

THE BUSINESS OF THE SUPREME COURT OF THE
UNITED STATES—A STUDY IN THE
FEDERAL JUDICIAL SYSTEM

V. FROM THE JUDICIAL CODE TO THE POST-WAR JUDICIARY ACTS

I

PERHAPS the decisive factor in the history of the Supreme Court is its progressive contraction of jurisdiction. This tendency has been particularly significant since the Civil War. In contrast with the vast expansion of the bounds of the inferior federal courts, the scope of review by the Supreme Court has been steadily narrowed. Familiar devices for dealing with growth in business by adding to personnel have been eschewed. The serious proposals made from time to time to increase the membership of the Court, to add temporary judges, to break up an enlarged Court into divisions, did not prevail. There are intrinsic limits to the size of a court if it is to be a coherent instrument for the dispatch of business and at the same time to observe the needs of consultation and deliberation. The effective conditions for insuring the quality of judicial output of the Supreme Court have been maintained. Human limitations have been respected. Confidence in the competence of the Court has not been won by the presence of an occasional man of genius. The explanation lies rather in the capacity of the Court to dispose adequately the tasks committed to it. Despite the country's phenomenal increase in population and wealth and the resulting extension of governmental activities, the duties of the Supreme Court have been kept within limits appropriate for nine judges who are not supermen. On the other hand, Congress, the executive departments, the commissions, and the lower federal courts have always had duties placed upon them which disregarded the limits of strength and capacity. As a result paper duties are neglected; incumbents of high position perform in name only; they are administrators without time to know what they are doing, or to think how to do it.

At times Congress has unduly delayed in narrowing the ambit of the Supreme Court's duties. In the end, however, legislation has been forthcoming to keep the Court sufficiently compact and the litigation within its compass. In a few instances, the Court, by the application of laws of doubtful meaning, has let down the bar to needless litigation. Against the views of Chief Justice Waite and Mr. Justice Miller it held in the *Pacific Railroad Removal Cases*,¹ that every case concerning a federal corporation was necessarily a case "arising under the Constitution or laws of the United States" within the meaning of the Removal Act of March 3, 1875, and thereby unduly burdened its own dockets as well as those of the lower federal courts.² Again, out of the doubtful provisions of the Circuit Courts of Appeals Act, the Court, over the protest of Chief Justice Fuller and Mr. Justice Brown, evolved a system of double appeals.³ Finally—to anticipate the Act of September 6, 1916⁴—in considering when "is drawn in question the validity of a statute," the Court narrowly construed the relief intended by that Act, against the dissent of Mr. Justice Brandeis, concurred in by Mr. Justice Clarke.⁵

Very seldom, indeed, since the original Judiciary Act, has Congress broadened the base of resort to the Supreme Court. Judge Humphrey's decision in the *Beef Trust Case* led to the extension of jurisdiction involved in the Criminal Appeals Act of 1907.⁶ Section 240 of the Judicial Code⁷ further broadened the government's opportunity for appeal in criminal cases by allowing the United States to bring up criminal cases on writ of *certiorari* after reversal of a judgment of conviction in a circuit court of appeals.⁸ The next enlargement of the Court's scope of

¹ 115 U. S. 1 (1885).

² Felix Frankfurter, "The Business of the Supreme Court of the United States," 39 HARV. L. REV. 35, 48.

³ *Spreckles Sugar Refining Co. v. McClain*, 192 U. S. 397 (1904). See Charles W. Bunn, "Review in the Supreme Court," 35 HARV. L. REV. 902.

⁴ 39 STAT. 726, c. 448, § 2.

⁵ *Dahnke-Walker Co. v. Bondurant*, 257 U. S. 282 (1921).

⁶ Felix Frankfurter, "The Business of the Supreme Court of the United States," 39 HARV. L. REV. 325, 337 *et seq.*

⁷ See *United States v. Gulf Refining Co.*, 268 U. S. 542 (1925). For a more recent exercise of this jurisdiction, see *United States v. Daugherty*, 46 Sup. Ct. Rep. 156 (1926).

⁸ This constituted a legislative modification of *United States v. Dickinson*, 213 U. S. 92 (1909), following the grounds taken in *United States v. Sanges*, 144 U. S.

review was again due to profound public concern over a particular case—*Ives v. South Buffalo Railway Company*,⁹ this time a decision of the New York Court of Appeals. The outcome was a change in the policy of review of state courts by the Supreme Court as it had prevailed since the Union was established.

A vital chapter of American history derives from the famous twenty-fifth section of the Judiciary Act of 1789.¹⁰ The story of its survival against legislative and judicial attacks is to no small degree a narrative of the conflict between national and state forces.¹¹ *Marbury v. Madison*¹² has unduly overshadowed *Cohens v. Virginia*.¹³ For one hundred and twenty-five years this jurisdiction remained, in effect, as it was molded by the First Congress. Even the powerful centralizing impulses of the Civil War left it unchanged. A revision of the twenty-fifth section by the Judiciary Act of 1867,¹⁴ however, furnished an opportunity for its expansion. From the omission in the Act of 1867 of the restrictive clause of the twenty-fifth section whereby, in reviews from the state courts, "no other error shall be assigned or regarded as a ground of reversal . . . than such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute," it was urged¹⁵ that the jurisdiction of the Supreme Court was no longer "limited to the correction of errors relating solely to Federal

310 (1892). The need for legislation to correct the restrictions against review by the Government of a reversal of conviction was first brought to the attention of Congress by Attorney General Bonaparte, REP. ATTY. GEN. FOR 1908, 4-5, renewed by Attorney General Wickersham the next year, REP. ATTY. GEN. FOR 1909, 20.

⁹ 201 N. Y. 271 (1911).

¹⁰ 1 STAT. 73, 85-7.

¹¹ See Charles Warren, "Legislative and Judicial Attacks on the Supreme Court of the United States," 47 AMER. L. REV. 1.

¹² 1 Cranch (U. S.) 137 (1803).

¹³ 6 Wheat. (U. S.) 264 (1821).

¹⁴ 14 STAT. 385, c. 28, § 2. As amended by this Act it found its way as Section 709 into the Revised Statutes. A further amendment was made by the Act of Feb. 15, 1875, 18 STAT. 318, permitting the Court at its discretion to award execution or to remand the case to the court from which it was removed by the writ of error.

¹⁵ Particularly in a powerful brief submitted by Benjamin R. Curtis as *amicus curiae*. CURTIS, JURISDICTION OF THE UNITED STATES COURTS, 2 ed., 46 *et seq.* The brief is printed in full *ibid.* 59. Substantial extracts will be found in *Murdock v. Memphis*, 20 Wall. (U. S.) 590, 602 (1874).

law,"¹⁶ but extended to all questions in the record, even those of exclusive state concern. Three Justices acceded to the argument.¹⁷ But the Court, in *Murdock v. Memphis*,¹⁸ refused to impute to Congress such a "radical and hazardous change of a policy vital in its essential nature to the independence of the State courts."¹⁹ It thereby also saved itself from a heavy increase in what is perhaps the most obscure field for its adjudications, namely, the interpretation of local statutes and local practices.

The twenty-fifth section of the Judiciary Act provided for writs of error to state courts only when a state court had denied a claim of federal right.²⁰ Fear of disobedience of national authority by state judiciaries determined this legislation. The framers of the Judiciary Act guarded against the danger of state

¹⁶ *Murdock v. Memphis*, 20 Wall. (U. S.) 590, 630 (1874).

¹⁷ Clifford, Swayne, and Bradley, JJ. Waite, C. J., having been appointed after the argument and re-argument of the case, took no part in the judgment.

¹⁸ 20 Wall. (U. S.) 590 (1875).

¹⁹ *Ibid.*, at 630.

²⁰ The material portion of the twenty-fifth section reads: "That a final judgment . . . in the highest court . . . of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity, or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error. . . ." 1 STAT. 73, 85-6.

Cases in which the Supreme Court refused jurisdiction on the ground that the federal right had been upheld and not denied in the state courts are not numerous. See *Gorden v. Caldcleugh*, 3 Cranch (U. S.) 268 (1806); *Montgomery v. Hernandez*, 12 Wheat. (U. S.) 129 (1827); *Commonwealth Bank of Kentucky v. Griffith*, 14 Pet. (U. S.) 56 (1840); *Fulton v. Morgan*, 16 Pet. (U. S.) 149 (1842); *Walker v. Taylor*, 5 How. (U. S.) 64 (1847); *Strader v. Baldwin*, 9 How. (U. S.) 261 (1850); *Linton v. Stanton*, 12 How. (U. S.) 423 (1851); *Burke v. Gaines*, 19 How. (U. S.) 388 (1856); *Reddall v. Bryan*, 24 How. (U. S.) 420 (1860); *Roosevelt v. Myer*, 1 Wall. (U. S.) 512 (1863); *Ryan v. Thomas*, 4 Wall. (U. S.) 603 (1866); *Missouri v. Andriano*, 138 U. S. 496 (1891); *Jersey City & Bergen R. R. v. Morgan*, 160 U. S. 288 (1895); *De Lamar's Gold Mining Co. v. Nesbitt*, 177 U. S. 523 (1900); *Kizer v. Texarkana & Ft. Smith Ry.*, 179 U. S. 199 (1900); *Baker v. Baldwin*, 187 U. S. 61 (1902).

judges whose inclination towards support of action by their "sovereign states" would lead them to be unmindful of the national interest as expressed in the Constitution, laws and treaties of the United States.²¹ The constitutional litigation of the first half of the nineteenth century does not prove these fears to have been ill-founded.²²

Though politically of great moment these cases prior to the Civil War were not very numerous. After 1870, however, the legislative momentum became accelerated. In turn the new protection of the Fourteenth Amendment, with its "convenient vagueness,"²³ was invoked against the various regulatory laws. Judicial development of the Fourteenth Amendment put claims of federal right within easy reach of astute counsel in the state courts. Litigation was multiplied by the heavy legislative output, concurring with the opportunities afforded by the Fourteenth Amendment. The twenty-fifth section, in its modern phrasing, became one of the most active sources of Supreme Court business. With the twentieth century came the steady rise in the flood of social legislation. But in 1905 it received a sharp check by *Lochner v. New York*.²⁴ State courts added their force to the ensuing ebb.²⁵ The broad language of Mr. Justice Peckham in *Allgeyer v. Louisiana*²⁶ and later in the *Lochner* case was un-

²¹ The historic consideration has thus been expressed by the Supreme Court: "The object of the present judiciary act was not to give a right of review wherever the validity of an act of Congress was drawn in question, but to prevent courts of the several States from impairing or frittering away the authority of the federal government, by giving a construction to its statutes adverse to such authority." *Missouri v. Andriano*, 138 U. S. 496, 499 (1891).

²² See, for instance, the fate of the Kentucky Court of Appeals which, against the strong desires of the community, in *Blair v. Williams*, 4 Litt. (Ky.) 35 (1823), held state laws staying the levy of executions and imposing restrictions upon execution sales to be unconstitutional. Efforts at impeachment followed. See MCELROY, *KENTUCKY IN THE NATION'S HISTORY*, 377, 387 *et seq.* This led to an attempt to broaden the right of appeal to the Supreme Court. A bill was introduced by Senator Talbot, of Kentucky, permitting parties in suits involving a federal question to remove them prior to trial to the federal courts. The bill, however, was not pressed. See Charles Warren, "Legislative and Judicial Attacks on the Supreme Court of the United States," 47 *AMER. L. REV.* 1, 528.

²³ Charles M. Hough, "Due Process of Law — Today," 32 *HARV. L. REV.* 218.

²⁴ 198 U. S. 45 (1905).

²⁵ For a summary of the trend of decision in the state courts at this period, see Roscoe Pound, "Liberty of Contract," 18 *YALE L. J.* 454.

²⁶ 165 U. S. 578 (1897).

critically accepted, and constitutional adjudications drew heavily on loose dicta.²⁷ Courts inculcated with the doctrine of *Matter of Jacobs*²⁸ found vindication in the *Lochner* case. In 1908, however, application of a new technique²⁹ in constitutional arguments wherein an appreciation of facts is the decisive element,³⁰ brought forth *Muller v. Oregon*³¹ and with it the hope of a restricted direction to the Fourteenth Amendment. The philosophy behind the constitutional outlook of Mr. Justice Holmes, insofar as the generalities of due process were involved, appeared to be vindicated by demonstration in detail. His warnings that "a constitution is not intended to embody a particular economic theory"³² and that the "accident" of the Court "finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States"³³ seemed at last to have been heeded, in the regard which was paid in *Muller v. Oregon* to the realities behind industrial legislation.³⁴

²⁷ See Charles Warren, "The New Liberty under the Fourteenth Amendment," 39 HARV. L. REV. 431, 448, 449.

²⁸ 98 N. Y. 98 (1885).

²⁹ The application of the inductive method to constitutional cases, characterized later by Mr. Justice McKenna as an appeal to "a judgment from experience as against a judgment from speculation." *Tanner v. Little*, 240 U. S. 369, 386 (1916). In the *Muller* case Mr. Justice Brewer thus indicated the significance of the new type of argument and brief first introduced by Mr. Brandeis appearing in this case for Oregon: "In patent cases counsel are apt to open the argument with a discussion of the state of the art. It may not be amiss, in the present case, before examining the constitutional question, to notice the course of legislation as well as expressions of opinion from other than judicial sources. In the brief filed by Mr. Louis D. Brandeis, for the defendant in error, is a very copious collection of all these matters, an epitome of which is found in the margin . . . when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that truth, a widespread and long continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge." 208 U. S. 412, 419, 420-21 (1908).

³⁰ See Felix Frankfurter, "Hours of Labor and Realism in Constitutional Law," 29 HARV. L. REV. 353, and Henry Wolf Bickl , "Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action," 38 HARV. L. REV. 6.

³¹ 208 U. S. 412 (1908).

³² *Lochner v. New York*, 198 U. S. 45, 75 (1905).

³³ *Ibid.*

³⁴ See, for instance, the significance which the present Chief Justice attaches to the basis which underlies *Muller v. Oregon* and the series of cases which followed

Into this atmosphere of expectancy workmen's compensation legislation was ushered. Its tried experience in other industrial countries, the long, careful investigations which preceded enactment, the thorough discrediting of common-law doctrines of master and servant when applied to modern industry, furnished basis for the hope that the broad outlines of the Constitution did not exclude the adaptation of legislation to modern industrial necessities. But the economic and social considerations which prevailed with the Supreme Court in 1908 were deemed irrelevant by the New York Court of Appeals in 1911.³⁵ In *Ives v. South Buffalo Railway Company* that court unanimously defeated the first American workmen's compensation law by finding it "a deprivation of liberty and property under the Federal and State Constitutions."³⁶

The *Ives* decision aroused the fiercest criticism. Theodore

it "which may be said to have established a rule of decision." *Adkins v. Children's Hospital*, 261 U. S. 525, 563, 566 (1923). Both the Chief Justice and Mr. Justice Holmes in their dissenting opinions in the *Adkins* case assumed that this series of cases, ending with *Bunting v. Oregon*, 243 U. S. 426 (1917), had worn away the authority of the *Lochner* case. "I have always supposed," the Chief Justice put it, "that the *Lochner Case* was thus overruled *sub silentio*." 261 U. S. at 564. And Mr. Justice Holmes "had supposed . . . that *Lochner v. New York*, 198 U. S. 45, would be allowed a deserved repose." *Ibid.*, at 570.

³⁵ "In arriving at this conclusion we do not overlook the cogent economic and sociological arguments which are urged in support of the statute. There can be no doubt as to the theory of this law. It is based upon the proposition that the inherent risks of an employment should in justice be placed upon the shoulders of the employer, who can protect himself against loss by insurance and by such an addition to the price of his wares as to cast the burden ultimately upon the consumer; that indemnity to an injured employee should be as much a charge upon the business as the cost of replacing or repairing disabled or defective machinery, appliances or tools; that, under our present system, the loss falls immediately upon the employee who is almost invariably unable to bear it, and ultimately upon the community which is taxed for the support of the indigent; and that our present system is uncertain, unscientific and wasteful, and fosters a spirit of antagonism between employer and employee which it is to the interests of the state to remove. . . . If such economic and sociologic arguments as are here advanced in support of this statute can be allowed to subvert the fundamental idea of property, then there is no private right entirely safe, because there is no limitation upon the absolute discretion of legislatures, and the guarantees of the Constitution are a mere waste of words." *Ives v. South Buffalo Ry.*, 201 N. Y. 271, 294-95 (1911).

³⁶ 201 N. Y. 271, 294 (1911). For the further history of New York workmen's compensation legislation, see *N. Y. Cent. R. R. v. White*, 243 U. S. 188, 195-96 (1917).

Roosevelt led the critics in characteristic language,³⁷ but even such sober organs as the *New York Evening Post* and the *Springfield Republican* uttered vigorous speech.³⁸ Nor was the legal profession, on the whole, less outraged.³⁹ A notable protest of "teachers of Constitutional law in some of the principal law schools and universities of the country, who have devoted years of study to the principles of American Constitutions" included the names of Andrew A. Bruce, Ernst Freund, Frank J. Goodnow, James Parker Hall, and Roscoe Pound.⁴⁰

The adverse New York decision came on the heels of the spacious conception of the scope of the due process clause announced by the Supreme Court in the famous case of *Noble*

³⁷ Theodore Roosevelt, "Workmen's Compensation," 98 OUTLOOK, 49, 53 (May 13, 1911). After quoting an "eminent jurist" to the effect that the decision was "another illustration that in many American courts property is more sacred than life," Roosevelt continued: "It is out of the question that the courts should be permitted permanently to shackle our hands as they would shackle them by such decisions as this, as the decision by the same Court many years ago in the tenement-house cigar factory cases, and the decision of the bakeshop cases shackled them. Such decisions are profoundly anti-social, are against the interests of humanity, and tell for the degradation of a very large proportion of our community; and, above all, they seek to establish as an immutable principle the doctrine that the rights of property are supreme over the rights of humanity, and that this free people, this American people, is not only forbidden to better the conditions of mankind, but cannot even strive to do the elementary justice that, among even the monarchies of the Old World, has already been done by other great industrial nations." For a reply to Roosevelt's criticism, see Charles C. Moore, "New York Workmen's Compensation Act," 15 LAW NOTES, 44.

³⁸ See press comments in 42 LITERARY DIGEST for Apr. 8, 1911.

³⁹ See, e.g., the comment of Mr. Bernard Flexner: "The decision is a shock not only to the 'economist' . . . ; it is quite as distinct a shock to a growing number of judges and lawyers who recognize that our employers' liability laws are barbarous. . . . A court which cites at this time *In re Jacobs*, as an illustration of the limitation of the exercise of police power, rightfully draws down upon itself the criticism not of laymen alone, but of lawyers who find in the economic, social, and ethical conditions that the New York court brushes aside with a few patronizing words the justification for a constantly widening exercise of the police power of the state." 26 SURVEY, 192 (Apr. 29, 1911). And see comments of other lawyers in the same issue of THE SURVEY. Also James P. Hall, "New York Workmen's Compensation Act Decision," 19 JOUR. POL. ECON. 694; Ernst Freund, "Constitutional Status of Workmen's Compensation," 6 ILL. L. REV. 432; A. A. Bruce, "The New York Employers' Liability Act," 9 MICH. L. REV. 684; Edward Q. Keasbey, "The Courts and the New Social Questions," 24 GREEN BAG, 114; Eugene Wambaugh, "Workmen's Compensation Acts," 25 HARV. L. REV. 129; and Notes in 11 COL. L. REV. 475 and 24 HARV. L. REV. 647.

⁴⁰ 98 OUTLOOK, 709, 710 (July 29, 1911).

State Bank v. Haskell.⁴¹ Mr. Justice Holmes' opinion, speaking for a unanimous Court, gave solid hope that the justification which underlay workmen's compensation legislation would find ample shelter within the due process clause.⁴² But the *Ives* case, so long as it stood, remained an obstacle if not a bar — short of constitutional amendment⁴³ — to workmen's compensation laws. For claims under the Federal Constitution had been asserted and sustained. Federal right had been vindicated, not denied. Under the existing appellate jurisdiction there was no way of reviewing the *Ives* result by the Supreme Court. When, shortly after, the Supreme Court of Washington upheld the constitutionality of a similar statute,⁴⁴ the demand for review by the Supreme Court was intensified by a wide-spread feeling that, in practice, constitutionality turned on geography.⁴⁵

⁴¹ 219 U. S. 104, 575 (1911).

⁴² See, for instance, Professor Ernst Freund's prophecy "there is good reason to believe that the Supreme Court would sustain such a law," 26 SURVEY, 195, 196 (April 29, 1911), and Senator Root's remark: "There have been some cases in which the decisions of the courts of last resort in states have been in favor of the claim, giving to the provisions of the Federal Constitution an effect which many people think the Supreme Court would not give to those cases. The notable case in that connection is the *Ives* case in New York, regarding the workmen's compensation act." Address before the Judiciary Committee of the House of Representatives, February 27, 1914, printed in ROOT, ADDRESSES ON GOVERNMENT AND CITIZENSHIP, 466, 475.

⁴³ The inaptness of the suggestion of the New York court, to modify the conception of due process by constitutional amendment as a way of securing workmen's compensation legislation, was thus dealt with in the protest of the law teachers: "A court which condemns a rule of law as contrary to due process should not suggest a remedy by an appeal to the people; for such a suggestion creates the impression that the principle of due process is one susceptible of improvement." 98 OUTLOOK, 709, 711 (July 29, 1911).

⁴⁴ *State v. Clausen*, 65 Wash. 156, 117 Pac. 1101 (1911), vindicating the prophecy made shortly before this decision by Mr. Louis D. Brandeis in a letter to the editor of THE SURVEY: "I am inclined to think that we shall find legislatures of some of the other states undeterred by the decision of your Court of Appeals; and some other court will have the opportunity soon of making a more just decision." 26 SURVEY, 198 (Apr. 29, 1911). In a few years Mr. Justice Brandeis shared in decisions by the Supreme Court sustaining workmen's compensation laws more sweeping than the one temporarily defeated by the New York Court of Appeals. See *Mountain Timber Co. v. Washington*, 243 U. S. 219 (1917); *Arizona Employers' Liability Cases*, 250 U. S. 400 (1919); *Ward & Gow v. Krinsky*, 259 U. S. 503 (1922). For the steady extension of the workmen's compensation legislation movement, see Bulletins No. 272, 332 and 379 of United States Bureau of Labor Statistics.

⁴⁵ Anticipating that the Supreme Court of Washington would reach a result contrary to that reached by the New York Court of Appeals, the Committee of

Thus did the *Ives* case precipitate the movement to alter the appellate jurisdiction of the Supreme Court over state courts. The impetus given by that decision was sufficiently powerful to realize the desire for reform which it provoked. "Lawyers, as a class," wrote the lawyers of the House Judiciary Committee, "are conservative and slow to change existing laws. Reforms in the law grow out of some concrete experience that so forcibly presents the necessity of change as to arouse public interest. The decision of the *Ives* Case in New York, which held the Workmen's Compensation Act passed by the Legislature of New York unconstitutional, on the grounds that it was in violation of the Fourteenth Amendment to the Federal Constitution served this purpose."⁴⁶

Yet lawyers bore the heaviest testimony against the New York decision; and lawyers promptly exerted themselves to devise and promote legislation to effect the necessary change in the reviewing power whereby sterile applications of the Federal Constitution might be subjected to the livelier scrutiny of the Supreme Court. The lead was taken by a special committee of the American Bar Association.⁴⁷ In December, 1911, a bill drafted by it, extending writs of error to judgments of the highest court of the state upholding as well as denying a federal right, was introduced in both Houses of Congress.⁴⁸ Senator Root vigorously supported it in Congress.⁴⁹ The bill came out of the Senate Judiciary Committee with *certiorari* substituted for writ of error for the new class of cases.⁵⁰ This amendment met the occasion by furnishing a means of review and yet protecting the already over-loaded Court from further obligatory jurisdiction.⁵¹ In this shape the bill encoun-

the Bar Association remarked: "We shall then be in the position of having the Constitution of the United States mean one thing in New York, and another in Washington." 36 AM. BAR ASSN. REP. 448, 464.

⁴⁶ HOUSE REPORT, No. 1222, 63rd Cong., 3rd Sess., Ser. No. 6766, 2.

⁴⁷ 36 AM. BAR ASSN. REP. 448, 462, 469.

⁴⁸ In the Senate on December 13, 1911, by Nelson (by request); and the House on Dec. 20, 1911, by Clayton. 48 CONG. REC. 294, 580. Similar bills were introduced in the House by Lenroot on Jan. 4, 1912, and by French on Jan. 8, 1912. *Ibid.* 676, 736.

⁴⁹ See ROOT, *op. cit.* 467, 474.

⁵⁰ In this form it was reported out by Senator Root, Apr. 4, 1912. SEN. REP., No. 560, 67th Cong., 2nd Sess., Ser. No. 6121; 48 CONG. REC. 4274.

⁵¹ "The idea of that modification was that the unlimited right would load down the calendar of the Supreme Court of the United States with a vast multi-

tered little opposition and passed the Senate without division.⁵² Nevertheless the House adjourned without action.

The legislative effort was at once renewed in the new Congress. In various forms bills were introduced authorizing cases decided in favor of the claim of a federal right to be brought up to the Supreme Court.⁵³ But the legislative pace had slowed down as the spur of the *Ives* case weakened with time. Congress again had to be pushed from without. Thus, the Wisconsin Legislature memorialized Congress,⁵⁴ although a voluntary as distinguished from a compulsory compensation act, such as was involved in the *Ives* case, had already hurdled the constitutional barriers before the Wisconsin Supreme Court.⁵⁵ The American Bar Association continued to prod,⁵⁶ but the first Wilson Congress was preoccupied with more urgent demands for legislation, and not until January 20, 1914, was Senator Root's bill reported out of the Judiciary Committee.⁵⁷ The bill promptly passed the Senate,⁵⁸ but again encountered delay in the House, where it went over to the next session.⁵⁹ Meanwhile the New Jersey Supreme Court upheld a workmen's compensation statute⁶⁰ and thereby emphasized the geographic feature of constitutionality. As the House Judiciary Committee pithily reported: "The Fourteenth Amendment meant one thing on the east bank of the Hudson and the

tude of cases in which an appeal was taken for purposes of delay, and that in every case of public importance and concern involving a constitutional question the Supreme Court would exercise its jurisdiction." Root, *ADDRESSES ON GOVERNMENT AND CITIZENSHIP*, 467, 476.

⁵² 48 CONG. REC. 6012.

⁵³ In the Senate by Root on Apr. 7, 1913; by Jones (for Clapp) on Apr. 21, 1913; by Nelson on May 5, 1913; by Gallinger on Dec. 1, 1913; by Smith of Georgia on Dec. 10, 1913; by Root on Jan. 14, 1914. 50 CONG. REC. 53, 239, 1094, 6051; 51 *ibid.* 593, 1622. In the House by Lenroot on Apr. 7, 1913; by French on Apr. 7, 1913; by Smith of Minnesota on Aug. 9, 1913. 50 *ibid.* 81, 90, 3202.

⁵⁴ *Ibid.* 1797.

⁵⁵ *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N. W. 209 (1911).

⁵⁶ 38 AM. BAR ASSN. REP. 45.

⁵⁷ Through Senator Root on Jan. 20, 1914, SEN. REP., No. 161, 63rd Cong., 2nd Sess., Ser. No. 6552; 51 CONG. REC. 2016.

⁵⁸ On Jan. 21, 1914, *ibid.* 2016.

⁵⁹ It was reported from the House Judiciary Committee on Dec. 14, 1914. See HOUSE REPORT, No. 1222, 63rd Cong., 3rd Sess., Ser. No. 6766; 52 CONG. REC. 199.

⁶⁰ *Sexton v. Newark District Telegraph Co.*, 84 N. J. 85, 86 Atl. 451 (1913).

opposite thing on the west bank.”⁶¹ When the bill finally reached the calendar of the House it moved easily. The debate gave vent to feelings about the *Ives* case as well as about the general attitude of courts toward social legislation. No one ventured to defend the *Ives* case,⁶² and Lewis of Maryland took occasion to remark that the prevalent judicial mood had destroyed “some of the wisest state legislation enacted in this country on these difficult relations of capital and labor.”⁶³ The bill passed without division,⁶⁴ and on December 23, 1914, a new principle of appellate control over state courts became law.⁶⁵

2

Since the Judicial Code, the Act of December 23, 1914, is the only instance of Congressional expansion of the jurisdiction of the Supreme Court. But the story of a second attempt must be told, and for convenience it will be dealt with here, out of its chronological order. The instance is important for its own sake, as well as for the legislative method which it discloses. The history of federal judiciary acts is singularly free from a frequent tendency in state legislation whereby the special need of an individual in a particular litigation is written into a judicial code.⁶⁶ Public interest and widely canvassed professional views have guided the laws by which the jurisdiction of the federal

⁶¹ HOUSE REPORT, No. 1222, 63rd Cong., 3rd Sess., Ser. No. 6766, 2.

⁶² 52 CONG. REC. 276.

⁶³ *Ibid.* 277.

⁶⁴ *Ibid.*

⁶⁵ 38 STAT. 790.

⁶⁶ See Senator Root's testimony, derived from special experience with the New York Code of Civil Procedure but reflecting a practice prevalent throughout the country:

“MR. MCCOY. Is it not true that a lawyer who has encountered something in his own particular practice is likely to go up to the legislature and get an amendment to the code?

“MR. ROOT. Precisely. And the prohibitions which are put in our constitutions against special legislation have contributed to that. Somebody sees what seems to him an evil in his own practice, or he is disgruntled; something has been done that he does not like, and he becomes a member of the legislature, and he gets a change in the code of procedure. That may be all very well for him, but it may be very bad, indeed, for ten thousand other people; and our system of practice has been built up in that way on special instances to answer the demands of the lawyer who thinks about his own case instead of considering the general interests of the public.” ROOT, *op. cit.* 467, 469-70.

courts is determined. The so-called Cummins Amendment of February 17, 1922,⁶⁷ furnishes a striking exception.

On May 17, 1921, Senator Cummins of Iowa introduced a bill⁶⁸ to amend Section 237 of the Judicial Code, which determines the scope of writs of error from judgments of state courts. The Senate Judiciary Committee reported the bill favorably but without comment.⁶⁹ A perfunctory debate followed, a short colloquy between Senator King and Senator Nelson, who had charge of the measure, revealing very clearly that neither was aware of the purpose or effect of the proposal.⁷⁰ In this atmosphere of indifference and senatorial courtesy it passed the Senate without division.⁷¹ In the House the measure received more serious consideration. The report of the House Judiciary Committee, supplemented by the remarks⁷² of Congressman

⁶⁷ 42 STAT. 366. The Act amended Section 237 of the Judicial Code by the following addition: "In any suit involving the validity of a contract wherein it is claimed that a change in the rule of law or construction of statutes by the highest court of a state applicable to such contract would be repugnant to the Constitution of the United States, the Supreme Court shall, upon writ of error, re-examine, reverse, or affirm the final judgment of the highest court of a state in which a decision in the suit could be had, if said claim is made in said court at any time before said final judgment is entered and if the decision is against the claim so made."

⁶⁸ 61 CONG. REC. 1497.

⁶⁹ *Ibid.* 348.

⁷⁰ *Ibid.* 5011. Senator Nelson, in the absence of Senator Cummins and at his request, pushed the bill: "MR. NELSON. Mr. President, I ask unanimous consent to go back to Senate bill 1831, to amend section 237 of the Judicial Code. That bill was introduced by the senior Senator from Iowa [MR. CUMMINS], who is ill, and he is very anxious to have it passed." That Senator Nelson misconceived the implication of the bill is plain from his reply to a question from Senator King: "This [bill] does not enlarge the jurisdiction [of the Supreme Court] at all, in any shape or manner." *Ibid.*

⁷¹ *Ibid.*

⁷² "When a person contracts in keeping with the law then in force, as declared by the supreme court of the State, he thus acquires a property interest that can not be taken away by a subsequent reversal by the supreme court of that State of its former holding. However, the supreme court of a State does sometimes reverse its former holdings without declaring the fact, and in such case, where vested property rights are affected adversely, the Supreme Court of the United States will right the wrong, if the question is properly presented. In order to have review by the Supreme Court of the United States the question must have been first claimed or the right asserted in the State court. This bill affords the remedy, and by making claim in a petition for rehearing in the State supreme court the Supreme Court of the United States will entertain a writ of error and correct any errors of the State court." 62 CONG. REC. 2188.

Boies of Iowa, the House proponent, leaves no doubt as to the actual intent of Congress:

"The purpose of this amendment is to provide a litigant the opportunity to amend his pleadings before final judgment in a case where the Supreme Court of a State in reversing its previous holdings thereby renders a contract valid at the time of execution invalid by reason of the new holding, in such a manner as to preserve the right to carry the case on writ of error to the Supreme Court of the United States, in order to have the opinion of the Supreme Court upon the right of the party complaining to have his contract construed and upheld under and according to the law as proclaimed by the Supreme Court of a State at the time of the due execution of the contract."⁷³

Members of the House were more inquisitive about the origin and objects of the bill than was the Senate, even though Mr. Boies claimed for the bill the support of the Chief Justice and the Attorney General.⁷⁴ Discussion did not remove doubts, and the bill went over to a later date. When next considered, Mr. Mann of Illinois allayed suspicion by denying that the bill was in the nature of private legislation for a particular litigant:

"I am informed there was a case in the Supreme Court of the State of Iowa where this provision might have been desirable under certain circumstances. That case was disposed of and this will not apply to it; but one of the judges of the Supreme Court of Iowa who took part in the decision of that case considered it important enough afterwards, when he was no longer a judge of the supreme court, to call attention to it, so it is not intended to apply to any particular case."⁷⁵

With these assurances the bill passed the House and was allowed to become law on February 17, 1922.

Mr. Mann was misinformed. There was a case then pending in the Supreme Court of Iowa to which the Act did apply, and it was this case to which Mr. Mann undoubtedly referred.⁷⁶

⁷³ HOUSE REPORT, No. 534, 67th Cong., 2nd Sess., Ser. No. 7955.

⁷⁴ 62 CONG. REC. 1227. This claim seems extraordinary in view of the opinion of the Chief Justice in *Tidal Oil Co. v. Flanagan*, 263 U. S. 444 (1924).

⁷⁵ 62 CONG. REC. 2188.

⁷⁶ *Fleming v. Fleming*, 194 Iowa 71 (1922). The original decision in this case was rendered on Dec. 16, 1919. A petition for rehearing was filed on Feb. 5, 1920, resulting in a supplemental decision on Dec. 20, 1920. A second petition for rehearing was filed on Feb. 17, 1921, leading to a third decision on Sept. 28,

The Iowa judge indicated by Mr. Mann had been a dissenting judge in *Fleming v. Fleming*⁷⁷ and after he left the Supreme Court of Iowa he joined Senator Cummins, who had been acting as counsel in the case.⁷⁸ In their brief⁷⁹ they relied upon the Act of February 17, 1922, to support the Supreme Court's jurisdiction.

But to no avail. The Act encountered "the long line of decisions"⁸⁰ establishing the settled constitutional doctrine that a change by the state court of a rule of law governing a contract is not equivalent to a "law" impairing the obligation of contracts. When the Cummins Amendment came before it, the Supreme Court reinterpreted the "intent" of Congress and completely defeated the aim of Senator Cummins, which certainly his senatorial colleagues did not apprehend. By a familiar canon of constitutional construction the Supreme Court was constrained to disregard the actual but unconstitutional intent of the promoters of this legislation if thereby it could save the Act, however restricted in its scope.⁸¹ Chief Justice Taft him-

1921, in which the Iowa Supreme Court specifically denied that a federal question was involved. A third petition for rehearing was filed on Nov. 5, 1921, which the Iowa supreme court overruled without opinion on Apr. 23, 1922. See Transcript of Record, Supreme Court of the United States, *Fleming v. Fleming*, Oct. Term, 1923, No. 175, 85, 131. The writ of error from the Supreme Court was not allowed until Dec. 16, 1922. *Ibid.* 139. The record discloses no evidence of any effort to secure such a writ prior to the passage of the Act of February 17, 1922.

⁷⁷ See dissenting opinions of Salinger, J., in *Fleming v. Fleming*, 194 Iowa at 89, 109.

⁷⁸ See *Fleming v. Fleming*, 194 Ia. 71, 73, 174 N. W. 946, 947, 180 N. W. 206, 184 N. W. 296 (1920-21-22); s. c. 264 U. S. 29, 30 (1924).

⁷⁹ See Brief for Appellant, in *Fleming v. Fleming*, in the Supreme Court of the United States, 10.

⁸⁰ See *Tidal Oil Co. v. Flanagan*, 263 U. S. 444, 451 (1924).

⁸¹ A month prior to the argument in *Fleming v. Fleming*, *supra*, note 78, the case of *Tidal Oil Co. v. Flanagan*, *supra*, note 80, was decided, involving an exactly similar situation. Following the decision in *Tidal Oil Co. v. Flanagan*, *supra*, on Jan. 7, 1924, Senator Cummins and Judge Salinger, as counsel for plaintiffs in error in the *Fleming* case, filed a reply brief contending that in the *Flanagan* case the court fell into "error as to what said act affects. Roughly speaking, it provides that where there is a suit involving the validity of a contract and it is claimed therein that the highest court of the state has made a change in the rule of law or construction of statutes applicable to such contract which it is asserted is repugnant to the Constitution of the United States, the Supreme Court shall upon writ of error re-examine, etc., provided that said claim is made by a stated time." Reply brief, *Fleming v. Fleming*, 10-11.

self wrote the opinion of the Court demonstrating the futility of the purpose avowed by Mr. Boies:

"The intention of Congress was not, we think, to add to the general appellate jurisdiction of this Court existing under prior legislation, but rather to permit a review on writ of error in a particular class of cases in which the defeated party claims that his federal constitutional rights have been violated by the judgment of the state court itself, and further to permit the raising of the objection after the handing down of the opinion. This Court has always held it a prerequisite to the consideration here of a federal question in a case coming from a state court that the question should have been raised in that court before decision, or that it should have been actually entertained and considered upon petition to rehear. A mere denial of the petition by the state court without opinion, is not enough. . . .

"It was the purpose of the Act of 1922 to change the rule established by this formidable array of authorities as to the class of cases therein described. . . .

"We can not assume that Congress attempted to give to this Court appellate jurisdiction beyond the judicial power accorded to the United States by the Constitution."⁸²

*Tidal Oil Co. v. Flanagan*⁸³ and *Fleming v. Fleming*⁸⁴ thus accomplished a practical nullification of the Amendment.⁸⁵ Its elimination in the revised enactment of Section 237 in the Act of February 13, 1925,⁸⁶ leaves the abortive measure an interesting episode in the history of federal judicature, and a striking warning against such legislative methods.

⁸² *Tidal Oil Co. v. Flanagan*, 263 U. S. at 454, 455.

⁸³ *Supra*, note 80.

⁸⁴ *Supra*, note 78.

⁸⁵ Senator Cummins, in the petition for rehearing filed in *Fleming v. Fleming*, thus characterizes the decision: "It is true that the special act intended a new time limit as to such cases as the one at bar is, but that was not all that was intended. For if a matter may not be reviewed at all, it is idle to make time provisions as to it. In a word, the opinion holds Congress intended nothing by the Act it passed and which it expected the President to sign." Petition for Rehearing, 3.

⁸⁶ 43 STAT. 936. It is interesting to note that Judge Salinger, Senator Cummins' associate in *Fleming v. Fleming*, opposed the legislation which eventuated in the Judiciary Act of 1925, partly because it would repeal the Act of Feb. 17, 1922, *supra*. We quote the following from his testimony before the House Judiciary Committee on Apr. 18, 1922:

"Judge Salinger. . . . The ink is hardly dry on a measure that passed the

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The rest of our story concerns the period ushered in by the World War and the sharp stimulus to the growth of the business of the federal courts which followed in its wake. We shall briefly record the efforts which resulted in an increase in the number of federal judges, in a steady decrease of the obligatory jurisdiction of the Supreme Court and in firmer articulation of the federal judicial system.

When the Act of December 23, 1914,⁸⁷ was going through the House, Mr. Mann of Illinois noted its tendency further to increase the work of the Supreme Court, and prophesied that the next Congressional action would have to be directed towards lessening its burden.⁸⁸ His discernment was soon vindicated. In fact, while the Act of 1914 was in the legislative mill, measures for relief were before the House. On October 2, 1914, Beall of Texas sponsored a bill,⁸⁹ the principal object of which was to shut off reviews as of right by the Supreme Court in bankruptcy litigation. The House Judiciary Committee stated conclusive reasons for this curtailment of an overburdened docket:

"The bankruptcy law has now been so thoroughly construed that there is not much doubt about any of its provisions, and cases now coming to the Supreme Court under it involve complicated questions of fact rather than law. Besides all of this many of these matters now have four hearings—one before the referee, one in the district court, one in the circuit courts of appeals and one in the Supreme Court.

House on February 6, last, with expressed approval of the Chief Justice and of the Department of Justice. Same is now a law and provides that if the objection is raised before the court of last resort enters final judgment there shall be review by writ of error where a contract that was, when made, approved by the decisions of said State court of last resort, and that court now overrules such decisions. Under the bill before you that law will be repealed and it will become matter of discretion whether the Supreme Court will interfere. . . .

"Mr. Walsh. That was passed to cover an exceptional case, and such change-of-front cases would probably be very few.

"Judge Salinger. It was passed to cover cases that are in a class by themselves. But they are not few. . . ." Hearing before the Committee on the Judiciary, House of Representatives, 67 Cong., 2nd Sess., on H. R. 10479, Ser. 33, Pt. 2, Apr. 18 and 27, 1922, p. 2.

⁸⁷ 38 STAT. 790, *supra*, pp. 1055 *et seq.*

⁸⁸ 52 CONG. REC. 277.

⁸⁹ 51 CONG. REC. 16097.

Certainly all litigants ought to be satisfied with a hearing before the referee, a trial in the district court, an appeal to the circuit court of appeals, with a right of review in the Supreme Court of the United States by a writ of *certiorari* upon a sufficient showing."⁹⁰

The bill also gave the circuit courts of appeals finality in cases under the trademark laws;⁹¹ and by attaching Porto Rico to the first circuit withdrew from the Supreme Court review of the District Court of Porto Rico, save in cases where appeal lay from the federal district courts.⁹² After a smooth and unevent-

⁹⁰ HOUSE REPORT, No. 1182, 63rd Cong., 2d Sess., reprinted in 52 CONG. REC. 435.

⁹¹ Under the Act of Feb. 20, 1905, § 18, 33 STAT. 724, the right of appeal in trademark cases arising under that Act was assimilated to the prevailing right of appeal in patent causes, thereby making circuit courts of appeals the final tribunal, subject only to review by *certiorari*. *Hutchinson, Pierce & Co. v. Lowey*, 217 U. S. 457 (1910). The Judicial Code left this situation unchanged. *Street & Smith v. Atlas Mfg. Co.*, 231 U. S. 348 (1913). Since few cases involving trademarks arose save under the Act of 1905, the change affected was more formal than substantial.

⁹² The consideration which led Congress to attach Porto Rico to the First Circuit rather than the Second was thus put by Senator Root: "the disposition made in the bill by the House, and which was anticipated by the Judiciary Committee of the Senate, would facilitate the disposal of business coming from Porto Rico much better than to send it to the second circuit. The second circuit appears to be overburdened, and the effect of sending it there would be probable delay in the disposition of causes that come up. The opportunity to get a swift decision in the first circuit, I think, is very much better." 52 CONG. REC. 1545-6. Senator Root then proceeded to state the reasons which led to the withdrawal of this jurisdiction from the obligatory duties of the Supreme Court: "The transaction of business in Porto Rico and Hawaii and different outlying possessions has been gradually shaping down to a fixed course of procedure and a common understanding of the relations of the judicial proceedings in those islands to the general administration of justice in the United States. There was a period during which everything was chaotic; there were great misunderstandings and differences of understanding, and it was probably desirable at that time that the Supreme Court of the United States should supervise the settling of the law. I think that time has passed. I think they are getting down to an ordinary regular course of procedure in the administration of justice, which makes it appropriate to apply to them the same principle with respect of appeals and with respect of the review of decisions which we apply to our own States. Inasmuch as it is quite certain that as we go on we must progressively relieve the Supreme Court, it seems to me that this step which puts Porto Rico on the same basis with Connecticut and Rhode Island and Vermont and the other New England states is timely and is called for. The enormous growth of this country and the still greater growth of national business as compared with local state business and the great extension of the field over which national authority is asserted are creating an enormous number of new questions and increasing the burden upon the

ful passage in both houses,⁹³ the bill became law on January 28, 1915.⁹⁴

The Act of 1915 was a feeble palliative. The number of cases on the Supreme Court's docket steadily mounted and the delay in their disposition lengthened. From 509 cases docketed in

Supreme Court, and as the process of extension goes on that increase of burden will go on. The judges of our Supreme Court now are driven to the very limit of their human power to do their work, and if you drive them too hard, if you impose too great a body of duty upon them, you do not get good work; you do not get the operation of fresh and active minds, and thus we are going to have the great and all-important function for the whole country which is performed by the Supreme Court done in an inferior way." 52 CONG. REC. 1546.

For an illuminating instance of the corrective review still exercised by the Supreme Court on *certiorari* over decisions of the Circuit Court of Appeals involving Porto Rican law see *Diaz v. Gonzalez*, 261 U. S. 102 (1923). Mr. Justice Holmes, for the Court, uttered admonitions of humility, applicable to every tribunal when called upon to administer an unfamiliar body of law: "This Court has stated many times the deference due to the understanding of the local courts upon matters of purely local concern. . . . This is especially true in dealing with the decisions of a Court inheriting and brought up in a different system from that which prevails here. When we contemplate such a system from the outside it seems like a wall of stone, every part even with all the others, except so far as our own local education may lead us to see subordinations to which we are accustomed. But to one brought up within it, varying emphasis, tacit assumptions, unwritten practices, a thousand influences gained only from life, may give to the different parts wholly new values that logic and grammar never could have got from the books." 261 U. S. at 105-6.

⁹³ It was reported to the House (HOUSE REPORT 1182, 63rd Cong., 2nd Sess.) on Oct. 8, 1914 (51 CONG. REC. 16345) and passed on Dec. 16, (52 *ibid.* 282-3). It passed the Senate with minor amendments on Jan. 14, 1915 (*ibid.* 1542-6), in which the House concurred on Jan. 22 (*ibid.* 2137).

⁹⁴ 38 STAT. 803. The Act also took out of the federal courts the litigation, at one time heavy, which the Pacific Railroad Removal Cases, 115 U. S. 1 (1885) had brought there, by providing in § 5 that "no court of the United States shall have jurisdiction of any action or suit by or against any railroad company upon the ground that said railroad company was incorporated under an Act of Congress." In the House Mr. Sherley of Kentucky vainly sought to extend this section by renewing the effort to restrict the scope of jurisdiction based on diversity of citizenship. See Felix Frankfurter, "The Business of the Supreme Court of the United States," 39 HARV. L. REV. 35, 68 *et seq.* "You have a bill here," he said, "undertaking to change the jurisdiction of the Federal courts as to railroads that are incorporated by the United States. You are dealing with one little evil. All the railroads of the country exercise the right to transfer actions from a State court to the Federal court on the ground of diverse citizenship, although at the time that the provision was put into the law originally there were not a hundred corporations in the country to be affected by it." 52 CONG. REC. 283. At the time of its passage the Texas and Pacific Ry. Co. was the only road still operating under federal law.

1910, the number increased to 528 in 1914 and 647 in 1916.⁹⁵ Under the pressure of this increase the Court disposed of 637 cases in 1916 as compared with 539 in 1914 and 455 in 1910.⁹⁶ The addition to the docket through the 1914 Amendment was negligible.⁹⁷ The source of the new business was elsewhere.

As a result of the *First Employers' Liability Cases*⁹⁸ national legislation for the protection of railroad employees had in theory to be limited to injuries suffered at the time of employment in interstate commerce.⁹⁹ The theory was based on an illusory differentiation between interstate and intrastate commerce. Railroad men were engaged in transportation; neither they nor their employers, in the practical conduct of life, allocated their duties to interstate or intrastate commerce. But this unreal line determined whether relief was to be had under the Federal Employers' Liability Act or whether the plaintiff was to be relegated to state remedies. Judicial astuteness had to decide, as a solemn problem of constitutional law, whether a particular employee at a particular moment was acting in his interstate or intrastate capacity. An erroneous guess on the part of counsel, a confused ruling by the trial court, subjected the plaintiff to all the waste and tribulation of delay and frequently of defeat. The many opinions by the Supreme Court, to say nothing of the dissents, revealed an obstinate problem and sterility

⁹⁵ See REP. ATTY. GEN. FOR 1911, 1915, and 1917.

⁹⁶ *Ibid.*

⁹⁷ Until the Act of 1916 only three petitions for *certiorari* were filed under the 1914 Amendment. All were refused. See 33 HARV. L. REV. 102, 104 (1919). For a recent resort to this jurisdiction where a state court found, and not unnaturally, narrower limits upon state power than the Supreme Court subsequently recognized, see *Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109 (1924).

⁹⁸ 207 U. S. 463 (1908). The effect of this decision upon the practical administration of justice by the courts has been neglected by commentators. See, for instance, Mr. Warren's comment upon the decision: "This was later cured by an amendment of the Act confining its operation to interstate transactions, so that this decision had no permanent effect." WARREN, CONGRESS, THE CONSTITUTION AND THE SUPREME COURT, 239. Thus, even Mr. Warren, comprehensive student that he is of the functioning of the federal judiciary, is too intent upon the abstract constitutional line drawn by the *First Employers' Liability Cases* to concern himself with the practical problems of application raised by them.

⁹⁹ The second Federal Employers' Liability Act of Apr. 22, 1908, 35 STAT. 65, drawn to conform to the decision in the *First Employers' Liability Cases*, *supra*, note 98, was sustained in the *Second Employers' Liability Cases*, 223 U. S. 1 (1912).

of solution. Such standards as were evolved¹⁰⁰ proved elusive in application. The differences of opinion among the judges stimulated appeal. From both state and lower federal courts the volume of this litigation steadily increased.¹⁰¹ A reading of

¹⁰⁰ See, e.g., *Shanks v. D., L. & W. R. R.*, 239 U. S. 556 (1916). Summing up the distinctions applied in prior cases the Shanks case formulated this test: "Was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it?" *Ibid.* at 558. This test left open a wide door for differences in judgment and litigation was encouraged to enter this door.

¹⁰¹ Of the 554 cases remaining undisposed of on June 21, 46 arose under the Employers' Liability Act. James D. Maher, Clerk of the Court, estimated that each year brought an average of 30 more of these cases to the docket. See SEN. REP., No. 775, 64th Cong., 1st Sess., Ser. No. 6899, 3. An enumeration of the cases involving the Act that reached the Supreme Court as of right can alone give an adequate conception of the volume of this litigation, and the facts of the cases will disclose their inappropriateness as business for the Supreme Bench. Second Employers' Liability Cases, 223 U. S. 1 (1912); *American R. R. v. Birch*, 224 U. S. 547 (1912); *Phila., Balt. & Wash. R. R. v. Schubert*, 224 U. S. 603 (1912); *Seaboard Air Line v. Duvall*, 225 U. S. 477 (1912); *M., K. & T. Ry. v. Wulf*, 226 U. S. 570 (1913); *Mich. Cent. R. R. v. Vreeland*, 227 U. S. 59 (1913); *Win-free v. Northern Pac. Ry.*, 227 U. S. 296 (1913); *Troxell v. D., L. & W. R. R.*, 227 U. S. 434 (1913); *Gulf, Colo. & S. F. Ry. v. McGinnis*, 228 U. S. 173 (1913); *Seaboard Air Line Ry. v. Moore*, 228 U. S. 433 (1913); *St. L., Iron Mountain & So. Ry. v. Hesterly*, 228 U. S. 702 (1913); *Norfolk & West. Ry. v. Earnest*, 229 U. S. 114 (1913); *Pedersen v. D., L. & W. R. R.*, 229 U. S. 146 (1913); *St. L., S. F. & T. Ry. v. Seale*, 229 U. S. 146 (1913); *St. L. & Iron Mountain Ry. v. McWhister*, 229 U. S. 265 (1913); *Pennell v. Phila. & Reading Ry.*, 231 U. S. 675 (1914); *North Carolina R. R. v. Zachary*, 232 U. S. 248 (1914); *Taylor v. Taylor*, 232 U. S. 363 (1914); *Young v. Cent. R. R. of N. J.*, 232 U. S. 602 (1914); *M., K. & T. Ry. v. West*, 232 U. S. 682 (1914); *Grand Trunk Ry. v. Lindsay*, 233 U. S. 42 (1914); *So. Ry. — Carolina Division v. Bennett*, 233 U. S. 80 (1914); *Ill. Cent. R. R. v. Behrens*, 233 U. S. 473 (1914); *Seaboard Air Line Ry. v. Horton*, 233 U. S. 492 (1914); *So. Ry. v. Gadd*, 233 U. S. 572 (1914); *Ex parte Roe*, 234 U. S. 70 (1914); *Wabash R. R. v. Hayes*, 234 U. S. 86 (1914); *So. Ry. v. Crockett*, 234 U. S. 725 (1914); *Garrett v. L. & N. R. R.*, 235 U. S. 308 (1914); *Yazoo & Miss. Valley R. R. v. Wright*, 235 U. S. 376 (1914); *McGovern v. Phila. & Reading Ry.*, 235 U. S. 389 (1914); *T., St. L. & W. R. R. v. Slavin*, 235 U. S. 454 (1915); *Norfolk & West. Ry. v. Holbrook*, 235 U. S. 625 (1915); *Seaboard Air Line Ry. v. Padgett*, 235 U. S. 668 (1915); *Ariz. & N. M. Ry. v. Clark*, 235 U. S. 669 (1915); *Robinson v. B. & O. R. R.*, 237 U. S. 84 (1915); *Seaboard Air Line Ry. v. Tilghman*, 237 U. S. 499 (1915); *St. L., Iron Mountain & So. Ry. v. Craft*, 237 U. S. 648 (1915); *St. L. & S. F. R. R. v. Conarty*, 238 U. S. 243 (1915); *N. Y. C. & H. R. R. R. v. Carr*, 238 U. S. 260 (1915); *Norfolk So. R. R. v. Ferebee*, 238 U. S. 269 (1915); *D., L. & W. R. R. v. Yurkonis*, 238 U. S. 439 (1915); *Cent. Vt. Ry. v. White*, 238 U. S. 507 (1915); *Kan. City So. Ry. v. Leslie*, 238 U. S. 599 (1915); *Pa. Co. v. Donat*, 239 U. S. 50 (1915); *C., R. I. & P. Ry. v. Devine*, 239 U. S. 52 (1915); *Atl. Coast Line R. R. v. Burnette*, 239 U. S. 199 (1915); *A. T. & S. F. Ry. v. Swearingen*, 239 U. S.

the opinions constrains one to believe that these federal employers' liability cases constitute the most copious and futile waste of the Supreme Court's efforts.

339 (1915); *Great Northern Ry. v. Otis*, 239 U. S. 349 (1915); *Seaboard Air Line Ry. v. Koennecke*, 239 U. S. 352 (1915); *Chicago & Alton R. R. v. Wagner*, 239 U. S. 452 (1915); *Reese v. Phila. & Reading Ry.*, 239 U. S. 463 (1916); *Southern Ry. v. Lloyd*, 239 U. S. 496 (1916); *C., R. I. & P. Ry. v. Wright*, 239 U. S. 548 (1916); *Shanks v. D., L. & W. R. R.*, 239 U. S. 556 (1916); *Kanawha & Mich. Ry. v. Kerse*, 239 U. S. 576 (1916); *Seaboard Air Line Ry. v. Horton*, 239 U. S. 595 (1916); *Kan. City Western Ry. v. McAdow*, 240 U. S. 51 (1916); *Ill. Cent. R. R. v. Skaggs*, 240 U. S. 66 (1916); *Pecos & Northern Texas Ry. v. Rosenbloom*, 240 U. S. 439 (1916); *Great Northern Ry. v. Wiles*, 240 U. S. 444 (1916); *C., R. I. & P. Ry. v. Bond*, 240 U. S. 499 (1916); *Great Northern Ry. v. Knapp*, 240 U. S. 464 (1916); *Seaboard Air Line Ry. v. Kenney*, 240 U. S. 489 (1916); *Osborne v. Gray*, 241 U. S. 16 (1916); *C., B. & Q. R. R. v. Harrington*, 241 U. S. 177 (1916); *Kan. City So. Ry. v. Jones*, 241 U. S. 181 (1916); *M. & S. L. R. R. v. Bombolis*, 241 U. S. 211 (1916); *S. L. & S. F. R. R. v. Brown*, 241 U. S. 223 (1916); *Jacobs v. So. Ry.*, 241 U. S. 229 (1916); *Baugham v. N. Y., P. & N. R. R.*, 241 U. S. 237 (1916); *C. & O. Ry. v. Carnahan*, 241 U. S. 241 (1916); *Louisville & Nashville R. R. v. Stewart*, 241 U. S. 261 (1916); *Seaboard Air Line Ry. v. Renn*, 241 U. S. 290 (1916); *Chesapeake & Ohio Ry. v. De Altey*, 241 U. S. 310 (1916); *Chesapeake & Ohio Ry. v. Proffitt*, 241 U. S. 462 (1916); *San Antonio & Arkansas Pass. Ry. v. Wagner*, 241 U. S. 476 (1916); *Chesapeake & Ohio Ry. v. Kelly*, 241 U. S. 485 (1916); *Spokane & Inland Empire R. R. v. Campbell*, 241 U. S. 497 (1916); *Louisville & Nashville R. R. v. Parker*, 242 U. S. 13 (1916); *Atl. City R. R. v. Parker*, 242 U. S. 56 (1916); *Great Northern Ry. v. Capital Trust Co.*, 242 U. S. 144 (1916); *B. & O. R. R. v. Whitacre*, 242 U. S. 169 (1916); *Ill. Cent. R. R. v. Peery*, 242 U. S. 292 (1916); *B. & O. R. R. v. Wilson*, 242 U. S. 295 (1916); *Erie R. R. v. Welsh*, 242 U. S. 303 (1916); *M. & S. L. R. R. v. Winters*, 242 U. S. 353 (1917); *Atl. Coast Line R. R. v. Mims*, 242 U. S. 532 (1917); *McCluskey v. Marysville & Northern Ry.*, 243 U. S. 36 (1917); *Bay v. Merrill & Ring Logging Co.*, 243 U. S. 40 (1917); *Raymond v. C., M. & St. P. Ry.*, 243 U. S. 43 (1917); *N. Y. C. R. R. v. White*, 243 U. S. 188 (1917); *St. Joseph & G. I. Ry. v. Moore*, 243 U. S. 311 (1917); *Seaboard Air Line Ry. v. Lorick*, 243 U. S. 572 (1917); *M. & St. L. R. R. v. Gotschall*, 244 U. S. 66 (1917); *N. Y. C. R. R. v. Winfield*, 244 U. S. 147 (1917); *Erie R. R. v. Winfield*, 244 U. S. 170 (1917); *Lehigh Valley R. R. v. Barlow*, 244 U. S. 183 (1917); *Mo. Pac. Ry. v. Taber*, 244 U. S. 200 (1917); *Erie R. R. v. Purucker*, 244 U. S. 320 (1917); *N. Y. C. R. R. v. Tonsellito*, 244 U. S. 360 (1917); *Southern Ry. v. Packett*, 244 U. S. 571 (1917); *Washington Ry. & Elec. Co. v. Scala*, 244 U. S. 630 (1917); *Boldt v. Pa. R. R.*, 245 U. S. 441 (1918); *U. P. R. R. v. Huxoll*, 245 U. S. 535 (1918); *G. N. Ry. v. Donaldson*, 246 U. S. 121 (1918); *Nelson v. Southern Ry.*, 246 U. S. 253 (1918); *Great Northern Ry. v. Alexander*, 246 U. S. 276 (1918); *U. P. R. R. v. Hadley*, 246 U. S. 330 (1918); *Louisville & Nashville R. R. v. Holloway*, 246 U. S. 525 (1918); *Dickinson v. Stiles*, 246 U. S. 631 (1918); *New Orleans & Northeastern R. R. v. Harris*, 247 U. S. 367 (1918); *N. Y. C. R. R. v. Porter*, 249 U. S. 168 (1919); *New Orleans & Northeastern R. R. v. Scarlet*, 249 U. S. 528 (1919); *Yazoo & Miss. Valley R. R. v. Mullins*, 249 U. S. 531 (1919); *Gillis v. N. Y., N. H. & H. R. R.*, 249 U. S. 515 (1919). The Federal Employers' Liability Act of June

Here was a source of jurisdiction both prodigal of the Court's time¹⁰² and indifferent to the Court's significance. For it is almost grotesque that the ultimate voice of the Constitution should be invoked to determine whether "the requisite employment in interstate commerce exists"¹⁰³ where a car repairer is replacing a drawbar in a car then in use in such commerce,¹⁰⁴ as contrasted with a worker in a railroad machine shop who alters the location of a fixture communicating power to machinery used in repairing engines hauling both intrastate and interstate trains!¹⁰⁵ The elimination of the duty to review cases of this nature became the main objective of relief measures for the Court.¹⁰⁶ If finality of decision could not normally be left in such cases to the state courts and the circuit courts of appeals, then no litigation involving federal legislation could safely be entrusted to those tribunals. The principle on which the Circuit Courts of Appeals Act was founded—the division of federal questions according to their intrinsic public importance, and the immunity of the obligatory jurisdiction of the Supreme Court from cases significant only to the litigants—obviously invited extension of the principle to curb the evil revealed by the downpour of employers' liability litigation. To be sure, the renewed necessity for enabling the Supreme Court to dispose of its business revived the old panaceas¹⁰⁷ of an

11, 1906, 34 STAT. 232, being held valid as to carriers in the District of Columbia and the territories, *El Paso etc., Ry. v. Gutierrez*, 215 U. S. 87 (1909), during this period gave rise to the following cases: *Chicago, I. & L. Ry. v. Hackett*, 228 U. S. 559 (1913); *Santa Fe Cent. Ry. v. Friday*, 232 U. S. 694 (1914); *Wash. & Mt. Vernon Ry. v. Downey*, 236 U. S. 190 (1915).

¹⁰² "Many of these cases ought not to be reviewed; the delays are unfortunate and the time that should be devoted to important subjects is treasured upon." HOUSE REPORT, No. 794, 64th Cong., 1st Sess., Ser. No. 6905, 2.

¹⁰³ *Shanks v. D., L. & W. R. R.*, 239 U. S. 556, 558 (1916).

¹⁰⁴ See *Shanks v. D., L. & W. R. R.*, 239 U. S. 556, 558 (1916), referring to *Walsh v. N. Y., N. H. & H. R. R.*, 223 U. S. 1 (1912).

¹⁰⁵ *Shanks v. D., L. & W. R. R.*, *supra*, note 103.

¹⁰⁶ "... it was preëminently the decision of questions like these from which Congress sought to relieve this court by the Act of September 6, 1916. . . . Of the cases on the docket for the preceding term of this court 37 presented the question whether the employee was engaged in interstate or intrastate commerce." Brandeis, J., (dissenting) in *Dahnke-Walker Co. v. Bondurant*, 257 U. S. 282, 299, n. 1 (1921).

¹⁰⁷ See Felix Frankfurter, "The Business of the Supreme Court of the United States," 30 HARV. L. REV. 35, 39 *et seq.*

enlarged Court with divisional sittings.¹⁰⁸ The Court itself quietly rejected a form of relief which would beget more evils than it cured.¹⁰⁹ The main source of the Court's embarrassment was too obvious to sustain much vitality this time for a scheme which would change the whole character of the Court and impair its processes of deliberation.

On April 28, 1916, Chairman Webb of the House Judiciary Committee introduced the measure¹¹⁰ which brought the needed relief. Elimination of cases due to the Federal Employers' Liability Act was its chief aim.¹¹¹ Similar litigation arising under the Hours of Service and Safety Appliance Acts, but much less voluminous, was also relegated to final disposition by the circuit courts of appeals. These restrictions upon the obligatory jurisdiction of the Supreme Court, in cases coming from the circuit courts of appeals, involved the simple device of eliminating review of litigation arising under specific statutes. At the same time reviews from the Supreme Court of the Philippine Islands were restricted to *certiorari*.¹¹² The period for

¹⁰⁸ In 1916, the Committee of the American Bar Association, to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation, in considering legislation then pending before Congress, called attention to the old Evarts plan looking to the division of the Supreme Court into three departments as well as to the divisional schemes in the House of Lords and the Judicial Committee of the Privy Council. The Committee suggested an increase in the membership of the Court "with the proviso that the whole number shall not sit at the same time, and that the concurrence of less than a majority of the whole number shall be sufficient to make a decision. . . . This would enable the Court to transact business through the whole term without recess." 2 AM. BAR. ASSN. JOUR. 603, 612, 613.

¹⁰⁹ The Court's attitude, elicited at a conference between the Bar Association Committee and the Chief Justice, is thus indicated in the Committee's report for the following year: "We learned that the court is not unmindful of the danger of delay caused by the increased number of cases brought before it under existing legislation, but the court is of opinion that it will be able to cope with this increase in the number of cases brought before it by delivering fewer opinions and by making the opinions more concise in most cases. It was very obvious that the delay caused by the increased number of cases brought before it under existing conditions. We therefore felt it our duty to proceed no further in this particular matter." 42 AM. BAR ASSN. REP. 334, 335. See also, Alexander W. Smith, "Relief of the Supreme Court of the United States," 4 LAW AND BANK, 128.

¹¹⁰ 53 CONG. REC. 7014. It was reported from the Judiciary Committee on June 1, 1916. HOUSE REPORT, No. 794, 64th Cong., 1st Sess., Ser. No. 6905.

¹¹¹ See HOUSE REPORT, No. 794, 64th Cong., 1st Sess.

¹¹² Under Section 248 of the Judicial Code review could be had by writ of error or appeal in Philippine cases involving "The Constitution, or any statute,

perfecting appeals was cut down,¹¹³ and, at the Court's suggestion, the length of its term was extended.¹¹⁴

The occasion was also utilized to restrict the scope of the appellate jurisdiction over state courts which had prevailed since 1789. The principle of review under Section 25 of the Judiciary Act, as later embodied in Section 237 of the Judicial Code, was simple in statement and easy of application. Prior to 1914, the denial of a federal right by the highest court of a state in which a decision upon the question could be had, was reviewable upon writ of error. The Act of 1914 permitted review by *certiorari* in the same class of cases, when the state court upheld instead of denied the federal right. The Webb bill of 1916, however, altered the provinces of writ of error and *certiorari*. It drastically narrowed the area of review as of right by the Supreme Court of state decisions denying federal claims. Writ of error was left available for only two types of state court decisions: (1) where the validity of a treaty or statute of, or an authority exercised under, the United States was drawn in question and the decision was against its validity; and (2) where the validity of a statute of, or an authority exercised under, any state on the ground of its repugnance to the Constitution, treaties or laws of the United States was drawn in question and the decision was in favor of its validity. All other cases were left

treaty, title right or privilege of the United States, . . . or in causes in which the value in controversy exceeds twenty-five thousand dollars, or in which the title or possession of real estate exceeding in value the sum of twenty-five thousand dollars, . . . is involved. . . ." See *Cariño v. Insular Government*, 212 U. S. 449, 456 (1909); *Harty v. Victoria*, 226 U. S. 12 (1912).

¹¹³ Under Section 22 of the Act of Sept. 24, 1789, 1 STAT. 73, 85, writs of error could be "brought" within five years after rendering the judgment or decree complained of. The provision was later limited to two years. U. S. REV. STAT., § 1008. The time within which a writ of error was "brought" was calculated from the date when the writ was filed in the court to which it issued. *Brooks v. Norris*, 11 How. (U. S.) 204 (1850); *Scarborough v. Pargoud*, 108 U. S. 567 (1883); *Polleys v. Black River Improvement Co.*, 113 U. S. 81 (1885). The Act of 1916 reduced the period to three months and only required that the writ of error, appeal, or writ of *certiorari* shall be "duly applied for" within that period. The date of application thus becomes relevant. See *Citizens Bank v. Opperman*, 249 U. S. 448, 449, (1919); *Puget Sound Co. v. King County*, 264 U. S. 22, 24 (1924). See Charles C. Moore, "Appellate Review by United States Supreme Court Limited to Three Months," 21 LAW NOTES, 5.

¹¹⁴ "They want a little shorter vacation and more time to do work when the weather is better." Webb, in the House, on June 10, 1916, 53 CONG. REC. 9442.

to the judicial grace of *certiorari*.¹¹⁵ Thus, in addition to the cases where the state court sustained a federal claim when its denial would have given rise to writ of error, *certiorari* was now extended, as the only means of securing review, to cases where any title, right, privilege or immunity was claimed under the Constitution, or under any treaty or statute of, or commission or authority derived from, the United States, and the decision was either for or against the title, right, privilege or immunity so claimed. Cases arising in the state courts under the Federal Employers' Liability Act came, of course, within this qualifica-

¹¹⁵ In his address before the American Bar Association in 1922, Chief Justice Taft gave this explanation for the change: "The general power of *certiorari* in such constitutional questions was conferred in the Act of 1916, and has been exercised ever since. It was granted because Congress found that counsel were often astute in framing pleadings in state courts to create an unsubstantial issue of Federal constitutional law and so obtain an unwarranted writ of error to the supreme court." 47 REP. AM. BAR ASSN. 250-56. In *Dahnke-Walker Co. v. Bondurant*, 257 U. S. 282, 294 (1921), Mr. Justice Brandeis, in a dissenting opinion, attributed to the legislation a more far-reaching purpose: "But the Act of 1916 made the nature of the constitutional question raised in applying the statute a matter of importance. If the question is a denial of the power of the legislature to enact the statute as construed, a review may be had as of right. If the question concerns merely the propriety of the particular use of the statute or of the manner of applying or administering it, the review may be had only in this court's discretion. The classification thus introduced rests upon broad considerations of policy. The steady increase of the business of this court had made it necessary to limit the appellate jurisdiction in cases arising under § 237. To this end Congress determined in 1916 that even cases involving constitutional questions should be reviewed here only where the public interest appeared to demand it. Congress left parties a review as of right where the validity of a state statute had been drawn in question; because the decision of such a question is usually a matter of general interest. But whether a valid state statute has in a particular case been so used as to violate a constitutional guaranty is ordinarily a matter of merely private interest. Hence, Congress provided that where the validity of the statute is not assailed, the denial of a claim that in applying it a right, privilege or immunity had been violated, should not be reviewed, unless this court, in its discretion to be exercised upon petition for a writ of *certiorari*, should direct the review. That is, Congress treated a right, privilege or immunity claimed to have been violated by the courts' erroneously applying a confessedly valid statute to the particular facts of a case, just as it treated a claim that the right, privilege or immunity had been violated by a decision erroneous in some other respect."

Senator Walsh has criticised the inconsistency of the Act of 1916: "The Act left, however, illogically subject to review by writ of error or appeal just such questions [coming from the state courts and subject to review only by *certiorari*] if they came to the Supreme Court from the Circuit Court of Appeals." Thomas J. Walsh, "The Overburdened Supreme Court," 1922 REP. VA. BAR ASSN. 216, 223, reprinted in 62 CONG. REC. 8545.

tion. A sharp line was thus drawn between the validity of legislation and the application of legislation. Where a case concerned the power of the state to enact laws or exercise authority in alleged defiance of a federal bar, the issue obviously partakes of that public interest upon which the Supreme Court sits in judgment. Where, however, a claim relates to the assertion of a federal right apart from the conflict of such right with the power of a state, the matter is apt to be of restricted private concern, and the national interest is sufficiently safeguarded through appeal to the Court's discretionary jurisdiction.¹¹⁶

Here was a marked change of policy, albeit in form merely an extension of the principle of discretionary jurisdiction through *certiorari* derived from the Circuit Courts of Appeals Act. But the chief aim of this measure — to save the Supreme Court from the voluminous futilities of employers' liability litigation — was so compelling, that the important innovation of the Act went through Congress without serious consideration, certainly without debate.¹¹⁷ Since then, one of the most powerful lawyers of the Senate, Thomas J. Walsh of Montana, has vigorously deprecated its enactment.¹¹⁸ But at the time, the bill passed both Houses as though it were a perfunctory measure,¹¹⁹ and became law on September 6, 1916.¹²⁰ The authorship of this measure

¹¹⁶ See Brandeis, J., dissenting, in *Dahnke-Walker Co. v. Bondurant*, *supra*, quoted in note 115. Senator Walsh has questioned the validity of the distinction. See Thomas J. Walsh, *supra*, 1922 REP. VA. BAR ASSN. 216, 224.

¹¹⁷ Upon an explanatory statement from Webb, the bill passed the House on June 10. 53 CONG. REC. 9441. It was reported from the Senate Judiciary Committee on Aug. 11 with an amendment, eliminating the House provision restricting appeals in *habeas corpus* proceedings. SEN. REP., No. 775, 64th Cong., 1st Sess., Ser. No. 6899. The purpose of the House provision was to avoid delays, and assimilate all appeals on *habeas corpus* to appeals in those cases where the petitioner complained of detention by state authority in violation of a federal right. See Act of March 10, 1908. 35 STAT. 40. The Bill as amended passed the Senate without debate on Aug. 26. 53 CONG. REC. 12478, 13279. On Sept. 1, the House concurred in the Senate amendment. *Ibid.* 13579.

¹¹⁸ See Thomas J. Walsh, *supra*, 1922 REP. VA. BAR ASSN. 216; also Senator Walsh's remarks in the Senate on Feb. 3, 1925, 66 CONG. REC. 2925.

¹¹⁹ See note 117, *supra*.

¹²⁰ 39 STAT. 726. The same session of Congress, strangely enough, saw an attempt to enlarge the appellate jurisdiction of the Supreme Court. Senator Nelson, by request, on Dec. 10, 1915, introduced a bill imposing on the Supreme Court review of all decisions by circuit courts of appeals reversing the judgment or decree of a district court in all cases where review could be had as of right from

is generally attributed to Mr. Justice McReynolds whose experience, as former Attorney General, with the members of the Judiciary Committees of both the House and the Senate greatly promoted its enactment.

The Act brought prompt relief.¹²¹ Employers' liability cases ceased to drain the Court's time, though they still evoke need-less *certiorari*.¹²² But the Act of 1916 in its new classification of review over state courts led to perplexing distinctions, puzzling alike to court and counsel. The Court's refusal to extend the

a final decision of a circuit court of appeals in such a suit. The bill, which is printed in 53 CONG. REC. 9233, aimed at securing review of decisions of circuit courts of appeals upon interlocutory orders and judgments lacking the customary quality of finality. It was reported from the Judiciary Committee by Senator Sutherland on Apr. 19, 1916, SEN. REP., No. 363, 64th Cong., 1st Sess., Ser. No. 6898, and passed the Senate, without debate, on June 3. 53 CONG. REC. 9233. In the House the bill went quietly to sleep.

¹²¹ The effect of the Act of 1916 in reducing cases reaching the Supreme Court as of right from state courts and the circuit courts of appeals is illustrated by the following statistics covering the Terms of the Court during which that Act was making itself progressively felt. The figures relate to the cases disposed of during each Term of Court.

Term	On error to state courts	On appeal from or error to circuit courts of appeals
1916	157	36
1917	150	48
1918	132	48
1919	101	25
1920	69	38
1921	65	29

See also 33 HAR. L. REV. 102.

¹²² See *Yazoo & M. R. R. v. Mullins*, 249 U. S. 531 (1919); *N. Y. C. R. R. v. Porter*, 249 U. S. 168 (1919); *Kinzell v. C., M. & St. P. Ry.*, 250 U. S. 130 (1919); *Phila., B. & W. R. R. v. Smith*, 250 U. S. 101 (1919); *So. Pac. Co. v. Industrial Accident Comm.*, 251 U. S. 259 (1920); *Lee v. Central of Ga. Ry.*, 252 U. S. 109 (1920); *C., R. I. & P. Ry. v. Ward*, 252 U. S. 18 (1920); *Hull v. Phila. & Read. Ry.*, 252 U. S. 475 (1920); *Phila. & Read. Ry. v. Hancock*, 253 U. S. 284 (1920); *Erie R. R. v. Szary*, 253 U. S. 86 (1920); *Erie R. R. v. Collins*, 253 U. S. 77 (1920); *Southern Pac. Co. v. Berkshire*, 254 U. S. 415 (1921); *Wells Fargo & Co. v. Taylor*, 254 U. S. 175 (1920); *Troy Union R. R. v. Mealy*, 254 U. S. 47 (1920); *Phila. & Read. Ry. v. Polk*, 256 U. S. 332 (1921); *Phila. & Read. Ry. v. Di Donato*, 256 U. S. 327 (1921); *Reed v. Director General*, 258 U. S. 92 (1922); *Ind. Comm. v. Davis*, 259 U. S. 182 (1922); *Davis v. Green*, 260 U. S. 349 (1922); *N. Y. C. R. R. v. Kinney*, 260 U. S. 340 (1922); *B. & O. S. W. R. R. v. Burtch*, 263 U. S. 540 (1924); *Frese v. C., B. & Q. R. R.*, 263 U. S. 1 (1923); *B. & O. R. R. v. Groeger*, 266 U. S. 521 (1924); *Schendel*, 46 Sup. Ct. Rep. 420 (1926); *C. & O. Ry. v. Nixon*, decided May 24, 1926; *St. Louis-San Francisco Ry. v. Mills*, decided May 24, 1926.

interpretation of "the exercise of an authority under a state"¹²³ to include constitutional objections to the exercise of an authority under a state statute whose validity had not been attacked,¹²⁴ has resulted in diminution of review as of right.¹²⁵ On the other hand, in *Dahnke-Walker Co. v. Bondurant*,¹²⁶ the Court needlessly burdened its docket by entertaining a writ of error where the validity of a statute was not in issue but merely its particular unconstitutional application, put in terms of *ad hoc* invalidity.¹²⁷ Unexpected difficulties disclosed themselves in practice, as is generally true of new procedural measures. But the *Dahnke-Walker* decision added to the confusion of counsel by increasing the uncertainties to which the Act gave rise. With surprising frequency counsel mistook the proper method for seeking re-

¹²³ See *Baltimore & Potomac R. R. v. Hopkins*, 130 U. S. 210 (1889).

¹²⁴ *Jett Bros. Distilling Co. v. City of Carrollton*, 252 U. S. 1 (1920).

¹²⁵ Shepard's Citations of *Jett Bros. Distilling Co. v. City of Carrollton*, *supra*, note 124, indicates the frequency with which its doctrine has led to the dismissal of cases from state courts.

¹²⁶ 257 U. S. 282 (1921), commented on in 35 HARV. L. REV. 618 (1922). See *Eureka Pipe Line Co. v. Hallanan*, 257 U. S. 265 (1921); *United Fuel Gas Co. v. Hallanan*, 257 U. S. 277 (1921).

¹²⁷ The embarrassments created by this decision were thus put by Mr. Justice Brandeis in his dissent: "If jurisdiction upon writ of error can be obtained by the mere claim in words that a state statute is invalid, if so construed as to 'apply' to a given state of facts, the right to a review will depend, in large classes of cases, not upon the nature of the constitutional question involved but upon the skill of counsel. The result would be particularly regrettable, because the decision of such cases often depends not upon the determination of important questions of law (which should in the main engage the attention of this court), but upon the appreciation of evidence frequently voluminous." 257 U. S. at 298. The case has since been followed in *Gillespie v. Oklahoma*, 257 U. S. 501 (1922); *Cudahy Packing Co. v. Parramore*, 263 U. S. 418 (1923); *Kansas City Structural Steel Co. v. Arkansas*, 46 Sup. Ct. Rep. 59 (1925). Cf. *Phila. & Reading C. & I. Co. v. Gilbert*, 245 U. S. 162 (1917); *Dana v. Dana*, 250 U. S. 220 (1919). The principle of the *Dahnke-Walker* case has, however, not been extended to a situation where the application of a confessedly valid state statute is claimed to be in conflict with a federal law. Although the basis of review in such a case would seem to be the same, cases of this nature have been reviewed by *certiorari*. Cf. *Mo. Pac. R. R. v. Boone*, 46 Sup. Ct. Rep. 341 (1926); *Harrigan v. Bergdoll*, 46 Sup. Ct. Rep. 413 (1926). But cf. *Davis v. Cohen & Co.*, 268 U. S. 638 (1925). The applicability of the principle of the *Dahnke-Walker* case to suits in state courts involving maritime law, and its tendency thereby to increase the Court's obligatory jurisdiction in such cases, has been adverted to by Brandeis, J., in *Washington v. Dawson & Co.*, 264 U. S. 219, 237, note 19 (1924). Cf. *Miller's Indemnity Underwriters v. Brand*, 46 Sup. Ct. Rep. 194 (1926).

view.¹²⁸ The extent of dismissals for want of jurisdiction by the Court led the Chief Justice to speak of the situation thus created, or at least intensified, by the Act of 1916, as "more or less a trap."¹²⁹ Certainly, however, this Act shunted from the Supreme Court cases which are not within its function and released its energies for those problems which are its proper concern. The wisdom of the reform is perhaps best gauged by the enormous extension of the principle of *certiorari* introduced by the Act of February 13, 1925,¹³⁰ which brings us, finally, to the post-war judiciary acts and the accession to the Chief Justiceship of William Howard Taft, whose influence largely shaped the legislation.

Felix Frankfurter.

HARVARD LAW SCHOOL.

¹²⁸ Cf., e.g., *Rust Land and Lumber Co. v. Jackson*, 250 U. S. 71, 76 (1919).

¹²⁹ William H. Taft "Reforms in the Administration of Justice in the Federal Courts" 47 REP. AM. BAR ASSN. 250, 258, (1922).

¹³⁰ 43 STAT. 936.

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