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IMPACT OF THE COURTS UPON THE NRA PROGRAM: JUDICIAL ADMINISTRATION OF NIRA

AN abundant literature in both legal[1] and lay[2] periodicals has attempted, with diverse results, to predict the constitutional status of the NRA program. Two cases presently to be considered by the Supreme Court[3] may draw forth final judicial determination of some aspects of the question, although recent developments seem likely to allow decision on other grounds.[4] Meanwhile,

1. See, e.g., Black, *National Industrial Recovery Act and the Delegation of Legislative Power to the President* (1934) 19 CORN. L. Q. 389; Carpenter, *Constitutionality of the National Industrial Recovery Act and the Agricultural Adjustment Act* (1934) 7 SO. CALIF. L. REV. 125; Elder, *Some Constitutional Aspects of the National Industrial Recovery Act* (1934) 28 ILL. L. REV. 636; Field, *Constitutional Theory of the National Industrial Recovery Act* (1934) 18 MINN. L. REV. 269.

2. See, e.g., Arnold, *New Deal is Constitutional* (1933) 77 NEW REP. 8; Clark, *A Socialistic State Under the Constitution* (1934) 9 FORTUNE 68; Corwin, *Some Probable Repercussions of Nira on our Constitutional System* (1934) 172 ANN. AM. ACAD. 139; Cummings, *Recovery Plan as Constitutional Remedy* (1933) 9 REF. SHELF No. 2, at 90.

3. Panama Refining Co. v. Ryan, and Amazon Petroleum Corp. v. Ryan, cert. granted, U. S. L. Week, Oct. 9, 1934, at 102, Col. 1.

4. An error in amending the petroleum code, discovered since the cases were in the lower courts, may remove from the *Amazon* case the question of the power to make pro-

since the beginning of administrative action under the Act, a considerable number of lower courts have been required to discuss various features of the recovery scheme based on the National Industrial Recovery Act. The contact of the courts with the tremendous program involved has been interesting not only to indicate judicial attitude toward the fundamental purpose of the Act, but likewise to indicate the type of question most likely to arise and perhaps therefore to focus attention and consideration upon more real issues than hitherto has been possible. Moreover, regardless of the eventual determination on the constitutional issues, the reported cases reflect an active administration over business and labor that meanwhile must have far reaching effects.

CONSTITUTIONALITY

It has been generally felt that, without much difficulty and with adequate lip-service to precedent, the Act itself and much of the regulation under it could readily be held constitutional. But the subject matter of the NRA program is so broad that it raises a number of separate constitutional questions that can very possibly receive different treatment from the courts. The major points so far raised for consideration are, first, the scope of the regulatory power of Congress under the commerce clause; second, due process as a restriction on price fixing; third, the validity of Section 9(c) providing for prohibition of shipment in interstate commerce of petroleum produced in contravention of state law; and, fourth, the extent to which Congress may delegate legislative power to the president. Further important questions that have not been passed upon are the validity of the provisions for licensing in Section 4(b) and for regulation of employer-employee relationships under Section 7(a).

An approach to the question of constitutionality must consider two aspects: one is the Act itself; the other is conduct under the authority of the Act, prescribed by the codes adopted in accordance with its terms. Thus where the Act sets forth that it purports to regulate interstate commerce, such an intention on the part of Congress can certainly find constitutional sanction. But the terms of the Act indicate that conduct encouraged thereby is intended to extend governmental control further than ever before. Consequently the constutionality of the NRA program depends in large part upon the validity of particular provisions by which it is put into effect. These methods appear only by investigation of individual codes; the invalidity of a code or some of its provisions is no indication that the Act itself is invalid.

Although neither the power to prohibit interstate shipment by requiring operation under a license nor the power to protect labor by guaranteeing the right to collective bargaining and by abolishing the yellow-dog contract has been judicially determined, the questions have been largely discussed by commentators. As to the power to license, it has been argued that such a power to prohibit has long been considered a part of the power to regulate and that

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duction of petroleum in excess of the State quotas an unfair trade practice, and the question of the power to prohibit shipments of "hot oil" in interstate commerce may be dismissed as moot, the regulations having been amended since the suits were instituted. U. S. L. Week, Oct. 2, 1934, at S7, col. 3.

licensing should easily be sustained.[5] And without deciding the validity of the labor provisions, courts have entertained damage suits by employers and have enjoined employers from interfering with employee rights, both under the President's Reemployment Agreement and under the sanction of code provisions.[6]

Scope of the Commerce Clause. A fundamental purpose of the Recovery Act is to subject to minute restrictions as many kinds of business as possible. The questions naturally arise, then, as to how far such regulation may extend to businesses not directly concerned with interstate commerce as such, and what forms of control may be exercised within the field subject to the exercise of the power. The Supreme Court has previously held that the power of Congress to regulate commerce does extend to local matters which, though not themselves a part of it, are inextricably intermingled with interstate commerce or so closely related thereto as to make their regulation essential to the effective regulation of interstate commerce.[7] The restriction on this power has been only that the relation to interstate commerce must be "direct and substantial," not merely "accidental, secondary, remote, and problematical,"[8] a vague enough test, surely, and one which leaves wide room for judicial discretion. Consequently, when by the terms of the NIRA Congress purports to regulate "transactions in or affecting interstate or foreign commerce," attack can not well be directed against the Act, but only against particular regulation attempted thereunder.

As reflected in the codes, many of the attempts at regulation are similar to previous attempts that have been declared unconstitutional. In attempting to regulate prices, wages, hours of labor, and production the codes are exerting over manufacturing and producing processes a confining control hitherto declared impossible where the only connection with interstate commerce has been the fact that the product was eventually to be shipped in such commerce.[9]

5. Carpenter, *supra* note 1, at 140; Field, *Supra* note 1, at 279; Corwin *Congress's Power to Prohibit Commerce a Crucial Constitutional Issue* (1933) 18 CORN. L. Q. 477.

6. See the section on labor, *infra.*

7. In re Debs, 158 U. S. 564 (1895); Addyston Pipe and Steel Co. v. United States, 175 U. S. 211 (1899); Northern Securities Co. v. United States, 193 U. S. 197 (1904); Swift and Co. v. United States, 196 U. S. 375 (1905); Loewe v. Lawlor, 208 U. S. 274 (1908); Second Employers' Liability Cases, 223 U. S. 1 (1912); Minnesota Rate Cases, 230 U. S. 352 (1913); Houston, East and West Texas Ry. Co. v. United States, 234 U. S. 342 (1914); Lawlor v. Loewe, 235 U. S. 522 (1915); Wilson v. New, 243 U. S. 332 (1917); Duplex Printing Co. v. Deering, 254 U. S. 443 (1921); Railroad Commission of Wisconsin v. Chicago, Burlington and Quincy Rr. Co., 257 U. S. 563 (1922); Stafford v. Wallace, 258 U. S. 495 (1922); Chicago Board of Trade v. Olsen, 262 U. S. 1 (1923); Colorado v. United States, 271 U. S. 153 (1926); Tagg Brothers and Moorhead v. United States, 280 U. S. 420 (1930).

8. United Mine Workers of America v. Coronado Coal Co., 259 U. S. 344 (1922); United Leather Workers' Industrial Union v. Herkert, 265 U. S. 457 (1924); Industrial Association v. United States, 268 U. S. 64 (1925); Levering and Garrigues Co. v. Morrin, 289 U. S. 103 (1933).

9. United States v. E. C. Knight Co., 156 U. S. 1 (1895); Delaware, Lackawanna and Western Rr. Co. v. Yurkonis, 238 U. S. 439 (1915); Hammer v. Dagenhart, 247 U. S. 251 (1918).

This regulation is now sought to be justified upon different grounds, as indicated in the Congressional declaration of policy.[10] It is there stated to be the desire of Congress to remove obstructions to the free flow of interstate commerce by eradicating the causes of the depression. Thus an attempt is made to shift from physical connection with interstate commerce to the less tangible ground of economic connection. And if this premise be accepted, then it would follow that whatever may factually be said to have contributed to the depression should be subject to federal regulation until the period of economic stress has ended. Thus the picture is presented of local industry as a subject for state control when national prosperity reigns, and federal control during periods of emergency. Conceivably the state of our economic development might be found to be such that a permanent rather than transitory federal control would be permissible under this theory.

In cases that have arisen under the Act some judges have avoided this vital question by finding from the facts a physical connection with interstate commerce. Thus where a cleaner had his plant in New Jersey but sold his services in New York, he was held to be actually engaged in interstate commerce.[11] Again, where advertisements were placed in a newspaper of interstate circulation and a sale to a customer from another state was proved, the evidence clearly established a direct and substantial effect on interstate commerce.[12] On the other hand, it has been bluntly said that Congress cannot regulate manufacture or production, any effect on interstate commerce being simply ignored.[13] Six courts, however, have given full consideration to the theory of economic effect on interstate commerce and have divided equally in result. Thus violations of the wage, hours of labor, and other provisions of the live poultry code were held to disrupt the free flow of interstate commerce and therefore to have a direct and substantial effect on that commerce;[14] exceeding the restriction of operations in hosiery mills to two forty-hour shifts per week was found to affect interstate commerce substantially;[15] and the practice by operators of filling stations in Detroit of giving coupons redeemable in merchandise with sales of gasoline products was held directly to burden and substantially to obstruct the free flow of interstate commerce in petroleum products.[16] But two cases held that the giving of premiums in connection with the sale of petroleum products had at most only a "merely accidental, secondary, remote, and prob-

10. NIRA, § 1; see Field, *supra* note 1, at 270 et seq.

11. United States v. Spotless Dollar Cleaners, 6 F. Supp. 725 (S. D. N. Y. 1934).

12. United States v. Canfield Lumber Co., U. S. L. Week, Sept. 18, 1934, at 46, col. 2 (D. Neb. 1934).

13. Panama Refining Co. v. Ryan, 5 F. Supp. 639 (E. D. Tex. 1934), rev'd, 71 F. (2d) 8, sub. nom. Ryan v. Panama Refining Co. (C. C. A. 5th, 1934); United States v. Lieto, 6 F. Supp. 32 (N. D. Tex. 1934); Hart Coal Corp. v. Sparks, 7 F. Supp. 16 (W. D. Ky. 1934); United States v. Eason Oil Co., U. S. L. Week, Oct. 2, 1934, at 83, col. 1 (W. D. Okla. 1934).

14. United States v. Schechter, U. S. L. Week, Sept. 4, 1934, at 17, col. 2 (E. D. N. Y. 1934).

15. Richmond Hosiery Mills v. Camp, 7 F. Supp. 139 (N. D. Ga. 1934).

16. Victor v. Ickes, 61 Wash. L. Rep. 870 (D. C. 1933).

lematical" effect on interstate commerce;[17] and the price at which coal was sold at a wagon mine or the desultory production of the mine even though sales to some who took the coal across State lines were proved, was held not to affect interstate commerce in the way and to the extent necessary to justify federal regulation.[18] The facts of these six cases are close enough to draw attention to what will probably prove to be the most important question needing authoritative settlement, that is, whether Congress has the power to regulate transactions which it considers as causative of the depression and therefore of the derangement of interstate commerce.

In addition to the necessity for some affirmative argument to justify federal control over matters heretofore considered as of a local nature only, the necessity has arisen in certain types of cases, notably those involving restriction of production, to distinguish precedents which appear to foreclose that particular form of regulation.

It has already been pointed out that the Supreme Court has held that manufacture and production, since they are not commerce, cannot be regulated under the commerce power when the only basis for regulation is that the goods are destined for interstate commerce. Nevertheless, restrictions in production output are a vital factor in many of the codes, and only in cases arising under the petroleum code[19] has the obstacle of previous decisions proved insurmountable to the courts.[20] But the restriction of production provisions have been upheld with respect to the lumber,[21] cotton textile,[22] silk textile,[23] rayon silk

17. United States v. Suburban Motor Service Corp., 5 F. Supp. 798 (N. D. Ill. 1934); United States v. Mills, 7 F. Supp. 547 (D. Md. 1934).

18. United States v. Gearhart, U. S. L. Week, August 14, 1934, at 1043, col. 1 (D. Colo. 1934).

19. Panama Refining Co. v. Ryan, 5 F. Supp. 639 (E. D. Tex. 1934); United States v. Smith, The Blue Eagle, Sept. 4, 1934, at 4, col. 2 (E. D. Tex. 1934); United States v. Eason Oil Co., U. S. L. Week, Oct. 2, 1934, at 83, col. 1 (W. D. Okla. 1934).

20. It is true that the Supreme Court had previously held that oil production was not so intimately connected with interstate commerce that state regulation of the former constituted an undue burden upon the latter. Champlin Refining Co. v. Corporation Commission, 286 U. S. 210 (1932). Thus a lower court might now hesitate to hold that the same process did have such a connection with interstate commerce as to bring it within the scope of the commerce clause. But certainly there is no compelling reason why a court should so hesitate; there are several fields in which the state is competent to regulate without burdening interstate commerce unduly which are yet closely enough connected with interstate commerce to permit of federal regulation as well. E.g., Houston, East and West Texas Ry. Co. v. United States, 234 U. S. 342 (1914) (complementary state and federal control over intrastate railroad rates); Thornton v. United States, 271 U. S. 414 (1926) (complementary state and federal control over diseased intrastate cattle).

21. Willamette Valley Lumber Co. v. Watzek, 5 F. Supp. 689 (D. Ore. 1934).

22. United States v. Greenville Finishing Co., The Blue Eagle, Sept. 4, 1934, at 4, col. 1 (D. R. I. 1934).

23. United States v. Salzberg and Sons, U. S. L. Week, Oct. 2, 1934, at 74, Col. 3 (D. R. I. 1934).

dyeing and printing,[24] and hosiery[25] codes where the courts have accepted the theory that economic effect on interstate commerce gave the necessary relation for regulation under the commercial clause. A difficult subordinate problem arising here concerns the equitable allocation of production quotas, and it has been held that, although due process requires the fairest allocation practicable, administrative difficulty obviates the necessity of considering such matters as past productive history and existing contract obligations.[25]

Due Process. Further adverse precedent is encountered when an attempt is made to fix prices. There is a long series of cases, beginning with *Munn v. Illinois*[26] and continuing unbroken to the *O'Gorman and Young*[27] insurance case, establishing affectation with a public interest as the criterion of the validity of price and rate regulation. But this line of cases has been demonstrated to be founded upon historical error.[28] In the *Nebbia* case[29] the Supreme Court went out of its way to recognize this false basis, saying that the test means nothing more than that a business must be subject to regulation under the police power in order to be affected with a public interest and explaining the cases holding such regulations invalid as based upon the arbitrary character of the regulations under conditions then existing rather than upon the nature of the business. Furthermore, in the past, price-fixing has usually been a legislative attempt to reduce prices for the protection of the consumer; the NRA program attempts to increase and maintain, rather than to reduce, prices for the purpose of protecting industry from the devastation of price wars so prevalent under the system of free competition. To support the present provisions it is contended that Congress has the power to regulate methods of competition in interstate commerce and that under existing conditions price cutting is a method of unfair competition to be avoided only by governmental price control. The cases so far arising under the NRA have almost uniformly upheld that right thus to fix prices, either on the theory that it is justified by emergency[30] or with no discussion at all.[31] And even where the power has

24. United States v. Allied Dye and Print Works, Inc., The Blue Eagle, Sept. 4, 1934, at 4, col. 1 (D. N. J. 1934).

25. Richmond Hosiery Mills v. Camp, 7 F. Supp. 139 (N. D. Ga. 1934).

26. 94 U. S. 113 (1877).

27. 282 U. S. 251 (1931). See also, Tyson 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). See Elder, *supra* note 1, at 640.

28. Hamilton, *Affectation with a Public Interest* (1930) 39 YALE L. J. 1039.

29. Nebbia v. New York, 291 U. S. 502, 531 (1934).

30. United States v. Spotless Dollar Cleaners, Inc., 6 F. Supp. 725 (S. D. N. Y. 1934); Hoskins v. Gullatt Cleaning & Laundry Co., U. S. L. Week, April 3, 1934, at 682, col. 2 (C. P., Franklin Co., Ohio 1934) (State act).

31. United States v. Blue Ribbon Corp., The Blue Eagle, Sept. 10, 1934, at 4, col. 3 (W. D. Ark. 1934) (consent decree); United States v. James W. McAllister, Inc., U. S. L. Week, Oct. 2, 1934, at 89, col. 3 (N. D. Cal. 1934); United States v. Barnhill, The Blue Eagle, Sept. 10, 1934, at 4, col. 1, (S. D. Ga. 1934) (guilty plea); United States v. Tung, The Blue Eagle, Sept. 10, 1934, at 4, col. 2 (E. D. La. 1934); United States v. Howard's Odorless Cleaners, Inc., The Blue Eagle, Sept. 10, 1934, at 4, col. 3 (E. D. La. 1934); United States v. Truckers Ice and Cold Storage Co., Ltd., The Blue Eagle, Sept. 10, 1934,

been said to be inapplicable to a business because the requisite interstate character was lacking,[32] this defect has been successfully met when a state recovery act supplementing the terms of the National Act has been in force.[33] But a check on the operation of the power is to some extent preserved in the requirement that for valid price control the authority must act in good faith,[34] avoiding arbitrary and unfair discrimination.[35] Only in one instance has a court denied that price cutting was an unfair method of competition under present day conditions and consequently reached the conclusion that price fixing was therefore unwarranted.[36]

Prohibition of Shipment of Petroleum Illegally Produced. Only the discredited case of *Hammer v. Dagenhart*[37] stands in the way of a holding that the power to regulate commerce includes the power to prohibit shipments in that commerce of an article produced in contravention to the laws of the state of production. That case may be distinguished on the ground that the fatal defect of the law there declared invalid was not that prohibition was an improper form of regulation of interstate commerce, but that the law was primarily a regulation of manufacture. Under the NIRA, however, the primary purpose is the stimulation of interstate commerce, and so the question seems to be not one of the scope of the commerce clause, but one of the validity of the prohibition as a reasonable form of regulation under the Fifth Amendment. There are precedents holding that prohibition is proper

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at 4, col. 2 (E. D. La. 1934); United States v. Howard's Odorless Cleaners, Inc., The Blue Eagle, Sept. 10, 1934, at 4, col. 3 (W. D. La. 1934); United States v. Divine, U. S. L. Week, Oct. 2, 1934, at 89, col. 2 (D. Neb. 1934); United States v. C. H. Joyner Chevrolet Co., U. S. L. Week, Oct. 2, 1934, at 89, col. 2 (M. D. N. C. 1934) (consent decree); New Jersey v. Magid, 2 NRA Rep. 174 (Ct. Quart. Sess. Jersey City, N. J. 1934) (State act); Stokes v. Newton Creek Coal and Coke Co., U. S. L. Week, Sept. 18, 1934, at 47, col. 1 (Sup. Ct., N. Y. 1934) (State act); State v. Riesenberg, U. S. L. Week, Oct. 2, 1934, at 88, col. 2 (Mag. Ct., Millcreek Twp., Hamilton Co., Ohio 1934) (State act); Brady v. Lewis, U. S. L. Week, Oct. 2, 1934, at 89, col. 1 (Circ. Ct., Roanoke Co., Va. 1934) (State act); cf. U. S. L. Week, Oct. 16, 1934, at 109, col. 3.

32. Purvis v. Bazemore, 5 F. Supp. 230 (S. D. Fla. 1933); United States v. Gearhart, U. S. L. Week, Aug. 14, 1934, at 1043, col. 1 (D. Colo. 1934); People of State of California v. Economy Cleaners, U. S. L. Week, April 10, 1934, at 696, col. 1 (Super. Ct., Santa Clara Co., Cal. 1934).

33. New Jersey v. Magid, 2 NRA Rep. 174 (Ct. Quart. Sess., Jersey City, N. J. 1934); Stokes v. Newton Creek Coal and Coke Co., U. S. L. Week, Sept. 18, 1934, at 47, col. 1 Sup. Ct., N. Y. 1934); State v. Riesenberg, U. S. L. Week, Oct. 2, 1934, at 88, col. 2 (Mag. Ct., Millcreek Twp., Hamilton Co., Ohio 1934); Brady v. Lewis, U. S. L. Week, Oct. 2, 1934, at 89, col. 1 (Circ. Ct., Roanoke Co., Va. 1934).

34. Stokes v. Newton Creek Coal and Coke Co., U. S. L. Week, Sept. 18, 1934, at 47, col. 1 (Sup. Ct., N. Y. 1934).

35. Woodward Iron Co. v. Adams, U. S. L. Week, Aug. 21, 1934, at 1049, col. 1 (N. D. Ala. 1934); Hoskins v. Gullatt Cleaning and Laundry Co., U. S. L. Week, April 3, 1934, at 682, col. 2 (C. P., Franklin Co., Ohio 1934).

36. State v. Gullatt Cleaning and Garment Co., The Blue Eagle, Sept. 10, 1934, at 4, col. 2 (C. P. Ct., Hamilton Co., Ohio 1934).

37. 247 U. S. 251 (1918).

as an aid to a valid policy of the state of destination[38] or to prevent the spread of evil.[39] If the economic effect of price reduction through overproduction is considered, these cases furnish a strong analogy. But closer still is the case of *Brooks v. United States*,[40] upholding the law making transportation of stolen automobiles in interstate commerce a crime, as it seems to hold that Congress may reenforce the policy of the State of origin by prohibiting interstate commerce in a commodity banned by the law of that state. It is this power whose validity is called into question in the two cases now pending in the Supreme Court. The Circuit Court of Appeals upheld the provision as being a regulation of commerce rather than of production, although it supplemented and aided the state law regulating production.[41]

Delegation of Power. The problem of delegation of legislative powers to the President, though concededly serious, seems to be the least important of the constitutional considerations. There is no constitutional provision prohibiting the delegation of legislative powers, but it is deemed to be implicit in the doctrine of separation of powers, which is said to be embodied in the Constitution. And it is sometimes also said that the grant of power to one implies a prohibition of its exercise by another. The dialectic is that if the Congress provides a primary standard for the guidance of the executive, it may delegate the power to issue administrative rules and regulations which will tend to effectuate the policy expressed by the primary standard; something to guide the administrator is said to be essential. The suggestion has been made that the true rule is that Congress must be as definite and detailed as the practicality of the situation will allow and that the degree of power that can be delegated will thus vary with the subject matter of the legislation.[42] In any event, the Supreme Court has never held an act of Congress unconstitutional on this ground,[43] and the lower courts have been reluctant to say that there is an unwarranted delegation of power by the Act. Several judges have indicated that they thought the delegation excessive, but none have been willing to make an outright holding to that effect.[44]

PROCEDURE

Three procedural questions have confronted the courts in their interpretation of the NIRA; namely, who can sue under the act either to prevent or

38. *In re* Rahrer, 140 U. S. 545 (1891); Clark Distilling Co. v. Western Maryland Ry. Co., 242 U. S. 311 (1917); United States v. Hill, 248 U. S. 420 (1919).

39. Champion v. Ames, 188 U. S. 321 (1903); Hipolite Egg Co. v. United States 220 U. S. 45 (1911); Hoke v. United States, 227 U. S. 308 (1913); Caminetti v. United States, 242 U. S. 470 (1917).

40. 267 U. S. 432 (1925); see Field, *supra* note 1, at 286.

41. Ryan v. Amazon Petroleum Corp., 71 F. (2d) 1 (C. C. A. 5th, 1934); Ryan v. Panama Refining Co., 71 F. (2d) 8 (C. C. A. 5th, 1934).

42. Black, *supra* note 1; Carpenter, *supra* note 1, at 126.

43. United States v. Suburban Motor Service Corp., 5 F. Supp. 798 (N. D. Ill. 1934).

44. Panama Refining Co. v. Ryan, 5 F. Supp. 639 (E. D. Tex. 1934); Hart Coal Corp. v. Sparks, 7 F. Supp. 16 (W. D. Ky. 1934); Irma Hat Co. v. Local Retail Code Authority for Chicago, Inc., U. S. L. Week, Aug. 7, 1934, at 1033, col. 1 (N. D. Ill. 1934).

require its enforcement, where such suits can be brought, and when it is permissible or advisable to bring such suits.

Who Can Sue. Where the purpose is to challenge the validity of the act or regulations thereunder, any person whose interests are seriously affected can bring suit.[45] A general restriction on this broad privilege is found in the requirement that the interest for which judicial protection is desired shall be in fact "directly and seriously" affected by the act. As an example of this requirement a federal district court considered as too remote the interest of an employee discharged as a result of the wage, hours and production regulation of a code, wherefor his employer was no longer able to retain the services of all his employees.[46] Litigation may likewise be restricted by the ruling that signers of a code are estopped from attacking its validity. In spite of a denial of the application of this flexible doctrine in one case attacking generally the recovery legislation and discussing particularly the coal code,[47] indications point to an extended use of this device,[48] especially where the complainants thus foreclosed have freely accepted benefits provided by the code.[49]

It is less easy to determine who can sue to enforce the act and regulations. Clearly the Federal Trade Commission has the power to do so, for it is specifically provided in the Act that violations of the codes are deemed to be unfair methods of competition within the purview of the Federal Trade Commission Act.[50] But the power thus vested in that body has not yet been exercised. Similarly federal district attorneys are explicitly empowered to institute proceedings both to enjoin and to penalize violations of the Act or of any valid code, and actions have occasionally been brought by these officials in the exercise of this authority.[51] Beyond this the act is silent, neither giving to nor withholding from individuals the privilege successfully to resort to court action.

There have been two specific types of individual or private suits before the courts for the purpose of enforcing the Recovery legislature. First, there have been suits by individuals to take advantage of favorable regulations in the President's Reemployment Agreement. Under the section of the NIRA giving the President power to enter into voluntary agreements,[52] a number of contracts were executed between the President and various employers whereby the employers received the Blue Eagle in return for a promise to maintain a mini-

45. For a discussion of possible methods of attacking the NIRA, see Comment (1933) 28 ILL. L. REV. 544.

46. Starring v. Frazer, 4 F. Supp. 818 (D. Tenn. 1933).

47. Hart Coal Corp. v. Sparks, 7 F. Supp. 16 (W. D. Ky. 1934).

48. Courts sympathetic to the President's recovery program will probably find this a convenient doctrine with which to bolster doubtful decisions. Thus in a suit brought by an employee for code wages estoppel has been held a valid defense against an employer who advertised compliance with the Petroleum Code. Laux v. Smith, U. S. L. Week, July 3, 1934, at 11, col. 2 (Mun. Ct., Marion City., Ind. 1934).

49. Cf. Fuller Cleaning and Dyeing Co. v. Morris Brickner, U. S. L. Week, May 8, 1934, at 13, col. 1 (C. P. Cuyahoga Co., Ohio 1934).

50. § 3(b).

51. §§ 3(c) and (f). The cases are cited in note 122, *infra*.

52. § 4(a).

mum wage and maximum hour scale and to permit without interference the exercise of labor rights guaranteed by Section 7(a) of the Act. Where employees of a party to such an agreement have sued their employer to recover the agreed wages,[53] or have sued to enjoin the employer from interfering with their right to free collective bargaining,[54] the courts have upheld such claims upon the theory that the agreement was a contract between the employer and the President for the direct benefit of the workers, who may sue as third party beneficiaries. These decisions strain somewhat the traditional contract ideology;[55] but the result seems legally permissible, since consideration to bind the signatories can be found in the award of the Blue Eagle, the forebearance of the President from altering the agreement and the mutual promises of other employers to be similarly bound.[56] A second group of cases has arisen through attempts upon the part of individuals to enforce the provisions of specific codes. Certain of these cases deal with actions at law, and the net result of these decisions is a decided split of authority on the right of individual suit. Thus employees have in general been permitted to enforce the wage provisions set forth in the codes,[57] but on the other hand suits for damages brought by one competitor against another for alleged code violations appear to be summarily dismissed for lack of complainant's capacity to sue.[58] The decisions dealing with suits for injunctions, however, have displayed complete uniformity, and the ruling in each case has been a denial of complainant's privilege of suit.[59] It seems

53. Chipa v. Regas, 2 NRA Reporter 148 (Just. Ct., Tucson, Ariz. 1933); Williams v. Rienzi Valet Co., 2 NRA Reporter 149 (Mun. Ct., Chicago, Ill. 1934); Brown v. Hunter, 2 NRA Reporter 149 (City Ct., Wichita, Kan. 1934); Bethel v. Kamas, 2 NRA Reporter 149 (C. P., Detroit, Mich. 1933); Rush v. Somers, 2 NRA Reporter 149 (C. P., Detroit, Mich. 1933); Tedford v. Taylor, 2 NRA Reporter 16 (Just. Ct., Kansas City, Mo. 1934); Shurman v. Kleckner (Mun. Ct., N. Y. City, N. Y. 1933); Morrison v. Gentler, U. S. L. Week, Sept. 25, 1934, at 9, col. 1 (Mun. Ct., N. Y. City, N. Y. 1934); Mesloh v. Schulte, 151 Misc. 750, 273 N. Y. Supp. 699 (Mun. Ct. 1934); Greleck v. Amsterdam, U. S. L. Week, April 17, 1934, at 10, col. 2 (Mun. Ct., Phila., Pa. 1934).

54. Fryns v. Fair Lawn Fur Dressing Co., 114 N. J. Eq. 462, 168 Atl. 862 (1933); Amalgamated Workers v. Reed, The Blue Eagle, Aug. 20, 1934, at 4, col. 3 (Circ. Ct., Milwaukee Co., Wis. 1933); Trustees of Wisconsin State Federation of Labor v. Simplex Shoe Manufacturing Co. (Cir. Ct., Milwaukee Co., Wis. 1933). Note, however, the last decision on appeal, 256 N. W. 56 (1934).

55. Notes: (1933) 32 MICH. L. REV. 270; (1934) 82 U. OF PA. L. REV. 283.

56. An able discussion of this question is found in Comment (1933) 33 COL. L. REV. 1394.

57. Laux v. Smith, U. S. L. Week, July 3, 1934, at 11, col. 2 (Mun. Ct., Marion City, Ind. 1934); Laney v. Milner Hotel Co., The Blue Eagle, Aug. 27, 1934, at 4, col. 1 (J. P., Grand Rapids, Mich. 1934); Canton v. The Palms, Inc., 152 Misc. 347 (City Ct., Buffalo, N. Y. 1934). *Contra:* Abramovitz v. Trolman, 273 N. Y. Supp. 243 (Mun. Ct., N. Y. City, 1934).

58. National Foundry Co. v. Alabama Pipe Co., U. S. L. Week, Aug. 7, 1934, at 6, col. 1 (D. C. E. D. N. Y. 1934).

59. Purvis v. Bazemore, 5 F. Supp. 230 (S. D. Fla. 1933); Stanley v. Peabody Coal Co. 5 F. Supp. 612 (S. D. Ill. 1933); Western Powder Manufacturing Co. v. Interstate Coal Co., 5 F. Supp. 619 (E. D. Ill. 1934); Bookbinders' Trade Association, Inc. v. Book Manufacturers' Institute, Inc., U. S. L. Week, Aug. 7, 1934, at 6, col. 1 (D. C. S. D.

unfortunate that the courts should have hesitated to recognize freely the right of individual suit to enforce the NIRA and codes, for to allow an individual intimately connected with the daily operation of business affected by this legislation to resort to court assistance upon a departure therefrom is a more direct and effective method of enforcement than any other conceivable. Certain courts have reasoned, however, that the specific grant by the NIRA of enforcement power to federal district attorneys and the Federal Trade Commission indicated a Congressional intention to limit such suits to those agencies alone. To sustain this line of reasoning they have pointed out that Congress borrowed Section 3 (c) of the Act, which gives the district attorneys the duty of enforcement, from the Anti-Trust Act,[60] but failed to copy other provisions from the latter statute which gave individuals the right to institute damage suits[61] and injunctive proceedings.[62] They have moreover shown that this Section 3(c), when part of the Anti-trust Act, had been interpreted by Supreme Court dicta to deny the right of individual enforcement. It is interesting to note, however, that this reasoning has been widely criticised. It is logically demonstrated that the NIRA imposes upon business the duty of obeying code provisions, and that this duty was imposed for the protection of employers and competitors.[63] Attention is then called to the recognized ruling that when a statute creates a duty of specific law observance for the benefit of a particular class, there is likewise created a correlative right in the individuals of that benefited class to secure fulfillment of this duty by legal action. Thus it is concluded that competitors, employees and all individuals intended to be specially benefited by the Recovery Act have individual rights under its provisions.[64] Further argument in favor of individual enforcement of the codes rests on the traditional right of a private party to secure injunctive relief when irreparable injury is proven. A competitor may certainly be enjoined from code disobedience when it is proven that special injury to complainant, as distinguished from general injury to the public, has resulted from this code violation.[65] Finally

N. Y. 1934); Colorado v. United Dividend Corp., The Blue Eagle, Sept. 24, 1934, at 2, col. 1 (Dist. Ct., Colo. 1933); Cline v. Consumers' Cooperative Gas and Oil Co., 152 Misc. 653 (Sup. Ct., N. Y. 1934); cf. Chicago Flexible Shaft Co. v. Katz Drug Co., 6 F. Supp. 193 (D. Del. 1934). But cf. Sherman v. Abeles, 150 Misc. 497, 269 N. Y. Supp. 849 (Sup. Ct. 1934) (granting an injunction at request of individual, on grounds that State Recovery Act recognized this right).

60. 26 STAT. 209 (1890), 15 U. S. C. A. § 4 (1926).

61. 38 STAT. 731 (1914), 15 U. S. C. A. § 15 (1926) (providing for triple damages).

62. 38 STAT. 737 (1914), 15 U. S. C. A. § 26 (1926).

63. For example, it has repeatedly been said that the NIRA was intended to protect the honest "90%" of an industry from the unfair practices of the other "10%". See the report of the President's radio address, in N. Y. Times, May 8, 1933, at 2; *Hearings before Committee on Ways and Means of the House of Representatives on H. R. 5664,* 73rd Cong., 1st Sess. (May 18-20, 1933) at 15, 74, 106.

64. Mintz, *Rights of Action Under NIRA and the Codes* N. Y. L. J., Oct. 10, 1934, at 1186, col. 2, 3 (note, however, article referred to). Note also the language used in Amalgamated Workers v. Reed, The Blue Eagle, Aug. 20, 1934, at 4, col. 3 (Cir. Ct., Milwaukee Co., Wis. 1933).

65. Rosenbaum, *Enforcement of the NIRA and Codes By Private Injunctive Proceedings* (1934) 8 U. OF CIN. L. REV. 155. Also note Mayer, A HANDBOOK OF NRA (2d ed. 1934)

the right of individual enforcement is established by an analysis of particular Supreme Court decisions. It is demonstrated that Supreme Court dicta interpreting Section 3(c) when part of the Anti-trust Act merely denied injunctive relief to individuals when injury to the general public was alone shown, that lower federal courts gave injunctive relief under that act when special injury was proven, and that repeatedly Supreme Court decisions have approved the right of private proceedings to enforce statutes which made no provision for this right.[66]

Where suit can be brought. Because of the present restrictions as to who can bring suit, the questions of where these suits are to be brought does not seem difficult. The Federal Trade Commission is required to apply to the Circuit Court of Appeals[67] and the federal district attorneys are directed to bring their penal or injunctive suits in federal district courts.[68] And since no provision is made for suits by individuals, neither is any restriction placed upon their choice of courts in which to bring what suits they may be allowed to maintain.[69] But on the whole it has been in the state courts that individuals have found what protection has been granted to them in suits against employers under the President's Reemployment Agreement,[70] under codes[67] and under state recovery acts specifically providing for state court jurisdiction.[71]

When suits can or should be brought. The courts have addressed themselves not only to the question of where to sue, but also to the question of prerequisites to the right of suit. There is some danger that an individual would be required to violate a code before he could bring suit to prevent its enforcement,

12; Williams, *Employee Relations Under The National Recovery Act* (1933) 26 LAW. AND BANK. 291, 293; Note (1933) 32 MICH. L. REV. 270, 274. But cf. Comment (1934) 28 ILL. L. REV. 673, 685, 686.

66. Note (1934) 43 YALE L. J. 480. It has been suggested that an individual might secure a mandamus to compel the district attorney to institute proceedings against a code violator. Comment (1933) 28 ILL. L. REV. 544, 547. But cf. Comment (1934) 28 ILL. L. REV. 673, 683. Likewise it has been suggested that the reasoning of the decisions permitting individual suits to enforce the President's Reemployment Agreement could be applied to enforcement of codes. This contractual theory, however, would only apply where defendants were signatories of the codes. For discussion of this question, see Comments: (1933) 33 COL. L. REV. 1394, 1401, 1402; (1934) 2 GEO. WASH. L. REV. 228, 232-235; (1933) 47 HARV. L. REV. 85, 100.

67. 38 STAT. 719 (1914) [as amended 43 STAT. 939 (1925)], 15 U. S. C. A. § 45 (1926).

68. § 3(c): "The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of any code of fair competition approved under this title; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations."

69. Certainly if individuals may not sue, no question of where they may sue arises. Colorado v. United Dividend Corp., The Blue Eagle, Sept. 24, 1934, at 2, col. 1 (Dist. Ct., Colo. 1933).

70. See notes 53 and 54, *supra.*

71. For an interpretation of the New York Recovery Act on this point, see Sherman v. Abeles, 150 Misc. 497, 269 N. Y. Supp. 849 (Sup. Ct. 1934), aff'd, 241 App. Div. 676, 269 N. Y. Supp. 864 (1st Dep't, 1934). *Contra:* Cline v. Consumers' Cooperative Gas and Oil Co., 152 Misc. 653 (Sup. Ct., N. Y. 1934).

although no specific cases have touched on this point.[72] Certainly, however, this prerequisite should not be essential, as the law should hardly encourage its own disobedience, nor penalize bewildered litigants who merely desire to know whether such law should be obeyed. Assuming a violation to be essential, one court has further held that a threat of enforcement must be shown for otherwise no justiciable controversy exists.[73] However, since daily penalties of $500 are provided for each code violation,[74] and since these cumulative penalties might assume gigantic proportions before enforcement is threatened, it would seem that a court of equity should take jurisdiction and pass upon the validity of the regulation at once in order to prevent irreparable injury in the form of penalties, which might have to be paid by the violator as the result of his disbelief in the validity of the untested legislation. Finally, again assuming that code violation is a prerequisite to the commencement of a test case, the question of the wisdom of taking immediate action, rather than waiting until a test case is raised by another party, is presented. A federal district court has raised the question of whether only a wealthy or helplessly bankrupt individual can afford to seek to enjoin the enforcement of a code provision, in view of the accumulation of the NIRA and code penalties during litigation.[75] Two factors induce the belief that even if a regulation cannot be tested without violation a complainant may safely risk an immediate equitable suit when brought in good faith without fear of being subject to an exhorbitant accumulation of penalties. One is that the courts in penal actions are not bound to impose the maximum daily fine of $500, but may reduce it to a lower figure at their discretion; the other is that it has been held that a court of equity in such event may suspend the penal provisions of legislation for the duration of equitable proceedings contesting the validity of that legislation.[76] Neither code violation nor threats of enforcement, however, would appear to give sufficient grounds for an adjudication of code provisions if there are still administrative proceedings open to complainant which have not been pursued to a final conclusion. But it has been held that only such administrative remedies as are actually provided by the Recovery legislation must be exhausted,[77] thus an informal appeal and rejec-

72. The decision cited in note 73 considers a threat of enforcement to be a prerequisite to the right to contest the validity of a code. To secure such a threat, however, there must be a code violation, and thus by implication a violation is required before suit may be brought. Note also that a violation is thought necessary to test the validity of legislation in Ex Parte Young, 209 U. S. 123, 145, 146 (1908).

73. Budd v. Straus, U. S. L. Week, July 17, 1934, at 11, col. 2 (S. D. N. Y. 1934).

74. § 3(f): "When a code of fair competition has been approved or prescribed by the President under this title, any violation of any provision thereof in any transaction in or affecting interstate or foreign commerce shall be a misdemeanor and upon conviction thereof an offender shall be fined not more than $500 for each offense, and each day such violation continues shall be deemed a separate offense."

75. Willamette Valley Lumber Co. v. Watzek, 5 F. Supp. 689 (D. Ore. 1934).

76. Note (1934) 43 YALE L. J. 827.

77. The Recovery Administration has provided numerous code authorities, compliance directors and arbitration boards for the handling of code disputes. A discussion of these agencies is found in Comment (1934) 28 ILL. L. REV. 673.

tion by the Code Authority is sufficient when no formal appeal has been provided for.[78]

Fewer prerequisites to the right of suit are recognized as essential in proceedings brought to enforce the NIRA and codes. The Federal Trade Commission and the federal district attorneys may commence penal and injunctive proceedings against code violators whenever such action seems to them advisable. Likewise, individual suits to enforce the President's Reemployment Agreement may be brought without technical preliminaries. Proceedings instituted by individuals against code violators, however, if recognized as permissible, may only be commenced upon an exhaustion of administrative remedies similar to that required of a party contesting the validity of the recovery legislation. Thus injunctions have been repeatedly denied in labor disputes on the partial grounds that complainants had not availed themselves of the facilities afforded by labor boards established to handle such disputes.[79] This application of the doctrine of administrative remedies to individuals enforcing, as distinguished from indivduals attacking, legislation is novel but it accords with the purpose of the doctrine which is to relieve the courts of litigation and appears to receive legal periodical approval.[80] Certainly some such device is essential if the individual's right to enforce the recovery legislation is recognized, to curtail the flood of potential code litigation;[81] and it may well be that the application of this doctrine will also prove beneficial in promoting that self-government of industry which appears to be the goal of code legislation.[82]

Unfair Trade Practices

The Provisions of the codes are declared by the NIRA to be the standards of fair competition for the particular trades or industries or subdivisions thereof to which they are applicable. Any violation of these standards in a transaction in or affecting interstate commerce constitutes an unfair method of competition.[83] Congressional prohibition of such practices has been familiar since the adoption of the Federal Trade Commission Act in 1914,[84] but heretofore there has been no previously constituted set of standards, other than that supplied

78. Woodward Iron Co. v. Adams, U. S. L. Week, Aug. 21, 1934, at 5, col. 1 (N. D. Ala. 1934); cf. Sherman v. Abeles, 150 Misc. 497, 269 N. Y. Supp. 849 (Sup. Ct., 1934) (reargument) aff'd, 241 App. Div. 676, 269 N. Y. Supp. 864 (1st Dep't, 1934).

79. Western Powder Manufacturing Co. v. Interstate Coal Co., 5 F. Supp. 619 (E. D. Ill. 1934); Stanley v. Peabody Coal Co., 5 F. Supp. 612 (S. D. Ill. 1933); cf. Fuller Cleaning and Dyeing Co. v. Morris Brickner, U. S. L. Week, May 8, 1934, at 13, col. 1 (C. P., Cuyahoga Co., Ohio 1934).

80. Note (1934) 43 Yale L. J. 480.

81. Of 100 questions presented to the NRA, 95 can be settled by arbitration or studies apart from legal technicalities. N. Y. Times, Oct. 13, 1934, at 6, col. 1 (quoting the President).

82. Comment (1934) 43 Yale L. J. 599, 605, 606. Voluntary arbitration agreements providing for resort to NRA agencies are binding. Farulla v. R. A. Freundlich, Inc., U. S. L. Week, Sept. 4, 1934, at 18, col. 2 (N. Y. Sup. Ct. 1934).

83. Section 3(b).

84. 38 Stat. 717 (1914), 15 U. S. C. A. 41-51.

by the common law, for determining what is a fair or an unfair method of competition. Congress deliberately refused to define the term, preferring that the concept should be given content by the Commission by a gradual process in its handling of individual cases,[85] a policy resulting in an uncertainty which suggested the desirability of some sort of predetermination of the lawfulness of questionable practices.[86] Furthermore, enforcement of the Federal Trade Commission Act proved inadequate.[87] The codes are an apparent advance in that they attempt to meet the objections of uncertainty and unenforceability. The standards are definitely expressed in the codes, and violations may be more easily detected and punished. Whereas formerly judicial proceedings against parties engaging in ruinous competitive practices were delayed until after a hearing by the Federal Trade Commission,[88] now action may be immediately taken against unfair competitors, their conduct compared with code provisions, and fines or injunctions imposed.[89] Thus it is a simple matter to secure prompt convictions for making sales below cost in violation of code provisions.[90] More effective enforcement may result also from the fact that code standards of fair competition find more ready acceptance by the courts than have the rulings of the Commission. In the operation of the Federal Trade Commission Act the courts always reserved for themselves the determination of what constitutes an unfair method of competition, with an unnecessary reverence for the common law precedents, at the expense of administrative efficiency.[91] But the courts have signally failed to hold a code provision void on the ground that the practice forbidden was not an unfair method of competition.[92] When there has been a desire to avoid the question of the validity of code standards, however, defendants displaying the Blue Eagle of advertising compliance with the NIRA have been convicted for violation of the codes

85. Haines, *Efforts to Define Unfair Competition* (1919) 29 YALE L. J. 1, at 3.

86. Watkins, *An Appraisal of the Work of the Federal Trade Commission* (1932) 32 COL. L. REV. 272, at 283.

87. Wahrenbrock, *Federal Anti-Trust Law and the National Industrial Recovery Act* (1933) 31 MICH. L. REV. 1009, at 1018.

88. Peycke, *The Federal Trade Commission* (1922) 7 MINN. L. REV. 11, at 18.

89. These sanctions are in addition to those available under the Federal Trade Commission Act.

90. United States v. Canfield Lumber Co., U. S. L. Week, Sept. 18, 1934, at 46, col. 2 (D. Neb. 1934); State of Utah v. Marthakis, U. S. L. Week, Jan. 16, 1934, at 408, col. 2 (Dist Ct., Utah 1933) (State act).

91. Tollefson, *Judicial Review of the Decisions of the Federal Trade Commission* (1927) 4 WIS. L. REV. 257, at 281.

92. There has been a split of authority over the validity of the anti-premium rule in the petroleum code. Those decisions holding it void, however, have done so on the ground that it was a regulation of intrastate commerce only. Three decisions have held the rule valid: Victor v. Ickes, 61 Wash. L. Rep. 870 (D. C. 1933); United States v. Rose Oil Co., U. S. L. Week, Oct. 2, 1934, at 89, col. 3 (S. D. Miss. 1934); United States v. Konstendt, The Blue Eagle, Sept. 17, 1934, at 4, col. 1 (E. D. Mich. 1934). Two have held it void: United States v. Suburban Motor Service Corp., 5 F. Supp. 798 (N. D. Ill. 1934); United States v. Mills, 7 F. Supp. 547 (D. Md. 1934); see Cline v. Consumers' Cooperative Gas and Oil Co., Inc., 152 Misc. 653 (Sup. Ct., N. Y. 1934).

on the evasive ground of misleading advertisement.[93] More frequently the code provisions are simply accepted as prima facie proof that the standard set is correct, and the result of this attitude has been the issuance of injunctions restraining code violators from selling jewelry at retail under the guise of conducting an auction,[94] using silk textile designs not properly registered,[95] and failing properly to inspect and adjust speedometers in the sale of new cars;[96] the denial of an injunction restraining the issuance of clothing labels by a code authority;[97] and the conviction of renting parking space below the advertised price.[98] Thus the judicial enforcement of this aspect of the recovery legislation has produced a very real administrative control over many small details of business.

Labor Problems

Section 7(a) of the NIRA, and code provisions relating to hours and wages, constitute the primary contributions of the Recovery Act to labor law. The effect of this legislation is best studied in relation first, to the resulting substantive rights or privileges thus guaranteed to labor, and secondly, to the remedial or procedural methods afforded for the enforcement of these rights.

Substantive Rights. The right of collective organizing and bargaining, "free from the interference, restraint, or coercion of employers of labor, or their agents" is guaranteed to labor by the codes.[99] It has been said at times that this provision is superfluous in that it merely recognizes a right of labor already in existence.[100] This statement is, however, misleading. The right to organize for cooperative activity did exist formerly, but for the most part it existed only in the limited sense that the right was not prohibited by law.[101] The common law, on the other hand, never penalized mere "interference" by an employer with collective bargaining, and state legislation directed against employer coercion was generally held unconstitutional.[102] Section 7(a), as contained in the codes, is far from superfluous since it now makes collective organizing and bargaining a positive right, interference with which is punished as a statutory crime.[103] And the Section has even further strengthened the right of collective

93. People of California v. Capital Cleaners and Dyers, U. S. L. Week, Mar. 27, 1934, at 633, col. 1 (Super. Ct., Los Angeles, Cal. 1934) (State act); State v. Patton, The Blue Eagle, Aug. 27, 1934, at 4, col. 2 (Ct. Crim. Corr., St. Louis, Mo. 1934).

94. Gross v. Jamaica Auction Galleries, 2 NRA Rep. 237 (App. Div., N. Y. 1934).

95. United States v. Adolph Meirowitz, Inc., U. S. L. Week, Oct. 2, 1934, at 90, col. 1 (S. D. N. Y. 1934).

96. United States v. Automobile Sales Co., U. S. L. Week, Oct. 2, 1934, at 90, col. 1 (W. D. Tenn. 1934).

97. William F. Chinquy Co. v. Budwig, The Blue Eagle, Sept. 17, 1934, at 4, col. 2 (S. D. N. Y. 1934).

98. People v. Schuyler, 2 NRA Rep. 151 (Ct. Sp. Sess., N. Y. 1934).

99. § 7(a) is incorporated in the codes. Without such incorporation the section has no binding effect.

100. Comment (1934) 20 Va. L. Rev. 553, 556.

101. Comment (1933) 19 St. Louis L. Rev. 32, 34.

102. Comment (1933) 47 Harv. L. Rev. 85, 120, 121. This Comment states that "restraint" and "coercion" were possibly tortious at common law.

103. Subject to fine of $500 per day, and an injunction procurable by the district attorney.

bargaining by the important implication, drawn from its provisions, that an employer must treat with the representative so selected.[104] This implication is a radical development in labor law. Two decisions have indeed attempted to limit the effect of this implication by denying the necessity of an employer to treat with an outside union agent as a representative of his employees.[105] But legal comment is invariably to the effect that such agents may be the accredited representatives of the employees,[106] and on appeal one of the unfavorable decisions was in effect reversed.[107]

A supplemental right to that of collective bargaining has also been acquired by labor through the medium of Section 7(a). This is the negative, but nevertheless, important, right of freedom from "yellow dog" contracts. No decisions have as yet been handed down interpreting the Section in this connection.

The right to strike is not specifically mentioned by the NIRA. However, certain courts appear to consider this right to be somewhat curtailed as a result of such legislation. In the first place, it has been held that strikes for a closed shop are illegal,[108] and this thought has been echoed by lawyers and commentators alike.[109] The apparent reason for the belief that strikes called to effectuate the closed shop are illegal is that Section 7(a) guarantees free collective bargaining, and that the closed shop denies the latter right. But the National Labor Relations Board has given a practical interpretation of Section 7(a) to the effect that the decision of a majority of employees may bind the minority.[110] It follows therefore that if the majority of employees vote for the closed shop, Section 7(a) requires rather than forbids the complete unionization of a plant, a view that other courts have expressly upheld.[111] In the second place, the right to strike has been held to be restricted by the NIRA,

104. Comment (1933) 47 HARV. L. REV. 85, 118, 119.

105. Bayonne Textile Corp. v. American Federation of Silk Workers, 114 N. J. Eq. 307, 168 Atl. 799 (1933); see H. B. Rosenthal-Ettlinger Co. v. Schlossberg, 149 Misc. 210 (Sup. Ct., N. Y. 1933).

106. Seiler, *The Effect of Section 7A of the National Industrial Recovery Act Upon the Rights of Employer and Employees* (1933) 11 N. Y. U. L. Q. 237, 241; Note (1934) 47 HARV. L. REV. 712.

107. Bayonne Textile Corp. v. American Federation of Silk Workers, 116 N. J. Eq. 146, 172 Atl. 551 (1934).

108. Drake Bakeries, Inc. v. Bowles, U. S. L. Week, March 27, 1934, at 12, col. 1 (C. P., Cuyahoga Co., Ohio 1934); cf. J. Lichtman and Sons v. Leather Workers' Industrial Union, 114 N. J. Eq. 596, 169 Atl. 498 (1933).

109. Williams, *Employee Relations Under The National Recovery Act* (1933) 26 LAW AND BANK. 291, 292, 293; Comment (1934) 20 VA. L. REV. 553, 558; Comment (1934) 43 YALE L. J. 625, 632, 633; N. Y. Times, Oct. 10, 1934, at 8, col. 3 (statement of chief of government counsel in the Weirton case).

110. In re Houde Engineering Corp. and United Automobile Workers Federal Union, U. S. L. Week, Sept. 4, 1934, at 11, col. 1 (1934). The majority rule was also upheld in Fryns v. Fair Lawn Fur Dressing Co., 114 N. J. Eq. 462, 168 Atl. 862 (1933).

111. Buckingham Cafeteria, Inc. v. Meservish, The Blue Eagle, Aug. 13, 1934, at 4, col. 1 (Sup. Ct., N. Y. 1933); Kings County Haberdashers' Association v. Retail Hat and Furnishing Salesmen's Union, ibid; H. B. Rosenthal-Ettlinger Co. v. Schlossberg, 149 Misc. 210 (Sup. Ct. N. Y. 1933).

in two decisions at least, to the extent of completely eliminating such right. It is said that strikes are now illegal, as interfering with the recovery program and violating the spirit of the Recovery Act.[112] This ruling completely overlooks the fact that Section 7(a) was enacted at the insistence and for the benefit of labor, which makes it improbable that Congress intended to outlaw strikes. The NIRA does not deny the right to strike, and both legal periodicals[113] and courts[114] have been quick to point out this fact.

Similarly the right to picket has apparently been unaffected by the NIRA.[115] The few decisions outlawing strikes have forbidden picketing "in large numbers."[116] Picketing, however, has in general been freely permitted, where unattended by violence,[117] and has even been dignified by its approved use on the part of a government agency. The Regional Code Authority for the Dry Cleaning Industry in Cleveland was permitted to picket the business establishment of an alleged code violator.[118]

Finally, a right to higher minimum wages and shorter maximum hours of labor has been secured to labor by the codes. Without question these code provisions have been frequently evaded. Thus when code wage and hours of labor regulations were held not to apply to apprentices,[119] there at times ensued discharges of skilled workers and reemployment of the same men as "apprentices." However, labor has undoubtedly gained by the codes through acquisition of a legal right to higher wages and shorter hours than were formerly enjoyed, and this right has in general been recognized by employers.

112. Bayonne Textile Corp. v. American Federation of Silk Workers, 114 N. J. Eq. 307, 168 Atl. 799 (1933); J. Lichtman and Sons v. Leather Workers' Industrial Union, 114 N. J. Eq. 596, 169 Atl. 498 (1933).

113. Even when the writer sympathizes with the result reached by the above case. Comment (1934) 19 IOWA L. REV. 346.

114. Bayonne Textile Corp. v. American Federation of Silk Workers, 116 N. J. Eq. 146, 172 Atl. 551 (1934); Robbins v. Altenberg, N. Y. L. J., Nov. 9, 1933, at 1690, col. 1 (Sup. Ct., N. Y. 1933). The effect of outlawing strikes would be to make arbitration compulsory. This is opposed on the grounds of policy by some writers. Comment (1934) 43 YALE L. J. 625, 635-640; Note (1934) 34 COL. L. REV. 175, 177; cf. Phillips, *Commercial Arbitration Under The NRA* (1934) 1 U. OF CHI. L. REV. 424. But cf. Comment (1934) 19 IOWA L. REV. 346, 352, 353.

115. Unless the Act changes the public policy of jurisdictions which have hitherto frowned on picketing. For a discussion of picketing before and after the NIRA, see Comment (1933) 33 COL. L. REV. 1188.

116. See note 112, *supra; also* H. B. Rosenthal-Ettlinger Co. v. Schlossberg, 149 Misc. 210 (Sup. Ct., N. Y. 1933).

117. Charles Levy and Sons v. Needle Trades Workers' Industrial Union, The Blue Eagle, Aug. 20, 1934, at 4, col. 2 (Super. Ct., Los Angeles, Cal. 1934); Bayonne Textile Corp. v. American Federation of Silk Workers, 116 N. J. Eq. 146, 172 Atl. 551 (1934); Fuller Cleaning and Dyeing Co. v. Morris Brickner, U. S. L. Week, May 8, 1934, at 13, col. 1 (C. P. Cuyahoga Co., Ohio 1934); Boston Lunch, Inc. v. American Federation of Labor Local, The Blue Eagle, Aug. 20, 1934, at 4, col. 2 (Cir. Ct., Milwaukee, Wis. 1934).

118. Bernstein v. Retail Cleaners' and Dyers' Association, U. S. L. Week, March 27, 1934, at 12, col. 2 (C. P., Cuyahoga Co., Ohio 1934).

119. For a typical view, see Hyatt v. Bookman Shoe Co., The Blue Eagle, Aug. 27, 1934, at 4, col. 2 (J. P., Tulsa, Okla. 1934).

The right has, moreover, been granted labor without restricting its freedom of action in any manner. Employees are at perfect liberty to bargain for greater concessions than those granted by the codes.[120]

Procedural Rights. The least disputed of the benefits conferred by the NIRA on labor was the provision for government enforcement of the substantive rights granted by that legislation. Employers, entrenched behind the open shop and waiting lists of unemployed workers, were thereby coerced for the first time into granting the minimum of decent wages and working conditions. To date no great activity has been noted among district attorneys to institute actual proceedings against violators of code labor provisions, due to uncertainty over the constitutionality of the NIRA;[121] but nevertheless such violators of code regulations have occasionally been penalized by fines,[122] and have been enjoined from continuing such violations.[123]

The right of employees to bring individual proceedings to enforce code provisions is less conclusively established, as has been seen previously in the discussion of the individual's right to enforce the recovery legislation. However, employees have been uniformly successful in recovering wages to which they were entitled by the President's Reemployment Agreement, and employee actions to recover wages set by codes have been permitted, although less frequently. Likewise violations by employers of the President's Agreement, and in one instance of code provisions, have been enjoined at the request of complainant employees.[124] If ultimately the individual's right to enforce the codes is definitely established, the result will be that labor will be in a position, through the medium of employee suits financed by unions, to supplement the activities of district attorneys in securing strict code observance by employers.

Finally, an indirect remedial right is afforded to labor by the doctrine of "unclean hands." In a much discussed case, an employer sought an injunction to restrain alleged violence and intimidation on the part of his striking employees, but he was refused this remedy on the grounds that he was violating the wage and hours of labor provisions of the NIRA code and thus was coming into court with "unclean hands."[125] If this defense by striking employers and

120. Bayonne Textile Corp. v. American Federation of Silk Workers, 116 N. J. Eq. 146, 172 Atl. 551 (1934).

121. But cf. The Perkins case, reported by Mark Sullivan, N. Y. Herald-Tribune, Oct. 22, 1934, at 2, cols. 2, 3, wherein it is stated that the trial of an employer who refused to pay code wages is to be prosecuted before the federal district court in Harrisburg, Pa., on Dec. 2, 1934, as a test case.

122. United States v. Allied Dye and Print Works, Inc., The Blue Eagle, Sept. 4, 1934, at 4, col. 1 (D. N. J. 1934); United States v. Perfect Coat and Suit Co., The Blue Eagle, Aug. 27, 1934, at 4, col 2 (D. N. J. 1934); United States v. Radiance Pierce Dye Works, Inc., The Blue Eagle, Sept. 4, 1934, at 4, col. 1 (D. N. J. 1934); United States v. Clyde Mills, Inc., The Blue Eagle, Aug. 27, 1934, at 4, col. 2 (D. R. I. 1934); cf. United States v. Hercules Gas Station Inc., The Blue Eagle, Aug. 27, 1934, at 4, col. 1 (E. D. N. Y. 1933).

123. United States v. Tung, The Blue Eagle, Sept. 10, 1934, at 4, col. 2 (E. D. La. 1934).

124. For a discussion of this subject and cited cases, see pp. .

125. La Mode Garment Co. v. International Ladies Garment Workers' Union, The Blue Eagle, Aug. 13, 1934, at 4, col. 1 (Cir. Ct., Cook Co., Ill. 1933).

union organizers is generally recognized, observance by employers of the substantive rights of labor guaranteed by the codes will be greatly stimulated. Extra-judicial comment strongly favors the application of "unclean hands" or a similar principle to an employer proven to be a code violator;[126] and it would appear that this flexible doctrine may be safely applied to defeat an individual employer's request for injunctive relief, without at the same time binding a court to deny relief to every code violator regardless of circumstances.

The concrete rights granted to labor by the NIRA are valuable. It may prove, however, that the most valuable result of this legislation is not to be found in tangible legal privileges. A careful reading of the labor cases arising to date under the NIRA discloses that for the first time opponents of collective activity and supplemental labor rights appear to be on the defensive, and that even where labor privileges are denied, the courts seem less positive of the legality of this denial. The NIRA may well be acclaimed by labor if it succeeds, where other legislation has failed, in influencing judicial thought to a more favorable view of collective activity by labor.

VOIDABILITY IN BANKRUPTCY OF TRANSFERS RECORDED WITHIN THE FOUR MONTHS PERIOD

IF one about to become a bankrupt satisfies or secures the claim of one creditor by a "transfer"[1] shortly prior to the filing of a petition in bankruptcy, the pro tanto depletion[2] of the estate at a time when all cannot be paid in full is unfair to other creditors of the same class. Accordingly, in Section 60 of the Bankruptcy Act trustees in bankruptcy are empowered under certain conditions to abrogate the effect of such a preferential transfer. Section 60a defines a preference as a transfer made to a creditor within four months of the petition in bankruptcy by an insolvent debtor, whereby that creditor obtains a greater percentage of his debt than other creditors of the same class.[3] Section 60b

126. Seiler, *The Effect of Section 7A of the National Industrial Recovery Act Upon the Rights of Employer and Employee* (1933) 11 N. Y. U. L. Q. 237, 249, 250; Note (1933) 33 COL. L. REV. 1264; Comment (1934) 20 VA. L. REV. 553, 563-564.

1. As used in the Bankruptcy Act, "transfer" includes "the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security." 30 STAT. 545 (1898), 11 U. S. C. A. § 1 (25) (1926).

2. "There can be no preferential transfer without a depletion of the bankrupt's estate." GILBERT, COLLIER ON BANKRUPTCY (3d ed. 1934) § 1169. National Bank of Newport v. National Herkimer County Bank, 225 U. S. 178, 184 (1912).

3. "A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer to [of] any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire

states that a transfer shall be voidable by the trustee if certain specified elements are found to exist, viz., that at the time of the transfer, and being within the four months preceding the petition in bankruptcy, the transferor be insolvent, that the transfer then operate as a preference, and that the transferee have reasonable cause so to believe.[4] By these provisions the vulnerable character of an outright preferential transfer made within the four months period is clearly established. And although the execution of the transfer may antedate the petition by more than four months, if by the local law creditors are not bound by such a transfer unless recorded, failure to secure recordation of the instrument prior to the filing of the petition in bankruptcy will expose it to attack by the trustee in his representative character.[5] When, however, the

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until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required or permitted." 30 STAT. 562 (1898), as amended 32 STAT. 799 (1903), 11 U. S. C. A. § 96a (1926). "Or permitted" was added by 44 STAT. 666 (1926).

4. "If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person. And for the purpose of such recovery any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction." 30 STAT. 562 (1898), as amended 32 STAT. 800 (1903), 36 STAT. 842 (1910), 11 U. S. C. A. § 96b (1926).

5. Thus by Sections 67a, 67b and 70e the trustee represents all actual creditors and by virtue of Section 47a(2) is a lien creditor after the filing of the petition, whether there are such creditors or not. Barbee v. Spurrier Lumber Co., 64 F. (2d) 5 (C. C. A. 10th, 1933). When the state recording act protects lien creditors or any class of creditors actually represented, the trustee can, therefore, invoke the local law to avoid the unrecorded transfer. § 47a(2): ". . . and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied; . . ." 30 STAT. 557 (1898), as amended 36 STAT. 840 (1910), 11 U. S. C. A. § 75a(2) (1926).

§ 67a: "Claims which for want of record or for other reasons would not have been valid liens [i.e. under state law] as against the claims of the creditors of the bankrupt shall not be liens against his estate." 30 STAT. 564 (1898), 11 U. S. C. A. § 107a (1926).

§ 67b: "Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate." 30 STAT. 564 (1898), 11 U. S. C. A. § 107b (1926).

§ 70e: "The trustee may avoid any transfer by the bankrupt of his property which any

execution of the transfer antedates the petition by more than four months, but the instrument is properly recorded within the four months period, the avoidance of the transfer presents a controversial problem.[6] State recording acts are supposedly designed to protect persons dealing with a present or prospective debtor by making available full information as to the true state of his resources.[7] But the efficacy of recording requirements is sometimes seriously limited, since a given state may demand that only certain types of transfers be recorded and may permit only certain limited classes of parties to attack an unrecorded instrument.[8] Knowledge of prior transfers or of liens already given on a debtor's property may thus often be withheld from creditors who, relying on the false security of his apparent ownership,[9] take no immediate steps to enforce satisfaction of their claims. When failure seems to be inevitable, the transfer or lien may be put on record, thereby becoming valid as against creditors not so secured, unless bankruptcy should intervene to alter the result. The patent unfairness to creditors who have been misled by the concealment and delay renders the recordation, within four months of bankruptcy, of a previously executed transfer just as objectionable as a transfer which is itself executed during the critical period. But while such tardy validation of "secret liens" earns broad condemnation,[10] both legislative and judi-

creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. . ." 30 STAT. 566 (1898), 11 U. S. C. A. § 110e (1926).

6. Technically, this situation is to be distinguished from the "equitable liens" involved in Sexton v. Kessler & Co., 225 U. S. 90 (1912); In re Traut's Estate, 297 Fed. 458 (C. C. A. 8th, 1924); Burrowes v. Nimocks, 35 F. (2d) 152 (C. C. A. 4th, 1929). But in reality the problem is very similar.

7. "The object of recording acts is to prevent the obtaining of credit by reason of the ostensible ownership of property which in reality is covered by a secret lien by giving notice to those intending to purchase such property and to creditors who give credit on the faith thereof." GILBERT, op. cit, *supra* note 2 § 1343.

The state recording acts involved in the most commonly recurrent transactions are treated in detail in 1 JONES, CHATTEL MORTGAGES AND CONDITIONAL SALES (6th ed. 1933) c. 6 (chattel mortgages); 3 id. c. 22, 23 III. (conditional sales). See also Hanna, *The Extension of Public Recordation* (1931) 31 COL. L. REV. 617, 638. For statutes on real property transactions, see 1 JONES, MORTGAGES OF REAL PROPERTY (8th ed. 1928) § 570. Distinguish the problem of special statutory liens such as that involved in Eggleston v. Birmingham Purchasing Co., 15 F. (2d) 529 (C. C. A. 5th, 1926).

8. For demonstration of the incomprehensiveness of the state recording statutes and the lack of uniformity among comparable acts of the different states see 1 JONES, CHATTEL MORTGAGES AND CONDITIONAL SALES (6th ed. 1933) §§ 190, 242c, 247b; 3 id. §§ 1033, 1111, 1112, 1135; 1 JONES, MORTGAGES OF REAL PROPERTY (8th ed. 1928) §§ 570, 576, 579; WALSH, THE LAW OF PROPERTY (2d. ed. 1927) §§ 338, 339, 348.

9. The scope of this discussion is limited to those cases of ostensible ownership in which the state law would permit recordation of the transactions. Nor is it intended to treat the problem of actual, fraudulent agreements to withhold from record. Consult Crothers v. Soper, 10 F. (2d) 793 (C. C. A. 4th, 1926); Rankin v. Cox, 71 F. (2d) 56 (C. C. A. 8th, 1934); cf. In re Selfridge, 33 F. (2d) 800 (D. Mass. 1929).

10. See, e.g., SEN. REP. No. 691, 61st Cong., 2d Sess. (1910) 8, quoted in In re T. H. Bunch Commission Co., 225 Fed. 243, 249 (E. D. Ark. 1915).

cial ingenuity have alike failed effectively to prevent the unequal distribution of assets which results from such a practice.

The original statute of 1898[11] did not anticipate this exigency. By the amendment of 1903,[3] however, it was provided in Section 60a, defining a preference, that the four months, during which the transfer in question must have been made in order to be a preference, should begin to run only after recordation, if recordation of the transfer were "required." But the trustee in bankruptcy at that time had no better standing to attack the transfer than had the bankrupt himself[12] or the creditors actually represented by the trustee under Sections 67a, 67b and 70e,[5] all of whom could be cut off by recordation before the petition. And since all transfers preferential under the terms of Section 60a were not necessarily voidable by authority of Section 60b,[13] there was often thus afforded no more effective way than previously existed[14] to question the immunity of a preferential transfer withheld from record until within the four months period. Further steps were taken in the revision of the Bankruptcy Act in 1910, when Section 47a(2)[5] was amended to give the trustee the position of a lien creditor as to property in the custody of the bankruptcy court, and, as to property not in custody, the position of a judgment creditor with execution returned unsatisfied. Moreover, although Section 60a was not altered, Section 60b was put in its present form, providing that the trustee may avoid the challenged transfer if, at the time of the transfer, *or of its recording if by law such recording is "required,"* and being within the four months preceding the petition, the requisite elements are found to exist.[4]

The crucial question at this time was the meaning of the word "required" as used in Section 60b. In the absence of a determinative ruling by the Supreme Court, a divergence of view soon appeared in the Circuit Courts of Appeals. On one hand it was held that by the word "required" reference was made to the "character of the instrument." Thus, if the local statute required recordation in order to validate the transfer as against *any* protected class, it was "required" to be recorded, within the terms of Section 60b, and failure so to record until within the four months period preceding the filing of the petition rendered the transaction vulnerable as a voidable preference.[15]

11. 30 STAT. 544 (1898).

12. York Manufacturing Co. v. Cassell, 201 U. S. 344, 352 (1906).

13. See Pirie v. Chicago Title & Trust Co., 182 U. S. 438, 446 (1901); Irving Trust Co. v. Chase National Bank, 65 F. (2d) 409, 410 (C. C. A. 2d., 1933). This distinction was explicitly recognized by Congress in 1903 in amending Section 57g to read: "The claims of creditors who have received preferences, *voidable under section sixty, subdivision b* . . ." (italics ours). 32 STAT. 799 (1903), 11 U. S. C. A. § 93g (1926). See GILBERT, op. cit. *supra* note 2, § 1147.

14. The powers of the trustee under state laws, derived from Sections 67a, 67b and 70e, *supra* note 5, are pertinent chiefly by way of contrast. The amendments of Section 60 here discussed seek to reach a different and more difficult problem, one not solely of rights under state law [see Holt v. Crucible Steel Co., 224 U. S. 262, 265 (1912); cf. Bunch v. Maloney, 233 Fed. 967, 970 (C. C. A. 8th, 1916)] but of affirmative rights under the Bankruptcy Act as well.

15. English v. Ross, 140 Fed. 630 (M. D. Pa. 1905); First National Bank v. Connett, 142 Fed. 33 (C. C. A. 8th, 1905); Loeser v. Savings Deposit Bank & Trust Co., 148 Fed.

The other view maintained that the class of parties protected under the pertinent recording act controlled. Thus, unless the attacking trustee by virtue of the position given him by the Bankruptcy Act represented persons of the class protected by the local statute, the transfer was not voidable by him under Section 60b, since its recordation, although within the critical four months period, was not "required" as to him.[16]

The latter interpretation ultimately received the sanction of the Supreme Court in *Carey v. Donohue*[17] in 1916. A deed of land there involved was, by the terms of the state recording statute, fraudulent until recorded, as against a subsequent bona fide purchaser for value without notice. Creditors, however, could not attack the transfer; since the trustee under Section 47a(2) could represent only creditors, he was not deemed to be a bona fide purchaser, and, as to him, recordation was in such circumstances immaterial. The Court stated that ". . . the intended meaning was to embrace those cases in which recording was necessary in order to make the transfer valid as against those concerned in the distribution of the insolvent estate; that is, as against creditors, including those whose position the trustee was entitled to take."[18] Two years later the Court further clarified its restrictive construction of Section 60b in *Martin v. Commercial National Bank*.[19] A chattel mortgage in that case was, by the local law, valid between the parties without recordation, but not as to intervening lienors or purchasers before recordation. After reviewing the earlier cases of *Bailey v. Baker Ice Machine Co.*[20] and *Carey v. Donohue*[17] and reaffirming the interpretation of "required" therein made, the Court said that ". . . before a trustee may avoid a transfer because of the provision in question he must in fact represent or be entitled to take the place of some creditor whose claim actually stood in a superior position to the challenged transfer while unrecorded and within the specified period."[21] Since there was in fact no such creditor, and since the trustee's position under Section 47a(2) could become his only at the date of the petition,[22] he was powerless to avoid

975 (C. C. A. 6th, 1906); In re Beckhaus, 177 Fed. 141 (C. C. A. 7th, 1910); Mattley v. Giesler, 187 Fed. 970 (C. C. A. 8th, 1911); Ragan v. Donovan, 189 Fed. 138 (N. D. Ohio 1911); In re T. H. Bunch Commission Co., 225 Fed. 243 (E. D. Ark. 1915) aff'd 233 Fed. 967 (C. C. A. 8th, 1916) [even after Carey v. Donohue, 240 U. S. 430 (1916)] rev'd per curiam 246 U. S. 658 (1918) [on authority of Martin v. Commercial National Bank, 245 U. S. 513 (1918)]; cf. In re Dundore, 26 AM. B. R. 100 (M. D. Pa. 1911).

16. Meyer Bros. Drug Co. v. Pipkin Drug Co., 136 Fed. 396 (C. C. A. 5th, 1905); In re Hunt, 139 Fed. 283 (N. D. N. Y. 1905); In re McIntosh, 150 Fed. 546 (C. C. A. 9th, 1907); In re Boyd, 213 Fed. 774 (C. C. A. 2d, 1914); In re Roberts, 227 Fed. 177 (N. D. Ga. 1915).

17. 240 U. S. 430 (1916). The decision was favorably discussed in Note (1916) 29 HARV. L. REV. 766; the opposite holding of the lower court in the case had been strongly approved in Note (1914) 14 COL. L. REV. 440.

18. Id. at 437.

19. 245 U. S. 513 (1918). The decision was adversely criticized in Note (1918) 16 MICH. L. REV. 258.

20. 239 U. S. 268 (1915) (involving a conditional sale).

21. 245 U. S. 513 (1918) at 519.

22. Bailey v. Baker Ice Machine Co., 239 U. S. 268 (1915) at 276.

a preference which had been validated by recordation only one day before the filing of the petition in bankruptcy.

The inevitable effect of these decisions, sharply curtailing the operation of section 60b, was to secure virtual immunity for many types of secret liens. The Supreme Court, however, placed responsibility for its decisions upon the language of the Bankruptcy Act.[23] An intent to render Section 60b more utile might therefore be imputed to the subsequent Congressional amendment in 1926 of Section 60a, which added "or permitted" to the word "required."[3] Thus if Sections 60a and 60b were to be read together, the trustee might now be able to avoid a preferential transfer recorded within four months, where recordation of the instrument is by the local law "required or permitted."[24] The intention that they should be so read together might have been suggested by the discussion in *Carey v. Donohue* of a similar amendment of Section 60a which had been proposed, but rejected in 1903;[25] the abandoned amendment was there regarded as one which would have had an important bearing on the powers of the trustee under Section 60b.[26] What little light is thrown by the reports of committee hearings on the purpose of Congress in enacting the amendment of 1926 seems to lend support to this contention.[27] And it is

23. Carey v. Donohue, 240 U. S. 430 (1916) at 436; Martin v. Commercial National Bank, 245 U. S. 513 (1918) at 518. It has been suggested by way of speculation that the Supreme Court's willingness to construe the Act strictly is perhaps due to the fact that many of its members have been equity lawyers and therefore were formerly accustomed to tracing specific liens. McLaughlin, *Amendment of the Bankruptcy Act* (1927) 40 HARV. L. REV. 341, 390.

24. This view is strongly advanced in the recent case of Foltz v. Davis, 68 F. (2d) 495 (C. C. A. 7th, 1934) and in Matter of Bowles, 14 AM. B. R. (N. S.) 133 (Ref. Neb. 1928) (dictum).

25. 35 CONG. REC. 6938, 6943 (1902); see Carey v. Donohue, 240 U. S. 430 (1916) at 436.

26. "This distinction between the test of the right to institute bankruptcy proceedings and the test of the right to recover from one who had received a transfer alleged to be a preference lay in the terms of the act and could not rightly be ignored. It was urged that the result was to encourage secret preferential transfers; but the wisdom of the prescribed condition of recovery . . . was a matter for legislative, not judicial, consideration. To secure this conformity, an amendment . . . added to § 60a the following clause: [a provision much like that now in force, concerning required or permitted recordation] . . . The Senate struck from this proposed amendment all that follows the words 'if by law such recording or registering is required,' . . . There is no basis for the assumption that the words . . . were ultimately deemed to be surplusage, for these words had an obviously distinct significance . . ." Carey v. Donohue, 240 U. S. 430 (1916) at 436. See also In re Beckhaus, 177 Fed. 141 (C. C. A. 7th, 1910) at 143.

27. In most of the hearings the amendment was merely stated, and comment, if any, was entirely cursory. But on one occasion it was stated by a representative of the National Credit Men's Association that "the effect of the proposed amendment would be to make such conveyance invalid as against the trustee in bankruptcy in any case where the law permits it to be filed or recorded, thereby compelling, in some cases the filing or recording of the conveyance and in all cases giving creditors notice of the fact that the transfer or conveyance has taken place." Hearing before House Committee on Judiciary on Revision of the Bankruptcy Law, 68th Cong., 2d Sess. (1925) 20.

the opinion of some writers that the expansion of Section 60a should be given the wide operation suggested.[28]

An argument may indeed be made that under the Act as it now stands the two sections can be read together and the desired result obtained without doing too great violence to the legislative language. One of the prerequisites to the avoidance of a transfer under Section 60b is that it shall operate as a "preference," a characteristic defined by Section 60a. An integral part of this section is the provision that the four months within which a transfer must have been made in order to be considered preferential shall not run until after the transfer has been recorded, if recordation is "required or permitted." The preferential character of the recordation of a transfer within four months of a petition is thus unequivocally defined by Section 60a. If the separate existence of this section is to be of any significance, the conflict of its terms concerning recordation with the corresponding words of Section 60b must be resolved against the latter; for otherwise the amendment of Section 60a in 1926 must be held merely to have made a futile addition to what was already confusing redundance. Moreover, under this interpretation, meaning is given to the rather obvious statement that the amendment makes the terms of Section 60a conform more closely with Section 3b, which measures the time for filing a petition in bankruptcy.[29] Therefore, so far as recordation is involved, Section 60a should control in determining under Section 60b what transfers are not only preferential, but also voidable.[24] And some support is given this argument by language referring generally to these two sections without accurate differentiation,[30] and by occasional references to Section 60a as the section which deals with the trustee's power to avoid preferences.[31]

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28. "In the author's opinion, it was the intent of Congress to apply the same measure to the definition and the trustee's right of avoidance and the two subsections should be read together." GILBERT, COLLIER ON BANKRUPTCY (2d ed. 1931) 878. See also COLLIER, BANKRUPTCY (13th ed. 1923) (Supp. 1934) 427 [1260]; Luberger, *Improvements in the Bankruptcy Act and in its Administration* (1925) 10 IOWA L. BULL. 209, 215, 217; Colin, *An Analysis of the* 1926 *Amendments to the Bankruptcy Act* (1926) 26 COL. L. REV. 789, 801; cf. 4 REMINGTON, BANKRUPTCY (3d ed. 1923) (Supp. 1934) § 1790.

29. § 3b: ". . . Such time [for filing a petition] shall not expire until four months after (1) the date of the recording or registering of the transfer . . . if by law such recording or registering is required or permitted . . ." 30 STAT. 546 (1898), 11 U. S. C. A. § 21b (1926). Cf. In re Ageloff Realty Co., 5 F. Supp. 295 (E. D. N. Y. 1933). See also Carey v. Donohue, 240 U. S. 430 (1916) at 435, and note 26, *supra*.

"The grounds upon which the senate decided, if as a matter of fact it did so deliberately, that section 60 should not conform to section 3-b are not known and no reasonable justification for such a conclusion is apparent. Any preference, constituting an act of bankruptcy under section 3 *ought* to be avoidable by the trustee under section 60. Conversely a preference that cannot be avoided under section 60 *ought not* to be the basis of an involuntary petition." Luberger, *supra* note 28, at 217.

30. See Stephens v. Pittsburgh Plate Glass Co., 36 F. (2d) 953 (C. C. A. 5th, 1930); In re Carr, 39. F. (2d) 916, 917 (M. D. Pa. 1930); Ehrlich v. Johnson Service Co., 272 Mass. 385, 389, 172 N. E. 508, 510 (1930).

31. See e.g., Corney v. Saltzman, 22 F. (2d) 268, 269 (C. C. A. 2d, 1927) ("Section 60a . . . makes voidable . . ."); Credito y Ahorro Ponceno v. Gorbia, 25 F. (2d) 817, 819 (C. C. A. 1st, 1928); Baker v. Chisholm, 268 Mass. 1, 5, 167 N. E. 321, 322 (1929).

But this argument is not entirely convincing. By its terms, the amendment of 1926 refers only to the running of the four months period in identifying the transfer as a preference. Accordingly, the provision regarding "required" recordation in Section 60b, the section which alone states which preferential transfers are voidable by the trustee,[13] is not affected by broadening the scope of Section 60a. However wide the category of "preferential transfer" may be made, operation as a preference remains but one of the elements which Section 60b requires to make the transfer voidable; so far as the pertinence of recordation to voidability is concerned, Section 60b is self-sustaining. And since "or permitted" was not added to "required" in Section 60b, but only in Section 60a, it seems over-sanguine to claim that the enactment of 1926 has settled the matter.[32] If in fact the greater power to avoid now exists in favor of the trustee, certainly it does not appear to have been successfully exercised; the reported cases, with some exceptions,[33] stay well within the limits of the rule of *Carey v. Donohue* and *Martin v. Commercial National Bank*.[34] Nor does it seem likely that if this somewhat strained interpretation of the 1926 amendment should be urged upon the Supreme Court, it would abandon the attitude of restrictive construction which it manifested in those earlier cases.

Revision of the Bankruptcy Act is necessary, not merely to strengthen the hand of the trustee in levelling preferences, but also to clarify and systematize the exercise of that function. Short of reforming all the state laws or setting up a comprehensive and independent set of recording standards for bankruptcy purposes, the obvious expedient, and the one which has in fact been incorporated into the Bankruptcy Act, is to make use of such terms as the applicable state statutes may happen to contain. But the "glaring lack of uniformity" in the recording statutes, when projected into bankruptcy proceedings, must lead to radically differing results in situations which may otherwise be identical in factual composition. And such inconsistency runs counter to the ideal of

32. The claim has been made in general terms. See, e.g., note 28 *supra*. Many commentators, however, have carefully restricted the amendment to its language, some deploring its failure effectively to attack secret liens. See *Report of the Special Committee on Practice in Bankruptcy Matters* (1925) 50 A. B. A. REP. 478, 489; Robinson, *The Scope and Effect of the 1926 Amendments to the Bankruptcy Act* (1926) 12 CORN. L. Q. 49, 55; McLaughlin, *supra* note 23, at 374 et seq.; Douglas, Book Review (1927) 27 COL. L. REV. 765, 766; Scott, *Recordation Provisions in the Bankruptcy Act* (1932) 18 VA. L. REV. 249, 262; cf. 4 REMINGTON, loc. cit. *supra* note 28. See also GILBERT, op. cit. *supra* note 2, §§ 1147, 1156, and contrast the statement from the earlier edition quoted note 28, *supra*.

33. Foltz v. Davis, 68 F. (2d) 495 (C. C. A. 7th, 1934); Stokes v. Johnson, 352 Ill. 371, 185 N. E. 567 (1933); see Matter of Bowles, 14 AM. B. R. (N. S.) 133, 140 (Ref. Neb. 1928); cf. John Hetherington & Sons v. Rudisill, 28 F. (2d) 713, 716 (C. C. A. 4th, 1928); In re Wisconsin Refining Corp., 63 F. (2d) 159 (C. C. A. 7th, 1933).

34. Hirschfeld v. Nogle, 5 F. Supp. 234 (E. D. Ill. 1933) and cases therein cited at 237; Stover v. Valley National Bank, 48 F. (2d) 54 (C. C. A. 3d, 1931) cert. den. 284 U. S. 631 (1931); Marks v. Wenzel, 6 F. Supp. 981 (E. D. N. Y. 1932); In re Finley, 6 F. Supp. 105 (M. D. N. C. 1933); Small-Ferrer, Inc. v. Ware, 68 F. (2d) 366 (C. C. A. 4th, 1934); Bank of Wadesboro v. Little, 71 F. (2d) 513 (C. C. A. 4th, 1934); In re Lloyd, 6 F. Supp. 514 (M. D. Pa. 1934); cf. Matter of Wood, 21 AM. B. R. (N. S.) 502 (Ref. W. D. Tex. 1932).

uniformity in bankruptcy administration, which is sought for reasons not only of convenience and practicability, but also of equitable result. The primary search must therefore be for some means of adapting a heterogenous pattern to serve consistently a known and uniform purpose. Even if the words "or permitted" which were inserted in Section 60a, had also been added to "required" in Section 60b, the result might not yet be satisfactory. As one authority has indicated,[35] almost all instruments of transfer are permitted to be recorded in some manner, and to demand the filing of all transactions would impose an excessive burden on commercial relations. Recordation, it is said, ought therefore to be given operation in this connection only where, if permitted, its existence would affect the rights of those interested in the bankrupt estate, the creditors. But it seems probable that the mere insertion of the suggested words in Section 60b without making the amendment more explicit would again require unduly extended judicial construction and would provoke confusion and conflict similar to that which resulted from the somewhat ambiguous wording adopted in 1910.[36]

Any revision of the existing provisions bearing on this problem ought unambiguously to express the intention which motivates its adoption. It should be so clearly the objective of the section to nullify the effect of any action or inaction which materially and unfairly jeopardizes the interests of creditors as to leave no room for judicial doubt.[37] In view of this purpose it does not seem to be sufficient to limit treatment of the trustee's powers of avoidance to those cases in which the local law may actually give recordation an insulating effect as against creditors. The attack should rather be directed against mala fide concealment of the fact that property which ostensibly belongs to the debtor and which thus gives illusory value to his assets is already appropriated in greater or less degree to satisfy the claim of one creditor. In some cases, although recordation may be permitted, the fact of recording does not, in legal result, detract from the rights of creditors, since the transfer was valid as against them even without recordation. Yet in a situation such as that reported in *Carey v. Donohue,* the limitation of the statutory protection to bona fide purchasers does not preclude the probability that in fact not only purchasers, but creditors as well are misled by the debtor's apparent ownership of the land. It would therefore seem advisable[38] to provide that the recording of any trans-

35. 4 REMINGTON, loc. cit. *supra* note 28.

36. See cases cited in notes 15 and 16, *supra.*

37. Cf. Corney v. Saltzman, 22 F. (2d) 268 (C. C. A. 2d, 1927) at 270: "Congress intended that the creditors of a bankrupt, whether or not they have liens, are entitled to know the bankrupt's financial standing, and a creditor who fails to record his mortgage, or to have one executed at the time of the passing of the consideration, shall not have a fictitious credit. The statute forbids such lienor to come in afterwards and claim for himself the property of which he has allowed the bankrupt to appear to be the absolute owner."

38. An argument might even be advanced in favor of going to the length of providing that if recordation of the transfer is permitted, but the privilege is not exercised, and if it be demonstrated that qualified creditors were materially deceived thereby, the transfer shall be voidable at the suit of the trustee. But the very extensive character of such a proposal and its lack of definite criteria probably render it impracticable.

fer, within four months of the petition, which affects adversely the interests of relying creditors, shall itself be considered to be a "transfer."[39] The whole transaction shall then be voidable by the trustee if a concurrence of the elements stipulated in Section 60b[4] is found to have existed at the time of such "transfer." Such a provision would not only broaden the category of voidable preferences, but would also mitigate the difficulty of establishing the conditions of avoidability of a transfer under Section 60b, since the essential concurrence of elements is more likely to be found during the four months period immediately preceding bankruptcy than at the earlier time of the execution of the instrument. As a supplement to this reform, and as a somewhat weaker substitute therefor in the event of its failure to be adopted, the advantageous position of the trustee, now his at the time of the petition under Section 47a(2),[40] should be declared to have been his retroactively during the whole preceding four months.[41] This would enable the trustee to avoid the transfers recorded within four months in the most numerous and troublesome class of cases, viz., where only lien creditors are protected by the recording statute and where there are in fact no lien creditors for him to represent.[42]

Such changes would do much to promote a more equitable bankruptcy distribution. Conceded difficulties of proof of some of the factors herein brought into prominence, such as the misleading of innocent creditors and the adverse effect of secrecy upon their interests, will be outweighed by the benefits of a requirement of more forthright conduct in commercial relations than recording statutes now exact. In a legal system which recognizes the premise that parties to credit transactions ought to act in good faith, small justification appears for permitting secret liens to go unimpeached. Such publicity as is required

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39. It may be said that there are in effect two "transfers" in the usual transaction: one effective between the parties, at the time of execution; the other effective as to the rest of the world when the facts become known, as by recordation. This second "transfer" can readily be brought under the broad Bankruptcy Act definition of "transfer" in Section 1 (25), *supra* note 1, and therefore can be held voidable as a transfer within the four months period. See the Senate Report cited note 10, *supra*. Cf. In re Caslon Press, 229 Fed. 133 (C. C. A. 7th, 1915); In re Havens, 255 Fed. 478, 481 (C. C. A. 2d, 1918); John Hetherington & Sons v. Rudisill, 28 F. (2d) 713, 716 (C. C. A. 4th, 1928); Nogi v. Greenwood, 1 F. Supp. 60 (M. D. Pa. 1932); Note (1905) 18 HARV. L. REV. 606, 607.

40. National Bank of Bakersfield v. Moore, 247 Fed. 913 (C. C. A. 9th, 1918) cert. den. 247 U. S. 507 (1918); In re Duker Ave. Meat Market, 2 F. (2d) 699, 700 (C. C. A. 6th, 1924); Albert Pick & Co. v. Wilson, 19 F. (2d) 18 (C. C. A. 8th, 1927); Barbee v. Spurrier Lumber Co., 64 F. (2d) 5 (C. C. A. 10th, 1933). But cf. Note (1934) 18 MINN. L. REV. 541.

41. Cf. Bailey v. Baker Ice Machine Co., 239 U. S. 268 (1915) at 276. Congress can give the trustee his position, under Section 47a(2) at the date of the petition, even if there are actually no lien or judgment creditors from whom such rights and powers might be derived. See cases cited in note 40, *supra*. And the retroactive operation of Section 60b in avoiding outright transfers made within the four months' period is not questioned. Similarly, the combination of these two rules, wherein the trustees' position under Section 47a (2) is not only non-derivative, but retroactive as well, is likewise unquestionable.

42. It would not, however, allow the use of a recording act protecting only purchasers, since this class is not included among the interested parties in bankruptcy.

by the amendments here advocated would not result in detrimental curtailment of credit or the premature and unnecessary precipitation into bankruptcy of temporarily embarrassed debtors. If, when all the facts are openly shown, it appears that the debtor's difficulties are really temporary and can probably be overcome, creditors are not likely to preclude their chances of receiving full payment within a reasonable time by forcing immediate bankruptcy for the sake of a present, but fractional satisfaction of their claims. If, on the other hand, the affairs of the debtor are so hopelessly involved as to give no promise of eventual recovery, knowledge of this situation will discourage the futile extension of more credit. And if a decadent course of business could thus be checked before the remaining assets are completely wiped out, it should be possible to minimize the severity of the economic dislocation and individual losses evidenced by the meagre dividends of the average bankruptcy.

LIMITATION OF LOWER FEDERAL COURT JURISDICTION OVER PUBLIC UTILITY RATE CASES

A QUARTER of a century of agitation to eliminate federal court interference with state control of public utility rates culminated in the last Congress with the enactment of the Johnson Bill.[1] This bill provides that no federal district court shall have jurisdiction to restrain the enforcement of state or local administrative orders concerned with public utility rates where jurisdiction would formerly have been invoked upon the grounds of diversity of citizenship or constitutional question, provided that such orders do not interfere with interstate commerce, are made after reasonable notice and hearing, and the state courts afford a plain, speedy and efficient remedy. Previous to the passage of this bill it was possible for a public utility to force a state regulatory body to submit the constitutionality of its orders to trial in a lower federal court, a procedure which was objectionable to the states not only because it involved a federal court's passing upon the validity of the states' regulatory action to the exclusion of a determination by the states' own courts, but also because of the expense and delay frequently incident to this type of federal judicial review.

The gradual evolution of that portion of federal jurisdiction now eliminated offers an interesting example of legal maladjustment. The strong national sentiment engendered by the Civil War, coupled with the ascendancy of northern capital and its desire to protect itself from such popular manifestations as the Granger movement,[2] led to the incorporation of a provision in the Judiciary Act of 1875 conferring original jurisdiction upon the lower federal courts over suits based upon claims of rights guaranteed by the Constitution.[3] Although

1. P. L. No. 222, 73d Cong., 2d Sess. (1934), signed by the President, May 14, 1934. The bill amends Section 24 of the Judicial Code.

2. See FRANKFURTER AND LANDIS, BUSINESS OF THE SUPREME COURT (1927) 65; 2 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (1928) 574 et seq.

3. 18 STAT. 470 (1875). The same jurisdiction existed during the period the Second Judiciary Act was vivant: Act of Feb. 13, 1801, 2 STAT. 89 (1801); repealed Mar. 8, 1802, 2 STAT. 132 (1802).

one of the purposes of this broader jurisdiction was to give federal protection to absentee capital, public utilities were unable to take advantage of it in rate questions, for it was decided in 1877 by the United States Supreme Court that rates set by a legislature could not be subject to judicial review.[4] But subsequent conduct in state regulation gave reason for a reconsideration of this attitude toward the validity of rates. Minnesota provided for the control of railroad rates under a distinctly arbitrary procedure which made the rate order of a commission conclusive upon the courts. Whether the action taken by the Minnesota commission under this provision was in fact unreasonable or whether it was not, such control was open to possibilities of flagrant abuse. So, in 1890, the Supreme Court reversed its previous stand and declared that although the creation of rates was a legislative function, the reasonableness of such rates was a matter for judicial review to protect utilities from a deprivation of property without due process of law.[5] Thus the reasonableness of rates became a constitutional question under the Fourteenth Amendment. Then, as an indirect result of the coexistence of, first, the enlarged federal jurisdiction and, second, the determination that rates were to be taken under the protection of the Fourteenth Amendment, it was possible to test the constitutionality of rate regulations by seeking in the federal courts an injunction against acts of enforcement attempted by state officers acting under the authority of allegedly unconstitutional state statutes. However, such remedy was available in only special and rare instances. Section 265 of the Judicial Code[6] forbade federal courts to issue injunctions to stay proceedings in the state courts. Thus, where a state officer could enforce a utility rate by merely resorting to judicial proceedings, it was generally believed that a federal court might not interfere.[7] Only in those few cases where compliance with a rate order was sought to be enforced by some positive, extra-judicial act could the state officer be enjoined. But even here it was not certain that an injunction should issue because of the prohibition in the Eleventh Amendment of suits against a state.[8] Nevertheless, on the theory that an act of a state officer sanctioned only by an unconstitutional statute was a personal rather than an official act, such a suit was sometimes allowed.[9]

Finally, in 1908, the Supreme Court in *Ex parte Young* declared that a suit against a state officer attempting to enforce a state statute was definitely not a suit against a state[10] and the fact that enforcement was to be carried out only

4. Peik v. Chicago, 94 U. S. 164 (1877); see Munn v. Illinois, 94 U. S. 113, 133 (1877).

5. Chicago, Milwaukee and St. Paul Rr. v. Minnesota, 134 U. S. 418 (1890).

6. 36 STAT. 1162 (1911), 28 U. S. C. A. § 379 (1926).

7. Taylor and Willis, *The Power of Federal Courts to Enjoin Proceedings in State Courts* (1933) 42 YALE L. J. 1169; Warren, *Federal and State Court Interference* (1930) 43 HARV. L. REV. 345.

8. In re Ayers, 123 U. S. 443 (1887); Fitts v. McGhee, 172 U. S. 516 (1899); see dissent of Mr. Justice Harlan in Ex parte Young, 209 U. S. 123, 192 (1908).

9. Reagan v. Farmers' Loan and Trust Co., 154 U. S. 362 (1894); Smyth v. Ames, 169 U. S. 466 (1898).

10. Ex parte Young, 209 U. S. 123 (1908); cf. Taylor and Willis, *supra* note 7, at 1191; Warren, *supra* note 7, at 375.

through judicial proceedings did not bring the attempt to enjoin the officer's actions within the application of Section 265 as long as proceedings had not already been instituted in the state courts.[11] Consequently, although the Court forbade the use of the federal injunction until the "legislative process" of fixing rates had been completed,[12] it was now possible for a utility to contest any rate regulation in the federal courts.

During this period of the growth of lower federal court jurisdiction to include rate cases, state regulation had been chiefly concerned with railroads and a few other forms of business affected with a public interest, the regulation of the local utilities being entrusted to the municipalities. But local utilities had increased in size and power to a point where they occupied a dominant position in local politics, and their corruption and bribery of local officials had seriously impaired municipal regulation.[13] Accordingly, a movement had been initiated to transfer the control of such utilities to the state to be administered through a central body of experts familiar with their problems. As this movement grew so that more and more local utilities were subjected to the more effective state regulation,[14] the use of the federal injunction as a newly perfected weapon for resisting commission control became also more widespread.

To a great extent, the problem of bringing the local utilities under central administrative control occupied the attention of the states at that time, and regulation of this type was still too new for the question of whether state or federal courts should have the judicial review of that regulation to be singled out for specific consideration. The decision in *Ex parte Young* had aroused a storm of protest,[15] but the main objection of the states was aimed at one prac-

11. See Ex parte Young, 209 U. S. 123, 161-163 (1908).

12. Prentis v. Atlantic Coast Line, 211 U. S. 210 (1908). However, even this restriction is limited, for where the rates pending final legislative action are not or may not be stayed, a federal injunction may issue. Pacific Telephone and Telegraph Co. v. Kuykendall, 265 U. S. 196 (1924).

13. See MOSHER AND CRAWFORD, PUBLIC UTILITY REGULATION (1933) c. 2; Monroe, *The Gas, Electric Light, Water and Street Railroad Services in New York City* (1906) 27 ANNALS 111.

14. The control of local utilities by the state rather than the municipality received not a little criticism from those who feared that the movement ignored those "wholesome principles of home rule" which were the foundation of "the American system of democratic government." Jones, *State Versus Local Regulation* (1914) 53 ANNALS 94; cf. Smith, *Effect of State Regulation of Public Utilities upon Municipal Home Rule* (1914) 53 id. at 85; Wilcox, *Effects of State Regulation upon the Municipal Ownership Movement* (1914) 53 id. at 71.

15. Even before the decision was rendered in *Ex parte Young*, while the United States Supreme Court had the case under consideration, Senator Overman introduced a bill on February 3, 1908, to prohibit issuance of federal injunctions against state officers. After the decision was handed down, protests became more vigorous. 42 CONG. REC. 4846-4859 (1908). After the passage of the Mann-Elkins Act and when the codification of the judicial laws occupied the attention of Congress, Madison sponsored a bill in the House to the same effect as the Overman bill. Congressmen Cullop and Hardy led the attack on the "vicious practice" that had grown up "for the purpose of preventing State courts from construing their own statutes." 46 CONG. REC. 315, 316, 343 (1910).

tice which resort to the federal courts made possible: a single federal judge, practically without notice and in an ex parte proceeding, could restrain the enforcement of a state statute.[16] This element of the problem Congress attempted to remedy by writing into the Mann-Elkins Act of 1910[17] the mandatory requirement of a three-judge federal court where either interlocutory or interlocutory and permanent injunctions were sought in cases involving the alleged repugnancy of state statutes to the federal Constitution. Provision was made for the expeditious handling of such cases by permitting appeal directly to the United States Supreme Court from the order granting or denying the interlocutory injunction. Reenacted as Section 266 of the Judicial Code,[18] the statute was later amended to include orders of administrative boards and commissions.[19] At the same time, Congress made some concession to the increasingly vigorous denunciation of a situation which prevented the state courts from construing their own statutes. A provision was added to Section 266 enabling state officers to oust the jurisdiction of the inferior federal court by instituting a suit in the state court and by asking that court to stay the enforcement of the statute or order until the conclusion of the litigation. The granting of that stay would automatically stay the proceedings in the federal court. This amendment, however, had practically no effect, both because of its own inherent weakness and because the states did not understand just what procedure was indicated.[20] Under it a stay pendente lite had to issue in order to oust the federal court's jurisdiction even if the order were one that a federal court would not have stayed. Only four states adapted their procedure so that a stay might be had as a matter of right in every case.[21] In thirty-four other states a discretionary stay was available,[22] and when it was granted the procedure of the

16. Restraining orders could be issued without notice. 17 STAT. 197 (1872). No limit was provided for the extent of the time of operation of a restraining order, nor, where such an order had been issued, had provision been made for expediting the hearing on the motion for injunction, nor for final hearing in most cases where an interlocutory injunction had been granted. 16 STAT. 176 (1870). See Hutcheson, *A Case for Three Judges* (1934) 47 HARV. L. REV. 795, 800 et seq.

17. 36 STAT. 557 (1910), 28 U. S. C. A. § 380 (1926). See Louisville and Nashville Rr. Co. v. Alabama Railroad Commission, 208 Fed. 35, 60 (M. D. Ala. 1913).

18. 36 STAT. 1162 (1911), 28 U. S. C. A. § 380 (1926).

19. 37 STAT. 1013 (1913), 28 U. S. C. A. § 380 (1926). But cf. Ex parte Collins, 277 U. S. 565 (1928); Ex parte Williams, 277 U. S. 267 (1928) (in both cases the Court found the statute inapplicable to cases of mere local importance); Hutcheson, *supra* note 16, at 822. The requirement of a three-judge court was subsequently extended to the hearings on the permanent injunction when an interlocutory one had already been sought. 43 STAT. 938 (1925), 28 U. S. C. A. § 380 (1926); Moore v. Fidelity and Deposit Co., 272 U. S. 317 (1926).

20. Cf. Hutcheson, *supra* note 16, at 822-825; Lockwood, Maw, and Rosenberry, *The Use of the Federal Injunction in Constitutional Litigation* (1930) 43 HARV. L. REV. 426; Pogue, *State Determination of State Law* (1928) 41 HARV. L. REV. 623.

21. Ariz. Laws, 1931, c. 84, § 2; NEB. COMP. STAT. (1929) §§ 20-21, 157; N. Y. PUB. SERV. LAW (Supp. 1934) § 112; Wis. Stat., 1931, § 285.06.

22. Although discretionary with the court, there are often certain prerequisites to be complied with before the stay will be granted. In seventeen states a suspending bond

amended section would have been satisfied. Nevertheless, the common interpretation of the requirement was that for a state court to deprive a federal court of jurisdiction in any one case it must of necessity be able to grant a stay in all cases and that to accomplish this each state must make the same legislative provision as had the other four states.[23] This was considered too high a price to pay to keep the suits in the state courts.[24] Consequently, little came of the amendment. Only five cases have been found where the federal court

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is a condition precedent to a stay order: ALA. CODE ANN. (Michie, 1928) §§ 9681, 9838; CAL. GEN. LAWS (Deering, 1931) act 6386, § 68(c); COLO. ANN. STAT. (Mills, 1930) § 5933a²(c); IDAHO CODE ANN. (1932) §§ 59-633—59-637; ILL. REV. STAT. ANN. (Smith-Hurd, 1933) c. 111 2/3, § 75; KAN. REV. STAT. ANN. (Supp. 1933) § 66-118(g), (h); MO. STAT. ANN. (1932) § 5235; N. H. PUB. LAWS (1926) c. 239 § 19; N. D. COMP. LAWS ANN. (Supp. 1925) c. 13B, § 4609c35; OHIO CODE ANN. (Page, 1926) § 548; OKLA. CONST., art. 9, § 21; ORE. CODE ANN. (1930) § 62-137; PA. STAT. ANN. (Purdon, 1930) tit. 66, § 832 (rate orders only); TENN. CODE (Will. Shan. & Harsh, 1932) § 9017; UTAH REV. STAT. ANN. (1933) § 76-6-17; VA. CONST. § 156(e) (orders to transportation or transmission companies); VA. CODE (Michie, 1930) § 3735 (orders not covered by constitutional provisions: commission may require bond); WASH. REV. STAT. ANN. (Remington, 1932) § 10429. In three states, courts "may" require suspending bond: N. J. COMP. STAT. (Supp. 1924) § 167-59; PA. STAT. ANN. (Purdon, 1930) tit. 66, § 832 (other than rate orders); W. VA. CODE ANN. (Michie, 1932) § 24-5-1. In three states the appeal acts as supersedeas unless Court decrees otherwise: CONN. GEN. STAT. (1930) § 3612; R. I. GEN. LAWS (1923) § 3698; S. D. COMP. LAWS (1929) § 9591. In four states there are no restrictions on the courts' discretion: ARK. DIG. STAT. (Crawford and Moses, Supp. 1927) § 8417z3; LA. GEN. STAT. (Dart, 1932) § 7936; MASS. ANN. LAWS (Lawyers' Co-op., 1933) c. 25, § 5 (court rules to determine conditions of stay); VT. PUB. LAWS (1933) § 6335. Seven states make notice to commission and hearing thereon a condition precedent to granting of stay; IND. STAT. ANN. (Burns, Supp. 1926) § 12751; MD. ANN. CODE (Bagby, 1924) art. 23, § 404; MICH. COMP. LAWS (1929) § 11042; MINN. STAT. (Mason, 1927) § 4651; MONT. REV. CODE ANN. (Choate, 1921) § 3906 (public utilities excepting railroads); id. § 3809, which is applicable to railroads, has been construed to the same effect as § 3906 in State v. District Court, 53 Mont. 229, 163 Pac. 115 (1917); NEV. COMP. LAWS (Hillyer, 1929) § 6133; WYO. REV. STAT. ANN. (Courtright, 1931) § 94-164. In Texas there must be notice to commission, hearing, and court must make specific findings from evidence heard that damage from failure to issue stay will be irreparable. TEX. ANN. CIV. STAT. (Vernon, 1925) art. 6453. In addition to these thirty-four states where the stay is discretionary, in one state supersedeas is automatic upon filing of a suspending bond, S. C. CODE (Michie, 1932) § 8254, and in another the commission may defer the effective date of the order so that its validity may be tested. IOWA CODE (1931) § 7886 (does not apply to power companies within cities or street railways). The statutes of only two states prohibit issuance of any stay order: ME. REV. STAT. (1930) c. 62 § 64; N. C. CODE ANN. (Michie, 1931) §§ 1066, 1083. In Illinois and Washington no stay may issue when commission order merely reinstates a rate that has already been in effect for at least a year: ILL. REV. STAT. ANN. (Smith-Hurd, 1933) c. 111 2/3, § 75; WASH. REV. STAT. ANN. (Remington, 1932) § 10429.

23. See REPORT OF THE COMMISSION, NEW YORK COMMISSION ON REVISION OF PUBLIC SERVICE COMMISSION LAW (1930) 156; *Hearings before Committee on Judiciary, House of Representatives, on S. 752*, 73d Cong., 2d Sess. (1934) 210; cf, Lockwood, Maw, and Rosenberry, *supra* note 20, at 453; Pogue, *supra* note 20, at 637.

24. Cf. Hutcheson, *supra* note 16, at 823.

was successfully ousted from jurisidiction[25] whereas other cases under this procedure resulted in limitations which robbed it of any of the value which it might have had. Not only was it held that the stay granted by the state court must be as broad as that obtainable in the federal court,[26] but in the *Union Light, Heat and Power Company*[27] case it was further determined that the amended section did not apply to cases where temporary restraining orders had been obtained in the federal courts prior to the state court's stay of the statute or order.[28] Under this interpretation, it was possible for the public utilities to make the provision inoperative by first obeying the commission's order, then seeking to enjoin its enforcement by going before a one-judge district court, applying for the convocation of the three-judge statutory court, and asking for a temporary restraining order.[29] Before the utility made this move, the commission, it was felt, had no grounds for entering the state court for the purpose of staying its order since there was as yet no controversy. Finally, since Section 266 applied only to those cases where an interlocutory injunction alone or an interlocutory and then a permanent injunction was sought and did not cover cases where merely a permanent injunction was requested,[30] there was a vast field of litigation unaffected by the amendment.

Thus before long it was clear that the amended section was not a real remedy. A further objection had now arisen to the use of the federal injunction. The purpose of the rule of *Ex parte Young* had been to secure an easy and early way of determining the validity of state statutes and administrative orders. Now the states claimed that at least in public utility rate cases it failed to achieve this purpose since instead of a saving in time and money, it resulted

25. See Mondovi Telephone Co. v. Public Service Commission of Wisconsin and Swarthout v. Commissioner (Dist. Ct. W. D. Wis. 1932) (titles reversed in circuit court for Dane County); State ex rel. Daniel v. Broad River Power Co., 164 S. C. 208, 213, 162 S. E. 74, 76 (1931) (question of the amount of attorneys' fees which should be paid for the extended litigation of which the pertinent procedure was only a part); Humble Oil and Refining Co. v. Allred, Equity No. 438 (W. D. Tex. Nov., 1933); United Gas Public Service Corp. v. Smith, Equity No. 32 (S. D. Tex. June, 1933) (both mentioned by Hutcheson, *supra* note 16, at 822).

26. Northwestern Bell Telephone Co. v. Hilton, 274 Fed. 384 (D. Minn. 1921); cf. Dawson v. Kentucky Distilleries, 255 U. S. 288 (1921) (required stay said to be "general").

27. 17 F. (2d) 143 (E. D. Ky. 1926). But in Michigan Public Utilities Commission v. Michigan State Telephone Co., 228 Mich. 658, 200 N. W. 749 (1924), the state court held that even after the telephone company had secured an interlocutory injunction in the federal court and the commission had, thereafter, entered the state court and instituted mandamus proceedings to enforce their order and requested a stay in compliance with Section 266, that stay was applicable and timely, and it thereupon became the state court's duty to dispose of the case on the merits since the federal jurisdiction had thus been ousted.

28. The two Texas cases in note 25, *supra*, refused to follow this reasoning. Hutcheson, *supra* note 16, at 825.

29. Cf. REPORT OF THE COMMISSION, NEW YORK COMMISSION ON REVISION OF PUBLIC SERVICE COMMISSION LAW (1930) 157 et seq.

30. Moore v. Fidelity Deposit Co., 272 U. S. 317 (1926); Smith v. Wilson, 273 U. S. 388 (1927); Ex parte Hobbs, 280 U. S. 168 (1929); Stratton v. St. Louis Southwestern Rr., 282 U. S. 10 (1930).

in a duplication of effort and expense. This argument was predicated upon the fact that the trial in the federal court was de novo, while in the state court it was upon the record compiled by the public utility commission.[31] All the expense and time consumed in the hearings before the commission could be ignored in the federal courts,[32] for not only might the commission's record be discarded at the request of either party, but, even if both parties had agreed to its use, the master could still reject it.[33] The public utilities had no cause to object to the duplication involved in compiling two records, for it was always possible for them to shift the cost to the consumers, and no matter who was the eventual winner in the litigation, the burden of bearing its expense fell on the people of the state either in the form of increased taxes or increased rates. Since expense and delay were no drawback to the utilities but would effectively tie the hands of commissions working on limited budgets, the threat of resort to the federal courts became a powerful weapon capable of causing a complete breakdown in commission regulation. For example, the Georgia Public Utility Commission,[34] having on ten successive occasions used up its appropriations in its own hearings, was forced to withdraw its rate orders as soon as the utilities went into the federal courts and filed applications for injunctions.

Two different methods of reformation were suggested, as objection to this use of the federal injunction became more and more vigorous during the last decade.[35] One was aimed simply at the removal of the duplication and re-

31. In only five states is there either a trial de novo, or is evidence so freely admissible as to permit, in effect, a trial de novo: ALA. CODE ANN. (Michie, 1928) § 9835; IOWA CODE (1931) § 8232; MONT. REV. CODE ANN. (Choate, 1921) § 3906 (new evidence need not be transmitted to commission if parties so agree); N. C. CODE ANN. (Michie, 1931) § 1097, interpreted by Corporation Comm. v. Cannon Mfg. Co., 185 N. C. 17, 116 S. E. 178 (1923) to require trial de novo; TENN. CODE (Will. Shan. & Harsh, 1932) § 9014.

32. The New York Public Service Commission spent more than three years in valuing the property of the New York Telephone Co. More than 25,000 pages of the commission's record was devoted to testimony taken in formal hearings. The federal master refused to accept this record, and four more years were spent in revaluing the property. There were 710 heaings before the master, 609 witnesses, upwards of 36,000 pages of testimony, and 3,228 exhibits. REPORT OF THE COMMISSION, NEW YORK COMMISSION ON REVISION OF PUBLIC SERVICE COMMISSION LAW (1930) 155.

33. Id. at 154. The use of a master in rate cases in federal courts became the rule as a result of Chicago, Milwaukee and St. Paul Ry. v. Tompkins, 176 U. S. 167 (1900).

34. Letter of Feb. 23, 1934, from George L. Goode, commissioner of Georgia Public Service Commission, to Hon. Hatton W. Summers, chairman of Judiciary Committee, House of Representatives. *Hearings before Committee on Judiciary, House of Representatives on S. 752*, 73d Cong., 2d Sess. (1934) 269.

35. The following are a list of some of the bills, having the same subject matter, which were forerunners of the Johnson bill: 67th Cong., 2nd session, H. R. 10212 introduced by Mr. Bachrach; 69th Cong., 1st session, H. R. 485 by Mr. LaGuardia; 70th Cong., 1st session, S. 4491 by Mr. Wagner, H. R. 95 by Mr. LaGuardia, H. R. 10759 by Mr. Black, H. R. 13852 by Mr. Dickstein; 71st Cong., 1st session, H. R. 132 and H. R. 135 by Mr. LaGuardia, H. R. 161 by Mr. O'Connell; 2nd Session S. 3085 by Mr. Wagner, H. R. 9185 by Mr. Dickstein, H. R. 9330 by Mr. Bachrach, H. R. 9484 by Mr. Cullen, H. R. 9228 and H. R. 9501 by Mr. Somers; 72nd Cong., 1st session, S. 3243 by Mr. Johnson; 73rd Cong., 1st session, S. 752 by Mr. Johnson and H. R. 53 by Mr. Martin.

quired that the procedure in the federal courts should be changed so that the trial should be had on the commission's record. This plan was embodied in the Lewis Bill,[36] endorsed by a majority of the Committee on the Judiciary of the House as a substitute for the Johnson Bill. There are, however, grave doubts as to the constitutionality of thus making an administrative body's record the basis of federal judicial review; for the Supreme Court has said that in cases on administrative orders which raise the issue of constitutionality a trial de novo must be had if the party aggrieved wants it.[37] Furthermore, the Lewis Bill provided that additional evidence would be admissible in the federal court, and since there would be nothing to prevent a utility from awaiting entrance to the federal court before presenting its evidence, basing the federal trial upon the commission's record would have been but an empty reform. The other plan, which was to divest the inferior federal courts of jurisdiction over these cases, is embraced in the Johnson Bill.[38]

Certainly expense and delay will be curtailed by eliminating the duplication in compiling two records, since state procedure, for the most part, provides for review on the commission's record.[31] And even in those states where the introduction of additional evidence is allowed upon review by a state court, that evidence must usually first be certified to the commission for its consideration and action thereon, being reviewed by the court only after it has been incorporated into the record.[39] That the commission's record may not validly be

36. 78 CONG. REC. 8328 (1934). The Lewis Bill also provided that although the public utilities might bring suit in either state or federal courts, having once chosen one, they must remain there exclusively.

37. 285 U. S. 22 (1932). See Dickinson, *Crowell v. Benson: Judicial Review of Administrative Determinations of Questions of "Constitutional Fact"* (1932) 80 U. OF PA. L. REV. 1055; Comment (1932) 46 HARV. L. REV. 478; Comment (1932) 41 YALE L. J. 1037.

38. During the debates on the Johnson Bill in the Senate, Austen offered an amendment which would have changed the bill into nothing more than a clarified reenactment of Section 266. To the prerequisite for the Johnson Bill's application, that there be a "plain, speedy and efficient remedy" in the state courts, Austen would have added the requirement that such remedy include a stay pendente lite. 78 CONG. REC. 2238 (1934).

39. In ten states no new evidence is to be received: ARK. DIG. STAT. (Crawford and Moses, Supp. 1927) § 8417z3; IDAHO CODE ANN. (1932) § 59-629; ILL. REV. STAT. ANN. (Smith-Hurd, 1933) c. 111 2/3 § 72; MO. STAT. ANN. (Vernon, 1932) § 5234; NEB. COMP. STAT. (1929) § 75-505; N. D. COMP. LAWS ANN. (Supp. 1925) c. 13B, § 4609c35; OHIO GEN. CODE (Page, 1926) § 544; OKLA. CONST. art. 9. § 22; S. D. COMP. LAWS (1929) § 9591; VA. CONST. § 156(f) (orders to transportation and transmission companies). In Wyoming no new evidence is admissible except as to fraud by the commission. Wyo. Laws 1933, c. 119. In two states only such evidence as had been rejected by commission or was not kept from commission by lack of diligence or good faith is admissible, but when new evidence is admitted, it must first be transmitted to the commission and court proceedings are stayed: KAN. REV. STAT. ANN. (Supp. 1933) § 66-118(f); N. H. PUB. LAWS (1926) c. 239, § 12. In eight states new evidence is freely admissible but procedure outlined above must be followed: IND. STAT. ANN. (Burns, 1926) § 12752; LA. GEN. STAT. (Dart, 1932) §§ 7934, 7935; MD. ANN. CODE (Bagby, 1924) art. 23, § 405; MICH. COMP. LAWS ANN. (1929) § 11042; NEV. COMP. LAWS (Hillyer, 1929) § 6133; ORE. CODE ANN. (1930) § 62-138; R. I. GEN. LAWS (1923) § 3700 (if court thinks it of sufficient importance); WIS. STAT. (1931) § 196-44.

the basis for state court review is, it is true, a slight possibility in view of the rule of *Crowell v. Benson*.[37] There the Supreme Court held that where the orders of a federal commission raise the issue of constitutionality, a judicial trial de novo must be had upon the constitutional issue if the aggrieved party desires it. There is, however, no logical compulsion upon state courts to adopt a similar view, since the Supreme Court based its reasoning upon Article III of the Constitution and the implied doctrine of the separation of powers of the federal government rather than upon the Fifth amendment. Since the constitutions of most of the states have provisions similar to those of Article III, the rule is persuasive upon them as to the rights and disabilities of their own separated governmental departments. But it is not mandatory as it would have been had the Supreme Court decided the case upon the authority of the due process clause.[40] Yet, as Mr. Justice Brandeis indicates in a note to his dissent,[41] there is an unhappy obiter in the majority opinion classifying cases which involve the question of confiscation as typical of the type of controversy that requires a trial de novo on the constitutional issue.[42] However, should this same rule be extended to state procedure, the Johnson Bill will have accomplished little towards minimizing the expense and delay.[43]

The fear that divesting the federal courts of this jurisdiction will create a situation where the public utilities would be insufficiently protected from hostile state sentiment and local prejudice[44] is hardly well founded. What hostility has existed in recent years has mainly been the result of the effect of expensive, long drawn-out litigation in the federal courts, the utilities' distrust of the state courts, and their occasional indifference to the orders of the public service commission.[45] With the elimination of this great cause for prejudice, it is not illogical to expect that the state's desire to secure for the public as inexpensive service as possible will be offset by the need to assure the existence of efficient and continuous service, thus guaranteeing treatment in which the interests of all parties will be adequately protected.

If, nevertheless, public sentiment should so influence a state forum as to render a fair trial unobtainable in particular instances, the utilities will still have an appeal as of right to the Supreme Court of the United States under Section 237a of the Judicial Code.[46] That this eventual review should be ample pro-

40. See comment (1932) 41 YALE L. J. 1037, 1047.

41. 285 U. S. at 92, n. 28.

42. 285 U. S. at 60.

43. It should be remembered as well that state procedure sometimes requires resort to one or two more courts than the procedure under Section 266 demands. But see note 69, *infra*.

44. *Hearings, supra* note 23, at 170-173; 78 CONG. REC. 2015-2022 (1934).

45. Cf. FRANFURTER, THE PUBLIC AND ITS GOVERNMENT (1930) c. 3; see dissent of Mr. Justice Brandeis, Southwestern Bell Telephone Co. v. Public Service Commission, 262 U. S. 276, 308 (1923).

46. 36 STAT. 1156 (1911) [as amended 43 STAT. 937 (1925)], 28 U. S. C. A. § 344 (1926). For jurisdictional purposes, the order of a state regulatory commission is treated as an act of the legislature. Lake Erie and Western Rr. v. State Public Utilities Commission, 249 U. S. 422 (1919), cases cited at 424. In those states where admittance as

tection would seem to be clearly shown by some of the very arguments advanced by the utilities against the Johnson Bill. It was claimed that resort to the federal courts was had only in those important cases where protection from local prejudice was necessary.[47] Yet according to their own figures,[48] in seventy-five per cent of the cases where the federal procedure was followed, the jurisdiction of the Supreme Court was invoked before an end was made to the litigation.

State court review is substantively as sufficient as that formerly obtainable in the inferior federal courts, for under the *Ben Avon*[49] rule a state statute is unconstitutional which does not provide for review of both the law and the facts where there is any question of confiscation, so that the court's determination may be based upon its own independent judgment of both law and fact. The commission's findings may be presumptively correct but cannot be conclusive upon the court without contravening the due process clause. It is not enough that there should be some evidence in the record to support the findings of the commission, but the court may weigh the probative force of the evidence.[50]

Although the Johnson Bill thus does not seem to work a hardship upon the utilities, attacks on its validity may be expected. That Congress has the power so to limit the jurisdiction of the district courts is no longer open to doubt. Federal Judicial power and the jurisdiction of the Supreme Court are derived directly from the Constitution and, therefore, are not subject to legislative alteration. But the jurisdiction of every other federal court comes from the authority of Congress, which may restrict or expand it subject to the one limitation that it be not extended beyond the constitutional boundaries.[51] The Johnson Bill

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of right to the highest court of the state is precluded by a unanimous decision in the intermediate appellate court, appeal will be permitted directly from the intermediate court to the United States Supreme Court if the highest state court refuses to review. Gregory v. McVeigh, 90 U. S. 294 (1874); Norfolk Turnpike Co. v. Virginia, 225 U. S. 264 (1912).

47. *Hearings Before Subcommittee on Judiciary on S. 937, S. 939 and S. 3243,* 72d Cong., 1st sess. (1932) 57-63. The last numbered bill was practically identical to the Johnson Bill.

48. These figures are set forth in three articles by Spurr, appearing in: (July 24, 1930) 6 P. U. FORT. 67-76; (October 2, 1930) id. at 395-404; (October 16, 1930) id. at 451-461.

49. Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287 (1920).

50. The doctrine has been reaffirmed many times. Truax v. Corrigan, 257 U. S. 312 (1921); Prendergast v. New York Telephone Co., 262 U. S. 43 (1923); Tagg Brothers and Moorehead v. United States, 280 U. S. 420 (1930); Phillips v. Commissioner, 283 U. S. 589 (1931); Crowell v. Benson, 285 U. S. 22 (1932).

51. Kline v. Burke Construction Co., 260 U. S. 226 (1922); cf. Turner v. Bank of North America, 4 U. S. 8 (1799); Fishback v. Western Union Telegraph Co., 161 U. S. 96 (1896).

For the merits of the question of limiting federal jurisdiction, see Frankfurter, *Distribution of Judicial Power between United States and State Courts* (1928) 13 CORN. L. Q. 499; dissent of Mr. Justice Holmes in Black and White Taxicab Co. v. Brown and Yellow Taxicab Co., 276 U. S. 518, 532 (1928). It is interesting to note that Senator Logan of Kentucky, counsel for the plaintiff in that case, spoke in opposition to the Johnson Bill in the debates in the Senate. 78 CONG. REC. 2238-2243 (1934).

makes no change in the extent of the power of the federal judiciary inasmuch as the United States Supreme Court will still retain appellate review of the state courts.[52] Nor does it seem that an attack on the bill as discriminatory legislation[53] against the public utilities, violating the Fifth Amendment, would be any more successful. The unique characteristics of public utility cases, involving as they do complex problems of economic and social importance,[54] the money and time expended in their determination, and the application to them of rules of law that do not obtain in cognate situations[55] are ample proof that such a classification has a reasonable basis in fact and is neither arbitrary nor capricious. Furthermore, due process of law does not guarantee any particular type of judicial review in preference to any other.[56]

The phrasing of the bill suggests the further possibility of interpretative litigation. By its terms, it divests the federal district courts of jurisdiction only where there is a "plain, speedy and efficient" remedy available in the state courts.[57] Although all states having commission regulations[58] have provided for judicial review of rate orders,[59] there are three which still make the com-

52. Argument was heard in Congress that since the word "all" was to be found in the clause of the Constitution "The judicial power shall extend to all cases . . . arising under the constitution" and did not appear in the phrase referring to diversity of citizenship cases, it followed that the jurisdiction of the federal courts could be limited with respect to the latter but not in regard to the former. Aside from the fact that this reasoning substitutes "jurisdiction" for "judicial power," it is faulty in another respect, for if Congress has the power to divest the inferior federal courts of all their jurisdiction, a fortiori, it has the power to divest them of part of it. Cf. The Assessors v. Osbornes, 76 U. S. 567 (1869).

53. Although the Fifth Amendment does not expressly guarantee equal protection of the laws as does the Fourteenth Amendment, nevertheless, the limitation upon federal legislation has been held, by judicial interpretation, to include classifications so arbitrary and capricious as to amount to discrimination. United States v. Yount, 267 Fed. 861 (W. D. Pa. 1920).

54. Cf. FRANKFURTER AND LANDIS, THE BUSINESS OF THE SUPREME COURT (1927) 153, and authorities cited, n. 34.

55. E.g. rules of valuation and methods of determining fair value: Smyth v. Ames, 169 U. S. 466 (1898); Minnesota Rate Cases, 230 U. S. 352 (1913). Depreciation: Knoxville v. Knoxville Water Co., 212 U. S. 1 (1909); United Railways v. West, 280 U. S. 234 (1930). Also see *Hearings, supra* note 23, at 242-246; dissent of Mr. Justice Brandeis in Crowell v. Benson, 285 U. S. 22, 75 (1932).

56. Hurtado v. California, 110 U. S. 516 (1884); Reetz v. Michigan, 188 U. S. 505 (1903); United States v. Heinze, 218 U. S. 532 (1910).

57. No persuasive reason was suggested in the Congressional debates for the use of the word "efficient" rather than the more usual "adequate." The cause, however, was probably the desire to escape the very broad interpretations given the latter by the courts. "Adequate" carries with it a suggestion of comparison which would be an unwarranted burden on the legislation. For example, the presence of an "adequate" remedy in the state courts might be judged by whether such forums could issue a stay as broad as in the federal courts. The designers of the bill seemed to have had this in mind and wished to eliminate the possibility of such issues arising. Cf. 78 CONG. REC. 2020 (1934).

58. Delaware alone has no commission regulation.

59. Only in Florida, Georgia, and Kentucky, are there no legislative provisions for

mission's findings of fact final upon the court.[60] That such a review is deemed by the Supreme Court to be "inefficient" was definitely proven by the *Ben Avon* case; thus it is probable that review under those statutes would fail to satisfy the bill's requirement. Moreover, what is necessary in the matter of a stay of the commission's order pendente lite offers another opportunity to test the efficiency of the state court's remedy. When the commission's order must remain in force during the judicial investigation, the requirements could scarcely be held fulfilled in the light of *Porter v. Investors' Syndicate*[61] where it was said that such a statutory provision would surely be unconstitutional. But where the state court has the power to grant a stay in its discretion and does so, no difficulties should arise; for the proceedings would be directly analogous to those under the amended Section 266. Further, where a stay is permitted in the discretion of the state court but none is granted, two factors would militate against a utility's entrance to the federal court through a claim of the inefficiency of the state procedure. First, the state trial having already been initiated, the utility might run afoul of the prohibition against a federal court's injunction of a state court's proceedings, and, secondly, a single district judge's authority would seem to extend only to a formal inquiry as to whether the state court had the discretionary power to issue a stay and not as to whether its refusal was an abuse of discretion.[62] Hence, state court procedure should fail to meet the requirement only in those states which prohibit the issuance of any stay.

A further problem might arise as to the sufficiency of the judicial review in Virginia and Oklahoma where the state supreme courts are empowered to entertain appeals from a commission order and upon finding them unreasonable in certain cases to set different rates.[63] In the *Prentis*[64] case a federal injunction, sought before the state court had thus acted, was held to be premature on the ground that the setting of a rate by a court was a legislative function that must be completed before resort could be had to the federal judiciary. A possible implication of this holding is that a federal court might enjoin the enforcement of the state supreme court's order for it would not be acting as a court but as a commission. Under this interpretation, it might be claimed that no state judicial

judicial review, but in Florida and Georgia the appropriate methods of review have been pointed out by court decisions. Florida Motor Lines, Inc. v. Railroad Commissioners, 100 Fla. 538, 129 So. 876 (1930); Georgia Public Service Commission v. Atlanta and West Point Rr., 164 Ga. 822, 139 S. E. 725 (1927). And in Kentucky, provision is made for review if the commission seeks to enforce its order: KY. STAT. (Carroll, 1930) §§ 201c-17, 201g-11.

60. COLO. ANN. STAT. (Mills, 1930) § 5933z1; Me. Laws 1933, c. 6; UTAH REV. STAT. ANN. (1933) §§ 76-6-16.

61. 286 U. S. 461, 471 (1932).

62. The inquiry as to whether a three-judge court would have jurisdiction would be made by a single judge. Ex parte Poresky, 290 U. S. 30 (1933). Since the statutory court's jurisdiction is based upon the absence of a "plain, speedy and efficient remedy" in the state courts, the availability and not the actual use of the remedy would be the jurisdictional question.

63. VA. CONST. § 156 (g) (transportation and transmission companies); OKLA. CONST. art. 9, § 23 (transportation and transmission companies).

64. Prentis v. Atlantic Coast Line, 211 U. S. 210 (1908).

review existed at all. But the problem may be approached from another angle. Although it could be said that if the state supreme court were acting legislatively the United States Supreme Court could take the case neither on appeal, since it can review only judgments, nor as an original case, since its original jurisdiction does not extend to cases of this sort,[65] nevertheless, it is likely that where the state supreme court merely affirmed or denied the commission's order, it would be considered to have acted in a judicial manner. And where the state court had revised the order, it could be deemed first legislatively to have set the rate and then judicially affirmed the rate's reasonableness. Under this rationalization, the United States Supreme Court would be enabled to review the judicial part of the state court's double function and the state courts would have provided adequate judicial review to comply with the terms of the bill.

Whether or not the bill extends to rates regulated by state statutes rather than by commission orders might present yet another problem. It has been the judicial interpretation of statutory rate regulation which the United States Supreme Court has considered more properly within the jurisdiction of the state judiciary than of the federal.[66] Moreover, the distinction between statutes regulating rates and commission orders is rendered merely verbal because of the procedure under which the cases arise. If a public utility is dissatisfied with the statutory rate, it submits its arguments to the public utility commission, and if the commission after a hearing decides against the utility's contention, it orders continued obedience to the statute. It is this order which the utility may be said to be enjoining, and the case would thus fall within the bill. The requirement that a "hearing" must be had upon rate orders would otherwise eliminate state statutes, for the meaning of the word could not be stretched to the perfunctory examination of witnesses which may precede the enactment of a state statute; "hearing" rather refers to the formal procedure followed by administrative boards in determining the rate for specific utilities.

One case involving the interpretation of the requirement that the rate order to be within the bill must issue only after a "hearing," has already arisen. In *Georgia Continental Telephone Company v. Georgia Public Service Commission*[67] a three-judge federal court dismissed a prayer for an interlocutory injunction on the ground that the Johnson Bill had divested it of jurisdiction, despite the utility's claim that the order had issued out of an unreasonable hearing. The utility contended that the commissioners acted under duress because the governor had appointed them after announcing that he would appoint only commissioners who would reduce the rates. The court followed the complainant's interpretation that the "hearing" must be reasonable[68] but held that public officers will be presumed to have acted honestly unless proven otherwise and that, therefore, the hearing was not unreasonable.

Apart from the Johnson Bill's effectiveness in achieving its purposes of permitting the states the first opportunity of construing the validity of their

65. Cf. Federal Radio Commission v. General Electric Co., 281 U. S. 464 (1930).

66. Gilchrist v. Interborough Rapid Transit Co., 279 U. S. 159 (1929).

67. U. S. L. Week, Aug. 21, 1934, at 1048, col. 1.

68. Senator Johnson stated in the debates on the bill that the requirement was merely of a "hearing" and not a "reasonable hearing." 78 CONG. REC. 2020 (1934).

own orders and in minimizing the expense and delay of rate regulation, other beneficial results may be expected. The former procedure, depriving the commissions in part of the function of rate-making and conferring the power upon the federal master, had undermined the authority of the commissions. With this changed under the Johnson Bill, the commissions should improve in personnel and ability as their power is increased; and, now that the utilities can only hurt their cause by withholding evidence from the commissions, the records made before those bodies should more completely reflect the contentions of both sides. State procedure, too, should further improve in efficiency now that resort to the federal courts is impossible and an incentive exists for the states to expedite the handling of these cases so that their jurisdiction may not be defeated for lack of an "efficient" remedy. Any movement towards improvement should now be aided by the influential and powerful backing of the utilities themselves. Already twenty-seven states[69] have provided that review of rate orders should be directly by the state supreme court or by one particular lower court, and it is reasonable to expect that other states will designate special courts for the exclusive hearing of these cases, with judges whose speed and efficiency in handling them will be rapidly augmented through experience.

One source of concern in Congress when the Johnson Bill was under discussion was the oft-repeated assertion that the bill was an opening wedge in a movement to abolish entirely the inferior federal courts.[70] Congressional halls have resounded to that cry too many times for it to have had much influence upon the decision of the legislators. The scope of the jurisdiction of those courts has been changed so frequently that if such a movement exists, the opening blow was struck many years ago.[71] If it is necessary, however, to delineate the Johnson Bill as a part of any movement, it would seem to be a

69. In sixteen states the review is directly by the Supreme Court. CAL. GEN. LAWS (Deering, Supp. 1933) act 6386, § 67; COLO. ANN. STAT. (Mills, 1930) § 5933z1; IDAHO CODE ANN. (1932) § 59-627; ME. REV. STAT. (1930) c. 62, § 63; MASS. ANN. LAWS (Lawyers Co-op., 1933) c. 25, § 5; NEB. COMP. STAT. (1929) § 75-505; N. H. PUB. LAWS (1926) c. 239, § 4; N. M. STAT. ANN. (1929) § 134-1118; OHIO CODE ANN. (Page, 1926) § 544; OKLA. CONST. art. 9, § 20; R. I. GEN. LAWS (1923) § 3697; S. D. COMP. LAWS (1929) § 9591; UTAH REV. STAT. ANN. (1933) § 76-6-16; VT. PUB. LAWS (1933) § 6063; VA. CODE ANN. (1930) § 3734 and VA. CONST. § 156(d); W VA. CODE ANN. (1931) § 24-5-1. In eleven states a single specified lower court has exclusive jurisdiction: ALA. CODE ANN. (Michie, 1928) § 9831 (Common carriers); ARIZ. REV. CODE ANN. (Struckmeyer, 1928) § 720; ARK. DIG. STAT. (Crawford and Moses, Supp. 1927) § 8417z3; LA. GEN. STAT. (Dart, 1932) § 7937; MICH. COMP. LAWS (1929) § 11042; N. Y. PUB. SERV. LAW (Supp. 1934) § 112; ORE. CODE ANN. (1930) § 62-136; S. C. CODE (Michie, 1932) § 8254(e); TEX. ANN. CIV. STAT. (Vernon, 1925) art. 6453; WIS. STAT. (1931) §§ 196.41, 285.06; Wyo. Laws, 1933, c. 119 and WYO. REV. STAT. ANN. (Courtright, 1931) § 94-164.

70. 78 CONG. REC. 2092, 2093 (1934).

71. Senator Norris has advocated complete abolition of diversity of citizenship jurisdiction for many years. For expression of opposing views on this problem, cf. Frankfurter, *Distribution of Judicial Power between United States and State Courts* (1928) 13 CORN. L. Q. 499; Yntema and Jaffin, *Preliminary Analysis of Concurrent Jurisdiction* (1931) 79 U. OF PA. L. REV. 869; Frankfurter, *A Note on Diversity Jurisdiction—In Reply to Professor Yntema* (1931) 79 U. OF PA. L. REV. 1097.

better classification to consider it a part of the movement to invest authority in those persons or bodies whose positions render them the most responsive to the societal and economic elements of the problem.

INTERSTATE COMMERCE COMMISSION CONTROL OF INTRASTATE RATES

THE incidence of the depression on our transportation system calls attention again to the power of the Interstate Commerce Commission over intrastate rates, the field of a memorable struggle in past years over the division of state and federal power.[1] No less than four opinions of the Supreme Court in cases decided in last year's term undertook to elucidate what was thought to have been settled by the Transportation Act of 1920. One of the effects of this Act was to amend the 1887 Act to Regulate Commerce by the insertion of Section 13(4) which, virtually enacting the holding of the *Shreveport* case,[2] empowers the Commission after proper hearing to change any rate fixed under state authority whenever it "finds that any such rate . . . causes any undue . . . preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate . . . commerce on the other hand, or unjust discrimination against interstate . . . commerce,"[3] the action of any state authority to the contrary notwithstanding. Three factors combine to give this provision current importance. The loss in revenues that has accompanied declining traffic has led the main trunk line carriers to seek horizontal rate increases that have met with strenuous local opposition. These roads have attempted to hold the rate structure high, claiming the right to an opportunity to earn a fair return on their property. They have felt the double burden of excessively high interest charges and of the effort to comply with Presidential appeals to keep wage payments up. Yet pursued to its natural conclusion, their rate policy is at once logically absurd and suicidal—absurd because it demands that the smaller the volume of traffic the higher the level of rates must be, ad infinitum; suicidal because the higher the level of rates the greater the incentive to shippers to resort to competing means of transportation, to trucks, pipe lines and water carriers. For the short term, however, it has seemed to the larger railroads the preferable choice of evils. Independently of this, local shippers, often aided by state regulatory bodies, have sought reductions in particular local rates in a desperate effort to retain their shares of a diminishing volume of business. They are urging that their own salvation, and that

1. An excellent recent discussion, both historical and analytical, will be found in 2 SHARFMAN, THE INTERSTATE COMMERCE COMMISSION (1931) 191-247, 269-307, 331-344. See also Peyser, *Authority of the Interstate Commerce Commission over Intrastate Rates* (1928) 17 GEO. L. J. 39; Cox, *The Dual Regulation of Commerce Under the Amended 13th Section of the Act to Regulate Commerce* (1931) 19 KY. L. J. 312; Swenson, *The Passing of the State Commerce Power* (1933) 8 TEMPLE L. Q. 53.

2. Houston, East and West Texas Ry. v. United States, 234 U. S. 342 (1914).

3. 41 STAT. 484 (1920), 49 U. S. C. A. § 13 (4) (1929).

of the carriers as well, depends upon the reduction of rates to a level where the volume of traffic will increase—if such a level there is. Finally, even the large carriers have been obliged by local competition to make substantial reductions at competitive points for the sake of diverting a little traffic to their own rails, although they have usually been unwilling to extend these reductions generally. The Commission thus is the forum where, with increasing bitterness, these two diametrically opposed views of a proper railroad rate policy in a time of depression have been urged. The attitude of the Commission and of the courts in dealing with this issue of public policy received a searching test in a case decided on the last day of the Supreme Court's 1933 term, *Ohio v. United States.*[4]

In the last eleven years no question of the constitutionality of the Commission's power has been raised. Consequently the current redefinitions of the line between federal and state power in this field is to be found in the practice of the Commission itself. There it appears that although the Commission has not attempted in recent years to enlarge its powers, it has sided with the major trunk lines in formulating its policy, and has been supported by the courts in so doing. Since the depression began, the Commission has on one occasion granted a substantial part of a request from the carriers for a general increase[5] and two years later entirely denied the united request of the largest shippers' organization for a general decrease.[6] A third and more critical test, another railroad petition for a general increase, is now in the stage of hearings before the Commission.[7] The frequency with which its decisions have been challenged in the courts during the past year indicates an increased unwillingness of litigants to be content with its orders, and a determined attempt to bring about a change in its rate policy.[8]

The Commission's control of intrastate rates has evolved from dealings with three general types of cases, although of course overlappings are to be found. All three types illustrate a trend toward greater uniformity in the rate structure and toward an increased national power. The first of these, known as the "discrimination" cases, is the type made familiar by the *Shreveport* case[2] of a discrimination between two localities. There the intrastate rate to one locality fixed by the state authority was found to be unduly preferential as compared with the interstate rate to the other. This was held to violate Section 3 of the original Interstate Commerce Act, forbidding undue preference and prejudice generally,[9] and to give the Interstate Commerce Commission power to raise the state rate to eliminate the preference. Subsequently the Transportation

4. 292 U. S. 498 (1934).

5. The Fifteen Per Cent Case, 1931, 178 I. C. C. 539 (1931), 179 I. C. C. 215 (1931), 191 I. C. C. 361 (1933).

6. General Rate Level Investigation, 195 I. C. C. 5 (1933).

7. Ex Parte 115, Increase in Freight Charges, 1934.

8. Of six decisions of the Supreme Court in its 1933 term involving the Transportation Act the following four dealt with section 13: United States v. Louisiana, 290 U. S. 70 (1934); Florida v. United States, 292 U. S. 1 (1934); Illinois Commerce Commission v. United States, 292 U. S. 474 (1934); Ohio v. United States, 292 U. S. 498 (1934).

9. 24 STAT. 380 (1887), 49 U. S. C. A. § 3 (1) (1929).

Act of 1920, without changing Section 3, defined the Commission's power in this type of case more specifically by adding Section 13(4) to the Interstate Commerce Act.[10] Thus under two sections of the Act these cases may be adjusted by the Interstate Commerce Commission. Such discrimination cases are still common.[11] The remedy is clear, but strictly limited. In proceedings under Section 3 alone both the prejudiced and the preferred localities must be served by the same railroad system.[12] This is not necessary where Section 13 is invoked, but in the latter event a showing that the prejudiced interstate rate is reasonable is also required.[13] More important, in this type of case under either section actual damage as a result of the discrimination must be proved and the intrastate rates may be raised only to or from the localities definitely shown to be preferred.[14] Rates throughout a state, that is to say, may not be

10. At the same time, however, it changed the remedial procedure by providing in paragraph 3 of the same section that the state commissions affected be allowed to sit with the Interstate Commerce Commission in the hearings in such cases for the purpose of presenting the state's viewpoint and of encouraging harmonious action by the two authorities. The state commissioners have no vote in these joint proceedings.

11. They make up the bulk of the cases cited under "State Rates and Regulation" in 2 LUST, CONSOLIDATED DIGEST OF DECISIONS UNDER THE INTERSTATE COMMERCE ACTS (1925) 1841-1882; 3 *id.* (1927) 1149-1169; 4 *id.* (1928) 1139-1148; 5 *id.* (1930) 1192-1204; 6 *id.* (1932) 755-765.

12. If more than one carrier serves the two localities, each road must participate in the hauls to or from both points before liability under Section 3 can be established. Ashland Fire Brick Co. v. Southern Ry. Co., 22 I. C. C. 115 (1911); Texas and Pacific Ry. Co. v. United States, 289 U. S. 627 (1933); see MANSFIELD, THE LAKE CARGO COAL RATE CONTROVERSY (1932) c. 7; Comment (1933) 43 YALE L. J. 297.

13. State Corporation Commission of Virginia v. Aberdeen and Rockfish Rr. Co., 136 I. C. C. 173 (1927), 161 I. C. C. 273 (1930), 165 I. C. C. 31 (1930), 169 I. C. C. 728 (1930), was an important recent case illustrating the effect of this limitation. The federal Commission there declined to raise the rates within Virginia to the level of Virginia-North Carolina rates on the ground of discrimination between localities, in the absence of a showing of reasonableness of the interstate rates.

The Commission's power over such discriminations extends to intrastate electric interurban carriers as well as to steam railroads. United States v. Village of Hubbard, 265 U. S. 474 (1925), rev'g 278 Fed. 754 and 769 (N. D. Ohio 1922). It is worth noting that this decision provoked from Mr. Justice McReynolds the only dissent in the entire series of cases dealing with Section 13.

14. In Illinois Central Rr. Co. v. Public Utilities Commission of Illinois, 245 U. S. 493 (1918), the Interstate Commerce Commission had previously found discrimination in intrastate passenger rates, based on evidence restricted to the East St. Louis region, in Business Men's League v. Atchison, Topeka and Santa Fe Ry., 41 I. C. C. 13 (1916). When the carriers attempted to make this the ground for a general increase in Illinois passenger fares the state commission refused its permission. On appeal the Supreme Court criticized the Interstate Commerce Commission's report for its indefinite scope and found it an insufficient justification for the carriers' refusal to obey the state commission.

But a little earlier an order of the Commission in Traffic Bureau v. American Express Company, 39 I. C. C. 703 (1916), finding discrimination in South Dakota express rates, was sustained, although based on evidence limited to Sioux City, Iowa, and five cities in South Dakota, American Express Co. v. South Dakota ex rel. Caldwell, 244 U. S. 617 (1917). Mr. Justice Brandeis for the Court, following the *Shreveport* case, criticized

raised on a showing of preference at a few localities in the state.[15]

A second type, called "revenue" cases, has resulted from the power granted to the Commission in 1920 by the last clause of Section 13(4) forbidding "unjust discrimination against interstate . . . commerce." This clause was interpreted by the Commission to include the power to change intrastate rates when they had been set at such a level as to cause undue loss of revenue to interstate carriers. The constitutionality of this power was sustained in *Railroad Commission of Wisconsin v. Chicago, Burlington and Quincy Railroad Company*[16] in 1922. There the failure of intrastate rates to contribute a fair share toward the revenues of the railroads as a whole was interpreted to be within the meaning of "unjust discrimination."[17] Writing for the Court, Chief Justice Taft dwelt on the so-called "dove-tail relationship" supposed to exist between Section 13 and Section 15a,[18] which guarantees the carriers in any rate

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the Commission's order for indefiniteness in scope, but reading the order in connection with the report concluded that it was intended to be limited to the area where evidence of discrimination was shown.

More recently, in Florida v. United States, 282 U. S. 194 (1931), rev'g 30 F. (2d) 116 (N. D. Ga. 1929), 31 id. 580 (N. D. Ga. 1929), the Court set aside an Interstate Commerce Commission order raising the rates on logs "within and throughout the entire state of Florida," Georgia Public Service Commission v. Atlantic Coast Line Rr. Co., 146 I. C. C. 717 (1928), because the evidence of actual discrimination was limited to interstate rates from points in northern Florida only. But see text, *infra* p. 138.

15. The Commission is also limited to fixing the intrastate rate not higher than the then existing interstate rate. It may not order that the intrastate rate shall move up or down with the interstate rate in the future, but must in such a case make a new order based upon new findings of discrimination; for otherwise the states would soon lose permanently all control of intrastate rates. Georgia Public Service Commission v. United State, 283 U. S. 765 (1931); Alabama v. United States, 283 U. S. 776 (1931).

16. 257 U. S. 563 (1922), sustaining Wisconsin Passenger Fares, 59 I. C. C. 391 (1920). For comments see LOCKLIN, RAILROAD REGULATION SINCE 1920 (1928) 55-58; Comment (1922) 35 HARV. L. REV. 864; Note (1922) 71 U. OF PA. L. REV. 11; (1922) 2 WIS. L. REV 56; Note (1922) 31 YALE L. J. 870.

17. In New York v. United States, 257 U. S. 591 (1922), sustaining Rates, Fares and Charges of the New York Central Rr. Co., 59 I. C. C. 290 (1920), and Iowa Passenger Fares and Charges. 60 id. at 55 (1921), which was decided the same day as, and on the authority of, the Wisconsin case, the situation was complicated by a contract embodied in the state's charter to the New York Central providing for a two-cent-a-mile passenger fare within the state. This contract was declared abrogated by the federal action. The case also differed from the Wisconsin case in that the state of New York was the direct appellant and so was allowed to attack the basis of the Commission's findings, whereas in the Wisconsin case the Commission's order was subject to collateral attack only, and consequently the Court declined to investigate the evidence for the order.

Section 22 of the Interstate Commerce Act, 24 STAT. 387 (1887), 49 U. S. C. A. § 22 (1) (1929), which allows reduced rates or free transportation for the property of federal, state, or municipal governmental authorities, was also held to be permissive only, and not to prevent the Commission from raising such intrastate rates where substantial discrimination was shown to result. Nashville, Chattanooga and St. Louis v. Tennessee, 262 U. S. 318 (1923), rev'g 284 Fed. 371 (M. D. Tenn. 1922), and sustaining Tennessee Rates and Charges, 63 I. C. C. 160 (1921).

18. 41 STAT. 488 (1920), 49 U. S. C. A. § 15a (1929).

territory a level of rates high enough to enable them as a whole to earn a fair return, and pointed out that unless the Commission had such a power, individual states might nullify this purpose by keeping state rates below the interstate level.[19] Once upheld by the Court, the Commission proceeded to use its new power firmly to secure a uniform application of the large freight and passenger increases granted in *Increased Rates, 1920.*[20] Again, following the *Fifteen Per Cent Case, 1931,*[21] a number of recalcitrant state authorities were forced into line in *Increases in Intrastate Rates,*[22] over the protest of a dissenting minority of the Commission. One of these states, Louisiana, carried its objections unsuccessfully to the Supreme Court.[23]

The character of the evidence required in "revenue" cases differs essentially from that required to prove discrimination between localities. A disparity between state and interstate rates must be shown, it is true. But on the one hand it is not necessary to show that each individual intrastate rate results in actual prejudice,[24] and on the other hand it is necessary to prove that the

19. For the effect of the repeal of this rule of rate making and the substitution of another rule by the Emergency Transportation Act, 48 STAT. 220 (1933), 49 U. S. C. A. § 15a (2) (1933), in the light of this argument about a "dovetail" relationship, see Florida v. United States, 292 U. S. 1 (1934). Evidently the argument was only a rationalization; for though the guarantee of an opportunity for a fair return no longer exists, the Court showed no disposition in the Florida case to accede to the argument of counsel that it reverse its conclusions in the Wisconsin case. Even though the literal basis of its logic in the latter case has been removed, the substance of it remains.

20. 58 I. C. C. 220 (1920). In the opinion of SHARFMAN, op. cit. *supra* note 1, at 292-301, and cases there cited, the Commission used its power with unnecessary harshness to enforce intrastate conformity with the results of this decision. A number of the states carried their protests to the Courts but the Commission was uniformly upheld. See the cases cited *supra* notes 16, 17 and *infra* note 31; cf. LUST, op. cit. *supra* note 11.

21. 178 I. C. C. 539 (1931), 179 id. at 215 (1931), 191 id. at 361 (1933).

22. 186 I. C. C. 615 (1932). The Commission applied with a few exceptions the interstate increases allowed in the *Fifteen Per Cent Case, 1931,* to about a dozen states where they had been denied in whole or in part. A minority of the Commission urged that as the Commission itself in that case had not allowed the flat 15% increase asked for, but had exercised its discretion in granting specific increases on named commodities while denying any increases on others, it should not now prevent the state authorities from exercising a similar discretion based upon a more intimate acquaintance with local conditions. See separate and dissenting opinions, 186 I. C. C. 615, 664, 666, 667 (1932), and Commissioner Eastman's dissent in Intrastate Rates on Bituminous Coal in Ohio, 192 I. C. C. 413, 453 (1933); see text, *infra,* p. . . .

23. United States v. Louisiana, 290 U. S. 70 (1933), rev'g 2 F. Supp. 545 (E. D. La. 1932). It was urged on behalf of the state that before the Commission could raise statewide rates it must first find each interstate rate reasonable and must find that the increased intrastate rates would raise the carrier's revenues by an appreciable amount.

24. In all of its orders for statewide increases in state rates the Commission has adopted the practice of inserting a saving clause which allows state authorities and other parties in interest to apply for modification of the order later as to any particular rates that can be shown not to result in discrimination against interstate commerce, or to be unrelated thereto. See for example Wisconsin Passenger Fares, 59 I. C. C. 391, 397 (1920), noted with approval in Railroad Commission of Wisconsin v. Chicago, Burlington and Quincy Rr. Co., 257 U. S. 563, 579 (1922). Little advantage has been taken of the opportunity thus afforded. SHARFMAN, op. cit. *supra* note 1, at 301.

lower intrastate rates result in a loss of revenue to the carrier which unduly burdens the interstate traffic. A neat illustration of this difference is the first *Florida Log Case.*[25] The Supreme Court there set aside an order of the Commission that all Florida intrastate log rates must be raised, for want of evidence as to the effect of the rates outside the northern Florida region. The Commission then proceeded to turn what had been a discrimination case into a revenue case. It held additional hearings, estimated the loss resulting from the lower intrastate rates, and on that basis reaffirmed its original conclusions. This time the Commission was upheld by the Supreme Court,[26] and thus was allowed to do for one reason precisely what it had been forbidden to do for another reason.

Decisions in revenue cases rest in an unusual degree upon human judgment. The effect upon revenues of a change in rates depends upon the volume of traffic subsequently realized, and this cannot be accurately foretold. Consequently, the new power of the Commission involves a large transfer of discretion to that body from carrier managements and state authorities. With the power has gone a feeling of responsibility, and it is not too much to say that this has been an important factor in bringing about a noteworthy change in the Commission's view of its own duties. Whereas twenty years ago its function was conceived primarily as that of protecting the shipping public against unreasonable exactions of the railroads, today its conception of the public has been expanded to include the railroads and it has become one of the chief guardians of their welfare. Particularly since the depression has it taken a conservative view of rate cases and has done everything in its power to preserve carrier revenues.[27]

The third type of case, less clearly defined than the others, rests upon the same prohibition of "unjust discrimination against interstate . . . commerce." The clause has lately been broadly interpreted to empower the Commission to require uniformity in rates where a long established set of rate relationships has been embodied in a single rate structure in which state and interstate rates are so closely mingled as to form an indivisible whole. This has been upheld even though it cannot be shown that each individual intrastate rate causes prejudice to an interstate shipper, or that additional revenues from the intrastate business are needed. In such cases, to allow the accident of a state line to disturb these relationships would upset the large volume of traffic built upon the existing order, and so would burden the interstate commerce involved. *Illinois Commerce Commission v. United States*[28] illustrates this type of case. The Interstate Commerce Commission had fixed a new and

25. Florida v. United States, 282 U. S. 194 (1931), rev'g 30 F. (2d) 116 (N. D. Ga. 1929), 31 id. at 580 (N. D. Ga. 1929), and setting aside the order in Georgia Public Service Commission v. Atlantic Coast Line Rr. Co., 146 I. C. C. 717 (1928).

26. 292 U. S. 1 (1934), aff'g 4 F. Supp. 477 (N. D. Ga. 1933) and sustaining 186 I. C. C. 157 (1932), 190 id. at 588 (1933). Cf. note 19, *supra.*

27. See the discussions of the financial situation of the carriers in the COMMISSION'S ANNUAL REPORTS for the past three years.

28. 292 U. S. 474 (1934), sustaining Switching Rates in the Chicago District, 177 I. C. C. 669 (1931).

higher level of rates for switching in the Chicago district, which covers the industrial area around the city and includes a portion of Indiana. When the Illinois Commission refused to allow the same increases on the traffic that did not cross the Indiana line, the Interstate Commerce Commission required them to do so. Because the conditions surrounding the two sets of traffic were practically identical, and an enormous amount of business depended upon the maintenance of the existing relationships, this order was sustained by the Supreme Court over the state's objection that it was necessary to consider separately the cost and reasonableness of the state and interstate business.[29] Similarly in *Louisiana Public Service Commission v. Texas and New Orleans Railroad Co.*[30] a separate charge for train ferrying across the Mississippi, imposed by the Interstate Commerce Commission alike on interstate and intrastate rates on road materials, was upheld, though no separate findings of cost were made. Thus far, however, this doctrine has only been applied to situations where the state and interstate transportation conditions are in fact substantially alike.[31]

All the threads that have been separately discussed thus far are to be found drawn together in *Ohio v. United States*,[32] a case that cuts across the categories that have been suggested and poses the basic issues of rate policy in a time of depression. The case arose as the latest phase of a controversy that has persisted since at least 1909 between the soft-coal operators of the northern and southern Appalachian coal fields, comprising Ohio and western Pennsyl-

29. The court also rejected an argument, based upon its decision in the Hoch-Smith Grain case, Atchison, Topeka and Santa Fe Ry. Co. v. United States, 284 U. S. 248 (1932), that since the evidence upon which the Commission's decision rested related to conditions as they stood in 1926-27, it was not adequate to support an order in 1934.

30. 284 U. S. 125 (1931), aff'g 41 F. (2d) 293 (E. D. La. 1930), and sustaining 155 I. C. C. 247 (1929) and 157 id. at 498 (1929). The Court likewise brushed aside a contention that the ferrying charge amounted to a port preference forbidden by the Constitution in Art. I, sec. 9, par. 6, as it had done with a similar argument in Texas and Pacific Ry. Co. v. United States, 289 U. S. 627 (1933). See Comment (1933) 43 YALE L. J. 297, 305.

31. A decision by the District Court sustaining the Commission in the first *Florida Log* case, Florida v. United States, 31 F. (2d) 580 (N. D. Ga. 1929) on the sole ground that the Florida intrastate rates discriminated against "general" interstate commerce, was reversed by the Supreme Court on appeal in that case. Florida v. United States, 282 U. S. 194 (1931). This was in line with a previous decision in Arkansas Railroad Commission v. Chicago, Rock Island and Pacific Rr. Co., 274 U. S. 597 (1927), in holding that except as to revenue cases the Transportation Act had not removed the necessity of proving actual discrimination. The authority of the decision in the well-known Minnesota Rate Cases, 230 U. S. 352 (1913), to the effect that until there is a finding of discrimination by the Interstate Commerce Commission the state retains its power over intrastate rates, stands therefore unimpaired by the Transportation Act. Board of Railroad Commissioners of North Dakota v. Great Northern Ry. Co., 281 U. S. 412 (1930).

32. 292 U. S. 498 (1934), aff'g 6 F. Supp. 386 (S. D. Ohio 1934). On Oct. 8, 1934 the Supreme Court granted a rehearing and reargument, set for Nov. 5, 1934, in this case, limited to so much of the Commission's order as restored the rate of $1.76 per ton on coal from the Cambridge district to Mansfield, both in Ohio. U. S. L. Week, Oct. 9, 1934, at 11, col. 3. This subordinate question, however, does not affect the major issues already decided by the Court.

vania on the one hand and West Virginia and eastern Kentucky and Tennessee on the other. In the past the controversy has centered mainly around the differential rates on coal from these origin territories to the ports on Lake Erie for transshipment by water to northwestern destinations, the so-called lake-cargo rates.[33] Since the end of the last century, when western Pennsylvania and Ohio enjoyed an almost complete dominance of the principal industrial coal consuming markets east of Chicago, the trend of production tonnage has been on the whole steadily southward. Among the various factors that have contributed to this end, such as labor costs, unionization, taxes, coal geology, mechanization of mines, exhaustion of favorable deposits, quality of coal, and aggressive marketing, freight rates have always been a particular grievance to the northern operators. The rates to the southern field were originally put in at a low level, only a few cents a ton more than the rates from the northern fields though the distances were nearly twice as great, to allow southern operators to compete in the same markets. With an increasing volume of traffic the southern carriers have prospered and the relations between these operators and their carriers have been on the whole cordial.[34] By contrast the northern operators have been unable to get any concessions from their carriers, and their rates have repeatedly been fixed at maximum reasonable levels.[35] Since 1914 the entire coal rate level has been raised nearly 100%, while the differentials, which fix the competitive margin, have been little altered. Faced with declining business and hampered with internecine competition, the northern operators have been obliged to rely increasingly on the industrial markets nearest to them. On numerous occasions they have sought relief from the Interstate Commerce Commission, but with only minor success.[36] In view of the effect of the depression and the refusal of the Commission in 1930 to increase the differential spread, the Ohio state commission (influenced no doubt by the plight of coal operators and miners in the state) in 1932 ordered a substantial decrease in the intrastate rates from two eastern Ohio districts to consuming points nearby. The Wheeling and Lake Erie Railway,[37] a relatively small and independent road, anxious for traffic, asked for and obtained permission to extend reductions to all the main consuming centers from Youngstown to Cleveland. Thus a part of the northern rates were substantially reduced. The principal

33. For the details of this controversy see MANSFIELD, THE LAKE CARGO COAL RATE CONTROVERSY (1932) cc. 3-5.

34. See Lake Cargo Coal from Kentucky, 139 I. C. C. 367 (1928).

35. Boileau v. Pittsburgh and Lake Erie Rr. Co., 22 I. C. C. 640 (1912); Ohio-Michigan Coal Cases, 80 I. C. C. 663 (1923); Lake Cargo Coal Rates, 1925, 101 I. C. C. 513 (1925); Eastern Bituminous Coal Investigation, 140 I. C. C. 3 (1928); Lake Cargo Coal Cases, 1930, 181 I. C. C. 37 (1932).

36. See Lake Cargo Coal Rates, 46 I. C. C. 159 (1917); Lake Cargo Coal Rates, 1925, 126 I. C. C. 309 (1927).

37. Majority control of the Wheeling, a former Rockefeller property, lies with its trunk line competitors, the Baltimore and Ohio, New York Central, and Chesapeake and Ohio, but it cannot be exercised under the terms of a trust agreement executed after the Interstate Commerce Commission refused to approve the legality of the acquisition. See Interlocking Directors of Wheeling and Lake Erie and Trunk Lines, 138 I. C. C. 643 (1928).

trunk lines, after unsuccessfully resisting these charges before the Ohio Commission, were obliged to make competitive reductions. Finally, the Pittsburgh and West Virginia Railroad, another independent line, made similar reductions from Pittsburgh. At this point, with a further spread of the reductions impending, the Interstate Commerce Commission was brought in by complaints of the trunk lines under Section 13 and of the Pennsylvania and West Virginia operators under Section 3. The Commission decided in favor of the trunk lines and ordered the original rates restored, on a finding of discrimination between localities.[38]

It will be seen that the case as stated does not directly raise the familiar issue of discrimination between the northern and southern coal fields, but rather between two sections of the northern field, one involving mainly intrastate rates in Ohio, and the other the interstate rates between western Pennsylvania and northeastern Ohio. The larger issue was not far in the background, however. If the Ohio reductions should be sustained, western Pennsylvania operators would have a very strong case for a similar interstate reduction, thus restoring the small differential between them to its previous size.[39] No serious contention had been raised over the adequacy and justice of this differential for many years. In fact, if the Pennsylvania operators had been able and willing to stand the immediate competitive losses entailed by the Ohio reductions, and had supported instead of opposed them, it might ultimately have worked out considerably to their advantage. For the result then would be a substantial widening of the differential between the northern fields as a whole and their southern competitors, from whom in the long run they have most to fear. The outcome of such an action could not confidently be predicted, but it would surely precipitate a bitter renewal of the political and legal controversies that flared up in 1927-28 around the *Lake Cargo* rate decisions at that time.[40] The southern operators and carriers might be expected to oppose before the Commission the extension of the northern reductions to Pennsylvania, and to appeal to the courts if necessary. If this line of attack proved unsuccessful, the southern carriers might offer reductions in their rates equal to those from the northern fields, thus restoring the differential structure all around at the expense of general revenue losses to all the carriers. The principal southern roads, the Chesapeake and Ohio and the Norfolk and Western, have been consistent money makers and are better fortified than most to engage in such rate competition. Such an offer would certainly provoke litigation before the Commission similar to *Lake Cargo Coal from Kentucky*.[41] Another

38. Intrastate Rates on Bituminous Coal within Ohio, 192 I. C. C. 413 (1933).

39. See Lake Cargo Coal Rates, 1925, 126 I. C. C. (1927).

40. See MANSFIELD, THE LAKE CARGO COAL RATE CONTROVERSY (1932) cc. 5, 6. In fact in one of the cases here consolidated and decided by the Interstate Commerce Commission, interstate shippers in Pennsylvania, Maryland and West Virginia raised the issue of the reasonableness of the interstate rates to the Ohio destinations under Section 1 of the Act, but the Commission ruled against them. See Intrastate Rates on Bituminous Coal Within State of Ohio, 192 I. C. C. 413, 451 (1933); Ohio v. United States, 292 U. S. 498, 503 (1934).

41. 139 I. C. C. 367 (1928).

possibility is that the carriers might get together and work out a new and less drastic readjustment of the differentials as a compromise which would better protect their revenues. In any event, the Pennsylvania operators, whether because of the uncertainty of the outcome or because of inability to suffer the temporary losses, decided to oppose the Ohio reductions. Thus the issue of discrimination in this case was confined to the question whether the hitherto small differential between Ohio and Pennsylvania should be suddenly magnified; the larger issue of discrimination between North and South was withheld pending the outcome of this first decision.

It is clear that a discrimination case could be made out of the disparity between the reduced intrastate rates from eastern Ohio points and the unchanged interstate rates from western Pennsylvania, if the latter could be shown to be reasonable, since no attempt was made to change all Ohio rates. Furthermore, it could be argued that the necessity of reducing the interstate rates to a competitive level with the intrastate rates cast an undue burden on the revenues of the interstate carriers, and thus a revenue case would result. There is the final possibility, that since the state and interstate rates here considered were part of a single rate structure under which the interstate commerce had developed, to change the intrastate portion of this structure would in itself be an "unjust discrimination" against interstate commerce, of the third type discussed above. With all these elements to consider, the exact reason for the Commission's decision is not clear. The stated reason was a finding of discrimination between localities. But the Commission did not actually thus confine its attention. It viewed with alarm the revenue effect of the reductions, although it made no specific findings on this subject. Moreover, the language of the report indicates an unwillingness to disturb one part of the "closely woven relationship of these rates under which the industry of this territory has been fostered . . . [In view of] the present economic condition which also has affected the railroads adversely, only the most convincing evidence would warrant a disruption of the long existing relationship of rates . . ."[42]

In his dissent from this decision,[43] Commissioner Eastman, who had in previous cases consistently advocated lower rates from the northern coal fields, demonstrated that at least as convincing an argument could be drawn from the same material in support of an opposite conclusion. He protested that the majority had placed the burden of proving the unreasonableness of the interstate rates upon Ohio, contrary to the previous practice which laid that burden on the interstate complainants, and indicated his belief that in the light of present conditions the interstate rates from the northern fields were probably unreasonably high. He contended, moreover, that since the intrastate road was apparently deriving adequate revenue from the lowered rates, and since the results of a decrease in interstate rates was largely a matter of guesswork, particularly now, the revenue effects of a general reduction were not conclusively discriminatory and were at least worth trying. Nor was he willing to admit

42. See Intrastate Rates on Bituminous Coal within Ohio, 192 I. C. C. 413, 450 (1933).
43. Id. at 455.

that a change in the Ohio state rates would necessarily result in discrimination against the interstate commerce that the present structure had fostered.

On appeal[32] the Supreme Court affirmed the findings of the three-judge District Court that evidence of discrimination between localities existed, and that it was therefore unnecessary to consider the revenue aspect. Ohio's contention that since her coal producers had been gradually excluded from every market but the nearest, she was entitled to give them the lowest possible reasonable rates to that market, was thus overruled for the sake of uniformity and carrier revenues. Since any judgment on this controversy is a matter of discretion and the weighing of relative values, no quarrel can be raised with the Court's refusal to intervene. To do so would imperil hard-fought gains for the exercise of administrative discretion unhampered by judicial review.[44]

It is a little less easy to understand why the Commission should have been so unwilling to experiment, for a temporary period at least, in a situation admittedly desperate for all parties concerned. This it could have done by reviewing the interstate rates from the Pennsylvania fields to determine whether, in the light of present conditions, they might not reasonably be lowered. With a lowered interstate rate the prejudice here complained of might then be nonexistent, or might be removed by a very minor increase in the Ohio rates. But perhaps the Commission too is simply pursuing a judicial attitude in allowing the trunk line railroads to exercise their discretion, and is content to support the policy adopted by the major units in the industry. As has been said, a further test of that attitude will be afforded in *Increase of Freight Charges, 1934*, now pending. But it seems evident that the policy of maintaining high rates in the face of declining traffic and advancing motor competition can not be followed indefinitely and can only be justified by a speedy return to the carloading figures of more prosperous times. In the meantime, local experiments in reduced rates, limited in time if desired, offer the only practicable alternative. These in turn can be fairly tried only if the Commission is willing to allow more leeway to local regulatory authorities than it seems at present inclined to do.

H. C. M.

44. Cf. DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW (1927); MCFARLAND, JUDICIAL CONTROL OF THE FEDERAL TRADE COMMISSION AND THE INTERSTATE COMMERCE COMMISSION, 1920-1930 (1930).