NOTES

CONSTITUTIONAL RIGHT TO CONGRESSIONAL DISTRICTS OF EQUAL POPULATION*

Manipulation of the boundaries of Congressional districts has long been a favored political device whereby factions in control of state legislatures secure disproportionately large representation in the national Congress.1 Knowing the political predilections of each locality, the dominant element may so tailor the districts that adverse votes will constitute ineffective minorities throughout the state. If, on the other hand, the strength and grouping of opposition supporters is such that some districts must in any event be yielded, the usual practice is to minimize the loss by concentrating unfriendly voters in a few sacrificial districts. In order to reduce adverse representation even further, such districts are often drawn to include a much greater total population than "safe" districts.2 So widespread has been the use of this latter device that today the largest district in 26 states has from 150% to 800% as many inhabitants as the smallest.3 The aggregate impetus of such unequal districting inevitably carries beyond the fortunes of candidates and the relative representation of citizens, to shape in some measure the overall composition of Congress and the legislation enacted.4 As now


2. In general usage, districting schemes smacking of political chicanery of any kind are labeled "gerrymanders," a term reputedly owing its origin to a Massachusetts legislative district shaped like a salamander under an 1812 statute enacted while Elbridge Gerry was governor. Id. at 15–21. The different techniques mentioned may of course be combined in various ways. For example, under an attempted Minnesota reapportionment in 1931, one district—containing nearly a hundred thousand more inhabitants than the smallest district—almost cut the state in two, extending from the South Dakota border eastward to include a single ward of Minneapolis. See Holm v. Smiley, 184 Minn. 228, 238 N. W. 494 (1931), rev'd, Smiley v. Holm, 285 U. S. 355 (1932); Shumate, Minnesota's Congressional Election at Large (1933) 27 Am. Pol. Sci. Rev. 58–9.

3. Since seven states elect all their Congressmen at large, the 26 is out of a total of 41 states. In 14 of the 26 the largest district has more than twice the population of the smallest: Ark., Calif., Fla., Ga., Ill., Md., Mich., Miss., Mo., Ohio, Ola., Pa., S. D., and Tex.; the other 12, in which the largest district is between half again as large and twice as large as the smallest, are Ala., Colo., Conn., Ind., Kans., Ky., N. J., N. Y., N. C., Ore., Tenn., and Wash. See 66 Sup. Ct. 1198, 1202–3 (U. S. 1946); SCHIECKEBIER, CONGRESSIONAL APPORTIONMENT (1941) 149–92.

4. "We are permitting the streams of legislation to become poisoned at the source." CHAFFEE, CONGRESSIONAL APPORTIONMENT (1929) 42 Harv. L. Rev. 1015, 6. How much unequal districting affects national legislation is inevitably speculative since it is impossible to ascertain, e.g., how individual Congressmen have reacted in informal committee votes or voice votes on the floor, what other Congressmen would otherwise have been elected, and how they would have voted in Congress. A comment on the Michigan apportionment of 1931 is sug-
used, it seems generally to favor rural over industrial areas and the Republican over the Democratic Party; for the future, it extends a weapon of vast potential to elements desirous of maintaining the political, economic, or social status quo.

For example: "... [D]eserves the admiring inspection of politicians. The Anti-Saloon League had a share in ... its artifices. These include taking so much wet territory from the districts of two wet representatives, and adding so many dry votes, that the anti-prohibitionists have little chance of reelection." Editorial, N. Y. Times, Apr. 20, 1931, p. 18, col. 3.

5. See SCHMECKEBIER, op. cit. supra note 3, at 128. Of the 26 states listed in note 3 supra as having especially unequal districting, 23 have at least one city over 100,000 in population; in 14 of the 23, the largest district contains at least part of the state's largest city, and in two more the second largest district includes the largest city. Detroit is divided among six of the seven largest districts in Michigan, and the six average over 100,000 more inhabitants than the other 11 districts in the state; Detroit legislators are said to have supported the scheme "because they considered it the best that could be obtained from a body of 'upstaters.'" N. Y. Times, Apr. 20, 1931, p. 18, col. 3. Ohio's five largest districts include part or all of Cleveland, Akron, Youngstown, Dayton and Columbus. Oklahoma City and Tulsa are in districts aggregating 35% of Oklahoma's population, yet have only 25% of the state's Congressmen. For discrimination against Chicago, see note 24 infra. The figures in this note and in note 6 infra were calculated from the Cong. Directory, 79th Cong., 1st Sess. (Feb. 1945) 3–133 and the WORLD ALMANAC (1946) 455–81.

6. Of the 26 states most unequally districted (see note 3 supra), 15 returned both Republicans and Democrats in the 1944 election. In 7 of the 15—Cal., Ky., Md., Mo., N. J., Okla., and Tenn.—unequal districting seems to have favored the Democrats; Republican districts averaging 39,302 more inhabitants than Democratic districts. All these states but N. J. usually have Democratic-controlled legislatures. In the other 8—Conn., Ill., Ind., Mich., N. Y., Ohio, Pa., and Wash.—the Republicans have apparently profited, the average Democratic district having 49,500 more inhabitants than the average Republican district. Lumping the 15 together, the average district going Democratic in 1944 had 17,916 more people than the average Republican district. While strongly suggestive, these figures cannot be given an absolute interpretation since relative party strengths in each district, as well as the size of the districts, must enter into evaluation of the political advantages involved. For example, in Ohio, which the Republican legislature has districted so that the average Democratic district in 1944 had 113,498 more inhabitants than the average Republican district, the significance of the overall state figures is enhanced by the fact that the largest district in the state (22d) is safely Republican; it combines a heavily Democratic section of Cleveland with enough outlying territory to assure election of a Republican. On the other hand, in a few exceptional districts—often as a result of historical accident—the minority party gains from unequal districting. For example, the smallest district in the country (Ill.'s 5th) is safely Democratic in a state districted by Republicans.

Potentially unequal districting could tip the scales in the selection of a President; should a third party become established and no candidate receive a majority of the votes in the Electoral College, the House, each state's delegation exercising a single vote, would choose the President. U. S. CONST. Art. II, § 1, cl. 3. A difference of one vote in a state delegation could throw the election.

Neither the method by which districts shall be laid out, nor, in fact, whether elections shall be by districts or at large, is specified in the Constitution. That document declares only that Representatives shall be "chosen by the people," that after every census Congress shall reapportion seats among the states according to population, and that, to the extent Congress does

8. "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U. S. Const. Art. I, § 2, cl. 1. The second half of this provision points up the fact that the relation between total population, on which representation is based (see note 9 infra), and even potential voting population will vary greatly between states so long as Section 2 of the Fourteenth Amendment, note 9 infra, remains a dead letter.

9. "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three-fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. . . ." U. S. Const. Art. I, § 2, cl. 3. "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." U. S. Const. Amend. XIV, § 2.

The complexities of equalizing representation even among the states seem not to have been recognized by the framers. Difficulties arose immediately after the census of 1790. The root of the trouble is that no matter what figures are fixed on for the total size of the House or the number of persons to be represented by each Congressman, all states almost inevitably are entitled to fractional representation—such as 3.2 or 10.7 Representatives. The vital issue has been what to do with the fractions. Washington chose the Apportionment Act of 1792 for the first exercise of the Presidential veto; and after every subsequent census there has been a dispute over which states should receive additional seats for fractional populations. Five different mathematical methods have been used. The one currently provided for, the "method of equal proportions," is complicated in exposition but simple in application and apparently the most equitable in result. 3 Annals of Congress 539 (1792); 87 Cong. Rec. 1071–89, 1123–30, 8059–9, 8076–88 (1941); 55 Stat. 761, 2 U. S. C. § 2(a) (Supp. 1941); Huntington, Methods of Apportionment in Congress, Sen. Doc. No. 304, 76th Cong., 3d Sess. (1940); Schmuckebier, op. cit. supra note 3, at 3, 107–26, 12–72; Chafee, loc. cit. supra note 4.

Congress has reapportioned seats, as directed, after every census except that of 1920 when it was unable to agree on a new act. To prevent recurrence of such a lapse, an act of 1929 provided for automatic reapportionment whenever Congress failed to act. 46 Stat. 21 (1929), as amended 55 Stat. 761, 2 U. S. C. § 2(a) (Supp. 1941). Partly because of the difficulty of ascertaining the degree of abridgment of the right of all 21-year old male citizens to vote, Congress has never reduced a state's representation for that reason. See Cong. Globe, 42d Cong., 2d Sess. (1871) 66; Saunders v. Wilkins, 152 F. (2d) 255 (C. C. A. 4th, 1945), cert. denied, 66 Sup. Ct. 1362 (1946).
not do so, state legislatures shall prescribe the "times, places, and manner" of elections; and that the House shall be the judge of the "elections, returns, and qualifications" of its members.

As a practical matter Congress has always left the states a free hand to determine the "manner" of Congressional elections. While federal statutes after 1872 did stipulate that elections be by districts containing as nearly as practicable the same population, this provision was never enforced, and was finally abandoned altogether in 1929. In the composition of state


The spectre of local abuses was apparently one of the major factors in inducing the framers to give Congress this 'semi-supervisory power. Madison once hinted at the possibility of unequal districting. 2 Farrand, The Records of the Constitutional Convention of 1787 (1937) 240-1. But the action generally feared seems to have been that legislatures might either cripple the national government by refusing altogether to provide for elections or assure desired election results by restricting the balloting places. Ibid.; The Federalist, Nos. 52-61.


12. In 1842 Congress for the first time required election by districts and directed that they be of contiguous territory. 5 Stat. 491 (1842). These requirements were dropped in 1850 but reinstated in 1862. 9 Stat. 428, 432-3 (1850); 12 Stat. 572 (1862). There was added in 1872 the requirement that each district contain "as nearly as practicable an equal number of inhabitants." Rev. Stat. § 23 (1875). The same provisions were continued after the next two censuses, and in 1901 were supplemented by a requirement that districts be "compact." 22 Stat. 5 (1882); 26 Stat. 735 (1891); 31 Stat. 733 (1901). Reenacted in 1911, all four requirements lasted at least until the next Reapportionment Act, in 1929. 37 Stat. 13 (1911); 46 Stat. 21 (1929), 2 U. S. C. § 3 (1940).

13. On only two occasions has the requirement been invoked in contests to determine which candidate should be seated in the House from a particular district. In the first, a House committee held the Congressional Act inapplicable as being either unconstitutional or unwise. Davison v. Gilbert (1901), Rowell, Digest of Contested Election Cases in the House of Representatives 1789-1901 (1901) 603. In the other, the House took no action despite a committee recommendation that a Virginia redistricting act should be held void as violating (1) the U. S. Constitution, (2) the federal statute, and (3) the Virginia Constitution. Parsons v. Saunders, (1910) Moores, Digest of Contested Election Cases in the House of Representatives 1901-17 (1917) 43.

14. The Reapportionment Act of 1929 did not expressly repeal the "equal population," "compact," or "contiguous territory" provisions of the Act of 1911. 46 Stat. 21 (1929), as amended 55 Stat. 762, 2 U. S. C. § 2(a) (Supp. 1941). Since the main purpose of the 1929 Act was to provide for automatic reapportionment in case Congress again failed to reallocate seats after any census (see note 9 supra), several courts held that it dealt only with the number of Representatives each state should have, not with the manner of their election, which was therefore still covered by the Act of 1911. Moran v. Bowley, 347 Ill. 148, 179 N. E. 526 (1932); Brown v. Saunders, 159 Va. 28, 166 S. E. 105 (1932); Koenig v. Flynn, 258 N. Y. 292, 179 N. E. 705 (1932), aff'd on other grounds, 285 U. S. 375 (1932); Hume v. Mahan, 1 F. Supp. 142 (E. D. Ky. 1932), rev'd, Mahan v. Hume, 287 U. S. 575 (1932); Broom v. Wood, 1 F. Supp. 134 (S. D. Miss. 1932), rev'd, Wood v. Broom, 287 U. S. 1 (1932). But the Supreme Court found it was the intent of Congress that the provisions supra. Wood v. Broom, supra. See 69 Cong. Rec. 4054 (1928); 70 Cong. Rec. 1499, 1604, 1711 (1929); 71 Cong. Rec. 254, 2279-80, 2363-4, 2443-58 (1929).
legislatures, therefore, lies the key to unequal Congressional districting. If the legislatures were themselves apportioned according to population, the schemes they perpetrate might be explained as merely the result of a political advantage pressed by representatives of a majority of the people. The facts, however, conform to no such apologia, for most legislatures have apportioned their own memberships at least as unequally as their Congressional delegations. The result is that citizens of under-represented areas, restricted to minority representation in the legislatures, are impotent at the polls to secure reform of Congressional districting.

As a consequence, citizens of several states have recently turned to the courts for relief. To date, however, their efforts have been of little avail. In 1932, three-judge federal district courts held that Kentucky and Mississippi redistricting acts contravened "compact" and "equal population" provisions of the federal statute; but the Supreme Court reversed, ruling in Wood v. Broom that these requirements had expired when not reenacted in 1929. Illinois and Virginia courts, also in 1932, invalidated similar statutes, but both placed partial reliance on the same federal statute.

Partly the inequality results from failure of legislatures to redistrict as often as state constitutions direct. Even if fair when made, static apportionment schemes then become inequitable as population shifts. Of 31 states whose constitutions order periodic redistricting, only 14 have acted within the designated period, and in six states no reapportionment has been made for forty-five years. See Farmer, Apportionment of Representatives in the Legislature: A Study of State Constitutions (1945) 43 Mich. L. Rev. 1091, 1093–4; MacCorkle, Texas Reapportionment Problem (1945) 34 Nat. Munic. Rev. 540; Farmer, op. cit. supra note 7, at 19–29; Reapportionment in Illinois, Ill. Leg. Council Rep. No. 66 (1945) 27; Walter, Reapportionment of Districts (1942) 37 Ill. L. Rev. 20, 38; Stewart, A Study of Gerrymandering in Kentucky (1934) 22 Ky. L. J. 417–24. Welsh, Government by Yokel (1924) 3 Am. Merc. 199; Neuberger, Last Stand of Rotten Boroughs, The Progressive, June 10, 1946, p. 9, cols. 2, 3.


18. See note 14 supra.

and the Illinois court in 1941 reversed its stand on the strength of *Wood v. Broom*.20

This year the Illinois statute was challenged again, this time on a ground never before squarely adjudicated: that grossly unequal districting is, as such, a violation of the federal Constitution.21 Except in degree, the facts were not atypical. Despite a large increase in the state's population and a radical change in its distribution, the Illinois legislature has not redrawn either Congressional or legislative districts since 1901.22 As a result, the largest Congressional district has eight times the population of the smallest, and the largest legislative district sixteen times that of the smallest.23 In both cases the inequality extends throughout the state, but the overall effect is to favor "downstate" areas at the expense of Chicago.24 Eight court actions, seven pleas by governors, and some nineteen bills in the legislature had previously been unsuccessful in securing representation proportionate to population.25

22. *46 ILL. ANN. STATS. (Smith-Hurd 1944) §§ 154-6.* Failure to reapportion the General Assembly every ten years has been in violation of a specific directive in the state constitution. ILL. CONST. Art. IV, § 6. In 1901 Illinois was entitled to 25 Congressmen, and the state was divided into as many districts. From 1911 to 1940 it was allotted 27 Congressmen and elected two at large rather than redistrict the whole state. In 1941 it lost one seat and has since chosen one representative at large. Had the state's quota dropped below 25 after any census, the legislature would have had to redistrict the state or allow election of the entire delegation at large. 37 STAT. 13 (1911), 46 STAT. 21 (1929), 55 STAT. 762, 2 U. S. C. § 2(a) (Supp. 1941).
23. The 7th Congressional district has a population of 914,053; while the 5th has 112,116. Five of the six largest districts in the United States are in Illinois; and, except for the entire state of Nevada, which would be entitled to one representative no matter how small its population, the three smallest districts in the country are also in Illinois. See CONG. DIRECTORY, 79th Cong., 2d Sess. (July 1946) 25-31, 68; U. S. CONST. Art. I, § 2, cl. 3. The largest legislative district (25th) has a population of 574,791, while the smallest (17th) has only 35,534. Each elects one senator and three representatives. See REAPPORTIONMENT IN ILLINOIS, supra note 15, at 16-8.
24. Ten Congressional districts (1st to 10th) include parts of Chicago. Even though three of these are the smallest in the state, the ten average 418,444 against an average of 247,654 for the 15 downstate districts. Thus the Chicago area, with 53% of the population of the state, has only 40% of those representatives elected by districts. CONG. DIRECTORY, 79th Cong., 2d Sess. (July 1946) 25-31. The election of one representative at large (see note 22 supra) does operate as a partial sop to Chicago. Similarly in the legislature Chicago has the six smallest districts in the state, but its other 13 are so large as to raise the combined average to 213,860 people against a downstate average of 119,809; the Chicago districts, aggregating 52% of Illinois' population, elect only 37% of the legislators. See REAPPORTIONMENT IN ILLINOIS, supra note 15, at 16-8.
25. Two of the cases have directly involved Congressional districting. Moran v. Bowley, 347 Ill. 148, 179 N. E. 526 (1932); Daly v. Madison County, 378 Ill. 357, 38 N. E. (2d) 160 (1942) (both taxpayer's suits). The others have dealt with districting for the General Assembly. Fergus v. Marks, 321 Ill. 510, 152 N. E. 557 (1926) (mandamus to
Complainants, three citizens of large districts, asked for a declaratory judgment of the unconstitutionality of the districting statute, and incidental relief. A three-judge federal district court, deeming itself bound by Wood v. Broom, reluctantly dismissed the bill, and the Supreme Court affirmed, in Colegrove v. Green, four to three. Three members of the majority, speaking through Justice Frankfurter, denied relief, first, on the basis of Wood v. Broom; second, for want of equity because the issues were "of a peculiarly political nature and therefore not meet for judicial determination"; and third, because of a belief that the Constitution gives Congress alone the authority to assure fair representation. Justice Rutledge, casting the deciding vote, concurred in the want of equity argument because of the fear that invalidation of the statute might "cause a clash with the political departments." Justice Black, dissenting with two associates, first spelled legislature); Fergus v. Kinney, 333 Ill. 437, 164 N. E. 665 (1928) (to restrain payment of legislators' salaries); People ex rel. Fergus v. Blackwell, 342 Ill. 223, 175 N. E. 750 (1930) (quo warranto); Keogh v. Neely, 50 F. (2d) 685 (C. C. A. 7th, 1931), cert. denied, 284 U. S. 583 (1931) (to enjoin collection of federal income tax on ground Illinois did not have republican form of government). See People v. Clardy, 334 Ill. 160, 165 N. E. 638 (1929) (conviction alleged on allegation legislature which passed penal statute was unconstitutional). When a state court in a later suit refused to listen to the plaintiff in Keogh v. Neely, supra, he shot the opposing counsel dead and fired at the judge, who escaped by dropping to the floor. N. Y. Times, Jan. 14, 1936, p. 3, col. 1. The only success in these suits had an ironic twist: in Moran v. Bowley, supra, a 1931 districting statute was held void, leaving in effect the more inequitable act of 1901 which was subsequently held immune to judicial attack in Daly v. Madison County, supra.

Since a legislative apportionment based entirely on population, as directed by the Illinois Constitution, would upset the whole balance of power in the legislature and also place control in the hands of a single county (Cook), the last six gubernatorial exhortations have advocated a Constitutional amendment whereby representation would be by counties in the state senate and by population in the house. The same consideration being inapplicable to Congressional redistricting, statutory action has been urged there. Ill. Const. Art. IV, §§ 6-8; Ill. H. J. (1915) 109; id. (1935) 38, 41-2; id. (1937) 24, 39-40; id. (1941) 37, 40; id. (1945) 12; Ill. Sen. J. (1931) 12, 15-6. See (1945) 34 Nat. Mun. Rev. 186; Reapportionment in Illinois, supra note 15, at 5.

For a legislative history of each apportionment bill, see principal case, brief of Better Government Association as amicus curiae, App. F.

Several detailed proposals, with maps, for redrawing the state's Congressional and legislative districts are presented in Reapportionment in Illinois, supra note 15, at 8-9, 23-5, 36-40, 43-6.

The bill was directed against the Governor, Secretary of State, and Auditor of the state as members ex officio of the Illinois Primary Certifying Board. In effect, complainants wanted these officers restrained from carrying out this year's Congressional elections under the provisions of the current statute. Had they been successful, the election would have been at large unless Illinois had enacted an equitable substitute prior to the election. Smiley v. Holm, 285 U. S. 355 (1932).

Colegrove v. Green, 64 F. Supp. 632 (N. D. Ill. 1946).

66 Sup. Ct. 1198 (U. S. 1946). Justice Jackson was unavailable and Chief Justice Stone had died before the case was decided.

The other two were Justices Burton and Reed.

Justices Douglas and Murphy.
out a "Constitutional policy" of substantially equal representation for all inhabitants and then countered the majority's arguments. He viewed state (and presumably Congressional) power to regulate the "manner" of elections as operable only within that Constitutional policy, and Wood v. Broom as standing for no broader proposition than that the current federal statute includes no "equal population" requirement.\(^{31}\) As for the want of equity argument, he denied that the relief sought was either unprecedented or likely to involve the Court in a clash with Congress, and termed it a play on words to say that, because elections are connected with politics, courts cannot protect the right to cast an effective ballot.

While the majority found it unnecessary to rule on the merits of the petitioners' Constitutional claim, the tenor of the opinions suggests agreement by the entire Court that the spirit of the Constitution calls for districts of approximately equal population.\(^{32}\) To buttress this proposition, the dissenters urged that apportionment of seats among the states according to population logically implies that apportionment within the states should be on the same basis,\(^{33}\) and that the established Constitutional rights to vote and to have one's vote counted \(^{34}\) similarly imply that each vote should have roughly the same weight.\(^{35}\) On a different tack, they argued that there must

\(^{31}\) Justice Rutledge appears to have agreed that Wood v. Broom settled only the statutory issue. He also agreed that previous decisions interpreted the Constitution as giving the Court, as well as Congress, jurisdiction over Congressional districting. The dissenters thus expressed a majority view on these two points. 66 Sup. Ct. 1198, 1208.

\(^{32}\) Justice Frankfurter alluded to "the standards of fairness for a representative system," "these evils," "fair representation . . . in the Popular House," and possible Congressional "default in exacting . . . obedience to its [the Constitution's] mandate." He also compared fair districting to "many [Constitutional] commands which are not enforceable by courts." He also included two appendices showing "glaring disparities" in the contours and population of districts throughout the country. 66 Sup. Ct. 1198, 1201-7. Justice Rutledge mentioned the latitude which state legislatures and Congress have in attaining approximate equality of districts "in full consistency with the Constitution." Id. at 1209.


\(^{33}\) U. S. CONST. AMEND. XIV, § 2; see note 9 supra. Justice Black found that the primary intent of this section was to make illegal a nation-wide system of "rotten boroughs" as between the states, but that the ultimate purpose was to make the votes of all citizens equally effective in the selection of members of Congress. As one commentator has pointed out, the Constitutional provision "comes to naught when state legislatures may perpetrate the very injustices prohibited to Congress. [It] . . . is comparable to a law which protects an individual from violence . . . by citizens of other states while leaving the road clear for such violence by his next door neighbor." Stewart, supra note 15, at 426.

\(^{34}\) See cases cited note 7 supra. This right of course is limited to those who are eligible under non-discriminatory state laws to vote for members of the most numerous house of the state legislatures. See note 8 supra.

\(^{35}\) "... [A] state legislature . . . can no more destroy the effectiveness of their vote in part and no more accomplish this in the name of 'apportionment' than under any
be some point beyond which states cannot go in discriminating against
groups of qualified voters without running afoul of the equal protection
clause.38

The majority's pivotal argument, that the issues were inappropriate for
judicial determination, follows the "political question" doctrine that regard
for the proper functioning of the government as a whole decrees that certain
questions be left to the exclusive determination of the political departments
—Congress and the President.37 But this doctrine has never been treated as

other name." 66 Sup. Ct. 1198, 1211. "Had Illinois passed an Act requiring that all of its
twenty-four Congressmen be elected by the citizens of one county, it would clearly have
amounted to a denial to citizens of the other counties of their Constitutionally guaranteed
right to vote. And I cannot imagine that an Act that would have apportioned twenty-three
Congressmen to the State's smallest county and one Congressman to all the others, would
have been sustained by any Court... The 1901 Apportionment Act here involved violates
that [Constitutional] policy in the same way." Ibid.

36. "The equal protection clause does not permit the states to pick out certain quali-
fied citizens or groups of citizens and deny them the right to vote at all. See Nixon v. Horn-
don, 273 U. S. 536, 541, ...; Nixon v. Condon, 286 U. S. 73, ... No one would deny
that the equal protection clause would also prohibit a law that would expressly give certain
citizens a half-vote and others a full vote. The probable effect of the 1901 State Apportion-
ment Act ... will be that certain citizens ... will ... have votes only one-ninth as effective ... as the votes of other citizens." 66 Sup. Ct. 1198, 1210.

37. The Court treated the suit as though it were for an injunction, and the critical
"want of equity" argument by implication therefore draws on the maxim that "equity will
not enforce political rights" as distinguished from property or civil rights. But none of the
opinions evinces a doctrinal rationale, and in the first substantive paragraph of his opinion
Justice Frankfurter sets the practical pitch for all three opinions by stating: "This is one of
those demands on judicial power which cannot be met by verbal fencing about 'jurisdiction'.
It must be resolved by considerations on the basis of which this Court, from time to time,
has refused to intervene in controversies. It has refused to do so because due regard for the
effective working of our Government revealed this issue to be of a peculiarly political na-
ture..." 66 Sup. Ct. 1198-9. In passing Justice Frankfurter does cite Giles v. Harris,
189 U. S. 475 (1903), in which the Court refused to use its equitable power to enforce Ne-
groes' right to vote in Alabama. But as Justice Frankfurter himself has said, "Apart from
this traditional restriction upon the exercise of equitable jurisdiction, there was another
difference in Giles v. Harris. The plaintiff there was in effect asking for specific performance
In other words the Court was asked to "supervise" elections, which does seem clearly beyond
its capacity. Ibid. And Justice Holmes, who wrote the opinion in Giles v. Harris, supra,
said in a subsequent election case that "the objection that the subject matter of the suit is
political is little more than a play upon words." Nixon v. Herndon, 273 U. S. 536, 540 (1927).
Indeed, in two cases the Court has protected "political rights" in connection with Congres-
sional districting by enjoining elections under statutes which had not been signed by gov-

In distinguishing cases in which the right to vote has been upheld against state action,
Justice Frankfurter says, "The basis for the suit is not a private wrong, but a wrong suffered
by Illinois as a polity." 66 Sup. Ct. 1198-9. As applied to voters in districts six and eight
times as large as other districts, this statement seems at least debatable. In any case it
would seem just as true in Smiley v. Holm or Carroll v. Becker, both supra.

In a subsequent opinion Justice Rutledge has explained the Colegrove decision as a
a rule of automatic application, and resort to it has only occasionally coincided with cases involving politics in the usual sense of the word. Rather it has been a discretionary formula seemingly invoked when the Court has felt it lacked adequate judicial criteria for an adjudication on the merits, or has been apprehensive of the practical consequences of such an adjudication. It is this latter factor in which the majority in the Colegrove case frankly beds its “want of equity” argument.

The only consequence articulated, however, was that nullification of the challenged statute would force elections at large in Illinois, resulting in violation of a “vital” Congressional policy of election by districts. Shortage of time probably would in fact have precluded passage of a fair substitute before this fall’s elections, but to deduce that this would cause a clash between the Court and Congress appears unjustified. The specific “district” requirement—never enforced by Congress—terminated in 1929 along with the companion “equal population” provision. And while the current

38. “In determining whether a question falls in that category [i.e., the political question category] the appropriateness . . . of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations.” Chief Justice Hughes in Coleman v. Miller, 307 U. S. 433, 454–5 (1939). See Willoughby, THE CONSTITUTIONAL LAW OF THE UNITED STATES (2d ed. 1929) 1326–38; Dodd, Judicially Non-Enforceable Provisions of the Constitution (1931) 80 U. PA. L. REV. 54; Field, The Doctrine of Political Questions in the Federal Courts (1924) 8 MINN. L. REV. 485; Finkelson, Judicial Self-Limitation (1924) 37 HARV. L. REV. 338; Finkelson, Further Notes on Judicial Self-Limitation (1925) 39 HARV. L. REV. 221. Cf. Weston, Political Questions (1925) 38 HARV. L. REV. 296. The doctrine has been invoked particularly in connection with federal action in foreign affairs, a field in which the Court could not tread a path different from that of Congress or the President without embarrassing the United States in its dealings with other nations. See Republic of Mexico v. Hoffman, 324 U. S. 30 (1945); Foster v. Neilson, 2 Pet. 253 (U. S. 1829); Ware v. Hilton, 3 Dall. 199 (U. S. 1796). Domestically the main application of the doctrine has been in cases invoking the guarantee to states of a “republican form of government.” U. S. CONST. Art. IV, § 4. The first and leading case arose out of Dorr’s Rebellion in Rhode Island; the Court refused to decide which of two competing governments was the legal government of the state, but on the very practical grounds that a decision on the merits might mean invalidation of everything the incumbent government had done since acceding to office, and that if troops were required to enforce the decision, only Congress could provide them. Luther v. Borden, 7 How. 1 (U. S. 1849). See Ohio ex rel. Davis v. Hildebrandt, 241 U. S. 563 (1916); Pacific States Tel. & Tel. Co. v. Oregon, 223 U. S. 118 (1912). But the Court has not allowed Congress a free hand even under this clause. Coyle v. Smith, 221 U. S. 559 (1910); Texas v. White, 7 Wall. 700 (U. S. 1868). See United States v. Cruikshank, 92 U. S. 542, 555 (1875). The mere fact that the issues involve elections has not been sufficient to induce exercise of the Court’s discretionary power to refuse a decision on the merits. “Where discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights.” Chief Justice Stone in Snowden v. Hughes, 321 U. S. 1, 11 (1944). See cases cited note 7 supra.

39. Justice Rutledge mentioned the short time remaining before the 1946 elections. 66 Sup. Ct. 1198, 1208.

40. The Constitution does not specify election by districts. In early elections some states followed the district method and others elected on a general state-wide ticket. AMES, THE PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES 1789-1889.
statute may include such a policy by implication, it also specifically directs
elections at large in certain cases.\textsuperscript{41} Indeed, as recently as 1932 a unanimous
Supreme Court disregarded the identical objection and forced elections at
large by invalidating Minnesota and Missouri redistricting measures because
they lacked gubernatorial approval; and Congress expressed no displeasure.\textsuperscript{42}

Insofar as the Court's apprehension may have been that the Illinois legis-
lature might refuse to redistrict the state in years subsequent to 1946, the
decision seems unnecessarily to assume an inconsistency between a Congres-
sional policy that elections be by districts and a judicial pronouncement that
such districts conform to basic Constitutional precepts. It also overlooks the
fact that Congress would retain in full its existing powers to enforce elections
by districts.\textsuperscript{43} Moreover, the same choice between redistricting and electing
at large will continue to confront state legislatures, as it has in the past,

\footnotesize{(1897) 56–8. The Apportionment Act of 1842 was the first to require election by districts.
5 STAT. 491 (1842). Congress reenacted this provision after every census except that of 1850
until 1929. See note 12 supra. These statutes have had no more than a possible moral in-
fluence. Four states defied the Congressional directive and elected at large in 1842. 1
HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES (1907) 170. Thereafter no state
elected its entire quota at large until 1930 when Arizona, New Mexico, and North Dakota
adopted the practice. In several other cases states have shunned the travail of redistricting
after their quotas have been increased, and have elected their additional Congressmen at
large. Illinois has elected at least one Representative at large since 1912. See note 22 supra.
And Ohio and Connecticut have done the same since 1932. A total of nine were elected at
large to the present Congress from states having more than a single Congressman. CONG.
DIRECTORY, 79th Cong., 2d Sess. (July 1946) 6, 16, 25, 74, 92, 93. And in 1932 as many as
54 Congressmen were elected at large. See note 42 infra, and accompanying text.
The "district" provision was in the same section of the 1911 statute as the "equal
population" provision. 37 STAT. 13 (1911). The Court held that the entire section had
expired in 1929. Wood v. Broom, 287 U. S. 1 (1932). In fact the representative who led the
fight for explicit reenactment of the 1911 provisions, Read of New York, was not concerned
with equality of population among districts, but with the "district" requirement itself, his
fear being that New York might otherwise choose to elect at large and return 45 Democrats.
41. Until a state is redistricted after any census "according to the law thereof," represen-
tatives previously elected at large continue to be so elected; additional representatives
are elected at large; and if the new quota is less than the number of existing districts, all are
42. Two other states, Kentucky and Virginia, also elected at large in 1932 as a result
of judicial action. In Kentucky a federal district court invalidated the districting statute
and the Supreme Court did not reverse until after the election. Hume v. Mahan, 1 F. Supp.
149 (E. D. Ky. 1932), rev'd, Mahan v. Hume, 287 U. S. 575 (1932). In Virginia the state
court struck down the statute. Brown v. Saunders, 159 Va. 28, 166 S. E. 105 (1932). In the
case of Minnesota and Missouri the Court recognized that its decisions would compel elections
at large, and stated that they would be Constitutional. Smiley v. Holm, 285 U. S. 355
43. If desire to enforce election by districts were strong enough to outweigh political
exigencies, Congress could refuse to seat representatives at large. See notes 11 and 13
supra. Conceivably Congress itself could also redistrict a state. See Ex parte Yarbrough,
110 U. S. 651 (1884); SCHMECKEBIER, op. cit. supra note 3, at 143; Chafee, supra note 4,
at 1016, n. 4.}
almost every time a census results in reduction of a state's Congressional quota.44

Further arguments might be marshalled in support of the decision, to the effect that judicial determination of the line between valid and invalid districting statutes could inspire accusations of political bias, and that a decision on the merits might open the Court's portals to a flood of cases arising out of political squabbles. Neither argument was used in the opinions, however, and neither appears forceful. While exact numerical equality of districts is of course impossible, the subject does lend itself to mathematical criteria, and the Court could chart its course with definite, if tacit, standards in mind.46 Likewise, the import of an adjudication of unconstitutionality could easily be limited to the precise type of situation at issue: gross inequality of population between Congressional districts. No logical compulsion would require an extension of the holding to cover either statutes involving state elections—such as the county-unit system making possible Talmadge's return to office as governor of Georgia 48—or even other types of gerrymandering of Congressional districts.47

There thus appear no overriding practical considerations to prevent judicial enunciation and protection of the right of every citizen to substantially equal representation in Congress. It therefore seems surprising that the Court, in candidly deciding the case on a practical level, did not deem the

44. This will happen whenever a state which has elected all its Congressmen from districts loses seats. 46 Stat. 21 (1929), as amended 55 Stat. 762, 2 U. S. C. § 2a (Supp. 1941). After the 1940 census seven states (Fla., Ind., Ia., Kans., Mass., Neb., and Pa.) faced this choice and all redistricted. The three states which elected at large in 1932 as a result of court decisions all passed new districting acts before the 1934 elections. Minn. Stats. (Mason, Supp. 1940) 22; Mo. Rev. Stats. Ann. (1943) §§ 12296–12309; Va. Code Ann. (1942) § 70. That no state having more than a few representatives has ever deliberately held elections at large strongly suggests that Illinois would have been redistricted in the near future. Elections at large would be inconvenient because of the difficulty of adapting voting machines to large numbers of candidates, unpopular to voters accustomed to having their own individual Congressmen, and distasteful to local party organizations and incumbents lacking a state-wide following. See Schumate, supra note 2.

45. Rules of thumb heretofore suggested for Congressional legislation provide samples of the criteria available. Limits proposed have been a 20,000 difference between districts; a 75,000 difference; a 20% relative deviation above or below the average population of all districts in a given state; and a 50% relative excess of the largest district over the smallest one in the state. 47 Cong. Rec. 695 (1911); Schmeckebier, op. cit. supra note 3, at 129–31. Any standard tacitly chosen by the Court should, of course give ample play to legislative discretion in adjusting district lines to precinct or county boundaries and perhaps even to geographical features such as mountain ranges.


47. Here again only the equal protection argument would seem applicable, since gerrymandering could be accomplished with districts of equal populations. See note 2 supra.
NOTES

objections to judicial action more than counterbalanced by the likely consequence of judicial inaction: continued use of the machinery of representative government to subvert the very principles on which that government is based.48

NEED FOR INJUNCTIVE RELIEF AS PREREQUISITE FOR GRANTING DECLARATORY JUDGMENT  

In the case of Colegrove v. Green,1 Justice Frankfurter for the majority inadvertently committed a grievous error concerning the law of declaratory judgments. He states as dictum:

"And so, the test for determining whether a federal court has authority to make a declaration such as is here asked, is whether the controversy 'would be justiciable in this Court if presented in a suit for injunction.' Nashville C. & St. L. Ry. v. Wallace, 288 U. S. 249, 262."2

The whole sentence, from which this quotation from the Nashville case is taken, reads:

"Thus the narrow question presented for determination is whether the controversy before us, which would be justiciable in this Court if presented in a suit for injunction, is any the less so because through a modified procedure appellant has been permitted to present it in the state courts, without praying for an injunction or alleging that irreparable injury will result from the collection of the tax."3

This is quite different from saying that in any case a test for determining whether a federal court may issue a declaration is whether an injunction is issuable. In fact, no such necessity exists in any case. The federal statute

48. The history of American politics affords little hope either that dominant interests in state legislatures will voluntarily refrain from exploiting their dominance, or that Congress will force state action which would adversely affect a large number of its members. The part that politics plays in apportionment measures before Congress can be seen from the 1941 struggle over the mathematical method of allotting representatives to each state. As applied to the 1940 census the choice made a difference of a single Congressman—who would go to Arkansas under the "equal proportions" method and to Michigan under the "major fractions" method. Arkansas being a safely Democratic state, "equal proportions" had the support of all but three Democrats in the House (except for those from Michigan), while all but one Republican went the other way. See 87 Cong. Rec. 8087 (1941); note 9 supra.

2. Id. at 1199.
expressly provides that the declaration may be issued "whether or not further relief is or could be prayed." 4 This is an indication that a declaration may be issued whether an injunction might or might not be asked for in addition. The usual conditions of a bill of injunction, namely, the danger of immediate irreparable injury and the absence of a remedy at law, are quite unnecessary to a suit for a declaratory judgment.5

Justice Stone expressly states in the Nashville case:

"Hence, changes merely in the form or method of procedure by which federal rights are brought to final adjudication in the state courts are not enough to preclude review of the adjudication by this Court, so long as the case retains the essentials of an adversary proceeding, involving a real, not a hypothetical, controversy, which is finally determined by the judgment below. . . . As the prayer for relief by injunction is not a necessary prerequisite to the exercise of judicial power, allegations of threatened irreparable injury which are material only if an injunction is asked, may likewise be dispensed with if, in other respects, the controversy presented is, as in this case, real and substantial." 6

As a matter of fact, no injunction to restrain taxes could have issued in the Nashville case under the provisions of the Tennessee Code.7

The declaration has its roots in equity, though it may be granted in legal cases also. There are many reasons why an injunction may be unobtainable, yet a declaration perfectly proper. The declaration may clarify the position for the future, or the facts may not be deemed to warrant so drastic a remedy as injunction, which may not lie for any number of reasons. Yet, instead of dismissing the case, the declaration serves to adjudicate the controversy. The requisites of a valid judicial judgment, whether denominated declaratory or by any other name, are only that the "case" must place in issue the plaintiff's rights, that the defendant must be an adversary party, that their "controversy" must be "real and substantial," and that the court's judgment will conclusively determine the issue raised. Of course, where an injunction would lie, a fortiori the milder declaration may be sought and granted. But the established fact is that where an injunction would not lie, a declaration may nevertheless be granted if the conditions of a judgment are present. It is by no means true that the propriety of an injunction is a necessary test for the issuance of a declaration.8

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REFORMATION OF THE "FINAL DECISION" RULE—PROPOSED AMENDMENT TO RULE 54(b)\textsuperscript{23}

The reviewability of separate judgments rendered by district courts in multiple suits has been a source of recurrent dissension among federal appellate courts.\textsuperscript{4} The importance of this issue has increased with the extensive joinder of claims and parties permitted by the Federal Rules of Civil Procedure. But frequent attempts to define "finality" for purposes of appeal have resulted only in a litter of contradictory criteria. Legally the clash is between the "pragmatic" and the "cause of action" theories of defining a claim. But considerations of expediency and certainty of appellate administration impress a deeper significance on the controversy.

Prior to the adoption of the Federal Rules, determination of the finality of judgments was based primarily upon procedural tests,\textsuperscript{6} whereby an appeal would be heard only after all issues as to all parties had been adjudicated. Exceptions to this rule were made only in rare instances where compliance


1. Compare Crick, _The Final Judgment as a Basis for Appeal_ (1932) 41 YALE L. J. 533; Note (1940) 49 YALE L. J. 1476; 3 MOORE, _FEDERAL PRACTICE_ (hereinafter cited as MOORE) (Cum. Supp. 1945) 141. For indications that this same problem causes trouble in English jurisprudence see _Counter Claim Complications_ (1945) 61 SCOT. L. REV. 89, 91; _J udgments, Final or Interlocutory_ (1945) 199 L. T. 18, 19.

2. _FED. RULES CIV. PROC.,_ 28 U. S. C. following § 723c. Rule 18 (joinder of claims and remedies); Rule 13 (counterclaim and cross-claim); Rule 20 (permissive joinder of parties); Rule 14 (joinder of third parties); Rule 24 (intervention). For discussion of the principles underlying these rules of joinder see 2 MOORE 2113. Comparison of the federal joinder provisions with those instituted in New York in 1936 (N. Y. CIV. PRACT. ACT § 253) can be found in (1937) 37 COL. L. REV. 462. See Reeves v. Beardall, 316 U. S. 283, 285 (1942), 31 CALIF. L. REV. 90, 41 MICH. L. REV. 535; Note (1940) 49 YALE L. J. 1476; (1941) 26 CORN. L. Q. 485. See also 3 MOORE 3156.

3. See cases collected in the Note to Rule 54, _ADVISORY COMMITTEE, REPORT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE_ (1946) 71.

4. These two opposing theories stem from different methods of defining a cause of action. The pragmatic definition is generally identified with CLARK, _CODE Pleading_ (1928) 84. The primary right definition of a cause of action is associated with Pomeroy, _CODE REMEDIES_ (5th ed. 1929) 526. See (1940) 5 MO. L. REV. 110, 112.


with the separate order might cause irreparable injury. Since suits were generally confined to one cause of action, this automatic rule of judicial economy seldom resulted in hardship to litigants.

Under the policy of the Federal Rules to elaborate individual suits by freely joining parties and claims, however, provisions for separate trials and separate judgments were introduced. But it was neither proper nor intended that the Federal Rules should enlarge appellate jurisdiction; the general rule remained that circuit courts of appeals still had jurisdiction to review only final decisions. In order to determine whether a judgment disposing of one claim was final and reviewable, therefore, the appellate court has been


9. Fed. Rules Civ. Proc., 28 U. S. C. following § 723c. Rule 13(i) (separate trials; separate judgments); Rule 20(b) (separate trials); Rule 42 (consolidation; separate trials); and Rule 54(b) (judgment at various stages). See also Collins v. Metro-Goldwyn Pictures Corp., 106 F. (2d) 83, 85 (C. C. A. 2d, 1939). Rule 54(b) reads as follows: "JUDGMENT AT VARIOUS STAGES. When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counter-claims arising out of the transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims. In case a separate judgment is so entered, the court by order may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered." The Notes to the Federal Rules indicate that Rule 54(b) is based upon N. Y. Civ. Prac. Act § 476 which reads, "Judgment may be rendered by the court in favor of any party or parties, and against any party or parties, at any stage of an action or appeal, if warranted by the pleadings or the admissions of a party or parties; and a judgment may be rendered by the court as to a part of a cause of action and the action proceed as to the remaining issues, as justice may require."


11. The "new" policy as to appeals from separate judgments was first discussed in Collins v. Metro-Goldwyn Pictures Corp., 106 F. (2d) 83, 85 (C. C. A. 2d, 1939) and later asserted by the Supreme Court in Reeves v. Beardall, 316 U. S. 283, 285 (1942); see, further, Toomey v. Toomey, 149 F. (2d) 19, 20 (App. D. C. 1945).
forced to examine the factual basis of the issue on which judgment was rendered.

But two contradictory approaches to the problem have left adjudications under the "final decision" rule in serious conflict. The "pragmatic" approach, generated by code reasoning, places emphasis on the facts of the occurrence rather than the legal theories of the case. By this reasoning, if several claims are founded upon the same set of facts, a judgment on one claim alone will not support appellate jurisdiction. The "cause of action" approach, on the other hand, stems from the common law principle that each legal theory constitutes a distinct cause of action. Thus, if a claim is such a cause of action as would support a separate suit for relief, a decision upon it is said to be final and reviewable. Variously applying these principles, circuit courts of appeals have drawn the line of "finality" with an unsteady hand.

Judge Clark, the leading advocate of the more generally accepted "pragmatic" theory, considered the problem at length in the recent case of


13. The pragmatic method of defining a separate claim is exemplified by Rosenblum v. Dingfelder, 111 F. (2d) 406, 407 (C. C. A. 2d, 1940) ["Rule 54(b) provides for a separate judgment on one of several claims upon a determination of all issues material to it, and thus shows that otherwise only one final judgment is contemplated; ..."], and Audi Vision Inc. v. RCA Mfg. Co., 136 F. (2d) 621, 624 (C. C. A. 2d, 1943) ["Rule 54(b) purports only to modify the previously existing law that a final judgment must finally dispose of all matters at issue in the case, ... to one requiring complete disposition of a single transaction and all matters connected with it; ..."]. Compare Bowles v. Commercial Casualty Ins. Co., 107 F. (2d) 169 (C. C. A. 4th, 1939); Leonard v. Socony-Vacuum Oil Co., 130 F. (2d) 535 (C. C. A. 7th, 1942); Wright v. Gibson, 128 F. (2d) 865 (C. C. A. 9th, 1942); Toomey v. Toomey, 149 F. (2d) 19 (App. D. C. 1945).


15. Collins v. Metro-Goldwyn Pictures Corp., 106 F. (2d) 83 (C. C. A. 2d, 1939), which is still good law in the Second Circuit, is an example of a confusion of the two principles. Judge Clark has said that a cause of action may mean different things for different purposes. See note 28 infra. That uncertainty to litigants has resulted, see Note (1940) 49 YALE L. J. 1476, 1482; 3 Moore (Cum. Supp. 1945) 146-53; 1 Moore (Cum. Supp. 1945) 92–3.

Libbey-Owens-Ford Glass Co. v. Sylvania Industrial Corp.\textsuperscript{17} In a patentee’s suit for infringement, defendant answered by denial of infringement, invalidity of the patents, and the “unclean hands” claim \textsuperscript{18} of plaintiff’s monopolistic use of the patents. On plaintiff’s motion, the district court dismissed the third defense.\textsuperscript{19} Defendant’s appeal from this order was denied by the Circuit Court of Appeals for the Second Circuit, on the ground that the order complained of was not “final.” \textsuperscript{20} Judges Clark and Swan regarded the allegation of patent abuse as an affirmative defense,\textsuperscript{21} arising out of the same transaction as the claim of infringement, and involving the validity of the patent which had not yet been adjudicated. The court’s opinion drew support from the “historic federal policy” of precluding piecemeal review of litigation for the sake of judicial economy.\textsuperscript{22}

Judge Frank’s dissent, on the other hand, was based primarily on the “cause of action” theory.\textsuperscript{23} Regarding the defense of monopolistic use of


\textsuperscript{19} 67 U. S. Pat. Q. 84 (S. D. N. Y. 1945).

\textsuperscript{20} 154 F. (2d) 814 (C. C. A. 2d, 1946).


\textsuperscript{22} Note to Rule 54, Advisory Committee, Report of Proposed Amendments to Rules of Civil Procedure (1946) 70, reads in part: “The historic rule in the federal courts has always prohibited piecemeal disposal of litigation and permitted appeals only from final judgments. . . . Rule 54(b) was originally adopted . . . to avoid the possible injustice of a delay in judgment of a distinctly separate claim to await adjudication of the entire case. It was not designed to overturn the settled federal rule. . . ." See Judge Clark, dissenting, in Zarati S. S. Co. v. Park Bridge Corp., 154 F. (2d) 377, 382 (C. C. A. 2d, 1946) “With this unsetting of the law, I fear we are inviting piecemeal appeals and making the enforcement of the federal policy difficult and aleatory.”

\textsuperscript{23} 154 F. (2d) 814, 817 (C. C. A. 2d, 1946).
the patent as a permissive counterclaim which could support a separate suit, he argued that its dismissal should therefore be entitled to separate appeal. In his view, moreover, policy demanded prompt action on the "unclean hands" claim, in order to give early hearing to charges of patent abuse and to deter the use of the infringement suit as an additional coercive weapon.24

Since the majority and minority opinions utilize the principal criteria developed by courts as guides in the application of the two opposing theories of finality, the case has the value of clearly defining the conflict. These criteria, however, appear to serve more as rationalizations of the result than as compelling factors in reaching it. For the choice between the two theories in a specific case is frequently influenced by the particular court's attitude toward interlocutory appeals, and by its interest in the merits of the case.25

Thus, exponents of the "pragmatic" method 25 may experience difficulty in deciding whether two claims are based on the same transaction or set of facts. For example, in the principal case Judge Clark concluded that proof of the "unclean hands" claim would involve substantially the same evidence as would be required on the trial of the patent's validity.27 But in a prior case he failed to find the "identic core" common to counts for copyright infringement of a book and for unfair competition in using the book's title.25 By a more procedural variant of the "pragmatic" test, however, the court


may rely on the effect of possible affirmance of the judgment. If further adjudication would be required to make the order effective, it is not final; conversely, if execution could be levied on the judgment, it is held to be appealable.

On the other hand, those courts which apply the "cause of action" theory, utilizing the measure of an independent suit to determine finality, often take guidance from the nature of the relief asked by the particular claim on which judgment was rendered. This test may be applied to claims raised by either plaintiff or defendant; thus, where an answer would accomplish anything beyond mere denial of the complaint, or asks affirmative relief of any nature, an appeal will be heard. For example, proponents of the "cause of action" theory argue that in patent litigation the mere defense of invalidity in an infringement suit is a request for affirmative relief.

In the application of the "cause of action" theory to counterclaims, the distinction between permissive and compulsory counterclaims introduced by Federal Rule 13 serves as a guide. Dismissal or denial of a permissive counterclaim, like an independent action, is regarded as final and separately appealable. To decide whether a particular counterclaim is permissive or compulsory, two criteria have been devised. Whereas res judicata bars compulsory counterclaims which are or might be pleaded in an action, per-


missive counterclaims are not so governed. Thus, if a counterclaim available at the time of a previous suit would not be barred by the former judgment, it is labeled permissive,33 and judgment on it is "final." Or the court may examine the counterclaim for independent jurisdiction; since a permissive counterclaim is required to have individual grounds for jurisdiction,34 a counterclaim is said to be permissive if such grounds would be required.35 Judge Frank relied on these criteria in the instant case, employing elaborate legal reasoning to demonstrate that the allegation of patent abuse was a permissive counterclaim.36 Yet, paradoxically, Rule 13, on which this entire theory of counterclaims is based, words the distinction in the pragmatic terms of "transaction or occurrence" rather than claim or cause of action.37

In order to evaluate the "final decision" rule as expounded in this case, examination of the principles on which it is founded is necessary. The rule takes its name from the language of Section 128 of the Judicial Code.38 By strictly limiting appellate review, it is intended to accomplish the following four purposes:39 1) to expedite judicial business by preventing appeal on errors which may later be proven harmless; 40 2) to provide uniformity and certainty of judicial administration for litigants; 3) to eliminate, in conformity with the spirit of the Federal Rules, the emphasis on pleadings which 


37. Rule 13, Fed. RULES CIV. PROC., 28 U. S. C. following § 723c. The Rule states that counterclaims arising out of the same transaction or occurrence as the claim sued on, are compulsory; other counterclaims are permissive.


would result from piecemeal review; 41 and 4) to prevent the delay caused by leaving the main action in abeyance during the appeal. 42

But the present Rule 54 (b) and current criteria for deciding finality do not, in practice, serve these purposes successfully. The large number of cases on the issue belie the claim that the rule decreases litigation. 43 For, as in the instant case, the appellate court must examine the substance of each case in order to apply its criteria, even though the majority of such appeals are ultimately dismissed. Nor is any uniformity or certainty of decision on the issue evidenced by a survey of the precedents in the several circuits. In the absence of an objective test for finality, parties who wait to appeal all issues together may jeopardize their rights; 44 the threat of immediate execution on the order, and the risk of expiration of appeal time, force litigants to appeal each order separately. 45

In an attempt to cure the faults of this rule, the Advisory Committee on Rules for Civil Procedure proposes a complete revision of Rule 54 (b).

Returning to a strictly procedural test, the new rule relegates the determination of finality entirely to the district court level, allowing appeal of only such orders as have been expressly marked "final" by the lower court. And the district court may mark an order final "only upon an express determination that there is no just reason for delay."


42. See, for example, Rosenblum v. Dingfelder, 111 F. (2d) 406 (C. C. A. 2d, 1940).

43. See Note (1943) 147 A. L. R. 583.


46. The Proposed Rule reads as follows: "Rule 54(b) JUDGMENT UPON MULTIPLE
is clearly to minimize appeals, discretion is granted to the district court to
“afford a remedy in the infrequent harsh case.”

In prospect, the proposed rule appears to answer most of the criticisms
leveled at the present Rule 54 (b). The return to an objective test of finality
will decrease litigation, since appealability will be apparent on the face of
the record. Certainty of the commencement of appeal time, and of the time
when execution can be levied on the judgment, will also be achieved. And
automatic uniformity among the circuits should follow. If district courts
conform to the spirit of the new rule, the use of Rule 54 (b) to take inter-
locutory appeals will be ended. In the majority of instances the rule will be
self-operating and will prevent appeal. The substantive controversy over
finality, requiring a balance of judicial expediency and convenience to
parties, will be raised only when a party specifically petitions that the
district court declare an order final and appealable.

The novel grant of discretion to the district courts, to determine what
orders an appellate court may review, will be the most controversial point
in the new rule. Critics may argue that such a rule gives the district courts
an unconstitutional control of appellate jurisdiction, that it violates Sec-
tion 128 of the Judicial Code, and that it is beyond the purported scope of
the Federal Rules. But if there is to be an appraisal of the transaction in
issue, the district court is the logical court to make it. For, as the trial court,
it has already heard the case, whereas the appellate court would have to
examine all the facts and issues in the case anew. And the uniformity of
judicial administration expected under the new rule should clearly com-
pensate for any technical infringement of the appellate court’s right to
control its jurisdiction.

CLAIMS. When more than one claim for relief is presented in an action, whether as a claim,
counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final
judgment upon one or more but less than all of the claims only upon an express determina-
tion that there is no just reason for delay and upon an express direction for the entry of
judgment. In the absence of such determination and direction, any order or other form of
decision, however designated, which adjudicates less than all the claims shall not terminate
the action as to any of the claims, and the order or other form of decision is subject to revision
at any time before the entry of judgment adjudicating all the claims. Advisory Com-

47. Ibid.
48. See notes 40 and 44 supra.
Procedure (1946) 70. A plan for giving such discretion to the district court, in practice,
was broached judicially by Judge Augustus Hand in Collins v. Metro-Goldwyn Pictures
Corp., 106 F. (2d) 83, 84 (C. C. A. 2d, 1939). See also (1940) 13 So. Calif. L. Rev. 353, 361
and (1942) 41 Mich. L. Rev. 535, 536. It was recently suggested again in Toomey v.
50. See Judge Clark’s criticism of suggested statutory changes to permit appellate dis-
cretion to review interlocutory orders, Audi Vision Inc. v. RCA Mfg. Co., 136 F. (2d) 621,
625 n. 2 (C. C. A. 2d, 1943) and Zalkind v. Scheinman, 139 F. (2d) 895, 907 (C. C. A. 2d,
1943).
STATUTES in several states allow aliens who are non-residents of the United States to take real or personal property within the jurisdiction by will or intestate succession only if their respective countries grant such rights reciprocally to American citizens.¹ The constitutionality of such a provision was drawn into question in the recent case of In re Bevilacqua's Estate,² in which the California legislation, passed in 1941,³ was challenged as infringing on fields reserved to, or preempted by, the Federal government.

¹ In re Bevilacqua's Estate, 161 P. (2d) 589 (Cal. App. 1945).
² See CAL. PROB. CODE ANN. (Deering, 1941) §§ 259, 259.1, 259.2, amended by CAL. STAT. 1945, c. 1160, §§ 1-3; MONT. REV. CODES ANN. (Supp. 1939) § 7000.2; ORE. COMP. LAWS ANN. (1940) § 61-107. See also Crowley v. Allen, 52 F. Supp. 850 (N. D. Cal. 1943); In re Bevilacqua's Estate, 161 P. (2d) 589 (Cal. App. 1945); In re Knutzen's Estate, 161 P. (2d) 598 (Cal. App. 1945); Bottomly v. Meagher County, 114 Mont. 220, 133 P. (2d) 770 (1943); In re Braun's Estate, 161 Ore. 503, 90 P. (2d) 484 (1939).
⁴ The probate provision as enacted and at the time of the litigation read as follows:

“Section 259: The rights of aliens not residing within the United States or its territories to take either real or personal property or the proceeds thereof in the State by succession or testamentary disposition upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are inhabitants and citizens and upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign countries.

“Section 259.1: The burden shall be upon such nonresident aliens to establish the fact of existence of the reciprocal rights set forth in Section 259.

“Section 259.2: If such reciprocal rights are not found to exist and if no heirs other than such aliens are found eligible to take such property, the property shall be disposed of as escheated property.”

Subsequent to the Bevilacqua decision, by Assembly Bill No. 2071, effective September 15, 1945, Sections 259.1, and 259.2 have been repealed, and Section 259 now reads:

“The right of aliens not residing within the United States or its territories to take real property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents and the right of aliens not residing in the United States or its territories to take personal property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take personal property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents. It shall be presumed that such reciprocal rights exist and this presumption shall be conclusive unless prior to the hearing on any petition for distribution of all or a portion of such property to an alien heir, devisee, or legatee not residing within the United States or in its terri-
The issue arose on the death intestate of Ignazio Bevilacqua, a resident of California, survived by a widow and four children, all residents and citizens of Italy, and leaving an estate of approximately $9,000. Application for letters of administration was made both by the decedent's cousin and the Public Administrator of San Francisco, the latter contending that the statute was unconstitutional and that the widow and children were the heirs at law. The cousin based his claim on the theory that since, by operation of the statute, the non-resident alien relatives were disqualified by a failure to prove the necessary reciprocity, he became the "next of kin entitled to share in the estate" and as such to administer it according to California law. Without determining the existence of reciprocal rights, the probate court held the statute unconstitutional and granted the letters of administration to the Public Administrator.

Urging three principal grounds for affirmance on appeal, respondent Public Administrator and the United States as amicus curiae alleged the statute to be (1) an indirect regulation of foreign trade in violation of the commerce clause; (2) an attempted exaction of reciprocal rights from other countries, and an embarrassing interference in international affairs, thereby invading a sphere reserved to the United States by the treaty clause; and (3) an interference with the exclusive power of the Federal Government to capture enemy property during wartime, in the exercise of which power Congress had passed the Trading with the Enemy Act, thereby fully occupying the field of alien property rights. These contentions were buttressed by a "declaration of urgency" appended to the enactment by the legislature, declaring the statute to be an "urgency measure" because of the possible use of estates moneys by foreign nations in a war against the United States. This statement, it was claimed, showed that the Act was primarily

4. See CAL. PROB. CODE ANN. (Deering, 1941) § 422, providing for order of privity in granting letters of administration to a decedent's estate.
10. See Brief for Amicus Curiae, pp. 13-18.
11. The "declaration of urgency," CAL. STAT. 1941, c. 895, § 2, reads:

"This act is hereby declared to be an urgency measure necessary for the immediate preservation of the public peace, health and safety within the meaning of Section I of Article IV of the Constitution of the State of California, and shall take effect immediately."
designed to control the international flow of currency and credits and was therefore a probate measure in name only.

The District Court of Appeal, however, pointing out that the "declaration of urgency" purported merely to explain why the legislation should take effect immediately, rather than after the expiration of the customary waiting period,\(^\text{12}\) declined to examine the legislative motives underlying the enactment for the purpose of invalidating the substantive law. Treating the Act as a probate regulation, the Court decided that estates funds are not "commerce" within the purview of the commerce clause, denied any invasion of or conflict with federal rights, and unequivocally upheld the statute's constitutionality.\(^\text{13}\)

Once it is thus assumed that the enactment is merely a regulation of the transmission of property at death, a determination in favor of its validity would seem inescapable, since states have an historic right to legislate as to the transfer by will or intestacy of property within the jurisdiction,\(^\text{14}\) and "to limit, condition, or even abolish the power of testamentary disposition."\(^\text{15}\) Pursuant thereto, most states, for example, have enacted provisions to remove, in whole or in part, the common-law disability of aliens to inherit or transmit realty by descent.\(^\text{16}\) Other states have allowed such privileges only to certain classes of foreign nationals.\(^\text{17}\)

This right of control over transfer of a decedent's property, inherent in the concept of sovereignty, served as the rationale in *Mager v. Grima*,\(^\text{18}\) cited by the California District Court of Appeal as authority for the proposition that

The following is a statement of the facts constituting such necessity: A great number of foreign nations are either at war, preparing for war or under the control and domination of conquering nations with the result that money and property left to citizens of California is impounded in such foreign countries or taken by confiscatory taxes for war uses. Likewise money and property left to friends and relatives in such foreign countries by persons dying in California is often never received by such nonresident aliens but is seized by these foreign governments and used for war purposes. Because the foreign governments guilty of these practices constitute a direct threat to the Government of the United States, it is immediately necessary that the property and money of citizens dying in this country should remain in this country and not be sent to such foreign countries to be used for the purpose of waging a war that eventually may be directed against the Government of the United States."

12. "It is simply the explanation required by the state constitution why Sections 259, 259.1, and 259.2 should become operative immediately rather than 90 days after the adjournment of the legislature." *In re Bevilacqua's Estate*, 161 P. (2d) 589, 594 (Cal. App. 1945).


14. For an enunciation of this principle by the United States Supreme Court, see *Mager v. Grima*, 8 How. 490, 493 (U. S. 1830). See also *Gibson, Aliens and the Law* (1940) 45.


18. 8 How. 490, 493 (U. S. 1850).
tion that estates proceeds are not "commerce." In that case a Louisiana inheritance tax on legacies to aliens was assailed as an attempted tax on exports and regulation of foreign commerce. The Supreme Court, emphasizing that it is within the scope of state power to attach to testate or intestate succession "any conditions which it supposes to be required by its interests or policy," upheld the tax and declared "it certainly has no concern with commerce or with imports or exports." Indeed, to hold otherwise would lead to a prohibition of state taxation on property whenever the owner had the intention of selling it and sending the proceeds abroad. However, even if money or property from a decedent's estate passing to a non-resident alien should be considered foreign commerce, in view of Congressional silence on the subject it seems logical that the states are free to continue their long-exercised powers of regulation until clearly prohibited.

Nor can a reciprocal inheritance statute be said to represent an invasion of Article I, Section 10 of the Constitution, forbidding states to enter into treaties. Although alien inheritance rights are a fitting subject for international compacts, that fact has never been held to preclude state action. Since a treaty is the supreme law of the land, any conflicting state law must yield. But it seems well settled that state regulations as to property ownership or transmission by aliens become dormant pro tempore only as to those foreign nationals whose rights are governed by a conflicting treaty, and are revived on its expiration, while in the absence of treaty, local law

19. Id. at 494.
20. Ibid.
22. See Notes (1919) 4 A. L. R. 1377, 1391; (1922) 17 A. L. R. 635, 637; (1941) 134 A. L. R. 882, 887, and cases cited. For a list of treaties covering aliens' rights in this respect, see Gibson, Aliens and the Law (1940) app. 167, 171. See also Note (1937) 37 Col. L. Rev. 1361.
23. State laws relating to property transfer, devise, or inheritance have been held suspended by conflicting treaties in Chirac v. Chirac, 2 Wheat. 259 (U. S. 1817); Hauenstein v. Lynham, 100 U. S. 483 (1879); Geofroy v. Riggs, 133 U. S. 258 (1890).
25. Determining the relationship of the Franco-American conventions of 1800 and 1853 to the laws of Maryland as they affected the rights of French citizens, the United States Supreme Court stated, in Geofroy v. Riggs, 133 U. S. 258, 267 (1890), that while the 1800 treaty was in existence, it "... controlled the statute and common law of Maryland whenever it differed from them. The treaty expired by its own limitation in eight years, pursuant to an article inserted by the Senate. ... During its continuance, citizens of France could take property in the District of Columbia by inheritance from citizens of the United States. But after its expiration that right was limited as provided by the statute and common law of Maryland ... until the convention between the United States and France was concluded, February 23, 1853."

For a declaration that state laws merely "are suspended during the life of a treaty" and are not "void as an unwarranted interference with ... the powers of the federal government," see Blythe v. Hinkley, 127 Cal. 431, 436, 59 Pac. 787, 788 (1900). In affirming the California decision, the United States Supreme Court noted that in case of a con-
of course controls. Furthermore, treaties are generally drawn so as to allow full effect to state law. Similarly, although such agreements between nations often deal with inheritance rights in terms of reciprocity, it can hardly be concluded that these conditions cannot be imposed by local enactment or that any attempt so to do is an effort to "exact concessions from foreign countries" and thus indirectly enter into a treaty.

Moreover, as pointed out by the Court in the Bevilacqua case with reference to the California statute, there is little validity in an allegation that such a law is a "possible source of embarrassment" to the United States in the foreign relations field. By conditioning non-resident aliens' rights on reciprocity, the state legislation impliedly anticipates exercise of the federal treaty power, for if a treaty granting reciprocal privileges exists, the courts must take judicial notice of it and can apply the statute accordingly. If no treaty is involved, presumably foreign nationals will receive the same treatment as their countries afford American citizens. Certainly the land acts in Western states, depriving non-declarant aliens of many rights in realty, are potentially far more provocative of international ill-will than a reciprocal inheritance probate provision. Yet they have never been assailed on this ground. Also, should Congress at any time desire to render nugatory the California law and others similar to it, it can do so by the exercise of its treaty-making powers.

For like reasons, unless it is conceded that the Trading with the Enemy Act indicates a Congressional purpose to preempt the field of alien inheritance rights, such a statute does not interfere with the exercise of federal wartime powers of capture. Admittedly the Alien Property Custodian is authorized to sequester the property of enemy nationals, but it is for the state to declare when the alien acquires an interest. Under the interpretation

fictitious state law was suspended during the treaty or the term provided for therein." Blythe v. Hinckley, 180 U. S. 333, 340 (1901).

29. See Brief for Amici Curiae, p. 23. On this point the United States focused its attack largely on the clause of Section 259, requiring as a condition for inheritance by non-resident aliens that United States citizens be allowed "to receive by payment within the United States or its territories money originating from the estates of persons dying within such foreign countries." Id. at 21-3. This requirement which the government argued would cause embarrassment and engender countless reparation suits during wartime because of a general international "freezing" of currency, has been stricken from the statute by amendment. See note 3 supra.
32. The Alien Land Laws have, however, been unsuccessfully attacked in the past as violative of the Fourteenth Amendment. Terrace v. Thompson, 263 U. S. 197 (1923); Webb v. O'Brien, 263 U. S. 313 (1923).
presented in the *Bevilacqua* opinion, no interest ever vested in the widow and children because of the condition precedent imposed by the statute as then worded, which required the "heirs" to prove reciprocity before being entitled to take.\(^{34}\) Thus there never existed any alien property for the custodian to seize. The California law has since been amended to create a rebuttable presumption of reciprocity and to shift the burden of proof from the non-resident foreign nationals to the contestant.\(^{35}\) Presumably under the new provisions, the property would pass to the alien heirs subject to divestiture upon the occurrence of a condition subsequent, and the custodian would be entitled to capture the interest. Only a misconception of the respective functions of the custodian and the state legislature, or a denial of the states' admitted authority to condition succession and testamentary transfer, would lead to the conclusion that a reciprocity statute invaded the federal sphere.

In *Crowley v. Allen*,\(^{36}\) however, a case later reversed for want of jurisdiction, a federal district court had declared the California Statute invalid on the grounds that Congress precluded state action when it passed the amended Trading with the Enemy Act in 1941, giving the President and his designated agents the broadest authority to control foreign funds and to sequester alien property in wartime. Such a contention was denied in the *Bevilacqua* case, the Court stating that to decide otherwise "would mean that upon entry of the United States into a war, the normal powers of the state to enact legislation admittedly within their powers in time of peace would be automatically curtailed."\(^{37}\) An even more valid argument is that a clear purpose to occupy fully the field of alien inheritance rights during a period of war should be required before imputing such intent to Congress, in view of the historic reservation to the states of control of property ownership.\(^{38}\) Furthermore, the Supreme Court decision in *Hines v. Davidowitz*,\(^{39}\) cited in the *Crowley* opinion, may be distinguished on the facts from the instant cases. There a Pennsylvania alien registration law was struck down on the theory that a similar national Act indicated that Congress intended to reserve the field to itself. The laws concerned, however, were largely coincident.\(^{40}\) A reciprocal inheritance statute regulates the conditions on which the non-resident foreign nationals may acquire property; the Trading with the Enemy Act applies to the seizure of property once acquired. No matter how closely they may be related in actual operation, the functions and purposes of each are distinct.

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35. See note 3 *supra*. In Oregon, however, the burden of proof of reciprocity is on the non-resident alien. *In re Braun's Estate*, 161 Ore. 503, 90 P. (2d) 484 (1939).
37. 161 P. (2d) 589, 597.
38. See (1944) 57 HARV. L. REV. 730–1.
39. 312 U. S. 52 (1941).
40. *Id.* at 61.
PROHIBITION AGAINST SALES OF NEW SECURITY ISSUES PRIOR TO EFFECTIVE DATE OF REGISTRATION STATEMENT

Section 5 of the Securities Act of 1933 1 prohibits the sale of new security issues by underwriters or dealers prior to the date upon which a registration statement, containing a detailed description of the issue, becomes effective. 2 By means of Section 5, Congress established a "cooling period" 3 intended to eliminate selling pressure upon investors before they could avail themselves of the information concerning new issues required by the Act. 4

However, because of the underwriters' continuous protests against legislative imposition of any "on the hook" period, during which they might have to commit themselves to an issuer for securities they were not immediately permitted to sell, 5 the effectiveness of a "cooling period" has been largely eliminated in a number of ways.

For example, the Commission may permit the filing of amendments to deficient 6 registration statements to be "accelerated" and thereby avoid

2 Section 5(a) provides: "Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—(1) to make use of any means or instruments of transportation or communication in interstate commerce to sell or offer to buy such security through the use of any prospectus or otherwise; or (2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale." The Act's comprehensive definition of "sale" underscored Congress' intent to proscribe any action which might align prospective purchasers before the effective date. Section 2 (3) provides that the term "sale," "sell," "offer to sell," or "offer for sale" shall include every contract of sale or disposition of, attempt or offer to dispose of, or a solicitation of an offer to buy, a security or interest in a security, for value; except that such terms shall not include preliminary negotiations or agreements between an issuer and any underwriter.
3 Section 8 (a) originally provided that the effective date of a registration would be the twentieth day after the filing thereof. By an amendment to the Act, 54 STAT. 857, 15 U. S. C. § 77(h) (1940), the Commission may allow a registration to become effective on an earlier date.
6 A registration statement is deficient when its information is incomplete, inaccurate or in anywise not in conformity with the Commission's requirements for full disclosure. Thus if the price at which an issue is to be sold is not given in the registration statement, an amendment to the statement would be necessary.
postponement of the effective date of the statement. Consequently, the selling price of an issue need not be decided upon until shortly before the end of the cooling period, and underwriters usually do not, until then, make final commitments to the issuer. If the final price amendment is filed on the last day of the cooling period and is accelerated by the Commission, the underwriter may begin to dispose of the issue by forming a selling group or otherwise disposing of the issue the following morning. Under these circumstances, the underwriter is actually committed to the issuer only for the short period from the time he makes a final contract with the issuer to the effective date of the registration statement, plus whatever time he may afterwards require to dispose of the issue. Before the Commission permitted such delay in the filing of final amendments, underwriters protected themselves in their commitments to the issuer of new securities by including "market out" clauses in their underwriting contracts. These clauses reserved to underwriters the right to withdraw during the waiting period if the market situation changed. Finally, by a 1940 amendment to the Act, the Commission was authorized to permit a registration statement to become effective less than twenty days after it is filed. By thus reducing the period during which an underwriter is committed before he may begin to dispose of an issue, the Commissioner reduced pro tanto the time during which complete disclosure is available to prospective buyers.

On the other hand, there is still available, from the date of filing the registration until its effective date, a substantial body of information to which, if Section 5 were strictly observed, buyers would have access before selling could commence. Unfortunately, however, the reluctance of many underwriters and dealers to commit themselves without previous assurance of their ability to sell at the determined price has found expression in the

7. Unless the Commission accelerates an amendment filed to complete or correct the information required in a registration statement, the cooling period would begin to run anew from the date such an amendment was filed. See Hearings before Committee on Interstate and Foreign Commerce on H. R. 4344, H. R. 5065, and H. R. 5832, 77th Cong., 1st Sess. (1941) 46; House Committee Print, Report of the Securities and Exchange Commission on Proposals for Amendments to the Securities Act of 1933 and the Securities Exchange Act of 1934, 77th Cong., 1st Sess. (1941) 4.

8. This amendment will also contain information concerning the spreads and underwriting participations. See Gourrich, Investment Banking Methods Prior to and Since the Securities Act of 1933 (1937) 4 LAW & CONTEMP. PROB. 44, 65.

9. See Hearings before Committee on Interstate and Foreign Commerce on H. R. 4344, H. R. 5065, and H. R. 5832, supra note 7, at 144.

10. For a discussion of this and other methods of avoiding liability in underwriting contracts, see Lockwood and Anderson, Underwriting Contracts Within Purview of Securities Act of 1933; With Certain Suggested Previsions (1939) 8 GEO. WASH. L. REV. 33, 44; 2 DREWING, FINANCIAL POLICY OF CORPORATIONS (4th ed. 1941) 1150 n. hh; Haven, supra note 5, at 125.

11. See note 3 supra.

12. As an extreme example, the registration statement for the Kaiser-Frazer issue became effective within three business days. See N. Y. Times, Sept. 27, 1945, p. 31, col. 8.
practice of "beating the gun," that is, committing shares of a new issue for sale prior to the effective date of registration. The Commission's failure to act against this practice opened the possibility for distributions of new issues prior to any adequate period during which even partial information was available.

Despite the emphasis placed in the Act on the importance of disseminating information during the cooling period to prospective purchasers, adequate media for dissemination are not available at the present time. Although the copious registration statement is available for inspection at the offices of the Commission and copies are distributed upon request and payment, few investors directly utilize this information in the appraisal of a new security. It is true that Section 5 requires that on or after the effective date, written offers to sell must be accompanied by a detailed prospectus. But if the offer to sell is made orally, no prospectus need be supplied a purchaser until the security is delivered. Hence, despite the disclosures demanded by the Act, it is not certain that a buyer will by these methods receive any direct information before the consummation of a sale. For a time the Commission permitted underwriters to distribute the so-called "red-herring" prospectus during the cooling period subject to the limitation that the prospectus not be used as an offer to sell. Unfortunately, the effective use of this device was severely reduced by the Commission's subsequent requirement that distributors circularize all recipients with any amendments to the original prospectus. Finally, there remains the customary method of disseminating information through discussions between an underwriter and dealer or between dealer and investor, which is apparently still in wide use despite the stringent penalties imposed by Section 12 with respect to misrepresentations by sellers. It should be realized that the two aims of prohibiting solicitation and encouraging dissemination of information are not wholly compatible; any dissemination of information by an underwriter or dealer, whether by "red herring" prospectus or word-of-mouth will inevitably be construed to some degree as a solicitation of an offer to buy. The problem is to find a method which balances the two conflicting aims.

13. See 2 Dewing, op. cit. supra note 10, at 1131; Gourrich, supra note 8, at 64.
14. Section 5(b). For the possible inadequacies of the statutory prospectus as a device for disseminating information, see Bates, Some Effects of the Securities Act Upon Investment Banking Practices (1937) 4 LAW & CONTEMP. PROB. 72, 74.
15. See 2 Dewing, op. cit. supra note 10, at 1133 n. k.; Hearings before Committee on Interstate and Foreign Commerce on H. R. 4344, H. R. 5065, H. R. 5832, supra note 5, at 47. The "red-herring" prospectus derived its name from the practice of printing across every page in red letters a notice that the prospectus was not intended as an offer of the security and calling attention to the Act's prohibitions against any offers before the effective date.
In spite of the widespread practice among underwriters of making informal commitments with dealers prior to the effective date of registration, the Commission's recent proceeding, In the Matter of Van Alstyne, Noel & Co., constituted the first prosecution of an established underwriting firm for violation of Section 5. The Van Alstyne firm, through a public statement, asserted that the transactions for which it was penalized in this case were merely in accordance with the usual practices of underwriting houses. For purposes of the proceeding, however, the firm admitted the allegations of the Commission and waived a hearing.

The Commission found that in December of 1945 Van Alstyne, Noel & Co. arranged with Andrew J. Higgins, president of Higgins Industries, Inc. for the underwriting of 900,000 shares of common stock of the then unorganized Higgins, Inc. Even before the registration statement was filed, the underwriter arranged for full publicity to be given the proposed public distribution. This publicity was disseminated throughout the country by the Dow-Jones financial ticker and in the newspapers. The firm then communicated on a nationwide scale with other underwriters to inform them of the proposed issue and to inquire whether they wished to participate in the underwriting. Upon completion of these conversations, the senior member of the firm phoned Higgins that the underwriting was a success. Higgins replied by letter that "the spectacular manner in which your company has received oversubscriptions to the Higgins issue has upset the placidity of New Orleans." Shortly afterwards, the firm completed the formation of the so-called underwriting group consisting of 74 other underwriters and the Van Alstyne firm which acted as syndicate manager for the marketing of the 900,000 shares. As a result of communications between the Van Alstyne firm and dealers, a selling group of 160 dealers was formed and allocated

19. N. Y. Times, Feb. 7, 1946, p. 33, col. 3. It was alleged by Van Alstyne-Noel that "our procedure was in all respects in line with our regular course of business and was, we believe, the same procedure followed by substantially all other underwriting houses doing a similar business."
20. Van Alstyne-Noel issued a statement to newspapers maintaining that it had waived a hearing in order to avoid delay for its client in the financing of the security issue involved. See N. Y. Times, Mar. 1, 1946, p. 28, col. 8.
21. Transactions of this nature do not usually violate the Act's prohibitions against "selling" inasmuch as negotiations for the actual underwriting are excluded from the definition of "sale." See note 2 supra.
22. The letter also stated that "Fenner and Beane have advised their clientele that their meagre allotment was sold out in a few minutes" and concluded with a request that 50,000 shares instead of 5,000 be allocated to that firm. In the matter of Van Alstyne-Noel & Co., Securities Exchange Act Release No. 3791, Feb. 28, 1946, p. 2.
23. Of the total 900,000 shares, 100,000 were reserved for Van Alstyne-Noel which retained discretion to withhold any amount from each underwriter for the selling group. The 900,000 shares were to be sold at $10.10 per share to the underwriting syndicate members who were, in turn, to offer them to the public at $11.00 per share. As syndicate manager, the Van Alstyne firm was to receive 20 cents per share from each underwriter.
specific amounts of stock. Dealers who had not been included in the selling
group contacted Van Alstyne-Noel and received allocations of 104,500
shares. Some of the dealers, in turn, allotted various amounts to their
customers. Similarly, the Van Alstyne firm received, through its own sales
department, numerous requests from public investors and entered for them
on its records "buy" order tickets aggregating 2,600 shares.

Following all these transactions, on January 30, 1946, a registration state-
ment was filed and had not yet become effective when, on February 6, the
Commission issued its order instituting proceedings. Upon the above find-
ings, the Commission concluded that there had been a "sale" by the under-
writer prior to the effective date of a registration statement and, hence, a
violation of Section 5(a)(1) of the Act. The penalty imposed by the Com-
mission resulted in the loss of profits to the firm of the Higgins underwrit-
ing and a ten day suspension from the firm's normal operations.

The Commission's initial action against such practices has apparently
reduced the more flagrant manifestations of premature selling. Analysis
of the Van Alstyne ruling, nevertheless, reveals the continued need for clearer
definition by the Commission of its policy toward future enforcement of
cooling period restrictions. The underwriter's waiver of a hearing in this
proceeding enabled the Commission to rely on its own generalized allega-
tions that a selling group has been "formed" and shares "allocated." The
Commission's opinion does not disclose whether to "form" a selling group,
the underwriter must initiate conversations or need merely list dealers who
"communicate their interest" to him. Nor is it established that when cus-
tomers advise they "wish to be kept in mind," a dealer who commits this
notice to writing will be deemed to have "allocated" shares. The Commis-
sion also warned that the so-called underwriting group may have been so
large in relation to the size of the issue as to constitute in reality a selling

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24. The Commission's ruling does not disclose whether these shares were withdrawn
from allotments previously made to members of the selling group or whether additional
shares were withheld from members of the underwriting syndicate.

25. Before the Commission made its findings, the Van Alstyne firm withdrew from the
Higgins underwriting and the syndicate was dissolved. Since the firm was to receive 90
cents per share on 100,000 shares to be sold its own customers and 20 cents per share on the
remaining 800,000, it thereby lost $250,000. The firm also lost the right to purchase at 10
cents each, some 100,000 stock purchase warrants which entitled the holder to purchase one
share of common stock at $11 per share up to January 31, 1951.

26. Although the firm's registration as a broker-dealer could have been revoked, the
Commission instead suspended the firm from membership in the National Association of
Security Dealers, Inc., for a period of ten days. This penalty barred Van Alstyne-Noel from
joining any underwriting group with other N.A.S.D. members. Nor can any member do
business with a non-member except on the same basis as with the public. It is of interest to
note that State Senator David Van Alstyne, senior member of the firm, upon receiving word
that his company had been cited for investigation, withdrew as a candidate for the New

27. Heffernan, Buyers Still Avid for Coming Issues, N. Y. Times, Mar. 11, 1946, p. 31,
col. 5.
group. But the ruling suggests no certain measure by which syndicate managers must in the future guide themselves in limiting the size of the syndicate.

Whatever stand may be taken concerning the rigidity with which restrictions against premature selling should be enforced, it is evident that effectuation of the Act's intent to provide full disclosure before selling may legally commence demands more effective dissemination of information. For example, the usefulness of the "red-herring" prospectus in distributing information may well outweigh its disadvantage as a medium of solicitation. An unfortunate result of the Van Alstyne ruling has been the virtual discontinuance by underwriters of the distribution of these preliminary prospectuses. In recognition of the situation, the Commission has formulated a proposed rule that would require underwriting managers to send "red-herring" prospectuses to all potential selling groups before the offering date. Supplements containing any necessary revisions would be appended at offering time and copies of these would be sent to anyone previously in receipt of the unrevised "red-herring." In order to protect the underwriter, the rule would stipulate that the distribution of this prospectus would not constitute premature solicitation.

In analyzing the possibilities of enforcing Section 5, a distinction should be made between the problems posed by underwriters' premature sales to dealers and those of dealers to the investing public. It is apparent that the former lie within the scope of more practical enforcement. The large number of dealers and their use of means of communication other than the instrumentalities of interstate commerce make premature solicitations by dealers difficult to control. In addition, an investor who has committed himself to a dealer may feel free to withdraw should he change his mind after receiving further information. A dealer who, under similar circumstances, withdraws from his commitment to an underwriter does so at the probable cost of participation in future issues. Moreover, enforcement on the underwriter-dealer level would reduce the pressure on dealers to solicit investors as insurance for the disposal of already "purchased" shares.

It may be that the underwriting industry could not profitably function under a rigid twenty-day cooling period of the type originally contemplated by the 1933 Act. The Commission's policy of acceleration, apparently

28. N. Y. Times, Sept. 28, 1946, p. 21, col. 8. The underwriting industry appears cooperative but its skepticism of the proposals indicates that no extensive distribution of these preliminary prospectuses may be immediately expected. See Heffernen, Bankers Weighing Proposals of SEC, N. Y. Times, Oct. 6, 1946, § 3, p. 1, col. 5. Although the first efforts along the lines suggested by the Commission have already been made by two underwriting firms, it is probable that full effectiveness of the plan will not be achieved until required by formal rule. See N. Y. Times, Oct. 25, 1946, p. 35, col. 5.

29. See note 2 supra.

30. H. R. REP. No. 85, op. cit. supra note 4, at 7-8. It is true, however, that all "sales" made before the effective date can be of only a tentative nature and are legally unenforceable.
adopted under this assumption, has permitted underwriters to reduce to the vanishing point the period during which they need be committed for an issue while unable to make legal offers of sale. Under such conditions, even the strictest enforcement of the restrictions upon selling prior to the effective date would not require that underwriters commit themselves until just before the end of the cooling period. At least until recently the surplus of investment funds has been so large that full disclosure would not prejudice the immediate success of an issue. The slower pace of new financing which has followed the sharp stock market decline indicates, however, that such conditions are abnormal and suggests the wisdom of insuring that both dealers and investors have a maximum opportunity to avail themselves of the disclosures required by the Securities Act before committing themselves to the purchase of new securities. It would therefore seem sound policy for the Commission, upon providing for more effective distribution of information, specifically to define and proceed against underwriters' premature selling arrangements, no matter how these may be hedged.

NON-COVERAGE AS A DEFENSE AGAINST JUDICIAL ENFORCEMENT OF ADMINISTRATIVE SUBPOENAS

To achieve a policy objective of optimum administrative efficiency consonant with protection of individual rights, the federal courts have traditionally refused to deny enforcement of an administrative subpoena ducem tecum except where the subpoena is found to be arbitrary, unauthorized, in the absence of acceleration the underwriters would presumably avoid firm commitments for the entire period by the use of "market out" clauses.

If it is believed that complete information is not now available for a long enough interval, the Commission might well consider a modification of its present policy of granting acceleration to amendments filed on the last day of a cooling period. The Commission could, for example, require that final amendments which contain sufficiently important information be filed by at least the eighteenth day of the cooling period.


4. The Commission might, for example, promulgate specific rules for the types of information it will permit sellers to distribute. Various letters or forms could be prescribed and would, with the "red-herring" or other limited prospectuses, comprise the only approved media. All other methods would be deemed attempts to dispose of the issue involved and therefore illegal.

or unduly oppressive.² Specific defenses uniformly recognized as available upon order to show cause are that the information sought is irrelevant to a proper subject of investigation,³ that enforcement would violate the privilege against self-incrimination,⁴ or that the subpoena is unreasonably vague,⁵ abuses from which protection rightfully may be claimed." Oklahoma Press Publishing Co. v. Walling, 66 Sup. Ct. 494, 508 (U. S. 1946). The constitutionality of this enforcement procedure was established in ICC v. Brimson, 154 U. S. 447 (1894), in which it was also intimated that Congress could not constitutionally invest an administrative Agency with power to punish for contempt. "Of course, the question of punishing the defendants for contempt could not arise before the Commission; for, in a judicial sense, there is no such thing as contempt of a subordinate administrative body. No question of contempt could arise until the issue of law, in the Circuit Court, is determined adversely to the defendants and they refuse to obey, not the order of the commission, but the final order of the court." Id. at 488–9. Provisions for enforcement of administrative subpoenas by District Courts have been included in many Congressional enactments; e.g., Emergency Price Control Act of 1942, 56 Stat. 30 (1942); Fair Labor Standards Act, 52 Stat. 1065 (1938), 29 U. S. C. § 209 (1940); Civil Aeronautics Act of 1938, 52 Stat. 1021 (1938), 49 U. S. C. § 644(c) (1940); Federal Power Act, 49 Stat. 856 (1935), 16 U. S. C. § 825(f)(e) (1940); Public Utility Holding Company Act of 1935, 49 Stat. 831 (1935), 15 U. S. C. § 79 r (d) (1940); National Labor Relations Act, 49 Stat. 455 (1935), 29 U. S. C. § 161 (2) (1940); Securities and Exchange Commission Act of 1934, 48 Stat. 900 (1934), 15 U. S. C. § 78 u (c) (1940); Securities Act of 1933, 48 Stat. 87 (1933), 15 U. S. C. § 77 t (c) (1940); Federal Trade Commission Act, 38 Stat. 722 (1914), 15 U. S. C. §§ 49, 50 (1940); Interstate Commerce Commission Act, 5 Stat. 859 (1889), 49 U. S. C. § 12(3) 1940.

2. The basic pattern of the defenses to an application for an enforcement order was set in ICC v. Brimson, 154 U. S. 447 (1894). "We do not overlook these constitutional limitations which, for the protection of personal rights, must necessarily attend all investigations conducted under the authority of Congress. . . . It is scarcely necessary to say that the power given to Congress to regulate interstate commerce does not carry with it any power to destroy or impair these guarantees . . . [A]s the Interstate Commerce Commission, by petition in a Circuit Court of the United States, seeks, upon grounds distinctly set forth, an order to compel appellees to answer particular questions and to produce certain books, papers, etc., in their possession, it was open to each of them to contend before that court that he was protected by the Constitution from making answer to the questions proposed to him; or that he was not legally bound to produce the books, papers, etc., ordered to be produced; or that neither the questions propounded nor the books, papers, etc., called for relate to the particular matter under investigation, nor to any matter which the Commission is entitled under the Constitution or laws to investigate." Id. at 478–9. Great emphasis was placed, in the earlier cases, on the individual right of privacy guaranteed by the fourth amendment to the United States Constitution. See FTC v. American Tobacco Co., 264 U. S. 298 (1924); Ellis v. ICC, 237 U. S. 434 (1915); Harriman v. ICC, 211 U. S. 407 (1903). See notes 3–8 infra.


not issued by a proper person,\textsuperscript{6} technically defective,\textsuperscript{7} or unauthorized by statute.\textsuperscript{8}

Where, however, this last defense has been invoked on the ground that the contestant was not within the jurisdiction of the agency, decisions have conflicted as to the nature of the proof required to overcome the defense. Although, in 1943, in Endicott Johnson v. Perkins,\textsuperscript{9} the Supreme Court held that the Administrator of the Walsh-Healy Act\textsuperscript{10} could not be required fully to prove "coverage" in seeking an enforcement order, the district and circuit courts refused to forego entirely a preliminary examination of coverage.\textsuperscript{11} Instead, most of these courts insisted on a "reasonable showing" or

\begin{enumerate}
\item Cudahy Packing Co. v. Holland, 315 U. S. 357 (1942); Cudahy Packing Co. v. Fleming, 122 F. (2d) 1005 (C. C. A. 8th, 1941), \textit{rev'd per curiam sub nom} Cudahy Packing Co. v. Holland, 315 U. S. 785 (1942); Lowell Sun Co. v. Fleming, 120 F. (2d) 213 (C. C. A. 1st, 1941), \textit{aff'd per curiam sub nom} Holland v. Lowell Sun Co., 315 U. S. 784 (1942).
\item 317 U. S. 501 (1943).
\item The force of the \textit{Endicott} decision was lost on some of the lower courts because of dicta indicating that the decision was limited to the peculiar circumstances of the Walsh-Healy Act. "It is not an Act of general applicability to industry. It applies only to contractors who voluntarily enter into competition to obtain government business on terms of which they are fairly forewarned by inclusion in the contract." Endicott Johnson Corp. v. Perkins, 317 U. S. 501, 507 (1943). See Oklahoma Press Publishing Co. v. Walling, 147 F. (2d) 658 (C. C. A. 10th, 1945), \textit{aff'd} 66 Sup. Ct. 494 (U. S. 1946). "Endicott Johnson Corp. v. Perkins ... held that in the circumstances, the District Court should have enforced the subpoena, but we do not understand that in so holding it intended to sweep away all power of judicial discretion. In reaching its decision, the court noted that the Walsh-Healy
"probability" of coverage, while the Third Circuit required merely allegations showing reasonable grounds and authority for the investigation.

Because of this conflict, the Supreme Court granted certiorari in the recent cases of Oklahoma Press Publishing Co. v. Walling and News Printing Co. v. Walling. There, pursuant to section 9 of the Act, the Administrator of the Fair Labor Standards Act had applied to District Courts in the Third and Tenth Circuits for enforcement of subpoenas duces tecum requiring production of certain books and records, including material which would enable him to determine whether the firms were covered by the Act. Upon order to show cause, the contestants claimed that since they came within the exemptions specified in section 13, the subpoena was unauthorized, and

Act had peculiar application to those doing business by voluntary contract with the United States Government. . . ." 147 F. (2d) at 660–1.


15. 66 Sup. Ct. 494 (U. S. 1946).
16. Sections 9 and 10 of the Federal Trade Commission Act, 38 Stat. 722–3 (1914), 15 U. S. C. §§ 49, 50 (1940) were made applicable for purposes of hearing and investigation under the Fair Labor Standards Act. 52 Stat. 1065 (1938), 29 U. S. C. § 209 (1940). Section 9 of the Federal Trade Commission Act provides "... [T]he commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation . . . In case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence. Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as contempt thereof." 38 Stat. 722 (1914), 15 U. S. C. § 49 (1940).

17. The Oklahoma Press Publishing Company claimed that its employees were exempt under section 13(a)(2) which provides exemptions to "any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce." 52 Stat. 1067 (1938), 29 U. S. C. § 213(a)(2) (1940). The News Printing Company relied on section 13(a)(1) which exempts "any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator)." 52 Stat. 1067 (1938), 29 U. S. C. § 213(a)(2) (1940).
therefore invalid. On appeal from a denial of enforcement,\textsuperscript{18} the Circuit Court of Appeals for the Third Circuit, on re-examination of the administrator's allegations and the affidavits submitted by the contestant, held that a sufficient showing of "reasonable grounds for making the investigation" had been made out.\textsuperscript{19} The Tenth Circuit Court, affirming a finding for the Administrator after full adjudication below,\textsuperscript{20} indicated that a showing of "probable cause" would have been sufficient.\textsuperscript{21} The Supreme Court affirmed both decisions in a single opinion, Mr. Justice Murphy dissenting.\textsuperscript{22}

Since the majority conceded that the allegations as to coverage which were held a sufficient showing by the Third Circuit would not have established "probable cause," as construed by the Tenth Circuit,\textsuperscript{23} this latter standard of proof was shown to be unnecessary.\textsuperscript{24} Furthermore, the opinion emphasized that these allegations satisfied any possible constitutional requirements as to the necessary showing.\textsuperscript{25} Because, however, the affidavits of the contestant were construed as showing coverage in fact,\textsuperscript{26} the case cannot be considered a square holding that allegations purporting to show coverage, are always a sufficient showing. Nevertheless, it may be fairly inferred that the extensive discussion in the majority opinion will influence the Circuit Courts to minimize the burden cast on the Administrator.

Subsequent to this decision, Congress passed the Administrative Procedure Act\textsuperscript{27} to "settle and regulate the field of Federal Administrative law and procedure"\textsuperscript{28} and to provide standards for judicial review.\textsuperscript{29} Its broad provisions are expressly designed to be read in connection with the particular

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\item[18.] Application of Walling, 49 F. Supp. 659 (D. C. N. J. 1943) (refused to enforce the subpoena).
\item[22.] 66 Sup. Ct. 494, 510 (U. S. 1946).
\item[23.] Id. at 509, n. 53.
\item[24.] The court stated that the administrator's inquiry should not be "limited . . . by . . . forecasts of the probable result of the investigation . . . ." Id. at 509.
\item[25.] "Congress has made no requirements in terms of any showing of 'probable cause'; and, in view of what has already been said, any possible constitutional requirement of that sort was satisfied by the Administrator's showing in this case, including not only the allegations concerning coverage, but also that he was proceeding with his investigation in accordance with the mandate of Congress and that the records sought were relevant to that purpose." \textit{Ibid.}
\item[26.] "Actually . . . the showing here, including the facts supplied by the response was sufficient to establish coverage itself, though that was not required." 66 Sup. Ct. at 509.
\item[28.] \textit{SEN. REP.} No. 752, 79th Cong., 1st Sess. (1945) 1. "Except in a few respects, this is not a measure conferring administrative powers, but is one laying down definitions and stating limitations." \textit{Id.} at 31.
\item[29.] \textit{Id.} at 7, 8. An analysis of the various types of provisions can be found at 8.
\end{itemize}
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statute under which the agency in question is functioning. 53 Section 6(b), dealing with administrative investigations generally, reads in part: "[N]o process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law." 31 Section 6(c) refers to subpoenas specifically, and states that "Upon contest the court shall sustain any such subpoena . . . to the extent that it is found to be in accordance with law. . . ." 32

The precise effect of this Act on the existing legal status of non-coverage as a defense is uncertain. Not only is the language of the applicable sections vague, but examination of their legislative history does not provide any definitive exposition of Congressional intent. Both the Senate Judiciary Committee report 53 and a floor explanation 54 delivered by the chairman of the House subcommittee 55 immediately before passage of the Act by the House 56 indicate a purpose to require some judicial scrutiny of the agency's jurisdiction, but they conflict as to the scope of this inquiry. The Committee report, submitted prior to the Press Publishing decision but subsequent to the Endicott case, interpreted the Act as then drawn to require the court to determine only "that the agency could possibly find that it has jurisdiction." 57 On the other hand, the floor explanation indicates that "coverage" must be fully proved as a condition precedent to enforcement. 58

30. "Nothing in this Act shall be held to . . . limit or repeal additional requirements imposed by statute. . . ." Pub. L. No. 404, 79th Cong., 2d Sess. (June 11, 1946) § 12, 5 U. S. C. A. § 1011 (July 1946 pamphlet). Note the references to statute in §§ 3 (c), 5, 5(c), 9 (a), 5 U. S. C. A. §§ 1002(c), 1004, 1006(c), 1009, 1009(a) (July 1946 pamphlet).
34. 92 Cong. Rec., May 24, 1946, at 5757.
35. Representative Francis Walter of Pennsylvania.
37. "The subsection constitutes a statutory limitation upon the issuance or enforcement of subpoenas in excess of agency authority or jurisdiction. This does not mean, however, that courts should enter into a detailed examination of facts and issues which are committed to agency authority in the first instance, but should, instead, inquire generally into the legal and factual situation and be satisfied that the agency could possibly find that it has jurisdiction." Sen. Rep. No. 752, 79th Cong., 1st Sess. (1945) 20. See H. R. Rep. No. 1980, 79th Cong., 1st Sess. (1945).
38. "Where administrative subpoenas are contested, the court is to inquire into the situation and issue an order of enforcement only so far as the subpoena is found to be in accordance with law. This is a definite statutory right and is applicable to subpoenas of every kind addressed to any person under authority of any law. The effect of the subsection is thus to do more than merely restate the existing constitutional safeguards which in some cases, such as those involving public contractors—see Endicott Johnson Corp. v. Perkins [317 U. S. 501, 507, 509, 510 (1943)], have been held inapplicable. Also, the term 'in accordance
Weight of this latter statement is, however, diminished by the fact that it was made after amendment had deleted from the bill all provisions specifically directing inquiry into jurisdiction. Furthermore, no mention was made of the Press Publishing case which had recently been decided, although the Endicott case was emphatically disapproved.

Whatever restrictions Congress or the Circuit Courts may have sought to impose, a defense of non-coverage is subject to criticism where the agency is granted investigative powers by its governing statute for the purpose of ascertaining statutory violations. In issuing the subpoena, the Administrator is seeking to obtain information which is exclusively in the possession of the contestant and which is essential to a determination of coverage. And since an administrative finding of the factual basis for jurisdiction is an essential part of a final administrative enforcement order, any initial examination of the issue of coverage by a District Court constitutes interference with this fact-finding function, and cannot be reconciled with the ban against preliminary injunctive attack on the agency's jurisdiction.

"with law" does not mean that a subpoena is valid merely because issued with due formality. It means that the legal situation, including the necessary facts, demonstrates that the persons and subject matter to which the subpoena is directed are within the jurisdiction of the agency which has issued the subpoena." 92 Cong. Rec., May 24, 1946, at 5757.

39. The bill as originally introduced stated: "§ 6 (B) . . . No process, requirement of a report, demand for inspection, or other investigative Act or demand shall be enforceable in any manner or for any purpose except (1) as expressly authorized by law (2) within the jurisdiction of the agency . . . § 6(c) . . . Upon any contest of the validity of a subpoena or similar process or demand, the court shall determine all relevant questions of law raised by the parties, including the authority or jurisdiction of the agency. . . ." Hearings before Committee on the Judiciary on H. R. 1203, 79th Cong., 1st Sess. (1945) 112. The bill, as reported by the Senate Committee on the judiciary stated, "§ 6(b) . . . Investigative process is not to be issued or enforced except as authorized by law. . . . § 6(c) . . . Where a party contests a subpoena, the court is to inquire into the situation and, so far as the subpoena is found in accordance with law, issue an order. . . ." Sen. Rep. No. 752, 79th Cong., 1st Sess. (1945) 19, 20.

40. See note 38 supra. The author, apparently, was not aware of the Press Publishing case which did not agree with his interpretation of the Endicott case [see Press Publishing case 66 Sup. Ct. at 506-7 and note 11 supra, and which held that no constitutional safeguards would be violated by the refusal of the District Court to consider the jurisdictional issue. Comments on the floor of the Senate are brief and unilluminating. 92 Cong. Rec., Mar. 12, 1946, at 2198. The Senate later, without debate, concurred in a House amendment to the bill which did not change the language of section 6(b) or 6(c). 92 Cong. Rec., May 27, 1946, at 5921-4.


42. Newport News Co. v. Schauffler, 303 U. S. 54 (1938); Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41 (1938) "So to hold would . . . in effect substitute the District Court for the Board as the tribunal to hear and determine what Congress declared the Board exclusively should hear and determine in the first instance. The contention is at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy is exhausted. That rule has been repeatedly acted on in cases where, as here, the contention is made that
Furthermore, since an interlocutory appeal from a finding of coverage in the administrative proceedings is not permitted, in order to avoid delaying the investigation, a dilatory reviewable hearing at this stage would be anomalous. Nor are all objections obviated by requiring merely a judicial determination of a "possibility" of jurisdiction. Seldom, if ever, will the face of the pleadings reveal an absolute impossibility of coverage, so that the defense would in most cases be unsubstantial unless the introduction of further evidence is permitted. This would afford an additional basis for time-consuming hearings and appeals.

Moreover, denial of this defense would not result in undue prejudice to individual rights, since the question of coverage may be judicially reviewed after promulgation of an enforcement order. Nor, assuming lack of coverage, would the investigation be an illegal search and seizure, inasmuch as the agency is proceeding pursuant to its delegated authority to determine whether or not the particular statute is applicable. Furthermore, this
defense has no special value as a bar to harassment, since that danger is present regardless whether the threatened individual is or is not subject to the Act. A more effective plea would be that the investigation is not for a purpose authorized by statute. Finally, the requirements imposed by uniform recognition of the remaining defenses to enforcement afford adequate protection against other possible abuses of administrative power.

TAXATION OF NET PROFIT INTERESTS IN OIL PROPERTIES*

The relative tax burden to be allotted parties to conveyances of oil properties depends primarily upon whether the transferor retains an “economic interest in the oil in place.” If a transferor divests himself of all “economic interest,” he pays capital gain rates on any revenue returned to him. Such income is ineligible for depletion deductions, inasmuch as these allowances have been drawn in the Press Publishing case. “We think, therefore, that the Courts of Appeals were correct in the view that Congress has authorized the Administrator, rather than the District Courts in the first instance, to determine the question of coverage in the preliminary investigation of possibly existing violations; in doing so to exercise his subpoena power for securing evidence upon that question....” Oklahoma Press Publishing Co. v. Walling, 66 Sup. Ct. 494 (U. S. 1946) at 509. “The result therefore sustains the Administrator’s position that his investigative function, in searching out violations with a view to securing enforcement of the Act, is essentially the same as the grand jury’s... and is governed by the same limitations. These are that he shall not act arbitrarily or in excess of his statutory authority, but this does not mean that his inquiry must be ‘limited... by... forecasts of the probable result of the investigation.’” Id. at 509. “All the records sought were relevant to the authorized inquiry, the purpose of which was to determine two issues, whether petitioners were subject to the Act and, if so, whether they were violating it. These were subjects of investigation authorized by § 11(a), the latter expressly, the former by necessary implication.” Id. at 506.

49. But see Cudahy Packing Co. v. Fleming, 122 F. (2d) 1005 (C. C. A. 8th, 1941), rev’d per curiam on other grounds sub nom Cudahy Packing Co. v. Holland, 315 U. S. 785 (1942). “The motive of an administrative officer in undertaking lawful action within the sphere of his valid powers and duties cannot be made the subject of judicial inquiry.” 122 F. (2d) at 1009.

50. See notes 8 and 48 supra. The evidence required to sustain this defense need not and should not include evidence of coverage, or the lack of it.

51. See notes 3-8 supra.


2. For rules of computation see Int. Rev. Code §§ 111, 113(b) (1940).

3. Oil and gas reserves, like other mineral deposits, are recognized as wasting assets,
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are measured by the extent to which production consumes a capital asset held by the taxpayer. As a corollary, the vendee-transferee is taxed on the entire operating receipts, minus depletion. If, however, an "economic interest" is retained by the transferor, revenue derived therefrom is a proper subject for depletion by him, and is deductible from the taxable income of the transferee. Of the interests typically saved, an oil royalty, or permanent right to participate in gross receipts, was the first deemed by the courts to be an "economic interest." Later, similar treatment was accorded oil payments, i.e., predetermined amounts of oil or cash paid out of production.

Two recent Supreme Court opinions, Kirby Petroleum Company v. Commissioner of Internal Revenue and the subsequent case of Burton-Sutton Oil Company, Incorporated v. Commissioner of Internal Revenue, indicate that henceforth depletion will also be allowed on reserved shares in net profits.

In the Kirby case, an owner-lessee was allowed depletion on both an oil royalty and a 20% share in net profits. The Commissioner had contended that since the taxpayer's right to net profit payments was contingent upon and thus depletion may be taken on income produced by their extraction. Anderson v. Helvering, 310 U.S. 404, 407-9 (1940). Depletion may be measured, at the option of the taxpayer, on either a cost or a percentage basis. Int. Rev. Code § 114(b)(1), (3) (1940). The allowances must be "equitably apportioned between the lessor and lessee." Int. Rev. Code § 23(m) (1940). If depletion is taken on a percentage basis, the taxpayer may recover taxfree, "27½ per centum of the gross income from the property during the taxable year, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property." Int. Rev. Code § 114(b)(3)(1940). For criticism of percentage depletion as too generous, see Comment (1943) 21 TEX. L. REV. 410. For the opposite view, see Id. at 798. The cost method of computing depletion is discussed in a Comment (1934) 43 YALE L. J. 466.

4. This income is excludible as rent or royalty within the meaning of § 114(b)(3) of the Internal Revenue Code.


6. It is immaterial whether the payments are to be made in oil or in cash. Anderson v. Helvering, 310 U.S. 404, 412 (1940).


10. For an excellent article detailing the past confusion concerning taxation of such interests, see Appleman, Taxation of Net Profits from Oil and Gas Properties (1945) 23 TAXES 1009.

11. 326 U.S. 599 (1946), rev'd 148 F. (2d) 80 (C. C. A. 5th, 1945), rev'd 2 T. C. 1258 (1943). Mr. Justice Douglas dissented without opinion. This case is discussed in Appleman, An Analysis of the Kirby and Crawford Decisions (1946) 24 TAXES 376; (1946) 20 TENN. L. REV. 639. (Since the facts of the Kirby case are substantially the same as those in Comm'r of Int. Rev. v. Crawford, with which it was consolidated, discussion will be limited, for the sake of convenience, to the Kirby case).

12. The Court also allowed depletion on a cash bonus received by the taxpayer on the ground it was an advance royalty. See note 33 infra.
profitable marketing of the oil, requisite interest in the oil in place was lacking. But the Court held the proper test was not whether an enforceable right accrued directly upon severance, but whether the revenue to the transferor was attributable solely to extraction and sale of the oil. This result appears sound, for the operator's function in paying marketing expenses seems purely administrative. In other words, "net profits" here merely signified that the transferor reserved 20% of the gross, less a like percentage of production and marketing expenses.

The scope of the Kirby decision is broadened by the Supreme Court's opinion in Burton-Sutton Oil Company, Incorporated v. Commissioner of Internal Revenue. There the taxpayer, an operating company which undertook to return 50% of its net profits to its grantor, was permitted to exclude this sum from its taxable income as rent, and, correlatively, depletion was permitted the grantor. By so holding, the Court repudiated implications of a dictum in the Kirby opinion to the effect that a net profit interest, absent an oil royalty, would not support depletion. Thus, a more realistic

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13. This argument was accepted by the majority of the Fifth Circuit. Since this interest was lacking, it reasoned, income from a net profit interest was payment of purchase price. Comm'r of Int. Rev. v. Kirby Petroleum Co., 148 F. (2d) 80, 82 (C. C. A. 5th, 1945). The following cases, which were decided largely on this basis, are probably no longer law: Quintana Petroleum Co. v. Comm'r of Int. Rev., 143 F. (2d) 588 (C. C. A. 5th, 1944); Blankenship v. U. S., 95 F. (2d) 507 (C. C. A. 5th, 1938); Euleon Jock Gracey, 5 T. C. 296 (1945). Cf. Sunray Oil Co. v. Comm'r of Int. Rev., 147 F. (2d) 962, 966 (C. C. A. 10th, 1945). In 1932, the Board of Tax Appeals allowed depletion on a net profit interest coupled with an oil royalty. W. S. Green, 26 B. T. A. 1017 (1932), which result was acquiesced in by the Commissioner, XII-1 Cum. Bull. 6 (1933). Ten years later, however, acquiescence was revoked. 1942-1 Cum. Bull. 23.


15. See the remarks of Circuit Judge Hutcheson in his dissent in the Kirby case, 148 F. (2d) 80, 85 (1945). The same argument would seem equally forceful when applied to Burton-Sutton Oil Co., Inc. v. Comm'r of Int. Rev., note 17 infra. In that case Mr. Justice Reed described the "net" agreement as follows, "The contract between Gulf and Sutton required the grantee-operator, who is now this taxpayer, to pay to the grantor, Gulf, 50% of the proceeds of the oil produced and sold from the land, deducting from the proceeds certain itemized expenses of the producer. Those expenses are so general in character that it may be said fairly that Gulf was to receive 50% of the net from operations." 66 Sup. Ct. 861, 863 (U. S. 1946).

16. 66 Sup. Ct. 861 (U. S. 1946) rev'g, 150 F. (2d) 621 (C. C. A. 5th, 1945) aff'g, 3 T. C. 1187 (1944). Messrs. Justices Black and Douglas dissented. Mr. Justice Frankfurter wrote a concurring opinion, expressing the view that the doctrine of Dobson v. Commissioner, "lodging practical finality in a Tax Court decision unless it invokes a 'clear-cut mistake of law,' " should have been applied in the instant case. 66 Sup. Ct. 861, 868 (U. S. 1946).


18. Since the original lessor retained an underlying royalty and the original lessee an overriding royalty, one possible construction of the Burton-Sutton case is that it merely reiterates the Kirby doctrine that depletion may be had on net profit interests coupled with oil royalties. But the reservations of these prior parties seem not to have affected the Court's holding, viz., "We do not agree with the Government that ownership of a royalty or
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tax apportionment is achieved, for the revenue at issue did in fact reflect reduction in value of the capital asset. Moreover, to allow a grantor who enjoys 50% of the net income, capital gain rates thereon, while subjecting the operator, who acts merely as a conduit for the payments, to higher rates on 100%, would be most inequitable. A further extension of the Kirby doctrine is the implied rejection in the Burton-Sutton decision of the former practice of denying depletion to purported assignors. Although use of the word "assignment" has sometimes relegated a transfer automatically to the category of sale, the Court here rested its conclusion on the nature of the transferor's share in receipts and the extent of his reversionary interest, rather than on technical refinements of title.

It is clear, however, from the Court's failure to repudiate the prior landmark cases of Helvering v. O'Donnell and Helvering v. Elbe Oil Land Development Company, that depletion deductions may still be unavailable where a) the recipient is a stranger to the lease, or b) the conveyance is construed as a sale. The former limitation is illustrated by the O'Donnell case, where the taxpayer, who received a net profit interest as consideration for other economic interest in addition to the right to net profits is essential to make the possessor of a right to a share of the net profit the owner of an economic interest in the oil in place.” Burton-Sutton Oil Co., Inc. v. Comm'r of Int. Rev., 66 Sup. Ct. 861, 865 (U. S. 1946); cf. Comm'r of Int. Rev. v. Felix Oil Co., 144 F. (2d) 276 (C. C. A. 9th, 1944) (owner-lessee); A. B. Innis, 4 C. C. H. 1945 Fed. Tax Serv. Dec. 14, 667 (T C mem.) (sublessor).

19. Quintana Petroleum Co. v. Comm'r of Int. Rev., 143 F. (2d) 588 (C. C. A. 5th, 1944); Estate of Japhet, 3 T. C. 86 (1944); Marrs McLean, 41 B. T. A. 565 (1940) aff'd, 120 F. (2d) 942 (C. C. A. 5th, 1941). The last named case seems a particularly graphic example of the use of words as formulae. See Appleman, supra note 11, at 1018-9.

20. The assignment was "made subject to the following conditions," among which were: 1. The property was to revert in the event drilling was not begun within thirty days. 2. The lease was to be reassigned before its termination. 3. The "assignor" reserved an option to purchase all oil "during the life of this agreement." 4. The "assignor" reserved a right of entry upon the land to produce sulphur. The contract in issue is set out in detail in Burton-Sutton Oil Co., Inc., 3 T. C. 1187, 1189-90 (1944); cf. Kirby Petroleum Co. v. Comm'r of Int. Rev., 326 U. S. 599, 606 (1946); Felix Oil Co. v. Comm'r of Int. Rev., 144 F. (2d) 276 (C. C. A. 9th, 1944); A. B. Ennis, 4 C. C. H. 1945 Fed. Tax Serv. Dec. 14, 667 (T C mem.).

21. While its applicability to assignments has heretofore been uncertain, this doctrine is by no means novel as a general proposition. See Anderson v. Helvering, 310 U. S. 404, 411 (1940); cf. Thomas v. Perkins, 301 U. S. 655, 657, 659 (1937) (assignor held to retain economic interest even though the granting clause read, "We . . . do hereby bargain, sell, transfer, assign, and convey all our rights, title, and interest in and to said leases and rights hereunder."). Courts early held that technical title to the oil in place was not necessarily controlling for tax purposes. Burnet v. Harmel, 287 U. S. 103 (1932); Palmer v. Bender, 287 U. S. 551, 556-7 (1933); Alexander v. Continental Petroleum Co., 63 F. (2d) 927 (C. C. A. 10th, 1933).

22. 303 U. S. 370 (1938).

23. 303 U. S. 372 (1938). The Elbe and O'Donnell cases are discussed in a Comment (1938) 51 HARV. L. REV. 1424; Traynor, Tax Decisions of the Supreme Court, 1937 Term (1938) 33 ILL. L. REV. 371, 392. For a view that the Elbe and O'Donnell cases are no longer good law, see (1946) 20 TULANE L. REV. 639, 644.
the sale of his stock in a lessee corporation, was refused depletion on the ground that, because of remoteness, he held a mere "economic advantage." 24

Similarly, depletion is withheld on percentage interests derived from piping 25 and other service contracts. 26 One rationale advanced in these cases, that the recipient has no right until after severance, 27 is weakened by the principal cases. Nevertheless, courts may continue to enforce this restriction on the ground that a contrary ruling would aggravate the already burdensome task of administering depletion. 28

Although net profit payments were not directly at issue in the Elbe case, that decision remains authority for the second qualification that retention of a net profit interest does not affect an instrument otherwise a sale. 29 There depletion was denied on large sums of cash, payment of which by the operator was a condition precedent to accrual of the transferor's net profit right. In the light of the instant cases, however, the Elbe doctrine will probably be narrowly construed. Presumably, any instrument in which a naked net profit interest is retained unconditionally will be treated as a lease. 30


25. Helvering v. Bankline Oil Co., 303 U. S. 362 (1938) rev'd, 90 F. (2d) 899 (C. A. 9th, 1937); 47 YALE L. J. 278. The taxpayer, a contract purchaser of casinghead gas who received a royalty share in exchange for piping services, was denied depletion.


27. See Donald P. Oak, 46 B. T. A. 265, 273 (1942). Taxpayers whose interests are derived from services rendered are held to have "a mere contractual right." Schermerhorn Oil Corp., 46 B. T. A. 151, 159 (1942).


29. Factors supporting the position that the Elbe transfer contemplated a sale are: 1. The contract expressly stated the parties' intention to be that the grantor retain no interest. 2. The cash payments were due absolutely. 3. The size ($2,000,000) of these payments indicates they were the principal consideration for the transfer. 4. The grantor, which operated the property prior to the transfer, sold its equipment together with the operating privileges. 5. The property was to revert only in case of abandonment. Compare with the provisions of the Burton-Sutton transfer, supra note 21.

30. Theoretically, reservation of a naked net profit interest does not necessarily mark
The kindred problem, however, of whether depletion will be allowed on a cash bonus coupled with a net profit interest, remains unsettled. Cash bonuses, unlike oil payments, need not be measured by production and, in fact, are often paid even before drilling is commenced. Nevertheless, when joined with a permanent interest in gross receipts, they are depletable as advance royalties. By eliminating the distinction between gross and net shares, the Burton-Sutton decision presages similar treatment for cash bonuses combined with net interests. While this extension is logically unobjectionable, the entire practice of allowing depletion on these bonuses seems anomalous, for although the government may recoup the allowances if operation is not timely begun, these payments still reflect, at best, only anticipatory production.

Since depletion is permitted on advance cash bonuses, however, there seems no basis for the present policy of withholding this privilege from either gross or net oil interests secured by the personal credit of a grantee. While income from an operator’s pocket or from sale of the leases transferred in nowise consumes the capital asset, a transferor should not be penalized where there is no resort to the guarantee, merely because payment may come from a source other than extraction. Such unrealistic allocation of depletion deductions can also work undue hardship on operators, who must thus account for income they never enjoy. Moreover, the problem of recoupment need not arise here, for depletion privileges can be withheld until production is begun.

a transfer as a lease. It seems likely, however, that henceforth depletion will be allowed on income from such interests, irrespective of the form of conveyance used. Cf. Procter & Gamble Mfg. Co., 5 C. H. Fed. Tax Serv. (Dec. 14 1945) 998 (TC mem.).

31. See Marrs McLean, 41 B. T. A. 565 (1940) aff’d, 120 F. (2d) 942 (C. C. A. 5th, 1941); Comm’r of Int. Rev. v. Felix Oil Co., 144 F. (2d) 276 (C. C. A. 9th, 1944); Blankenship v. United States, 95 F. (2d) 507 (C. C. A. 5th, 1938); Appleman, supra note 12, at 379-80. The provisions of oil conveyances are separable. Comm’r of Int. Rev. v. Fleming, 82 F. (2d) 324, 327 (C. C. A. 5th, 1936). In the Fleming case, the grantor reserved both a cash bonus and an oil payment. The Court held income from the latter interest depletable, as ordinary income from a lease, but held the bonus to be part of sale price, and therefore non-depletable.


34. The payee of an advance bonus is allowed depletion thereon, “but no deduction for depletion by such payee shall be claimed or allowed in any subsequent year on account of the extraction or removal in such year of any mineral so paid for in advance and for which deduction has once been made.” Treas. Reg. 111, § 29.23(m)-10(b) (1943). See G. C. M. 22730, 1941-1 Cum. Bull. 214; Murphy Oil Co. v. Burnet, 287 U. S. 299 (1932).


37. See p. 173 supra.
Although the distinctions between the transfers in the principal cases and the Elbe and O'Donnell instruments may not be "held in the mind longer than it takes to state them," they are nonetheless valid. Considering the manifold complexities of oil conveyances and the marginal nature of these cases, the Court seems to have achieved a delicate balance between predictability and flexibility.

**ORIGIN OF THE PHRASE, "INTENDED TO TAKE EFFECT IN POSSESSION OR ENJOYMENT AT OR AFTER . . . DEATH" (SECTION 811(c), INTERNAL REVENUE CODE)**

The words "intended to take effect in possession or enjoyment at or after . . . death," appearing in Section 811(c) of the Internal Revenue Code and referring to gifts to be included in the value of the gross estate of a decedent, may be traced to a Pennsylvania statute taxing collateral inheritances and enacted in 1826.1

This particular phrase appears to have no earlier antecedents, although death duties were imposed in England as early as 1694.2 The Probate Duty of that year, imposing a stamp tax on executors' and administrators' receipts, was succeeded in 1780 by a Legacy Duty.3 The latter, at first merely a replica of the old stamp tax, was subsequently revised to impose a duty on personal property actually devised to legatees or passing by intestacy.4 Between 1780 and 1815, nine revisions of the Legacy Duty6 were made, but neither these nor any of the previous statutes contained language akin to the phrase under discussion.

The next relevant English statute, the Succession Duty, taxing the transfer of interests in realty, was not enacted until 1853,5 twenty-seven years after the passage of the Pennsylvania Act.

In this country, prior to 1826, Congress enacted a legacy tax7 which was

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2. 5 & 6 WM. & MARY, c. 21; see Knowlton v. Moore, 178 U. S. 41, 48 (1899).
3. 20 GEO. III, c. 28.
4. 36 GEO. III, c. 52 (1796); see HANSON, DEATH DUTIES (6th ed. 1920) 29.
5. 23 GEO. III, c. 58 (1783); 29 GEO. III, c. 51 (1789); 36 GEO. III, c. 52 (1796); 37 GEO. III, c. 135 (1797); 39 GEO. III, c. 73 (1799); 44 GEO. III, c. 98 (1804); 45 GEO. III, c. 28 (1805); 48 GEO. III, c. 149 (1808); 55 GEO. III, c. 184 (1815); see HANSON, op. cit. supra note 4, at 46–7.
6. 16 & 17 VICT., c. 51. This Act also taxed transfers of personal property not subject to legacy duty but within the jurisdiction of British courts.
7. 1 Stat. 527 (1797).
for the most part the same as the English Legacy Duty of 1780. The requisite language is not therefore to be found in this federal statute.

Chapter 72 of the Pennsylvania Act provides in part:

"An Act Relating to Collateral Inheritances.

"Sect. 1. BE it enacted by the Senate and House of Representa-
tives of the Commonwealth of Pennsylvania in General Assembly
met and it is hereby enacted by the authority of the same, That
from and after the first day of May next all estates, real, personal,
and mixed, of every kind whatsoever, passing from any person who
may die seized or possessed of such estate, being within this Com-
monwealth, either by will or under the intestate laws thereof, or
any part of such estate or estates or interest therein, transferred by
deed, grant, bargain or sale, made or intended to take effect, in
possession or enjoyment after the death of the grantor or bargainor
to any person or persons, or to bodies politic or corporate, in trust or
otherwise, other than to or for the use of father, mother, husband,
wife, children and lineal descendants born in lawful wedlock, shall
be and they are hereby made subject to a tax or duty of two dollars
and fifty cents on every hundred dollars of the clear value of such
estate or estates, and at and after the same rate for any less amount,
to be paid to the use of the Commonwealth, and all executors, and
administrators, and their sureties, shall only be discharged from
liability for the amount of any and all such duties on estates, the
settlement of which they may be charged with, by having paid the
same over for the use aforesaid, as hereinafter directed: provided,
That no estate which may be valued at a less sum than two hun-
dred and fifty dollars shall be subject to the duty or tax." [Empha-
sis supplied.]

It will be noted that the only difference between the language in italics
above and the phrase appearing in Section 811(c) is the insertion in the
latter of the words "at or" and the slight changes necessitated by the omis-
sion of "of the grantor or bargainor."

Although no direct information is procurable as to the precise genesis of
the whole phrase, fairly sound conclusions may be drawn from the con-
temporary record of proceedings in the Pennsylvania House of Representa-
tives. Under the date, March 20, 1826, the Journal of the House of Repre-
sentatives records:

"The bill No. 443, entitled 'An act relating to collateral inheri-
tances,' was read a second time. And the first section being under
consideration, a motion was made by Mr. Roberts and Mr. Clarke,
to amend the same by inserting after 'thereof' in the sixth line,
these words, 'or by deed, grant, bargain, or sale made, to take effect
after the death of the grantor or bargainor.' And on the question
'Will the House agree so to amend?'
"... [T]he question was determined in the negative."
"A motion was then made by Mr. Ellis and Mr. M'Reynolds to
amend the section by striking therefrom these words 'estates real, personal and mixed,' and inserting in lieu thereof these words, 'personal estates.'

"Which was disagreed to.

"A motion was then made by Mr. Petrikin and Mr. G. Bell, they being in the majority, to reconsider the vote given on the amendment, viz. to insert after 'thereof' in the 6th line of the first section, these words, 'or by deed, grant, bargain or sale made, to take effect after the death of the grantor or bargainor.' And on the question

"Will the House agree to re-consider said vote?

"... So the question was determined in the affirmative.

"The amendment being again under consideration, a motion was made by Mr. Petrikin and Mr. Roberts, to amend the same so as to read as follows, viz. 'or any part of such estate or estates, or interest therein transferred by deed, grant, bargain or sale made or intended to take effect, in possession, after the death of the grantor or bargainor.'

"Which was agreed to.

"And the amendment as amended was agreed to." 8 [Emphasis supplied.]

After a discussion of several additional amendments not here relevant, the Journal continues:

"A motion was then made by Mr. Blythe and Mr. Adams, further to amend the section, by inserting in the 6th line after 'possession,' the words, 'or enjoyment.'

"Which was agreed to." 9

The sequential addition of the words "intended," "possession" and "or enjoyment" to the original phrase "to take effect after the death of the grantor or bargainor" strongly indicates that the language as finally approved had no earlier origin.

Following the lead of Pennsylvania, Congress enacted in 1862 a tax on legacies and distributive shares of personal property descending to collaterals. 10

Section 111 of the act provides:

"AND BE IT FURTHER ENACTED, That any person or persons having in charge or trust, as administrators, executors, or trustees of any legacies or distributive shares arising from personal property, of any kind whatsoever, where the whole amount of such personal property, as aforesaid, shall exceed the sum of one thousand dollars in actual value, passing from any person who may die after the passage of this act possessed of such property, either

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9. Id. at 617.
by will or by the intestate laws of any State or Territory, or any
part of such property or interest therein, transferred by deed, grant,
bargain, sale, or gift, made or intended to take effect in possession or
enjoyment after the death of the grantor or bargainer, to any person or
persons, or to any body or bodies politic or corporate, in trust or
otherwise, shall be, and hereby are, made subject to a duty or tax,
to be paid to the United States, as follows, that is to say:” [Em-
phasis supplied.]

Precisely the same language occurs in Section 124 of the Revenue Act of
186411 and Section 29 of the War Revenue Act of 1898,12 both of which
statutes similarly taxed legacies to collaterals.
The words “at or” occurring after “enjoyment” appeared for the first
time in the New York tax law of 1892, which imposed a tax on transfers of
personal property to near relatives as well as to collaterals.13 Section 1
refers to transfers

“... made by a resident or by a non-resident, when such
non-resident’s property is within this state, by deed, grant, bar-
gain, sale or gift made in contemplation of the death of the grantor,
vender or donor, or intended to take effect, in possession or enjoy-
ment, at or after such death.” [Emphasis supplied.]

The added words were finally incorporated into the first federal estate
tax law, the Revenue Act of 1916, of which Section 202 provides in part for
gifts made

“in contemplation of or intended to take effect in possession or en-
joyment at or after his [the decedent’s] death... .” 14 [Emphasis
supplied.]

This is the exact statutory language employed in Section 811(c) of the
present Internal Revenue Code.

In conclusion, mention may be made of the fact that substantially the
same over-all language appearing in Section 1 of the Pennsylvania Statute
of 1826 was employed in the New York Collateral Inheritance Tax Law of
1885.15 It persisted until 1892, unchanged by the amendments of 1887 16
and 1891,17 except for the inclusion in the latter of the words “in contempla-
tion of death.”

Gertrude C. K. Leighton†

13. N. Y. Laws 1892, c. 399.
15. N. Y. Laws, 1885, c. 483, § 1.
† Note editor, Yale L. J. 1944-5.