invalidating price maintenance contracts under the Sherman Act[13] and state decisions holding similarly are based on the repugnance of such agreements to public policy, irrespective of the existence of a property right otherwise capable of protection. It seems clear, however, that that policy is subject to change by the legislature. Thus, if the legislature could declare price maintenance contracts contrary to public policy, no constitutional lack of power would seem to bar their reversing their stand by protecting such contracts.

II

But the provision making the resale price agreed upon between a producer and a distributor binding also on those who deal in the product, even though the latter have not entered into any contract relating to the price they will exact, is open to serious constitutional objections. Its justification is based on the difficulties of the producer's merchandising problem. If a producer chooses to use all available distributive outlets and sells without restriction, the retail price of his product doubtless will vary according to the differences in the various retailers' costs of distribution.[14] The result is likely to be—and the

Ky. 1906); Authors & Newspaper's Assn v. O'Gorman Co., 147 Fed. 616 (C. C. D. R. I., 1906); L. H. Henry & Sons v. Rhinesmith, 260 N. W. 9 (Iowa, 1935).

11. See especially Hartman v. J. D. Park & Sons, 145 Fed. 358 (C. C. E. D. Ky. 1906), rev'd, 153 Fed. 24 (C. C. A. 6th, 1907); Grogan v. Chaffee, 156 Cal. 611, 105 Pac. 745 (1909); Ingersoll & Bro. v. Hahne, 88 N. J. Eq. 222, 101 At. 1030 (1917), aff'd, 89 N. J. Eq. 332, 108 At. 128 (1918); Fisher Flouring Mills v. Swanson, 76 Wash. 649, 652, 137 Pac. 144, 145 (1913).

12. See HARING, RETAIL PRICE CUTTING (1935) 7-8; NIMS, UNFAIR COMPETITION AND TRADE MARKS (3d ed.) § 16; TERRY, PRICE STANDARDIZATION (1915) 30.

13. Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S. 373 (1911), is the leading case from which the long line of federal decisions derived the doctrine of the illegality of price maintenance. Prior to that decision the federal courts had frequently upheld price maintenance contracts. See Fowle v. Park, 131 U. S. 88 (1889). This was true even after the enactment of the Sherman law, until the Dr. Miles decision. In re Greene, 52 Fed. 104 (C. C. S. D. Ohio, 1892); Dr. Miles Medical Co. v. Platt, 142 Fed. 606 (C. C. N. D. Ill. 1906); Hartman v. Park & Sons, 145 Fed. 358 (C. C. E. D. Ky. 1906); Dr. Miles Medical Co. v. Jaynes Drug Co., 149 Fed. 838 (C. C. D. Mass. 1906).

14. It is clearly established that there is a wide variation in relative costs of doing business not only as between different types of retail units but even as between different retail stores of the same type. See studies made by Harvard Bureau of Business Research, 1926, published in a series of bulletins. See also, U. S. Dep't of Commerce, CENSUS OF AMERICAN BUSINESS, RETAIL DISTRIBUTION, Vol. I, 20; FEDERAL TRADE COMMISSION, REPORT ON RESALE PRICE MAINTENANCE, Part II, 85-94.

better known the product, the greater is the likelihood—that the product will, in effect, compete with itself and become the subject of price wars. In particular, the familiar practice of some retailers in using the product as a "loss-leader" stimulates such wars.[15] The producer has reason to fear, not only that his product will thereby be cheapened in the public estimation,[16] but also that the squeezing out of the retailers' margin of profit or the actual loss entailed in meeting price-cutting competition will cause many retailers to refuse to handle the product or at least cause them to push the sales of competing products.[17] If, on the other hand, the producer elects to adopt a resale price-maintenance policy, in the belief that the consumer demand for his product is great enough to enable him to force most retailers to deal with him on his own terms, and to enable him to withstand the loss of sales volume arising from having competitive brands pushed in preference to his own product,[18] the producer may still be unable to carry out such a policy effectively. For, past experience has shown that the difficulties involved in attempting to prevent distributors from securing the product free of contract restrictions are often insuperable.[19] The very fact that the product is in such demand will stimulate

15. This practice has been most vigorously condemned by many as an unjustifiable appropriation by a price-cutting dealer of the goodwill and reputation built up by the producer. See dissenting opinion of Holmes, J., in Dr. Miles Medical Co. v. Park & Son, 220 U. S. 373, 412 (1911). See also, Rogers, *Predatory Price Cutting as Unfair Trade,* (1913) 27 HARV. L. REV. 139; SELIGMAN AND LOVE, PRICE CUTTING AND PRICE MAINTENANCE (1932) 269; TERRY, PRICE STANDARDIZATION (1915) 30.

16. The peculiar effect the price-cutting of a popular brand has in discrediting the brand in the eyes of the consumer is described by Taussig, 6 AM. ECON. REV. SUPP. 170 (1916). Opinion is not lacking, however, to the effect that price-cutting does not hurt any real values of a product, but merely deflates the bubble of fictitious advertised value. See FEDERAL TRADE COMMISSION, REPORT ON RETAIL PRICE MAINTENANCE (1931) 9, 162; Haney, *Price Maintenance* (1916) 6 AM. ECON. REV. SUPP. 185, 188.

17. The familiar chain of circumstances leading to price wars and resulting dealer repugnance for the product is well described in HARING, RETAIL PRICE CUTTING (1935) Chap. I. It is plain that the chief harm to a producer results from the loss of his distributing outlets and dealer goodwill. See Miller, *The Maintenance of Uniform Resale Prices,* (1914) 63 U. OF PA. L. REV. 22, 30-31; Rogers, *Predatory Price Cutting as Unfair Trade* (1913) 27 HARV. L. REV. 139, 151-153; Schlichter, *The Cream of Wheat Case* (1916) 31 POL. SCI. Q. 392, 409.

18. The development of so-called private brands as a result of dealer dissatisfaction with the prices on already existing popular brands has seen a remarkable growth in the past few years. The causes of this tendency seem to arise both from a downward price trend on the popular brand, which reduces dealer margins, and, conversely, from a price maintenance policy such as prevailed in the drug trade under N.R.A. Private brands may allow the dealer a larger margin of profit; and, where the popular brand is subject to a price maintenance policy, the private brands enable the low cost distributor to attract trade by featuring prices far below those of the popular brand. See HARING, RETAIL PRICE CUTTING (1935) c. 6, 15. The hazards from a price maintenance policy may thus prove as great as the hazards resulting from price-cutting practices.

19. A number of the cases involving price maintenance schemes indicate the difficulties in discovering these leaks. See, for example, Dr. Miles Medical Co. v. Goldthwaite, 133 Fed. 794 (C. C. D. Mass. 1904); Beech Nut Packing Co. v. Federal Trade Commission, 264 Fed. 885 (C. C. A. 2d, 1920); Singer Sewing Machine Co. v. Lang., 186 Wis. 530, 203 N. W. 399 (1925).

both the effort to secure it without entering into price-maintenance contracts and the tendency to sell it at cut prices. The higher the price fixed, the greater is the possibility that the price will be undercut in this manner. This type of competition will either cause the contracting retailers to break their contracts [20] or make it unprofitable for them to deal in the product, and consequently will undermine the price-maintenance policy. It was to afford legal protection against such price-cutting, thus to make an effective price-maintenance policy possible, that the provision under consideration was enacted.[21]

The legal theory on which the provision is based is that selling below the stipulated price constitutes an interference with the producer's contract and property rights which may properly be made tortious. Such sales do tend to result in the breach of the price-maintenance agreements and to detract from the producer's reputation and goodwill. And there seems to be no reason why the legislatures may not provide that these interests are entitled to legal protection against such practices.[22] Analogous offenses against business ethics have been classified as unfair competition.[23] Thus, even though the distributor owns the product, and ownership ordinarily includes the right of unre-

20. Some argument has been made that the conduct of the price cutter in selling below contract prices is actionable as inducement of breach of contract, but the mere fact that contracts may be broken as a result of the necessity to meet competitive price cutting is not enough to sustain a charge based on commission of such a tort. Coty v. Hearn Dep't Stores, *infra* note 26. Cf. Sweeney v. Smith, 167 Fed. 385 (C. C. E. D. Pa. 1909), aff'd, 171 Fed. 645 (C. C. A. 3d, 1909); Lamport v. 4175 Broadway Inc., 6 F. Supp. 923 (S. D. N. Y. 1934).

21. The amendment to the California act in 1933 is reported to have been necessitated by the fact that successful price-maintenance policies were impossible without some means of controlling non-contracting retailers. THE CALIFORNIA FAIR TRADE ACT, (pamphlet published by National Association of Retail Druggists) 9; Dunn, *Junior Capper-Kelley Bills*, 171 PRINTERS INK, 1935, 7, 84.

22. N. J. COMP. STATS. (Supp. Vol. II) *225, §§ 1-2, a law passed in 1913, makes it unlawful for a merchant to appropriate " . . . a name, brand, trademark, reputation or goodwill of any maker in whose product said merchant . . . deals . . . by depreciating the value of such products in the public mind . . . or in any other manner whatsoever". Under this statute an action was brought to enjoin a defendant retailer from selling the plaintiff producer's product at cut prices. The injunction was granted, and the statute held constitutional as a valid enactment of state public policy. Ingersoll & Bro. v. Hahne, 88 N. J. Eq. 222, 101 Atl. 1030 (1917), aff'd, 89 N. J. Eq. 332, 108 Atl. 128 (1918). See also Cooper & Cooper v. Angert, *infra* note 26, in which the New York Fair Trade act was upheld on this basis.

23. Rogers, *Predatory Price Cutting As Unfair Trade* (1913) 27 HARV. L. REV. 139. The author claims that enjoining a dealer from capitalizing on the goodwill of a popular brand by price-cutting may be analogized to the cases granting injunctions for the infringement of a name or trade mark, on grounds of preventing wrongful diversion of the trade and goodwill of the prior user. As to the state's power to prevent similar practices, compare Central Lumber Co. v. South Dakota, 226 U. S. 157 (1912) (state statute upheld which prohibited charging of lower prices in one locality than in another for the purpose of driving out competitors); Rast v. Van Deman & Lewis Co., 240 U. S. 342 (1916) (state statutes upheld imposing prohibitive tax on trading stamps given away by retailers as trade inducements).

stricted disposal,[24] nevertheless, since a particular means of exercising his right is found to be detrimental to the rights of others, it may be prohibited.[25] The instant provision appears to be nothing more than a legislative application of the principle *sic utere tuo ut alienum non laedas.*

The New York Court of Appeals, however, has held this provision unconstitutional[26] on the ground that it is in effect nothing but legislative price-fixing, the power to fix the price being delegated to the producer, whereas none of the circumstances justifying price-fixing legislation exist.[27] But it is arguable that the cases invalidating price-fixing legislation are inapplicable here, for those cases dealt with statutes which were found to deprive the class affected by the statutes of their liberty of contract by curtailing their bargaining power.[28] Although it is true that under the Fair Trade acts all those handling the goods after a price has once been set are deprived of the liberty to sell at whatever price they choose, it can be said that the price which is set must, in most cases, be determined as a result of the relative bargaining power of the producer and all distributors as a class, with further necessary consideration to the price which the consumer is willing to pay.[29] The contract between the producer and the first distributor who enters into the agreement simply represents this economic adjustment. The statutes may thus be said in no

24. Tyson Bros. v. Banton, 273 U. S. 418, 429 (1927).

25. "While it is true that every man has a right to use his own name in his own business, it is also true that he has no right to use it for the purpose of stealing the good will of his neighbor's business . . . " Garrett v. Garrett, 78 Fed. 472, 478 (C. C. A. 6th, 1896). See note 23, *supra.*

26. Doubleday, Doran & Co. v. R. H. Macy & Co., 269 N. Y. 272 (1936). The decision affirmed the decision in the N. Y. Sup. Ct. of Westchester County, N. Y. L. J. Nov. 20, 1935, at 1966. The act has also been held unconstitutional in Coty v. Hearn, N. Y. L. J., Nov. 26, 1935, at 2077. The California law was held unconstitutional in Max Factor v. Kunsman, Cal. Super. Ct., Oct. 18, 1933; Pyroil Sale Co. v. The Pep Boys, Cal. Super. Ct., July 10, 1934. Both of these cases are pending on appeal in the California Supreme Court. The acts have been held constitutional in Cooper & Cooper v. Angert, N. Y. L. J. Nov. 2, 1935, at 1655; General Cigar Co. v. The Drug Market, Cal. Super. Ct., Sept. 18, 1934: Weco Products Co. v. Sunset Cut Rate Drug Co., Cal. Super. Ct., Jan. 24, 1934; Emerson Drug Co. v. Weinstein, Cal. Super. Ct.

27. In Coty v. Hearn, *supra,* the court classified the circumstances which may justify governmental regulation of prices as follows: "First, those where the commodities were 'affected with a public interest', or 'devoted to a public use', i.e., so intimately bound up with the public interest or public welfare that the industry itself and the prices charged therein are subject to control for the public good. Second, instances where the state has determined that the public health, morals, safety or welfare . . . depend upon the maintenance of fixed prices. Third, instances where prices of commodities other than those included in the first two are fixed by reason of a compelling emergency which justifies such interference by the state."

28. Adams v. Tanner, 244 U. S. 590 (1917); Adkins v. Children's Hospital, 261 U. S. 525 (1923); Tyson & Bros. v. Banton, 273 U. S. 418 (1927); Ribnik v. McBride, 277 U. S. 350 (1928); Williams v. Standard Oil Co., 278 U. S. 235 (1929).

29. It has been argued that competition among producers as well as the bargaining power of the distributors who desire to sell at low prices will keep a price maintenance policy from establishing unreasonable prices. Fisher Flouring Mills v. Swanson, 76 Wash. 649, 660, 137 Pac. 144, 148 (1913). See Brandeis, *Cut Throat Prices—The Competition that*

substantial way to impair the existing bargaining power of distributors. Moreover, the legal position of the distributor who is unwilling to agree to maintain the stipulated price remains substantially unchanged under this provision of the statutes. The producer is privileged, in the absence of this statutory provision, to refuse to sell to him because of his refusal to maintain prices.[30] If the producer, acting under the concededly valid first provision of the statutes, exacts an agreement from all those to whom he sells not to resell except at the stipulated price or to persons who agree to sell only at that price, the only manner in which a distributor can acquire the product within a "Fair Trade" state without agreeing to maintain the price is by being party to a breach of contract.[31] Even if the product is secured without involving a breach of contract, as for instance by importation from distributors in non-Fair Trade states, the distributor may fairly be charged with tortious conduct in thus knowingly seeking to circumvent the producer's refusal to sell to him directly,[32] and effecting the reasonable and probable consequence of his actions, namely, the destruction of the price-fixing policy and hence the goodwill of the producer. The statute, by proscribing this conduct, merely requires that, if a distributor chooses not to deal with the goods on the producer's terms, he refrain from dealing with them at all. Rather than interfering with liberty of contract, the legislature has only protected the bargaining power which the producer himself has attained. Hence the statutes are not necessarily analogous to price-fixing statutes.

Kills, Harpers Weekly, Nov. 15, 1913. On the other hand, however, the Federal Trade Commission Report on Resale Price Maintenance predicted that legalization of price fixing would inevitably necessitate governmental supervision to keep prices at a reasonable level. In invalidating the New York Fair Trade Act, two of the decisions relied partially on the fact that there is no regulatory provision in the act to insure the reasonableness of the prices fixed. Doubleday Doran & Co. v. Macy, N. Y. L. J., Nov. 20, 1935, at 1966; Coty v. Hearn, N. Y. L. J., Nov. 26, 1935, at 2077. The Wisconsin Fair Trade Act has a provision designed to effect that purpose. See note 3, *supra*.

30. United States v. Colgate Co., 250 U. S. 300 (1919); Frey v. Cudahy Packing Co., 256 U. S. 208 (1921); Federal Trade Commission v. Raymond Bros.-Clark Co., 263 U. S. 565 (1924). See Brown, *The Right to Refuse to Sell* (1911) 25 YALE L. J. 194. Under the existing federal law, price maintenance policies are possible if carefully carried out by simply refusing to sell to price-cutters, without the addition of any acts which can be construed as involving implied agreements to sell to those only who will maintain prices. See HARING, RETAIL PRICE CUTTING (1935) c. 11, 12.

31. In many instances, it would seem, the defendant would be actually guilty of inducing breach of contract if he acquired goods from a distributor knowing of the latter's contract restrictions. Bitterman v. Louisville & Nashville Rr. 207 U. S. 205 (1907); Dr. Miles Medical Co. v. Platt, 142 Fed. 606 (C. C. N. D. Ill. 1906); Authors and Newspapers Ass'n. v. O'Gorman Co., 147 Fed. 616 (C. C. D. R. I. 1906); Dr. Miles Medical Co. v. Jaynes Drug Co., 149 Fed. 838 (C. C. D. Mass. 1906); Garst v. Charles 187 Mass. 144, 72 N. E. 839 (1903); Singer Sewing Machine Co. v. Lang, 186 Wis. 530, 203 N. W. 399 (1925).

32. Unless a price cutting distributor can explain from what source he acquired the product, it seems fair to hold him liable for inducing breach of contract. Singer Sewing Machine Co. v. Lang, 186 Wis. 530, 203 N. W. 399 (1925).

The basis outlined above in justification of the statutes, however, assumes that, because a distributor has no vested right to buy a producer's product, the statutes do not interfere with vested rights and that they may consequently be justified as merely defining and proscribing unfair conduct in the procurement of a price-fixing producer's product. Actually, however, the statutes are not confined in application to goods which are acquired with notice that contract prices have been fixed, and thus are not entirely justifiable on the grounds mentioned.[33] To the extent that they thus purport to bind retailers who have acquired goods without "notice" of the resale price-maintenance agreement, the statutes clearly interfere with vested property rights, the statutes being, to this extent, analogous to invalid price-fixing legislation. Thus, a strong showing of its need for the furtherance of the policy of the statute, assuming that that policy is otherwise valid, would be a minimum requisite to securing judicial approval of this portion of the statute.[34] Yet, it is difficult to believe that a distributor could acquire without notice a sufficiently large stock of goods to undermine a price-maintenance policy. Any goods so acquired would soon be exhausted, and if the producer felt his policy threatened by sales of such stock, he could himself buy up the stock in most instances. It would seem to follow that the means here adopted are not necessary to subserve the end in view.[35] Furthermore, the purpose to prevent unfair conduct cannot reasonably justify subjecting to the statutes' restrictions a distributor who has acquired the goods without notice of the price-maintenance agreement. For the latter has not procured the product by secretive means with intent to frustrate the producer's desire to keep the product out of the hands of price-cutting distributors, or in any similarly unfair way.[36] These defects in the statutes could be easily corrected, however, by prohibiting sales at less than stipulated prices when the goods so sold were acquired with notice that such price has been established. The effect then would be simply to create an equitable servitude in favor of the producer.[37]

33. If the adoption of a price-fixing policy by a producer applies to goods already acquired by dealers, the latter would be obliged to sell products at a fixed price even though the product was acquired (1) before the statute was passed (2) before the producer adopted a price maintenance policy (3) before the producer changed a price already established (4) without notice of a price-fixing policy, e.g., if bought at a liquidation sale.

34. Of course, if a regulation is essential to the attainment of an otherwise legitimate end, it may apply to already acquired property. Wulfsohn v. Burden, 241 N. Y. 288, 150 N. E. 120 (1925) (zoning regulations); Cockroft v. Mitchell, 230 N. Y. 630, 130 N. E. 921 (1921) (building safety requirements).

35. Adams v. Tanner, 244 U. S. 590 (1917); Burns Baking Co. v. Bryan, 264 U. S. 504 (1924); Nectow v. Cambridge, 277 U. S. 183 (1928).

36. "It is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody upon the chance that while the innocent will surely be entangled in its meshes, some wrong-doers also may be caught". Tyson & Bros. v. Banton, 273 U. S. 418, 443 (1927). See also Fairmont Creamery Co. v. Minnesota, 274 U. S. 1 (1927).

37. A few courts have recognized an equitable servitude in cases where the producer has attached a notice to his property as to price restrictions governing that property, and have allowed injunctions against sales in violation of that notice. Dr. Miles Medical Co. v. Goldthwaite, 133 Fed. 794 (C. C. D. Mass., 1904); Ingersoll & Bro. v. Hahne, 88 N. J.

Another principal objection to the legislation is the complete freedom of action accorded the producer. Thus, while purporting to maintain a fixed price policy, he may sell directly to some distributors unrestrictedly, while requiring others to enter into Fair Trade contracts. Likewise, conceivably he may stipulate different prices in different contracts. Thus, dealers may be subjected to the arbitrary caprice of the producer not only as to whether they are required to make contracts, but if they are not so required, whether he may decide to proceed against them for not conforming to the price stipulated in other contracts. They may also be in the position of not knowing which of several different fixed prices is binding upon them. Furthermore, the statutes leave room for a wholly arbitrary or even malicious decision on the part of the producer to proceed against some distributors while others are free to do as they like. Since, however, the producer must be consistent in maintaining his price policy in order to protect his reputation and goodwill effectively, his inconsistency would seem to justify the conclusion that he is not injured by failure of a distributor to conform to one of the prices fixed in the producer's contracts. At any rate, such consistency should definitely be required in the statutes as a condition precedent to the right of the producer to invoke the protective sanctions of the statutes. Otherwise, those sanctions are open to abuse and may well justify holding the statutes unconstitutional as being ill-adapted to effectuate their legitimate purposes.[38]

The claim has also been made that the statutes are invalid because they go beyond the evil to be remedied by prohibiting all price-cutting when only so-called predatory price-cutting—a vague term, perhaps identical with cutting prices below cost—is an abuse.[39] Even where predatory price-cutting is capable of segregation, however, it is not the sole factor capable of undermining a price-maintenance policy. So-called legitimate price-cutting may be fully as in-

Eq. 222, 101 Atl. 1030 (1917), aff'd, 89 N. J. Eq. 332, 108 Atl. 128 (1918). *Contra:* Bobbs-Merrill Co. v. Strauss, 210 U. S. 339 (1908); Authors and Newspapers Ass'n. v. O'Gorman, 147 Fed. 616 (C. C. D. R. I. 1906); Waltham Watch Co. v. Keene, 202 Fed. 225 (S. D. N. Y. 1913); Garst v. Hall & Lyons, 179 Mass. 588, 61 N. E. 219 (1901); Garst v. Wissler, 21 Pa. Super. 532 (1902); Fisher Flouring Mills v. Swanson, 76 Wash. 649, 668, 137 Pac. 144, 149 (1913). Cases where a defendant is enjoined from using property unrestrictedly which he took with notice of the restrictions are common. Edison v. Smith Mercantile Co., 188 Fed. 925 (C. C. W. D. Mich. 1911); P. Lorrilard & Co. v. Weingarden, 280 Fed. 238 (W. D. N. Y. 1922); Garst v Charles, 187 Mass. 144, 72 N. E. 839 (1905); N. Y. Bank-Note Co. v. Hamilton Bank-Note Co., 28 App. Div. 411, 50 N. Y. Supp. 1093 (1st Dep't, 1898); Murphy v. Christian Press Co., 38 App. Div. 426, 56 N. Y. Supp. 597 (2d Dep't, 1899). See Chafee, *Equitable Servitudes on Chattels* (1928) 41 HARV. L. REV. 945.

38. This is particularly objectionable when the regulatory functions are lodged in the hands of private parties. Eubank v. Richmond, 226 U. S. 137 (1912); Washington v. Roberge, 278 U. S. 116 (1928).

39. The attempt to draw a line between "legitimate" and "predatory" price cutting is impossible for several reasons. (1) Actual costs of doing business cannot be determined with complete accuracy. (2) There are many situations when selling below cost is concededly legitimate. (3) It is by no means universally agreed that selling below cost, even for the purpose of attracting trade, is disreputable. See FEDERAL TRADE COMMISSION, REPORT ON RETAIL PRICE MAINTENANCE (1931) Part II, p. 9.

jurious. Hence the question of the extent to which price-cutting should be prevented is one of policy for the legislature and may reasonably include all price-cutting which contributes to the evil sought to be corrected.

A further argument has been made that the statutes are a denial of the equal protection of the law in that they apply only to trademarked or branded articles. The trademark or brand, however, is the means by which the consumer identifies the product with the producer.[40] Without such identification the producer usually acquires no consumer demand, creates no reputation or goodwill for which he can claim protection, or at least he has no way of realizing on that demand and goodwill. The classification, therefore, seems reasonable in view of the purpose of the statutes, and should be easily sustainable.[41] The further restriction of the dispensation of the statutes to commodities "in fair and open competition with other commodities of the same general class produced by others," however, while not constitutionally objectionable, seems unfortunate because of its vagueness. In the absence of a standard by which to measure the existence of such competition, a producer in operating under the statutes may be incurring the risk of prosecution under some state anti-trust laws.[42] It would seem, furthermore, that the provision serves no good purpose. For, a producer with a monopoly seldom needs the aid of the statutes, since he can set his own prices without them, and more especially since price-cutting cannot injure him because there are no competing brands to supplant his own in dealer or consumer favoritism. The exception could be stricken out without loss. It would seem, therefore, that the acts as they are now worded contain unnecessary and arbitrary features which might well justify holding the acts unconstitutional. But that a statute could be drafted which would effect the purposes of these statutes in a reasonable and yet effective manner seems equally clear.[43]

III

Assuming that these or any similar statutes can survive the constitutional objections raised under due process clause of the federal and state constitutions, operation under them may nevertheless be narrowly confined because of the risk of invasion of the sphere of federal regulation of commerce. The possibility exists that such statutes might be held invalid as imposing a direct burden on interstate commerce,[44] although federal courts have been hesitant about in-

40. McLean v. Fleming, 96 U. S. 245, 251 (1887); State v. Bishop, 128 Mo. 373, 31 S. W. 9 (1895); Partridge v. Menck, 2 Barb. 101 (N. Y. Sup. 1848).

41. But cf. Hartman v. J. D. Park & Sons, 145 Fed. 358, 379 (C. C. E. D. Ky. 1906); Ghirardelli v. Hunsicker, 164 Cal. 355, 128 Pac. 1041 (1912).

42. Presumably, where a state anti-trust law previously was construed to prohibit resale price maintenance, the Fair Trade Act modifies such statute only to the extent of exempting contracts for price maintenance affecting products which are "in fair and open competition".

43. This is tacitly admitted in the opinions rendered under the New York Fair Trade act holding the act unconstitutional. See Doubleday Doran & Co. v. Macy, N. Y. L. J., Nov. 20, 1935, at 1966, Coty v. Hearn, N. Y. L. J., Nov. 26, 1935, at 2077.

44. Shafer v. Farmers Grain Co., 268 U. S. 189 (1925); Alabama & N. O. Transportation Co. v. Doyle, 210 Fed. 173 (E. D. Mich. 1914); Wm. R. Compton v. Allen, 216 Fed. 537 (S. D. Iowa, 1914).

validating state laws on that ground when they do not conflict with federal legislation.[45] But the Sherman anti-trust law covers this field[46] and has been unequivocally construed to prohibit any contract to maintain resale prices, directly affecting interstate commerce.[47] If, as is probable, the only effect of a price-maintenance policy carried out under the aegis of a state statute is merely to reduce the supply of articles which move in interstate commerce, that effect has been specifically designated by decisions in other instances as only "incidental and indirect."[48] Yet, because the line which separates transactions whose effect on interstate commerce is "direct" and those whose effect is "indirect or incidental" is hazy at best,[49] accurate prediction as to whether a given situation will be held to fall within the federal acts is difficult.

Presumably, the statutes will be most availed of by producers of products advertised and distributed nationally. Such producers will find considerable inconvenience in attempting to minimize their interstate transactions.[50] It would seem necessary for them to make each state a distributional unit[51] by maintaining a subsidiary or an agent there, if they would make use of the Fair Trade statutes without danger of conflict with federal law. This may in-

45. "It is established by many familiar cases . . . that although certain exercises of the public power . . . do burden interstate traffic in legitimate articles of commerce, yet, because the law is within the police power, the burden is considered not sufficiently substantial and direct to make the law invalid." Alabama & N. O. Transportation Co. v. Doyle, 210 Fed. 173, 184 (E. D. Mich. 1914). See also Smith v. Alabama, 124 U. S. 465 (1888); Hall v. Geiger Jones, 242 U. S. 539 (1917).

46. The Sherman Act applies to intrastate activities which have a tendency to restrain interstate commerce. Swift & Co. v. United States, 196 U. S. 375 (1905).

47. Dr. Miles Medical Co. v. Park & Sons, 220 U. S. 373 (1911); Federal Trade Commission v. Beech Nut Packing Co., 257 U. S. 441 (1922). For a review of the large number of subsequent cases in the federal courts see Dunn, *Resale Price Maintenance* (1923) 32 YALE L. J. 676; Comment (1927) 75 U. OF PA. L. REV. 248. These cases establish a hairline distinction between the legal policy of refusing to sell to price cutters and the illegal conduct consisting in any scheme, and the acts pursuant thereto, intended to effect a price-maintenance policy. See dissenting opinion of Holmes, J., in Dr. Miles Medical Co. v. Park & Sons, 220 U. S. 373 (1911). See also Klaus, *Sale, Agency & Price Maintenance,* (1928) 28 COL. L. REV. 312. 441 (1928); Murchison, *Resale Price Maintenance* (1922) 1 N. C. L. REV. 36; Schlichter, *The Cream of Wheat Case* (1916) 31 POL. SCI. Q. 392; Note (1933) 43 YALE L. J. 1332.

48. Anderson v. United States, 171 U. S. 605 (1898); United Leather Workers v. Herkert, 265 U. S. 457 (1924); Industrial Ass'n. v. United States, 268 U. S. 64 (1925).

49. Compare Hopkins v. United States, 171 U. S. 578 (1898), with Swift v. United States, 196 U. S. 375 (1905); and Hill v. Wallace, 259 U. S. 44 (1922), with Board of Trade v. Olsen, 262 U. S. 1 (1923).

50. The Bulova Watch Co., Colgate & Co. and other nationally known producers have successfully operated a price-maintenance policy even though selling in interstate commerce, but of course these policies do not involve contracts or agreements. See HARING, RETAIL PRICE CUTTING (1935) c. 11, 12.

51. The fact that goods had their source in another state is immaterial if the contracts are not made until after the goods are within the state. Schechter Poultry Co. v. United States, 295 U. S. 495 (1935); Wagner v. City of Covington, 251 U. S. 95 (1919); Ward Baking Co. v. Federal Trade Commission, 264 Fed. 330 (C. C. A. 2d, 1930).

volve the additional inconvenience of meeting the state's taxation requirements and its requirements for doing business. If, on the other hand, the effort is made to sell to jobbers outside the state, as has been suggested, depending on them to require price-maintenance agreements within the Fair Trade states, the producers are likely to find that they have acquired no rights under the state laws, and perhaps also that they have violated the federal laws.[52]

The limitation of the operation of the statutes to intrastate transactions involves practical handicaps to the effectiveness of any price-maintenance policy. If a distributor in one state sells to a consumer in another state, it seems clear that the Fair Trade law of neither state nor any contract made thereunder could be enforced with respect to such a sale.[53] Competition of distributors in non-Fair Trade states with distributors in a neighboring price-maintaining state might impair the effectiveness of the latter's policy, though the extent of such impairment would depend upon geographical conditions and the disparity of prices between the two states. It has also been argued that there is a possibility of effective evasion of the Fair Trade law of a state by distributors who purchase goods in a non-price maintaining state for retail sale in the former. It seems likely, however, that such a distributor could nevertheless be held under the the Fair Trade law in the state where he made the retail sale, on the ground that the goods have been mingled with the general property within the state and are subject to regulation under its police power.[54]

IV

If the acts are constitutional and could be effective in permitting a price maintenance policy to be maintained, the desirability of allowing resale price maintenance remains an open question. A price-maintenance policy framed in the interests of the producer may be expected to mean higher prices than would otherwise prevail.[55] This amounts to a virtual guaranty of existence to some

52. See DRUG TOPICS for July 15, 1935. Another form of the suggestion is that the producer make his contracts directly with retailers, without making the Fair Trade contracts part of the contracts for the sale of the goods themselves. The actual sale to retailers would be by jobbers whom the producers could depend upon to sell only to distributors in contractual relations with the producer. Martin, *The Fair Trade Act* (1936) 5 FORD. L. REV. 50. But this procedure may also be held objectionable on the ground that the contracts between the retailer and the producer directly affect interstate commerce. But see Blumenstock Bros. v. Curtis Pub. Co., 252 U. S. 436 (1920).

53. Interstate commerce being involved, any attempt to apply a Fair Trade contract to the sales so made would seem to violate the Sherman Act. The model contracts which are available as forms to be used in complying with the Fair Trade Acts specify that the contract is binding only as to sales within the state.

54. Schechter Poultry Co. v. United States, 295 U. S. 495 (1935); Ingersoll & Bro. v. Hahne & Co. 88 N. J. Eq. 222, 101 Atl. 1030 (1917), aff'd, 89 N. J. Eq. 332, 103 Atl. 128 (1918). But see Baldwin v. G. A. F. Seelig, Inc., 294 U. S. 511 (1935) holding regulations under New York milk control act an unconstitutional burden on interstate commerce as applied to milk imported from another state.

55. The Canadian Proprietary Articles Trade Association established in 1925 to maintain standard margins of price over cost for all retail druggists was investigated and broken up

of the high-cost distributors. The consumer will suffer the economic disadvantages resulting from the perpetuation by price-maintenance subsidy of the inefficient high-cost distributing units which would otherwise be eliminated by retail competition.[56] The consumer may perhaps also lose by the resultant stultification in development of improved and lower cost distribution systems.[57] He may also confidently expect to be affected in other ways by increased costs due to price maintenance. Thus, the producer of a price-maintained commodity will tend to advertise in a much greater degree to create sufficient demand to reclaim his losses in sales volume. On the other hand, the probable diminution in the sales volume of price-maintained commodities and the boosting of prices of such commodities may stimulate the marketing of a number of new and lower priced brands. But the cost of even these brands to the consumer will be relatively higher because the economies realized from the mass production and wide distribution of a few products cannot be realized in small-scale production and distribution of many products. These consequences bid fair to outdo the supposed injuries now being suffered by the consumer as the alleged victim of the "loss leading" and "cut price" dealers.

None of these possible consequences can be predicted with any certainty. Furthermore, an additional factor making prediction difficult is the fact that many producers may actually find that, no matter how legally available and practically effective a price-maintenance system can be, its inevitable concomitant in the form of sacrifice of wide distribution makes its use undesirable.

RECENT DEVELOPMENTS IN FEDERAL ESTATE TAXATION OF INTER VIVOS TRUSTS

FIVE recent decisions of the Supreme Court shed new light upon the much discussed question of what inter vivos gifts may be included in the gross estate of the settlor for the purpose of imposing a federal estate tax.[1] Since the disposition of property in trust is often a convenient substitute for transfer by will or intestacy, Congress has recognized from the beginning that an effective program of death taxes must also reach this other class of gifts. Prior to 1924 the subject was covered by the general language of a statute providing that the

by the Canadian government in 1927. A report made by the investigating commission indicated that prices were unreasonably enhanced to the detriment of the consumer in order to achieve the purpose of standardization of margins. See HARING, RETAIL PRICE CUTTING (1935) 195. See also NYSTROM, DANGEROUS TRENDS UNDER THE N.R.A. (privately printed pamphlet) 8.

56. See FEDERAL TRADE COMMISSION, REPORT ON RESALE PRICE MAINTENANCE (1921) Part II, 141, 149, 163; MURCHISON, RESALE PRICE MAINTENANCE (1919) 92-97; Stevens, *Resale Price Maintenance As Unfair Competition* (1919) 19 COL. L. REV. 265.

57. Stevens, *ibid;* Taussig, *Price Maintenance* (1916) 6 AM. ECON. REV. SUPP. 170.

1. White v. Poor, 56 Sup. Ct. 66 (1935); Helvering v. Helmholz, 56 Sup. Ct. 68 (1935); Helvering v. City Bank Farmers Trust Co., 56 Sup. Ct. 70 (1935); Helvering v. St. Louis Union Trust Co., 56 Sup. Ct. 74 (1935); Becker v. St. Louis Union Trust Co., 56 Sup. Ct. 78 (1935).

gross estate should include all property "to the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death."[2]

I

The application of this provision to revocable trusts was first considered by the Supreme Court in *Reinecke v. Northern Trust Co.*,[3] decided in 1929. The decedent had created two trusts, as to which he retained an unrestricted power of revocation, and five trusts which he could have revoked, as to four, with the consent of the single beneficiary and, as to one, with consent of a majority of the beneficiaries. Holding a wholly revocable gift to be incomplete and therefore, not an actual transfer until death terminated the donor's power to repossess, the Court approved inclusion of the first two trusts in the taxable estate. But the five trusts as to which the settlor's power was limited were held to be completed inter vivos gifts and therefore not taxable as transfers intended to take effect in possession or enjoyment at or after death. As an additional reason for so construing the scope of the Act, the Court expressed doubts as to the constitutionality of any other interpretation. This closing remark by Mr. Justice Stone seemed particularly significant, in view of the fact that Section 302(d) of the Revenue Act of 1924, which was enacted while the *Reinecke* case was pending, requires inclusion in the taxable gross estate of any property "to the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person to alter, amend, or revoke. . . . "[4] For the *Reinecke* case cast doubts upon the constitutionality of this provision, if the words "any person" be interpreted literally. There has been some uncertainty, however, as to whether Congress intended so broad a meaning, since the Reports of the House Ways and Means Committee and the Senate Finance Committee indicate that Section 302(d) was intended to "accord with the principle" of the analogous provisions of the income tax law, which read "in conjunction with any person not a beneficiary."[5] But while the view generally taken by commentators—that Section 302(d) should be construed in accordance with the income tax provision[6]—would remove any doubts as to its constitutionality, it would also

2. § 202(b), Revenue Act of 1916, 39 STAT. 777. This same provision is found in § 302(c) of the present law, 44 STAT. 70 (1926), 26 U. S. C. A. § 411 (1934).

3. 278 U. S. 339 (1929).

4. 43 STAT. 304 (1924), now found at 48 STAT. 752 (1934), 26 U. S. C. A. § 411 (1934).

5. H. R. Rep. No. 179, 68th Cong., 1st Sess., Ser. No. 8226; Sen. Rep. No. 398, 68th Cong., 1st Sess., Ser. No. 8220.

This Section, 219(g), 43 STAT. 277 (1924), has since been amended to read "any person not having a substantial adverse interest." 48 STAT. 729, 26 U. S. C. A. § 166 (1934).

6. See 2 BOGERT, TRUSTS AND TRUSTEES (1935) 895; ROBINSON, SAVING TAXES IN DRAFTING WILLS AND TRUSTS (2d ed. 1933) 206; Leaphart, *Use of the Trust to Escape Federal Taxes* (1930) 15 CORN. L. Q. 587, 593; Lowndes, *Constitutionality of the Federal Estate Tax* (1933) 20 VA. L. REV. 141, 160; Sutter and Owen, *Federal Taxation of Settlors of Trusts* (1935) 33 MICH. L. REV. 1169, 1186-1189.

seriously hamper the effectiveness of the change embodied in the 1924 Act. For, the fact that, under the suggested construction of Section 302(d), the settlor would have to share his power of revocation with the beneficiary or beneficiaries of the trust, rather than with some third person, in order to avoid having the trust included in his taxable estate, is no assurance that the settlor would, in those cases, have relinquished effective dominion over the trust before his death, in view of the fact that the normal trust settlement includes among its beneficiaries someone so amenable to the settlor's wishes, because of social or moral obligation, that a provision requiring such a beneficary's consent to revocation by the settlor would prove no real restraint on the settlor's control.

The issue finally came before the Supreme Court in *Helvering v. City Bank Farmers Trust Co.*, which involved a trust created in 1930, reserving to the settlor the power to modify, alter, or revoke it with the written consent of the trustee and the settlor's husband, who was one of the beneficiaries.[7] The Board of Tax Appeals and the Circuit Court of Appeals had taken the view of the *Reinecke* case, that when the grantor's power to revoke was subject to the concurrence of one having an adverse beneficial interest the transfer had become complete inter vivos, and that Section 302(d) could not be construed so as to apply to such a situation. By a majority of five to four the Supreme Court reversed, holding, first, that the words "any person" were so unambiguous as to permit no other than a literal construction, and second, that it was an appropriate and reasonable means of preventing tax avoidance for Congress to prescribe that such a gift in trust as this should be deemed to be testamentary in character.[8] From a practical point of view the decision is fortunate, for it not only simplifies the application of Section 302(d), but also carries out Congress' aim to prevent, so far as possible, the use of the revocable trust as a device for escaping death taxes.[9]

However, two other cases handed down at the same time as the *City Bank* case limit its broad interpretation of Section 302(d). In *Helvering v.*

The federal courts also took this view. White v. Erskine, 47 F. (2d) 1014 (C. C. A. 1st, 1931); Commissioner v. City Bank Farmers Trust Co., 74 F. (2d) 242 (C. C. A. 2d, 1934); Lit. v. Commissioner, 72 F. (2d) 551 (C. C. A. 3d, 1934), aff'g 28 B. T. A. 853 (1933); cf. Helvering v. Helmholz, 75 F. (2d) 245 (App. D. C., 1934). *Contra*: Commissioner v. Strauss, 77 F. (2d) 401 (C. C. A. 7th, 1935).

7. 56 Sup. Ct. 70 (1935), rev'g 74 F. (2d) 242 (C. C. A. 2d, 1934), and 29 B. T. A. 1141 (1934).

8. Van Devanter, McReynolds, Sutherland, and Butler, J. J., dissented without opinion.

9. The decision, however, gives rise to an interesting conflict with the federal gift tax, which is levied on the creation of all trusts which are revocable by the settlor only with the consent of a person having a substantial adverse interest, 47 STAT. 245, (1932) 26 U. S. C. A. § 550 (1934). The result is that both the gift tax and the estate tax are applicable to such a trust as was involved in the *City Bank* case. See Comment (1935) 30 ILL. L. REV. 361, 366. Although it would seem that the credit allowed against the estate tax for gift taxes previously paid would eliminate the discrepancy, the actual result is that the net federal estate tax against which state taxes can be credited is reduced, and therefore the total of all taxes paid on a trust with a restricted power of revocation is considerably greater than the total paid on a wholly revocable trust. For a more complete discussion of this, see Comment (1935) 44 YALE L. J. 1409, 1423.

Helmholz,[10] the declaration of trust stipulated that the grantor might revoke with the consent of all of the named beneficiaries. The Court held that the trust was not taxable as a part of the donor's estate, on the ground that the trust's provision was not a "power to revoke" as intended by the Revenue Act, but merely a restatement of what the law concedes to the settlor of a trust even in the absence of any reservation of power. For, even though the donor has effected as complete a divestment as it is possible to make, the donees are always privileged to give back what they have received.[11] This result seems sensible, and it can hardly be objectionable as a source of future tax avoidance.

In the next case, *White v. Poor*, decedent had conveyed property to herself, her son, and a person not connected with the family, in trust for her children and their appointees.[12] Although the trust was otherwise irrevocable, the trustees might terminate it and reconvey to the settlor. The indenture further provided that, in case of the resignation of one of the trustees, the others should appoint a successor with the approval of the settlor's children. After one year the settlor resigned as trustee and was succeeded by her daughter. The year following, the daughter resigned and the settlor was reinstated, continuing as trustee until her death ten years later. The Court held that this property could not be included in her taxable estate under Section 302(d) because the decedent acquired her power to participate in the termination of the trust solely by virtue of the action of other persons and not in any sense by virtue of power reserved to herself as settlor.[13] It is hardly necessary to elaborate upon how little the settlor, in such a situation as the instant case, hazards loss of control by entrusting his property to other members of his immediate family for a short time; and the terms of the decision make no requirement that the settlor's divestment of control be more than momentary. How far it is possible to go in this direction without provoking judicial or legislative reaction remains to be seen. Here, by adopting the approach it has taken in numerous other decisions, the Court could easily have reached the conclusion that the trust fell within the taxing statute. Taxation, it has frequently said, is a practical matter which is not so much concerned with the refinements of title as it is with the actual command over the property.[14] The law having provided that trusts created by settlors who retain a power of revocation, even in conjunction with "any person," shall be included in the gross taxable estate, it would seem immaterial that in holding

10. 56 Sup. Ct. 68 (1935), aff'g 75 F. (2d) 245 (App. D. C. 1934) and 28 B. T. A. 165 (1933).

11. RESTATEMENT, TRUSTS (1935) §§ 337, 338.

12. 56 Sup. Ct. 66 (1935), aff'g 75 F.(2d) 35 (C. C. A. 1st, 1935) and 8 F. Supp. 995 (D. Mass. 1934).

13. Although Mr. Justice Brandeis, Mr. Justice Stone, and Mr. Justice Cardozo did not assent to the reasoning of the majority either in this or the *Helmholz* case, they concurred in both cases in the second ground of decision, viz., that it would be a violation of due process of law to apply Section 302(d) to these trusts, since they were created prior to the enactment of that Section in 1924. This question of retroactivity is discussed *infra*.

14. Cf. Chase National Bank v. United States, 278 U. S. 327 (1929); Tyler v. United States, 281 U. S. 497 (1930); Klein v. United States, 283 U. S. 231 (1931); Porter v. Commissioner, 288 U. S. 436 (1933). It is interesting to observe that the passing of economic benefit, so often discussed as a ground for death taxes, is not mentioned in any of the instant cases.

a power of revocation, a settlor assumes the regalia of a trustee. Yet it cannot be denied that in the instant case there was at one time a complete relinquishment of all legal powers over the trust.

Regardless of the possibility that this decision might be distinguished if the Court were confronted with an instance where the substitution of trustees was plainly a device for tax avoidance, this case reveals the fallibility of a dichotomy based upon the control retained by the donor to change the enjoyment of the gift,—at least so long as control refers to legal rather than actual power. If a settlor can retain practical dominion by sharing the power of revocation with another person, he can do it equally well by vesting the power in the other person alone. In either event the settlor cannot alter, amend, or revoke the trust unless the other person is willing. But it seems unlikely that the Supreme Court would uphold a statute requiring inclusion in the decedent's estate of property which he has transferred in trust, the enjoyment of which is subject at his death to change through the exercise of power by any person.[15] The present Section 302(d) appears to go as far as possible in covering situations in which a tax can be based on the control retained by the settlor. Yet, the apparent weakness here can be largely eliminated by looking to the interest which the settlor retains, rather than the control which he reserves. There would seem to be no valid constitutional objection to an amendment to the Revenue Act including in the gross estate property transferred by the decedent which, at the time of his death was subject to the exercise of a power in his favor by any person except the sole beneficiary or all of the beneficiaries.[16] It might be argued that such a provision would be unconstitutional as a direct tax upon the property rather than an excise upon the termination of an interest, since it is difficult to see any transfer from the decedent to someone else at death.[17] Technically, however, the decedent does lose at his death a beneficial liability to have the power exercised in his favor, and the corresponding prejudicial liability of the beneficiaries to have the power exercised in that manner is changed to an immunity.[18] But the validity of such a tax will depend, as is indicated by the opinion in the *City Bank* case, not upon whether legal relationships are created or destroyed or economic benefits shifted at death, but upon whether it is proper for Congress to classify such an inter vivos transfer with testamentary dispositions for taxing purposes as a reasonable means of preventing

15. Although Congress clearly has power to tax such a transfer [Bromley v. McCaughn, 280 U. S. 124 (1929)], an attempt to classify it with testamentary gifts would seem to be objectionable as an "effort to tax *B* for *A*'s property." Cf. Hoeper v. Tax Commission, 284 U. S. 206 (1931); Heiner v. Donnan, 285 U. S. 312 (1392). See notes 19, 20, *infra*.

16. A power falling within this exception would probably be regarded as no power at all, since it gives nothing which the law does not give anyway. Cf. Helvering v. Helmholz, 56 Sup. Ct. 68 (1935).

17. Cf. Knowlton v. Moore, 178 U. S. 41 (1900); Bromley v. McCaughn, 280 U. S. 124 (1929).

18. See Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1913) 23 YALE L. J. 16, at 54, n. 90. The argument may be made that the beneficial liability of the settlor is valueless when the power is held by a beneficiary. But the interest of the settlor is just as real in this case as is his legal power when he shares it with a beneficiary. In each case it is his possible moral power over the beneficiary that makes his legal power or liability of practical significance.

evasion.[19] From this point of view, it will be difficult to distinguish between the possibility of evasion existing when a power is retained jointly with any person, which was held sufficient to justify a tax in the *City Bank* case, and that existing by simply vesting the power in any person. If, therefore, it can be demonstrated to the satisfaction of the court that the possibility of revesting the corpus in the settlor through the exercise of a power by a third person opens up a plausible method of avoiding the estate tax, the inclusion of such trusts in the taxable estate will probably be upheld.[20] This rationale also becomes important in dealing with the question of the retroactivity of any amendments which may be put into effect. In *Helvering v. Helmholz* and *White v. Poor* the Court declared as an alternative ground of its decision that it would be a violation of due process of law to apply Section 302(d) to trusts created before its enactment in 1924, and which had previous to that year become "completed gifts," as that term is defined in the *Reinecke* case.[21] These holdings, together with the language of the *City Bank* case, make it clear that statutes bringing additional classes of inter vivos gifts within the estate tax could not be made applicable to transfers executed before the Act was passed.[22] Theoretically, the tax could be said to be prospective in its application to the shifting of interests, however minute, at the death of the donor, but if this were the view of the Court, Section 302(d) could not have been condemned as retroactive in the *Helmholz* and *White* cases. Only in two kinds of situations have transfers ostensibly occurring during the life of the donor been taxed under statutes first

19. "Congress may adopt a measure reasonably calculated to prevent avoidance of a tax. The test of validity in respect of due process of law is whether the means adopted is appropriate to the end. A legislative declaration that a status of the taxpayer's creation shall, in the application of the tax, be deemed the equivalent of another status falling normally within the scope of the taxing power, if reasonably requisite to prevent evasion, does not take property without due process. But if the means are unnecessary or inappropriate to the proposed end, are unreasonably harsh or oppressive, when viewed in the light of the expected benefit, or arbitrarily ignore recognized rights to enjoy or to convey individual property, the guarantee of due process is infringed." Helvering v. City Bank Farmers Trust Co., 56 Sup. Ct. 70, 73 (1935); see Milliken v. United States, 283 U. S. 15, 20 (1931).

20. This has been called a "penumbra theory" of constitutionality, after the expression used by Mr. Justice Holmes, dissenting, in Schlesinger v. Wisconsin, 270 U. S. 230, 241 (1926). See Lowndes, *supra* note 6, at 143 et seq.; (1936) 49 HARV. L. REV. 491.

Although the language of the *Schlesinger* case, and of *Heiner v. Donnan*, 285 U. S. 312 (1932), to the effect that no amount of administrative necessity would serve to uphold an otherwise unconstitutional tax is in conflict with the language of the *City Bank* case, the latter can hardly be regarded as repudiating the prior holdings. *Heiner v. Donnan* stands for the proposition that a tax which is based upon arbitrary classification is void. The *City Bank* case accepts that premise, but concludes that the classification there is reasonable.

21. Other explanations of when a gift becomes complete are found in Saltonstall v. Saltonstall, 276 U. S. 260 (1928); Burnet v. Guggenheim, 288 U. S. 280 (1933).

22. See Lowndes, *supra* note 6, at 171 et seq.; Lowndes, *Spurious Conceptions of the Constitutional Law of Taxation* (1934) 47 HARV. L. REV. 628, 654.

That a tax which is retroactive is not necessarily arbitrary, see Milliken v. United States, 283 U. S. 15, 21 (1931); dissenting opinion of Mr. Justice Brandeis in Untermyer v. Anderson, 276 U. S. 440, 446 (1928).

enacted between the time of transfer and the date of the transferor's death. One is the case of the completely revocable gift, which is held to be practically no gift at all until death terminates its revocability.[23] The other is the taxing of survivorship in a joint tenancy or tenancy by the entirety created before the tax law was enacted. There, the Supreme Court has for tax purposes definitely repudiated the fiction of the common law that, because each has acquired the entire property when the tenancy was created, nothing passes when one joint tenant dies.[24]

II

Two other cases, *Helvering v. St. Louis Union Trust Co.*[25] and *Becker v. St. Louis Union Trust Co.*,[26] decided on the same day as the three just discussed, involve a problem different only in that the return of the property to the settlor depends not upon his voluntary act but upon the occurrence of a fortuitous event. Gifts were made in trust to a life tenant with remainders over, but with the further provision that if the life tenant should predecease the settlor, the trust should terminate and the corpus be paid over to the grantor absolutely. The Court held that, since the settlor died first, the only effect of his death was that the donees kept what they had already, and therefore nothing passed at that time which could be deemed a gift to take effect in possession or enjoyment at his death. This result furnishes an interesting contrast with *Klein v. United States*,[27] decided by a unanimous Court in 1931. In that case the decedent had conveyed a life interest in land to his wife, and the remainder to her in fee on condition that she survive him. There the Court found no difficulty in upholding a tax at the death of the husband because his death was the indispensable event giving rise to a larger estate in the grantee, that is, a vested estate instead of the contingent interest she had until then possessed. In the *St. Louis* cases the majority opinion, delivered by Mr. Justice Sutherland, who also spoke for the Court in the former case, explains that the remainderman's interest in the latter situation was vested subject to divestment, whereas in *Klein v. United States* the wife had only a contingent remainder until her husband died. As Mr. Justice Stone, speaking for the four dissenting Justices, points out, the sole difference is in the form of words used in the conveyance. Moreover, this introduction of the traditional classification of vested and contingent estates as a basis of distinction is unsatisfactory for the further reason that gifts made subject to the donor's power to repossess are generally considered vested subject to divestment, yet the *Reinecke* case decided that these transfers were taxable as intended to take effect at death. The language of the *Klein* opinion might appropriately have furnished the ratio decidendi of

23. Saltonstall v. Saltonstall, 276 U. S. 260 (1928); Reinecke v. Northern Trust Co., 278 U. S. 339 (1929).

24. Third National Bank v. White, 287 U. S. 577 (1932), aff'g 45 F. (2d) 911 (D. Mass. 1930); Tyler v. United States, 281 U. S. 497 (1930); Moffitt v. Kelly, 218 U. S. 400 (1910) (community property).

25. 56 Sup. Ct. 74 (1935), aff'g 75 F. (2d) 416 (C. C. A. 8th, 1935) and 28 B. T. A. 107 (1933).

26. 56 Sup. Ct. 78 (1935), aff'g 76 F. (2d) 851 (C. C. A. 8th, 1935).

27. 283 U. S. 231 (1931).

the *St. Louis* cases: "Nothing is to be gained by multiplying words in respect of the various niceties of the art of conveyancing or the law of contingent and vested remainders."[28]

Nevertheless the result reached is not without precedent. The precise question arose in 1933 in *Helvering v. Duke*, and an equally divided court affirmed the Board of Tax Appeals and the Circuit Court of Appeals, which had decided against a tax.[29] Another per curiam decision, *McCormick v. Burnet*, in 1931, reached this same result, but under quite different circumstances.[30] There the settlor had retained a possibility of reverter in the corpus, a life interest in the income of the trust, and a restricted power of revocation. The Circuit Court of Appeals regarded the combination of the latter two, without more, as sufficient grounds for imposing a tax under Section 302(c) and did not discuss the other question. But the Supreme Court, having decided in *May v. Heiner*[31] that retention of a life interest did not bring the trust within Section 302(c), reversed the *McCormick* case per curiam upon the authority of *May v. Heiner*. These decisions were not regarded by the Treasury Department as conclusive, in the light of the *Klein* and *Reinecke* cases.[32] But in the *St. Louis* cases the court followed the precept it has so often laid down, that tax laws must be construed strictly in favor of the taxpayer.

In this situation there seems to be no good reason why amendment of the Revenue Act cannot be effective to remedy the defect, for the interest retained by the settlor seems clearly taxable. It can be regarded as an interest passing at death so as to be included in the estate tax proper,[33] or these trusts may be regarded as a method of escaping death taxes and therefore taxable as an inter vivos transaction like the transfers embraced in Section 302(d). In the event the latter view is taken, it would be improper, under *Helvering v. Helmholz*, to apply the amendment to trusts already in being. And this result seems the more likely one, for the opinion in *Helvering v. St. Louis Union Trust Co.* declares that the termination of a possibility of reverter is not a passing of taxable interest from the settlor to the beneficiary.[34] Moreover, there is hardly enough

28. Id. at 234.

29. 290 U. S. 591 (1933), aff'g 62 F. (2d) 1057 (C. C. A. 3d, 1933) and 23 B. T. A. 1104 (1931). Since the Chief Justice, who did not sit in the *Duke* case, was one of the four dissenters in the *St. Louis* cases, the deciding factor in the latter is that one justice, presumably Mr. Justice Roberts, has changed his views since 1933. It is interesting to contrast Mr. Justice Roberts' lengthy dissent, dwelling upon the practical side of taxation, in Coolidge v. Long, 282 U. S. 582, 606 (1931), and his position with the majority in the extremely "liberal" decision in Burnet v. Wells, 289 U. S. 670 (1933), with his technical reasoning in *White v. Poor* and his concurrence in the strict construction of the majority in the *St. Louis* cases.

30. 283 U. S. 784 (1931), rev'g 43 F. (2d) 277 (C. C. A. 7th, 1930).

31. 281 U. S. 238 (1930).

32. U. S. Treas. Reg. 80, Art. 17.

33. See (1935) 44 YALE L. J. 1245.

34. Cf. Bingham v. United States, 56 Sup. Ct. 180 (1935). Life insurance policies payable to the estate of the insured in the event of the predecease of the beneficiary were held not taxable when insured died first because no interest passed. (1935) 44 YALE L. J. 1245; (1936) 30 ILL. L. REV. 674. Also cf. Helvering v. Grinnell, 294 U. S. 153 (1935), holding that nothing passes when a power of appointment is exercised in favor of the donor's remainderman and the remainderman elects to succeed from the donor. (1935) 45 YALE L. J. 172.

difference between the possibility of revestment by the occurrence of an event and by the exercise of a restricted power to warrant a different constitutional result. An amendment to catch up these contingent interests can be either general or specific in form. Every recognized interest in land might be enumerated, and all property in which the grantor retains until death any one of them may be specifically declared to be included in the gross estate. But it would seem preferable to provide that the taxable estate shall include all property of which the decedent has at any time made a transfer under which until the time of his death he might by any possibility have become entitled to the return of any interest in it.

POWER OF THE INTERSTATE COMMERCE COMMISSION UNDER SECTION 3(1) OF THE INTERSTATE COMMERCE ACT TO REMOVE UNJUST DISCRIMINATIONS

BY Section 3(1) of the Interstate Commerce Act it is made unlawful for any common carrier to give undue preference to any person or locality or to subject any person or locality to undue prejudice.[1] Although the provision appears on its face to be a sweeping prohibition of every form of unjust discrimination regardless of how or by whom caused,[2] the most recent construction of Section 3(1) by the Supreme Court in *Texas and Pacific Ry. Co. v. United States*[3] reverts to the construction of that Section made in 1911 by the Interstate Commerce Commission in *Ashland Fire Brick Co. v. Southern Ry. Co.*,[4] limiting the prohibition of that Section to situations in which a carrier or group of carriers is in effective control of the rates to both the preferred and prejudiced points so that it might itself remove the discrimination by raising the preferential rate, lowering the prejudicial, or adjusting both.[5] Clearly, such a ruling removes from the jurisdiction of the Commission under Section 3(1) the power to eliminate many cases of discrimination against localities by carriers, since a rate differential may be discriminatory and injurious to a locality even though no carrier or group of carriers is in control of the traffic both to that point and the preferred point.[6] The problem therefore arises as to whether the

1. 24 STAT. 380 (1887), 49 U. S. C. A. § 3(1) (1926).

2. See the remarks of Senator Cullom, 17 CONG. REC. 3472 (1886); Houston, East and West Texas Ry. Co. v. United States, 234 U. S. 342, 356 (1914); Merchants Warehouse Co. v. United States, 283 U. S. 501, 512 (1931); 1 SHARFMAN, INTERSTATE COMMERCE COMMISSION (1st ed. 1931) 17, 21; cf. New York, New Haven and Hartford Rr. Co. v. Interstate Commerce Commission, 200 U. S. 361, 391, 392 (1906); Louisville and Nashville Rr. Co. v. Mottley, 219 U. S. 467, 478 (1911); Chicago, Indianapolis and Louisville Rr. Co. v. United States, 270 U. S. 287, 293 (1926).

3. 289 U. S. 627 (1933). The court likewise held that the term "locality" in § 3(1) did not include seaports through which import, export, and coastwise traffic passed from rail to water carrier or *vice versa*. The defect was cured by a recent amendment of § 3(1) specifically including ports and gateways. 49 STAT. 607, 49 U. S. C. A. § 3(1) (1935).

4. 22 I. C. C. 115 (1911). For the history of the doctrine of this case down to the *Texas and Pacific* case, see Comment (1934) 43 YALE L. J. 297.

5. See American Express Co. v. Caldwell, 244 U. S. 617, 624 (1917).

6. See Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42, 48 (1911); BEALE

Commission may remove discriminations of the latter sort under provisions of the Interstate Commerce Act other than Section 3(1).

Seemingly in order to remove a discrimination in rates which it felt powerless to remove under Section 3(1), no carrier or group of carriers being in control of both the preferential and prejudicial rates, although the majority of them participated in both, the Commission in the *Lake Cargo Coal* case[7] found a preferential rate to be unreasonably low under Section 1(5)[8] because of its "relative unreasonableness." It therefore ordered the raising of the rate under its admitted power to raise unreasonably low rates. Under the doctrine of "relative unreasonableness," the reasonableness of a rate is tested by comparing it with other related rates previously found reasonable on the same or similar commodities between points at similar distances in the same general territory.[9] But unless the preferential rate is at the same time shown to be non-compensatory, objection may be made to the use of the doctrine of "relative unreasonableness," as in the instant case, to remove the discrimination by ordering the preferential rate to be raised. For, Section 1(5) is thus made virtually to cover the same ground as Section 3(1).[10] Accordingly, the latter Section becomes mere surplusage, thus violating the long-established distinction between Sections 1(5) and 3(1), the former designed to eliminate rates which are unreasonably high or unreasonably low, and the latter to remove rates, which, although within the

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AND WYMAN, RAILROAD RATE REGULATION (2d ed. 1915) §§ 758, 759. The possibility of irreparable injury to localities was recognized by the Commission as early as 1897 when it cited to Congress its inability to remove the harmful discrimination suffered by Eau Claire, Wisconsin, merely because the defendant carrier was subject to the competition of independent carriers at the preferred points. Eau Claire Board of Trade v. Chicago, Milwaukee and St. Paul Ry. Co., 5 I. C. C. 264 (1892). See ANN. REP. I. C. C. (1897) 24; id. (1904) at 8, 9. As to the economic loss to localities occasioned by discrimination, see BROWN, TRANSPORTATION RATES AND THEIR REGULATION, (1st ed. 1925) 100.

7. 139 I. C. C. 367 (1928), rev'd, Anchor Coal Co. v. United States, 25 F. (2d) 462 (1928), rev'd as moot, 279 U. S. 812 (1929). For previous proceedings before the Commission involving the same controversy, see Lake Cargo Coal Rates, 1925, 101 I. C. C. 513 (1925), 126 I. C. C. 309 (1927). See MANSFIELD, THE LAKE CARGO COAL RATE CONTROVERSY (1st ed. 1932) for a thorough discussion of the entire controversy.

8. 24 STAT. 379 (1887), 49 U. S. C. A. § 1(5) (1926). This section provided that all charges for the transportation of passengers or property should be just and reasonable and prohibited and declared unlawful all unjust and unreasonable charges.

9. Louisville and Nashville Rr. Co. v. United States, 238 U. S. 1 (1915); Railway Express Agency v. United States, 6 F. Supp. 249 (S. D. N. Y. 1934); see Corporation Commission of Virginia v. Chesapeake and Ohio Ry. Co., 40 I. C. C. 24, 28 (1916); Nagase and Co. v. Director General, 62 I. C. C. 422, 426 (1921); Salt Cases of 1923, 92 I. C. C. 388, 410 (1924), aff'd, 6 F. (2d) 315 (N. D. Ohio 1925); Wyoming Coal Co. v. Virginian Ry. Co., 98 I. C. C. 488, 496 (1925), aff'd, 272 U. S. 658 (1926); Lake Cargo Coal, 139 I. C. C. 367, 386 (1928); MANSFIELD, op. cit. *supra* note 7, at 238. Comparisons with other rates are not a conclusive test of reasonableness but have probative value only. Youngstown Sheet and Tube Co. v. United States, 295 U. S. 476 (1935).

10. See the concurring opinion of Commissioner Eastman in Lake Cargo Coal, 139 I. C. C. 367, 396 (1928); the partial dissents of Commissioners Brainerd and Porter in Chemical Lime Co. v. Bellefonte Central Rr. Co., 147 I. C. C. 285, 289 (1928); cf. Commissioner Eastman's concurrence, id. at 286.

zone of reasonableness, are unduly discriminatory between persons and localities.[11] Moreover, such use of the doctrine of relative unreasonableness would seem to result in the imposition of a more drastic restraint upon competition in railroad rates than the courts seem to have been willing to tolerate under the present Act.[12] The fact that the doctrine has not since been used by the Commission to remove discrimination seems to indicate that it recognizes that the doctrine may not validly be so used.[13]

Recently the Commission seems to have attempted, by invoking both Sections 1(5) and 15a(2),[14] to remove discrimination in a situation where Section 3(1) could not, under the rule of the *Texas and Pacific* case, be applied. In *United States v. Chicago, Milwaukee, St. Paul and Pacific Rr. Co.*[15] the defendant Milwaukee railroad participated in the transportation of coal from Indiana and Illinois mines to a common destination. On both routes it was subject to the competition of independent carriers so that it could control neither rate. While the distance from the Illinois mines to the common destination was shorter than that from the Indiana mines, the rates from both points for a number of years had been the same.[16] In 1930 the carriers serving the Illinois mines were compelled by the state commission to reduce their rates; and the Interstate Commerce Commission upheld the reduced rates as reasonable and non-discriminatory.[17] Thereafter the Milwaukee sought to reduce its Indiana rates

11. See Interstate Commerce Commission v. Baltimore and Ohio Rr. Co., 145 U. S. 263, 277 (1892); American Express Co. v. Caldwell, 244 U. S. 617, 624 (1917); Maritime Association of Boston Chamber of Commerce v. Ann Arbor Rr. Co., 95 I. C. C. 539, 567 (1925); West Coast Lumbermen's Association v. Akron, Canton and Youngstown Ry. Co., 183 I. C. C. 191, 208 (1932); Stewart Inso Board Co. v. Atchison, Topeka and Santa Fe Ry. Co., 188 I. C. C. 535, 538 (1932); General Electric Co. v. Alton Rr. Co., 197 I. C. C. 291, 296 (1933); NOYES, AMERICAN RAILROAD RATES (1st ed. 1906) 92. But see State Corporation Commission of Virginia v. Chesapeake and Ohio Ry. Co., 40 I. C. C. 24, 28 (1916).

12. See the concurring opinion of Commissioner Eastman in Lake Cargo Coal, 139 I. C. C. 367, 396 (1928). See note 36, *infra*.

13. In the recent case of United States v. Chicago, Milwaukee, St. P. and P. Rr. Co., 294 U. S. 499 (1935), counsel for the Commission argued on appeal the applicability of the doctrine of relative unreasonableness to a similar situation, but the Supreme Court took no cognizance of it. See Brief for United States and Interstate Commerce Commission 29, 53-55, 294 U. S. 499 (1935).

14. 48 STAT. 220, 49 U. S. C. A. § 15a (2) (1933). This Section provides that in exercising its power to prescribe just and reasonable rates the Commission should give "due consideration to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service."

15. 294 U. S. 499 (1935), aff'g 8 F. Supp. 970 (N. D. Ill. 1934), rev'g Coal from Indiana to Illinois, 200 I. C. C. 609.

16. Rates from Illinois mines south of Springfield were 30 cents higher than rates from either Indiana or Springfield.

17. Intrastate Rates on Bituminous Coal Between Points in Illinois, 182 I. C. C. 537 (1932). Although the Commission found that the Illinois rates might reasonably be higher, it found no justification for requiring an increase because the same thing was true of the Indiana rates.

so as to restore the previous parity of rates, and thereby gain back the business that had been diverted to the Illinois carriers and mines. The proposal of the Milwaukee was the object of attack in the instant case.[18] The facts seem to point to the conclusion that the fairness of the differential between the Illinois and Indiana rates was the real issue involved and that shippers of each locality were actually complaining of the prejudice to which the rate adjustment proposed by the other side subjected them.[19] Nevertheless, the Commission, under the *Texas and Pacific* rule, was powerless to invoke Section 3(1) as a basis for action, because the Milwaukee was not in control of rates to both points. Hence, the Commission, instead, found the proposed rates of the Milwaukee from the Indiana mines unreasonably low in violation of Sections 1(5) and 15a(2), on the ground that they disrupted the existing rate structure and would therefore be likely to result in a rate war. In this manner it might, in effect, have indirectly accomplished a removal of what it deemed an undue discrimination, although it could not have done so directly under Section 3(1). The Supreme Court, however, affirmed a decree of the District Court perpetually enjoining the order of the Commission.[15] It declared that a rate could not be held to be unreasonably low within the prohibition of Section 1(5), unless it was so low as to be non-compensatory, and such was not shown to be the situation in this case.[20] Moreover, it stated that, in view of the Commission's power to check any further rate reductions by exercising its minimum rate powers under Section 15(1),[21] the threat of a rate war was not a sufficient reason for declaring the reduced rate from the Indiana mines unreasonable under Section 15a(2)

18. Coal from Indiana to Illinois, 197 I. C. C. 245 (1933), 200 I. C. C. 609 (1934). Carriers from both Illinois and Indiana mines as well as Illinois coal operators attacked the proposed rates under §§ 15(1) and 15a(2). In contrast, § 3(1) was designed to protect only shippers and localities from prejudice and not the carriers themselves. See Delaware, L. & W. Rr. Co. v. Kutter, 147 Fed. 51, 63 (C. C. A. 2d, 1906); Oklahoma-Arkansas Tel. Co. v. Southwestern Bell Tel. Co., 183 I. C. C. 771, 774 (1932); Citrus Fruit from Florida Via St. Louis—S. F. Ry., 194 I. C. C. 445, 450 (1933). But apparently a carrier may invoke § 3(1) to protect the shippers on its lines from discrimination.

19. The Commission found that prior to the reduction in Illinois rates, the Indiana groups had an advantage over their Illinois competitors at the destination points and that it was this advantage that the Milwaukee was seeking to reestablish by reducing its rates and diverting traffic. The Milwaukee contended that as a result of reduced Illinois rates it was being deprived of tonnage that properly should move from Indiana mines. After considering evidence showing the volume of traffic from both Illinois and Indiana since the initiation of the lower Illinois rates, the Commission found that the tonnage from Indiana had not decreased as a result of the reduced Illinois rates. Coal from Indiana to Illinois, 200 I. C. C. 609, 612-613 (1934). But see Youngstown Sheet and Tube Co. v. United States, 295 U. S. 476, 480 (1935).

20. But see Jefferson Island Salt Mining Co. v. United States, 6 F. (2d) 315, 317 (N. D. Ohio 1925); Anchor Coal Co. v. United States, 25 F. (2d) 462, 471 (S. D. W. Va. 1928); Cement from Linwood to Points in Illinois, 140 I. C. C. 579, 582 (1928).

21. 41 STAT. 484 (1920), 49 U. S. C. A. § 15(1) (1926). Section 13(4), 41 STAT. 484 (1920), 49 U. S. C. A. § 13(4) (1926) authorized the Commission to prescribe maximum and minimum rates where existing rates caused undue preference and prejudice as between localities in intrastate commerce and those in interstate commerce or unjust discrimination against interstate or foreign commerce.

in the absence of any showing that the previously existing rate relationship was a fair one.[22]

While the Court's decision in the *Chicago, Milwaukee* case seems virtually to eliminate any possibility of the Commission's evading the limitations of Section 3(1) by proceeding instead under Secton 1(5), still, a dictum in that case to the effect that the threat of a rate war may be sufficient reason for rejection of a proposed rate under Section 15a(2) if the rate relation previously existing is found to be a fair one, may be said to afford a possible means to the Commission of preventing discriminations which would result from a reduction in rates to a particular locality, when such discriminations might otherwise fall outside the purview of Section 3(1).[23] But such an interpretation of the Commission's powers under Section 15a(2) would not, of course, aid the Commission in eliminating discriminations already in existence and not created by any reduction in rates; for, the Commission could act only to prevent rate reductions which would disrupt a fair rate relation between localities and could not itself establish a fair differential where an unfair one was in existence. Furthermore, in line with the *Chicago, Milwaukee* case, it would seem that the mere approval of a previous reduction which operated to create a certain rate relation would not constitute a sufficient finding of the existence of a fair relation, justifying the disapproval of a rate reduction subsequently inaugurated by competing carriers to offset the previously authorized reduction. Evidently the Commission would have to make an affirmative and detailed finding to the effect that the differential itself is a fair one before it could reject a proposed rate on the ground that it would precipitate a rate war by disrupting that differential.

The question remains as to whether the Commission may remove undue discriminations which could not be removed under Section 3(1) alone, by employing its rate making powers under Section 15(1) in conjunction with Section 3(1).[24] Section 15(1),[21] which was enacted in its present form as part of

22. In upholding the reduction in Illinois rates prescribed by the Illinois Commerce Commission and refusing to permit an increase, the Interstate Commerce Commission stated that no increase in Illinois rates would be insisted upon because the Indiana rates were themselves below a reasonable level. See Intrastate Rates on Bituminous Coal in Illinois, 182 I. C. C. 537, 549 (1932). In the later proceeding challenging the proposed reductions of the Milwaukee, the Commission admitted that the rate situation between the Illinois and Indiana groups might be in need of correction. See Coal from Indiana to Illinois, 197 I. C. C. 245, 249 (1933). But see note 23, *infra.*

23. See also Youngstown Sheet and Tube Co. v. United States, 295 U. S. 476 (1935), aff'g 7 F. Supp. 33 (N. D. Ohio 1934), 197 I. C. C. 617. In that case the Commission had ordered ex-river rates on coal from Pennsylvania to Ohio destinations reduced. Later, after full investigation, it prescribed a definite rate structure for all-rail transportation from various producing regions to Ohio destinations. The lower ex-river rates that had been instituted were then attacked as being so low as to disrupt the all-rail rate structure and unduly prejudice the producer on the all-rail routes; and the Commission so found. The Supreme Court upheld the Commission's order and distinguished the *Chicago, Milwaukee* case on the ground that the rate structure found to be disrupted had previously been found just and reasonable by the Commission.

24. In Central Railroad of New Jersey v. United States, 257 U. S. 247, 260 (1921), rev'g American Creosoting Co. v. Director General, 61 I. C. C. 145 (1921), the Supreme Court

the Transportation Act of 1920, authorizes the Commission, either upon complaint of a party or upon its own motion, to prescribe just and reasonable rates or maximum and minimum rates whenever existing rates are found after hearing to be unreasonable or unduly preferential or prejudicial.[25] Previous to the *Texas and Pacific* case, the language of the Court in one of its most oft-quoted decisions seemed to indicate that, since the minimum rate power had been conferred upon the Commission, it might require a carrier which participated in rates to the preferred and prejudiced localities, but did not control the rates to both, to act on the direction of the Commission to remove any existent discrimination.[26] The rationale leading to such a conclusion seemed to have been along the following lines. The basis of the *Ashland* rule, requiring that a carrier or group of carriers control both the preferential and prejudicial rates before the Commission might act under Section 3(1), was that a carrier participating in both rates of a discriminatory differential could not be held responsible for an "undue" preference when the lower rate causing the preference was caused by the competition of independent carriers over which the former carrier had no control. For, even though the defendant carrier or group of carriers might lower the prejudicial rates in an attempt to eliminate the discrimination, they would be helpless to prevent other carriers operating to the preferred point from continuing the discrimination by further reduction of the preferential rate.[27] But

declared that the Transportation Act, 1920 did not change the purpose or scope of § 3(1). See Argument for Appellants, id. at 249; Manufacturers Association of York v. Pennsylvania Rr. Co., 107 I. C. C. 219, 232 (1926); Biklé, *Power of the Interstate Commerce Commission to Prescribe Minimum Rates* (1922) 36 HARV. L. REV. 5, 23. But see Southern Hardwood Traffic Association v. Director General, 61 I. C. C. 132, 141 (1921); Commissioner Lewis's dissent, City of Oswego v. Baltimore and Ohio Rr. Co., 146 I. C. C. 293, 306 (1928). As to the effect of § 15(1) upon the operation of § 1(5), the Commission said in Lake Cargo Coal, 139 I. C. C. 367, 386 (1928): "The provisions of Section 1 are as broad in scope as the power conferred for its administration."

25. Despite the provision for proceeding on its own motion the Commission has in at least one case refused to correct an unfair situation because the exercise of its rate powers was not invoked by complainants. See Maritime Association of Boston Chamber of Commerce v. Ann Arbor Rr. Co., 95 I. C. C. 539, 573 (1925). Commissioner Campbell in his dissent favored an investigation by the Commission on its own motion. See also the remarks of Mr. Justice Cardozo, in United States v. Chicago, Milwaukee, St. P. and P. Rr. Co., 294 U. S. 499, 509 (1935), as to the Commission's' power under Section 15(1) to conduct a comprehensive inquiry into rates on its own motion.

26. United States v. Illinois Central Rr. Co., 263 U. S. 515, 525 (1924) (declaring that since the Transportation Act, 1920, the desire to compete need not be given so much weight in determining the justness of a discrimination against a locality); Virginian Ry. Co. v. United States, 272 U. S. 658, 664 (1926). Commissioner Eastman has subsequently advocated pursuing a similar policy in like situations. See his concurring opinions in Lake Cargo Coal Rates, 1925, 126 I. C. C. 309, 367 (1927); Lake Cargo Coal, 139 I. C. C. 367, 395 (1928); and his dissent in Baltimore Chamber of Commerce v. Ann Arbor Rr. Co., 159 I. C. C. 691, 698 (1929). The Commission in finding unjust discrimination in the *Texas and Pacific* case and repudiating the Ashland rule, placed principal reliance upon the *Illinois Central* case. See Galveston Commercial Association v. Galveston, Harrisburg, and San Antonio Ry. Co., 160 I. C. C. 345, 357 (1929).

27. Ashland Fire Brick Co. v. Southern Ry. Co., 22 I. C. C. 115, 120 (1911); see East Tennessee, Virginia and Georgia Ry. Co. v. Interstate Commerce Commission, 181 U. S. 1,

if that competition were brought within the control of the Commission under its power to fix minimum rates so that that competition would no longer be a disturbing factor in the newly-created rate relationship, the justification for the preference would cease, and accordingly the Commission might require the carrier to remove the discrimination.[28] But it seems always to have been assumed by the Supreme Court, even subsequent to the enactment of Section 15(1), that before proceedings could be instituted against a carrier under Section 3(1), it must at least have participated in the rates to both the preferred and prejudiced points,[29] the theory seemingly being that the responsibility of carriers under Section 3(1) is founded solely on fault. Hence, even under the most liberal construction of the Commission's powers under Section 3(1), the Commission would be powerless to remove any discrimination caused by entirely independent lines serving either the preferred or prejudiced localities.

But the *Texas and Pacific* case seems to have definitely precluded the possibility, suggested by previous decisions and dicta,[26] that the Commission's power to remove undue discrimination under Section 3(1) would be more broadly construed as a result of Congress's giving it minimum rate powers.[30] It is true that the Supreme Court has never passed upon a case in which the Commission exercised its rate-making powers under Section 15(1) in conjunction with Sec-

18 (1901); Comment (1933) 43 YALE L. J. 297. Numerous other cases following the rule are cited in Commissioner Porter's dissent in Duluth Chamber of Commerce v. Chicago and North Western Ry. Co., 156 I. C. C. 156, 173 (1929). The Commission has wavered from the rule only on the rarest occasions. City of Oswego v. Baltimore and Ohio Rr. Co., 146 I. C. C. 293 (1928); Duluth Chamber of Commerce v. Chicago and North Western Ry. Co., 156 I. C. C. 156 (1929); Galveston Commercial Association v. Galveston, Harrisburg, and San Antonio Ry. Co., 160 I. C. C. 345 (1929), rev'd, 289 U. S. 627 (1933); Inland Empire Manufacturers' Association v. Abilene and Southern Ry. Co., 165 I. C. C. 53 (1930). In Eau Claire Board of Trade v. Chicago, Milwaukee and St. Paul Ry. Co., 5 I. C. C. 264 (1892), usually cited as the first case to give expression to the Ashland rule, the Commission held the defendant guilty of unjust discrimination even though it was subject to the competition of independent carriers and though it was admitted that the latter could not be made subject to the order.

28. See cases cited note 26, *supra*.

See ANN. REP. I. C. C. (1897) 23-25, as to the Commission's request for the minimum rate power to perfect its authority in removing unjust discriminations where the defendant carriers are subject to independent competition as in Eau Claire Board of Trade v. Chicago, Milwaukee and St. Paul Ry. Co., 5 I. C. C. 264 (1892), cited note 27, *supra*. Congress apparently granted the minimum rate power in answer to the Commission's repeated demands. See the remarks of Senator Cummins, 59 CONG. REC. 143 (1919); ANN. REP. I. C. C. (1893) 220; id. (1898) at 23; id. (1905) at 177, 179 (bill recommended by the Commission granting the minimum rate power along with the maximum rate power, only when necessary to prevent discriminations under § 3); id. (1919) at 4; Galloway Coal Co. v. Alabama Great Southern Ry. Co., 40 I. C. C. 311, 315 (1916); 1 SHARFMAN, op. cit. *supra* note 2, at 201.

29. See Chicago, Indianapolis and Louisville Ry. Co. v. United States, 270 U. S. 287, 293 (1926); Central Railroad Co. of New Jersey v. United States, 257 U. S. 247, 259 (1921); cf. St. Louis Southwestern Ry. Co. v. United States, 245 U. S. 136, 144 (1917) [Section 3(1) not primarily involved]; United States v. Illinois Central R. Co., 263 U. S. 515, 520 (1924).

30. For a discussion of the varying effect the court has given to the *Ashland* rule down to the *Texas and Pacific* case, see Comment (1933) 43 YALE L. J. 297.

tion 3(1) to remove an unjust discrimination.[31] In the *Texas and Pacific* case the Commission acted under Section 3(1) only, and accordingly it may be said that the Court's holding is restricted to that situation.[32] Nevertheless, there is no reason to suppose that the Court would reach a different result where the Commission invoked its rate making powers under Section 15(1) to remove a discrimination under Section 3(1). For, it is apparently accepted that Section 15(1) is invocable to remove only such discriminations as are undue under Section 3(1).[33] And while, previous to the *Texas and Pacific* case, it was possible to maintain, consistently with the rule mentioned, that the meaning of Section 3(1) was broadened by the grant of the minimum rate power in Section 15(1),[26] and that Section 15(1) could be applied to remove discriminations violative of Section 3(1) as thus construed, the argument is no longer tenable. For the *Texas and Pacific* case seems to have established that, despite the existence of the minimum rate power, the Commission, under Section 3(1), may remove only discriminations caused by a carrier or group of carriers in control of both rates, thus limiting the scope of Section 3(1) to what it was before Section 15(1) was enacted. This interpretation, of course, renders the existence of the minimum rate power in Section 15(1) of practically no effect in removing discriminations, for under the present interpretation of Section 3(1), discriminations which are "undue" within the meaning of that Section may as well be removed by an alternative order under that Section as by the prescription of a particular rate,[34] since a carrier or group of carriers in control of both rates forming the discriminatory relationship could effectively eliminate the discrimination either by lowering the prejudicial rate, raising the preferential, or adjusting both. Indeed, the Court seems to admit as much, for a dictum

31. The Commission has exercised its rate powers under Section 15(1) to remove rates found unduly prejudicial under Section 3(1). Arkansas Jobbers and Manufacturers Association v. Director General, 59 I. C. C. 662 (1920); Salt Cases of 1923, 92 I. C. C. 388 (1924), aff'd, Jefferson Island Salt Mining Co., 6 F. (2d) 315 (N. D. Ohio, 1925) (imminence of a rate war furnished an added justification); Bituminous Coal to Youngstown, 197 I. C. C. 617 (1933) (to remove rates found both unreasonably low and unduly discriminatory).

32. 289 U. S. 627, 633, 650 (1933). Mr. Justice Stone in his dissent states that the Commission acted under both Section 3(1) and 15(1). Id. at 655. Actually the Commission in that case merely prescribed the same rates to Texas ports as to New Orleans where the distances to the latter did not exceed those to the former by more than 25 per cent; but where such difference in distances did exceed 25 per cent, the rates to the Texas ports were not to exceed those to New Orleans by certain prescribed differentials. Galveston Commercial Association v. Galveston, Harrisburg and San Antonio Ry. Co., 160 I. C. C. 345, 359 (1929).

33. The two sections have usually been identified with each other by the Supreme Court and lower federal courts. See Ann Arbor Rr. Co. v. United States, 281 U. S. 658, 668, 669 (1930); Atchison, Topeka and Santa Fe Ry. Co. v. United States, 284 U. S. 248, 262 (1932); Jefferson Island Salt Mining Co. v. United States, 6 F. (2d) 315, 318 (N. D. Ohio 1925); Anchor Coal Co. v. United States, 25 F. (2d) 462, 472 (S. D. W. Va. 1928). But see Youngstown Sheet and Tube Co. v. United States, 295 U. S. 476, 480 (1935).

34. See Mr. Justice Stone's dissent in Texas and Pacific Ry. Co. v. United States, 289 U. S. 627, 655, 668 (1933); Arkansas Jobbers and Manufacturers Association v. Director General, 59 I. C. C. 662, 669 (1920); Manufacturers Association of York v. Pennsylvania Rr. Co., 107 I. C. C. 219, 231 (1926); Biklé, *supra* note 24, at 18.

in the *Texas and Pacific* case clearly indicates that the majority of the Court looks upon the Commission's minimum rate power as confined to the raising of rates which are unreasonably low within the meaning of Section 1(5), despite the clear direction of the statute that rates are to be prescribed whenever existing rates are found to be unjustly discriminatory as well as unreasonable.[35]

From the foregoing analysis it may be seen that the Commission's authority to prevent or remove discriminations between localities when such are not caused by a carrier or group of carriers in control of both the preferential and prejudicial rates, is extremely limited. As a result, many localities may suffer irreparable injury caused by loss of trade to competing localities enjoying lower freight rates.[6] It would seem desirable that remedial legislation be enacted doing away with the distinction between discrimination in fact and discrimination in law by expressly empowering the Commission to remove by means of its rate powers any unduly discriminatory rates found to be injurious to localities, even though such rates are not caused by a single carrier or group of carriers in control of both preferential and prejudicial rates. While it is true that it has long been the policy of the government to allow the railroads considerable latitude in fixing their own rates to meet competition,[36] it would not seem to be too great a restraint upon competition to vest the Commission with broad discretionary powers to remove such discriminations as are shown to be injurious to localities because resulting in large diversions of business to competing localities which enjoy a preferential rate unwarranted by distance, physical terrain of the territory traversed, or other transportation conditions.[37]

35. Cf. Sugar Cases of 1922, 81 I. C. C. 448, 472 (1923); H. Moffat Co. v. Southern Pacific Co., 195 I. C. C. 198, 202 (1933). For instances in which the Commission has exercised its minimum rate power to remove undue discrimination, see cases cited *supra*, note 31.

36. Texas and Pacific Ry. Co. v. Interstate Commerce Commission, 162 U. S. 197 (1896); see Texas and Pacific Ry. Co. v. United States, 289 U. S. 627, 636 (1933); East Tennessee, Virginia and Georgia Ry. Co. v. Interstate Commerce Commission, 181 U. S. 1, 19 (1901); Maritime Association of Boston Chamber of Commerce v. Ann Arbor Rr. Co., 95 I. C. C. 539, 566 (1925); Consolidated Southwestern Cases, 188 I. C. C. 307, 308 (1932); Commissioner Eastman's dissent in Baltimore Chamber of Commerce v. Ann Arbor Rr. Co., 159 I. C. C. 691, 708 (1929); cf. United States v. Illinois Central Rr. Co., 263 U. S. 515, 525 (1924); Leaf Tobacco from North Carolina, 174 I. C. C. 422, 426 (1931). The Supreme Court has held that competition is a factor producing "dissimilarity of conditions" within § 4 of the Act. See Interstate Commerce Commission v. Alabama Midland Ry. Co., 168 U. S. 144, 175 (1897); East Tennessee, Virginia and Georgia Ry. Co. v. Interstate Commerce Commission, *supra* at 12; Interstate Commerce Commission v. Louisville and Nashville Rr. Co., 190 U. S. 273, 281 (1903); Interstate Commerce Commission v. Chicago Great Western Ry. Co., 209 U. S. 108, 119 (1908). As the railroad industry is one of increasing returns, the constant pressure to obtain more business and the resulting competition are the principal explanation of local discrimination. See JONES, PRINCIPLES OF RAILWAY TRANSPORTATION (1st ed. 1925) 108. Local discriminations induced by competition have been said to be justified by the value principle on the theory that service to a shipper at a point served by several railroads is not so valuable as that rendered at a point served by only one railroad. See NOYES, op. cit. *supra* note 11, at 93.

37. To establish undue prejudice, a mere showing of disparity in rates is not sufficient; the rates attacked must be shown to be a source of positive advantage to one locality and

It would in effect be no more than the substitution of the discretion of public authority for that of the individual carrier, and in the exercise of such discretion the Commission would be subject to the same requirements of conformity with transportation standards as the carriers are at present.[38] The proposed change would, of course, involve a shift from the present concept of Section 3(1) as being penal in nature, so that only when a railroad is at "fault" can the Commission remove the discrimination, to the view that the legislation is remedial and intended to permit removal of any unjustifiable discrimination regardless of what carriers are responsible therefor.[39] The latter would seem more in consonance with the spirit of the other provisions of the Interstate Commerce Act.[40]

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of positive disadvantage to another, both of which are in a competitive relationship with each other. See Smith, Richardson, and Conroy, Inc. v. Boston and Albany Rr., 139 I. C. C. 265, 268 (1928); Potomac Electric Power Co. v. Chesapeake and Ohio Ry. Co., 142 I. C. C. 236, 247 (1928); Federated Metals Corp. v. Pennsylvania Rr. Co., 161 I. C. C. 287, 288 (1930); Municipal Paving and Construction Co. v. Seaboard Air Line Ry. Co., 165 I. C. C. 220, 222 (1930); National Broom Mfg. Co. v. Atchison, Topeka and Santa Fe Ry. Co., 168 I. C. C. 407, 412 (1930); City of Moorhead v. Great Northern Ry. Co., 172 I. C. C. 38, 43 (1931). Nor can rates that are warranted by transportation conditions be declared unduly discriminatory, since the needs of shippers and localities are to be given only such consideration as may be reasonable considering distance, the nature and cost of the service, and the need for an adequate transportation system. Ann Arbor Rr. Co. v. United States, 281 U. S. 658 (1930); United States v. Illinois Central Rr. Co., 263 U. S. 515 (1924); Anchor Coal Co. v. United States, 25 F. (2d) 462 (S. D. W. Va. 1928); see Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42, 46 (1911); Ashland Fire Brick Co. v. Southern Ry. Co., 22 I. C. C. 115, 121 (1911); MANSFIELD, op. cit. *supra* note 7, at 242. But see Boileau v. Pittsburgh and Lake Erie Rr. Co., 22 I. C. C. 640, 647 (1912); Ex-Ohio-River Coal to Ohio Points, 185 I. C. C. 211, 220 (1932); Coal from Louisville and Nashville Rr. Mines to Southern Points, 192 I. C. C. 521, 530 (1933).

38. ". . . obviously, what the carrier may not lawfully do, the Commission may not compel." See Texas and Pacific Ry. Co. v. United States, 289 U. S. 627, 637 (1933).

39. See the remarks of Senator Cullom, 18 CONG. REC. 660 (1887): "It has been said over and over again here that the railroad companies would build up one man and crush another; that their policy has been to destroy one locality or city and build up another. Here we have undertaken to so regulate them as to prevent them from doing those things so far as we can do so." See also Ann Arbor Rr. Co. v. United States, 281 U. S. 658, 667 (1930). In New York, New Haven and Hartford Rr. Co. v. Interstate Commerce Commission, 200 U. S. 361, 391 (1906), the court said: "It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all, and to destroy favoritism, these last being accomplished by . . . forbidding rebates, preferences and all other forms of undue discrimination. To this extent and for these purposes the statute was remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve."

40. See cases cited *supra*, note 2.