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THE GOLDEN EGGS: A STUDY IN TRAGELAPHINE ANATOMY *

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The cost of transportation from the point of manufacture to the point of sale is a matter of concern to both shipper and carrier; but it means one thing to one and another to the other. Again, both buyer and seller are concerned, but to one it is a shipping cost, and to the other it may be cost of raw material or stock in trade. Controversies between these parties may arise, but as between shipper and carrier the problem is what freight shall be paid, while as between buyer and seller it is, who shall pay the freight? These different points of view, however, do not necessarily make the questions themselves distinct.

The public, too, has an interest both in what freight shall be paid and in whether it need be paid at all. Today we describe this interest roughly as one in "minimizing wasteful cross-haulage" (a crude characterization, if the public interest actually penetrates below the surface matter of total national expenditure); a century ago, Lincoln put the matter somewhat more pithily in classifying all human endeavor as "productive" and as "waste effort"¹ (and thus all people as producers and as parasites). Transportation, under his scheme, was waste effort, at least if it involved carrying coals to Newcastle. Lincoln fashioned this point into a rather plausible argument for a protective tariff system; but even those unimpressed with that argument may go along with his premise that there is no ultimate benefit,

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1. See I SANDBURG, *THE PRAIRIE YEARS* 394 *et seq.* (1926). In the recent campaign against cross-haulage, the Wheeler Bill of 1936 (S. 4055, 74th Cong., 2d Sess.) was one of the leading efforts, though unsuccessful. The various acts relating to the Interstate Commerce Commission, notable the Transportation Act of 1920 (41 STAT. 456) also reflect this policy.

ceteris paribus, in expenditures to carry over great distances what can be obtained from points nearby the destination.

The transportation cost problem has here been selected as one example of the numerous economic problems clothed with a public interest. It may serve as a useful medium for an approach to the broader question of whether there is consistency in governmental policy in attempts to manipulate the national economy. The example above indicates the imperfect view of such a large problem which may be gained by one concerned with only one narrow aspect of the field; it may be postulated, however, that a national government should take a sufficiently broad view to develop a policy of long-range consistency and significance. As the title of this study suggests, however, government may become such a large beast that one arm may act not only independently of another, but in actual conflict with the long-range objectives of the other. It is purposed to examine here that tendency in the treatment of the problem of transportation costs by our Federal Government, and especially the question whether the Supreme Court has in any degree reconciled the conflicts arising in administrative policy. The Interstate Commerce Commission and the Federal Trade Commission were selected for parallel treatment, not only because they are the two largest and most important agencies (though certainly not the only ones) dealing with transportation costs, but also because they have both recently carried important litigation in the field through the Supreme Court, and these cases, handled by substantially the same Court personnel, may, considered together, throw some light on the question whether the Court approaches the work of individual administrative agencies as facets of one broad public policy, or as unrelated contests between citizen and state.

The work of the I. C. C., dealing with the transportation companies as public utilities, has been grounded on the broad question of whether they have earned the money they charge, and has emphasized the distinction between such a utility and an entrepreneur with the inherent right to profit unlimited. On the other hand, the F. T. C., unconcerned generally with the measure of profit, has considered transportation charges as costs, and as such as only one of several elements, unimportant except insofar as they may be used as means of oppression or discrimination by a seller against a buyer, or as they may be the cloak of subterfuge by a group of sellers, acting in concert, to oppress buyers or competing sellers.² The significance of the amount

2. The best discussions of the I.C.C.'s handling of transportation costs are in SHEARFMAN, *THE INTERSTATE COMMERCE COMMISSION* (1937), especially vol. 3, and (as to interterritorial freight rates, under discussion here) "*Interterritorial Freight Rates*", 12 *LAW & CONTEMP. PROB.* 391 (1947). See also, for narrower phases

of transportation charge, or of where this burden falls, may naturally vary in these two contexts. There is no direct conflict, however, until the two agencies commence, intentionally or inadvertently to manipulate the same economic problem, as appears to have occurred in the attempts of the I. C. C. to adjust the relative economic status of the various regions of the country, through the regulation of freight rates, and in the probably unintended effect on the same matter of the F. T. C.'s campaign against basing-point prices. Of course it is for Congress, which creates these agencies and defines their powers and the scope of their interest initially, to reconcile such conflicts as they arise, but it is a thesis of this article that in the absence of Congressional adjustment it is also for the Supreme Court to develop and give expression to a consistent formulation of the underlying public policy, as a basic judicial function.

PART I: THE I. C. C. VERSUS THE ZONE FREIGHT RATE: A STUDY IN TERRITORIAL SUBSIDY

*"Was du ererbt von deinen Vätern hast,
Erwirb es um es zu besitzen."*

(You must first earn what you inherit from your forefathers, in order then to possess and enjoy it.)

Faust, I, 682-3.

THE ECONOMIC SETTING

Were the South generally regarded as the most prosperous area in the Country—irrespective of realities—it is to be doubted that any complaints from there of economic discrimination would carry much weight, either with public opinion, or with the official agencies created to regulate the nation's economy, or with others regarding such regulation as part of their function.

However, this is not the case; the South is thought of as a backward, impoverished area. It fell into this state after the struggle which destroyed its ancient way of economic life; it remained so when its people failed to find an adequate substitute.³ The present continuance

of the question, Tally, *The Supreme Court, the Interstate Commerce Commission, and the Freight Rate Battle*, 25 N.C.L. Rev. 172 (1947). The F.T.C.'s fight against the basing-point pricing practice has been much more widely discussed, and it is difficult to cite a single definitive treatment. The best starting point is perhaps OPPENHEIM, *CASES ON TRADE REGULATION* 964 (1936), which contains a full bibliographical reference list. The more recent basing-point cases are discussed in articles cited therein at n. 316.

3. The agrarian economy of the South rose Phoenix-like from its own ashes after the war, to be agrarian still, though its typical habitus has been prostrate, as its own members say, or supine, as it may seem to others. See on this tendency HACKER AND KENDRICK, *THE U.S. SINCE 1865* (4th ed. 1949); BUCK, *THE GRANGER MOVEMENT* (1913); SMELLIE, *THE AMERICAN FEDERAL SYSTEM* (1928).

of this state is demonstrated by statistical surveys, emphasizing particularly relative concentrations of industrial⁴ wealth and prevailing wage levels, and even to a degree by analyses emphasizing population-industry density and wage level-cost of living ratios.⁵ It is demonstrated by historical and sociological studies, and in song, story and (low be it spoke) drama.

The relative poverty of the South being a publicly received and deplored fact, and being laid at the root of so many evils of nationwide import, it is natural that any event or situation tending in any degree to redound to the economic disadvantage of the South will be regarded with intense suspicion and criticism. One such whipping-boy is the cost of transportation, which has been cited for some time as a principal offender in the retarding of Southern economic growth.⁶ The charge has been the basis of an amendment of the regulations controlling our national economy, and this suggestion has resulted in litigation at several points, and has been adjudicated in the Supreme Court. It is presently purposed to examine this adjudication from a policy viewpoint. First, however, the elements of the case for the Southern representatives must be stated, as a foundation for description and criticism of what the Court did.

To any Southerner not in the transportation business, of course, low railroad rates would be desirable. The advantage to the consumer is obvious, though freight rates bear only indirectly on the cost of living and hence with him are not a burning issue. From the business point of view, however, freight rates are not only important, but if they are, or appear to be, unduly high, they are an obvious thorn in the side. As rates charged Southern shippers have been, or have appeared to be, consistently higher than those charged in the North ever since railroad

4. As distinct from agrarian or natural-resource-based wealth.

5. See, e.g., REPORT OF THE BOARD OF TRANSPORTATION INVESTIGATION AND RESEARCH (1943); CLASS RATE INVESTIGATIONS, 1939, 262 I.C.C. 447 (1945), especially 536 *et seq.*; STATISTICAL ABSTRACT OF THE UNITED STATES (1939); T.N.E.C., HEARINGS ON INVESTIGATION OF CONCENTRATION OF ECONOMIC POWER, 75th Cong., 3d Sess. (1939). See on recent proposals for Federal subsidy to education, also, Editorial, The Boston Herald, 2 May 1949, and news report, The Boston Herald, 31 August 1949, of remarks of Republican Leader Baldwin of Connecticut concerning subsidy by Federal funds of states which offer tax exemptions to attract industries to move from non-subsidized states.

6. See Time, May 26, 1947, p. 30, col. 1; Fortune, *Freight Rate Battles*, October 1944, p. 49; Business Week, Sept. 25, 1943, p. 24, col. 2; *id.*, May 26, 1945, p. 17, col. 1; *id.*, June 16, 1945, p. 120, col. 1; *id.*, Dec. 8, 1945, p. 22, col. 3. Among the technical studies relating to the problems were three T.V.A. Surveys: *Interterritorial Freight Problem of the United States*, H.R. Doc. No. 264, 75th Cong., 1st Sess. (1937); *Supplemental Phases of Interterritorial Freight Problem*, H.R. Doc. No. 271, 76th Cong., 1st Sess. (1934); *Regionalized Freight Rates, Barrier to National Productiveness*, H.R. Doc. No. 137, 78th Cong., 1st Sess. (1943). See also *Report on Interterritorial Freight Rates*, H.R. Doc. No. 303, 78th Cong., 1st Sess. (1943) and VOGLE AND KLINE, FREIGHT RATES OF THE SOUTH (1943).

operations became a matter within the province of The Interstate Commerce Commission sixty-odd years ago, there has been throughout that time more or less political pressure from the South for an adjustment in its favor.⁷ During much of the period the Commission simply did not have rate-regulation powers,⁸ and even when it acquired general rate-fixing powers it was at best a dubious question whether they would extend to an adjustment for the benefit of a section of the Country rather than as between specific shippers and carriers.⁹ It was not until a decade ago that an amendment to the statutory language emboldened representatives of Southern shipping interests to precipitate the fight for a territorial rate adjustment in the Commission.¹⁰

A typical argument for rate change runs about as follows: during the post-Civil War era of rail expansion, rates were fixed according to what the traffic would bear. But during that time the South was politically and economically weak, and rates fixed in that area by North-controlled railroads were aberrantly high. When rail rates became the subject of Federal regulation, the status quo was taken as the starting point, existing rates being presumed proper and the burden placed on those urging change. With this handicap of history and impetus in their favor, railroads have conspired, in effect, ever since, to continue the regional oppression of the South by discriminatory rates. Something should be done to change this situation.¹¹

There were variations in the pattern and in the emotional intensity content, in proportion to history and reason, in these arguments, but the theme was constant, and it wanted only a leader to crystallize

7. Business Week, September 25, 1943, p. 24, col. 2; *id.*, May 26, 1945, p. 17, col. 1.

8. These were first granted by the Hepburn Act, 34 STAT. 584 (1906), as amended, 49 U.S.C. §§ 1-9 (1946). In practice, however, rates have commonly been fixed by rate bureaus and conferences of the railroads with Commission approval. A good brief summary description of this practice appears in Business Week, October 6, 1945, p. 24, col. 3.

9. The sections of the Interstate Commerce Act, 24 STAT. 379, §§ 3, 4 (1887), as amended, 49 U.S.C. §§ 3, 4 (1946), have been the subject of much amendment to clarify this point, but different Congresses have meant different things, and conflicting case interpretations have further obscured the point. The Hoch-Smith Resolution, 43 STAT. 801 (1923), as amended, 49 U.S.C. § 55 (1946), the "port" clause, 49 STAT. 607 (1935), and the Ramspeck Act, 54 STAT. 899 (1940), are the more important legislative amendments. *The Lake Cargo Coal Case*, (101 I.C.C. 513 (1925), 126 I.C.C. 309 (1927), 139 I.C.C. 367 (1928)) *rev'd sub nom.* *Anchor Coal Co. v. U.S.*, 25 F.2d 462 (1928), is a leading example of definition of those provisions by case decision. See also MANSFIELD, *THE LAKE CARGO COAL RATE CONTROVERSY* (1932).

10. The Ramspeck Resolution, 54 STAT. 899 (1940), 49 U.S.C. §§ 1, 8, 12, 13, n. 1001 (1946), was a part of the Transportation Act of 1940, 54 STAT. 899. The Commission had actually started its own investigation, leading to the case under discussion in 1939, but it may be questioned whether it would have gone so far as it did without the Resolution.

11. See Time, May 26, 1947, p. 30, col. 1. The argument is there represented as antediluvian in origin and usage. See also comments in Newsweek, April 9, 1945, p. 68, col. 3, and Time, April 9, 1945, p. 82, col. 2, relating to the then pending Arnall case.

Southern thinking and to register it on the sounding-boards of national public opinion. Such a leader offered himself in Governor Arnall of Georgia, and the debate of two generations and more reached the judicial forum five years ago, culminating at last in *The State of Georgia v. Pennsylvania R. Co.*¹² This action was designed to establish the principle that the I. C. C. must take into account considerations of interterritorial economic balance in establishing rates, rather than judging them simply by the test of reasonableness as to the individual shipper in relation to the return to be earned for the carrier by its total traffic.

Another case, *New York v. United States*,¹³ collateral to the Arnall case, and with an independent result, has largely taken the steam out of the Arnall proceeding. The latter is not rendered moot, but much less is at stake than before *New York v. United States*, where it was held that the I. C. C. may properly take into account broad territorial effects of rate levels, and may adjust rates in a manner calculated to achieve interterritorial economic parity. The difference between this decision and the Arnall case lies chiefly in the difference between "may" and "must", and so long as the I. C. C. adheres to its present policies is an academic distinction. It will here be assumed, then, that the South has won in *New York v. United States* the chief citadel of its objective, leaving only mopping-up needed for complete victory. It is then purposed to examine here in some detail just what *New York v. United States* did for Southern freight rates, and the soundness of the result.

THE I. C. C. AND THE FIXING OF RAILROAD RATES

The rate charged by a railroad for any shipment is the price of its service: that is, it represents from the railroad's point of view cost plus profit. As railroad entrepreneurs may be presumed in the bulk of instances to have built their roads from human motives of profit rather than from any response to an inner call to public service (which may have been controlling in the exceptional case), one might expect rates

12. 324 U.S. 439 (1945), holding that Georgia has standing to bring the suit. See text at note 158 *infra*. The latest development in the case was the filing of a report by the Master, on June 12, 1950. There has been no official report on the filing of this Master's Report, as the Court was adjourned for the Summer on June 5, and no action has been taken on the Report, but newspaper reports are fairly complete. See *e.g.*, New York, Herald Tribune, June 13, 1950, p. 4, col. 4. The Master, Lloyd K. Garrison, found that the railroads had violated the anti-trust laws by improper practices of the type alleged, but found that plaintiff had failed to establish the economic injury complained of, and recommended dismissal of the case.

13. 331 U.S. 284 (1946). The best comment on this case is in the foreword to *Interstate Freight Rates*, 12 LAW & CONTEMP. PROB. 391 (1947). The articles therein were written before the decision in the instant case but are impressively complete on the underlying factors.

to have been calculated to produce the maximum return—that is, set at what the traffic would bear. Under such a set-up it might be expected that rates would sometimes be high, in areas of high demand and low supply (absence of competition in service), and that discriminations of various sorts might be practised where it was advantageous for the railroad to do so, whether by inequalities of rates between different shippers, by inequalities between localities, or by rebates. Further, the business being one in which a large initial capital outlay, and perhaps some political aid, was required in the organization phase, it was peculiarly adapted to the growth of monopoly or to a sanctioned cartel organization and control.¹⁴

These same things were true of many other types of business in the post-Civil War period; but it was against the railroads that the political wrath of those injured by overbearing business practises was first turned.¹⁵ Why this was is hard to explain precisely, although a plausible and conveniently elliptical statement is that the railroad business was “tinged with the public interest,” and hence became classified as a public utility, subject to special governmental controls in fixing its rates as well as in certain other matters.¹⁶

14. See BUCK, *THE GRANGER MOVEMENT* (1913); BUCK, *THE AGRARIAN CRUSADE* (1920); HICKS, *THE POPULIST REVOLT* (1931); T.N.E.C. *op. cit.* *supra* note 5.

15. See CUSHMAN, *THE INDEPENDENT REGULATORY COMMISSIONS* c. 2, 3 (1941), for an interesting treatment of the legislative backgrounds of the Interstate Commerce Act. The matter is also treated in 1 SHEARFMAN, *THE INTERSTATE COMMERCE COMMISSION* (1931).

16. Just when a business becomes touched with a public interest, the assumed factor in this statement, remains elusive. Such businesses are easier to define by specific cataloguing than by general categorizing. Inns (that is, hotels and restaurants), common carriers (public transportation business, except intercontinental surface carriers), purveyors of pipe or wire-conveyed heat, light and water for the home, and communications business (telephone, telegraph, and radio) are touched with the public interest. The catalogue is not historically fixed in detail: airlines and radio stations have fallen into the category of utilities as they assumed large proportions. On the other hand, vendors of food, clothing, solid fuel for the home, and vehicles, lessors of living quarters, and furnishers of medical, dental, and tonsorial services are not touched with the public interest. The dividing line breaks down in the case of banks, insurance companies, accountants, investment and realty brokers and exchanges, and lawyers, so that it is sometimes difficult to tell whether a given activity is regulated as a “public utility” or under some otherwise-derived power. Size and tendency to monopoly do not control, as the contrast between inns and steel manufacturers will show. Neither does, apparently, the essential nature of the commodity or services involved, nor the fact that services rather than commodities are sold. A combination of characteristics is suggested by the listing above, as a means of probing the meaning of “tinged with a public interest,” though not as an infallible test in application to specific cases. In general, the public utility is a business which must typically be large to survive or to be profitable, and which deals directly with a great many customers in small individual transactions. The steel company deals with large customers, or in large transactions, and not directly with ultimate individual consumers; this is not true of the railroad or the telephone or electric company. Further, the fact that services and not commodities are dealt in, and that it would be wasteful and unprofitable for all affected to have enough concerns engaged in the business to produce free competition (whether because of the size of the business, or because of the necessary use of public facilities, as in the case of waterpipes or streetcar lines) may be strongly indicative of a “public interest” in a particular business. The legal literature in this field has not, organiza-

Transportation companies, such as canals and turnpikes, were freely subjected to public regulation during the nineteenth century, but the controls exercised were directly applied by the legislature, so that political manipulation was a definite possibility, and in the case of railroads public policy was at first set toward generosity and liberality, to encourage the expansion of rail transportation for the exploitation of undeveloped areas and resources. This made it possible for overbearing business practises to become sufficiently widespread and unpopular to be a serious political concern and a matter for special and continuing attention.¹⁷ In this setting arose the modern regulatory commission as a legislative device for exercising closer, continuous, and more nearly expert control than had been previously possible. First was the investigatory and advisory commission, in Massachusetts (1869) and other eastern states, and later the more powerful regulatory commissions, in Illinois (1871) and other midwestern states.¹⁸ Two thirds of the states created one or the other type of commission during the twenty years following the Civil War,¹⁹ but it was apparent that for efficiency's sake Congress should exercise the Federal power over this type of commerce, and thus create controls uniform throughout the Country. What was not so obvious, however, was the precise type of control which should be exercised.

Congress debated several legislative proposals for commission control of railroads during the period 1878-85,²⁰ and the present Interstate Commerce Commission, the senior federal independent administrative commission, was created in 1887.²¹ Pursuant to the recommendation of the leading authorities on rail regulation, the new commission was of the advisory rather than of the regulatory type.²² This was changed in 1906 by the Hepburn Act, the first major amendment

tionally, taken adequate note of the developments of the past decade and a half. The best general treatments are POND, *PUBLIC UTILITIES* (1932), and a briefer survey from a non-technical viewpoint, NASH, *THE ECONOMICS OF PUBLIC UTILITIES* (1925).

17. Authorities cited *supra* notes 14, 15. See also 2 HANEY, *CONGRESSIONAL HISTORY OF RAILWAYS IN THE U. S.* (1910), covering the period just prior to 1887.

18. CUSHMAN, *op. cit. supra* note 15, at 20-34; 1 SHARFMAN, *op. cit. supra* note 15, at 13-19.

19. Of thirty-eight states then in the Union, fifteen had an advisory type commission, and ten the stronger type of commission, with rate making powers. See CUSHMAN, *op. cit. supra* note 15, at 25-6.

20. See HANEY, *op. cit. supra* note 17; CUSHMAN, *op. cit. supra* note 15, at 40. The principal bills were the Reagan Bill (1878) and the Cullom Bill (1883).

21. 24 STAT. 379 (1887). This and the amending acts are all in 49 U.S.C. *passim*. See 1 SHARFMAN, *op. cit. supra* note 15, at 19-34, for a discussion of the Act of 1887 prior to the Elkins Act of 1903.

22. CUSHMAN, *op. cit. supra* note 15, at 27 *et seq.*, discusses the arguments as to which type of commission was more desirable. In addition to the cumulative effect of remarks of such leaders as Chauncey DePew, the most effective argument for the advisory type commission was probably that made by C. F. ADAMS, JR., in his *RAILROADS: THEIR ORIGIN AND PROBLEMS* (1878), at 133 *et seq.*

to the original Act,²³ which gave the Commission for the first time the power to prescribe maximum rates prospectively.²⁴ Though there have been some significant changes, the law of railroad rate regulation dates almost entirely from the Act of 1906.²⁵

All that has been said rests on an assumption of plenary legislative power to regulate in this field; and the legislative police power is, in fact, adequate for the general purposes of regulation. Two limitations of a Constitutional nature have touched the Interstate Commerce Commission.²⁶ One of these, the proper extent of delegation of legislative power to an administrative tribunal, combining legislative, judicial, and executive functions, is common to all administrative agencies, and need not be discussed here.²⁷ The other, however, the Due Process Clause of the 5th Amendment, goes to the essence of the rate-fixing power, in its admonition that rates must not be so low as to be confiscatory, and in the procedural minima flanking the administrative process.²⁸ The question of procedural due process is incidental here, but a more general background on the prohibition of confiscatory rate levels may be useful.

The general standard for administrative rate-fixing is that the rate must be "reasonable". "Reasonable", from the point of view of the shipper, or of the shipping public, means that the rate must not be exorbitant, or so high or unequal as to amount to a substantial deprivation or reduction of service. "Reasonable", from the point of view of the carrier, though, means that the rate must not be so low as to deprive the owners of the carrier of a "fair return" on the capital they have invested in the enterprise; and it is in support of this requirement that the Due Process Clause has been more than once invoked.

In making calculations under this latter standard, two elements are necessary: the percentage rate of return considered fair,²⁹ and the base amount to which the rate is to be applied. The fixing of the base for calculation of "fair return" has involved not only some accounting problems in valuation,³⁰ but also considerable controversy as to what

23. This Act (see note 9 *supra*) effectively changed the I.C.C. into the "strong" type commission. See 1 SHARFMAN, *op. cit. supra* note 15, at 40-52; CUSHMAN, *op. cit. supra* note 15, at 65-81, with a good summary.

24. See *id.* at 70 *et seq.*

25. *E.g.* The Mann-Elkins Act of 1910, 36 STAT. 539; The Transportation Acts of 1920, 1933 and 1940, 41 STAT. 456, 48 STAT. 211, 54 STAT. 899, 49 U.S.C. *passim* (1946).

26. Others, concerned chiefly with the scope of the Commerce Clause, may affect different agencies, and there may be special problems in determining the powers a state commission may properly exercise.

27. See generally GELHORN, ADMINISTRATIVE LAW: CASES AND COMMENTS 60 *et seq.* (2d ed. 1947) and authorities there cited.

28. On these procedural minima see *id.* and HART, AN INTRODUCTION TO ADMINISTRATIVE LAW pt. 5 (2d ed. 1950). On the rate level and its requirements, see 3 SHARFMAN, THE INTERSTATE COMMERCE COMMISSION c. 13, 14 (1936).

29. 3B *id.* c. 14 §§ 1-7.

30. 3A *id.*, especially at 68 *et seq.* and 97 *et seq.*

the valuation yardstick should be: original cost (actual investment), reproduction cost new (a standard important to the owner, at least, in case of casualty loss), present market value (difficult of application to such items as capital assets of railroads), or, more popular with the modern Court, the amount prudently invested by the owner.³¹ This latter standard ignores the present economic situation of the owner, or at least may ignore it; it substitutes the Court's hindsight for the investor's original judgment, faith, or daring; and it introduces a new imponderable—the definition of "prudence"—into the rate base calculation; but it has, nevertheless, largely replaced other rate base standards in the railroad rate law of the I. C. C. and the Supreme Court.³²

The Rule Against Territorial Discrimination

The power to regulate rates has been applied not only to prevent excessively high rates, but also to prevent "discriminatory" rates. Several provisions of the Interstate Commerce Act are directed to this general purpose, one forbidding differing rates for the same services,³³ another barring a lower rate for a given haul than that charged for a lesser included haul (the "long and short haul clause").³⁴ These are, however, but specialized relatives of a more general provision, whose scope might well be considered to include both the others. This general provision makes unlawful rates resulting in undue or unreasonable preferences of or prejudices to persons, points, or localities.³⁵

The rule against territorial discrimination involves in its administration the balancing of a number of complex and sometimes imponderable factors. The same factors may influence the determination of what is preference or prejudice, and again of what is "undue" under the statute, so that in a loosely-reasoned case some may be given more and some less than their relatively-justified weight.

The factors which have been taken into account in determinations of prejudice have been principally:

31. 3A *id.* at 130 n. 57, 141-3, 148-9, and authorities cited. The doctrine appears to have started, judicially, with a separate opinion by Justices Holmes and Brandeis in *Southwestern Bell Telephone Co. v. Pub. Serv. Comm.*, 262 U.S. 276 (1923). "Value" is an elusive concept, however, and has produced some of the finest discriminations in the law. The lay mind does not readily accept these and other nice distinctions involved in the rate making process, and there is a tendency to regard some of them as sophistry.

32. This seems to have been accomplished as a part of the process of transmutation of early dissents by Justices Holmes, Brandeis and Cardozo into law when a majority of the Court was obtained, willing to regard earlier cases as precedents only so long as supported by weight of numbers.

33. Section 2.

34. Section 4.

35. Section 3.

- (a) Whether the difference in rates charged is justified by a proportional difference in the cost of furnishing the service;
- (b) Whether the shippers charged the rates are in competition with one another, so as possibly to be affected by the difference.

In addition, in determining whether prejudice (or preference) is "un-
due", consideration has been given to:

- (c) Whether the shipper paying the prejudicial rates is actually injured by the difference, and
- (d) Whether such shipper would actually be aided by the removal of the discrimination.³⁶

The cost differential which may justify corresponding rate variances may be based on distance, but other factors, such as traffic density, terrain, and terminal facilities will also play a part in the picture, so that the calculation of this factor alone may be far from a simple matter.³⁷ Again, in determining whether a shipper has been injured by a rate discrimination, the actual prosperity or even the relative welfare of the shippers concerned will not be entirely controlling, so that the Commission if it will consider this factor may find itself confronted with an unrewarding exercise in tracing causation and in determining what causes are proximate.³⁸ If factor (d) can be determined, of course, that will be helpful in answering question (c), as they are closely related; but to admit this is somewhat to limit the number of factors actually relied on. In determining factor (d) it is noted first that a discrimination may be removed either by lowering the high rate or by raising the lower one, and the question is then asked, would the prejudiced shipper be relieved by the latter type of adjustment? If he would not, then his complaint becomes, if valid at all, solely one of exorbitant rates condemned by Section 1 of the Act.³⁹

In addition to the problems involved in determining the factors listed above, the question arises whether some of these may not be inconsistent with each other or with those which must be considered primarily by the Commission under the Constitutional requirements of due process, mentioned above. There is no necessary conflict in the case involving individual shippers, as the standard of reasonableness

36. 3B SHARFMAN, *op. cit. supra* note 28, at 542-70.

37. 3B *id.* at 559, and authorities cited in n. 422.

38. See particularly *Acme Mills v. A. G. S. R.*, 136 I.C.C. 1, 114, 118-121 (1927).

39. 3B SHARFMAN, *op. cit. supra* note 28, at 563 and authorities cited in his notes at 429-30.

will be so related to cost in individual cases as to determine the matter of the existence of prejudice, as the injury is manifest, even if not critical, where prejudice in shipping rates is present (not all cases have adopted this solution, however). But in the case of alleged territorial discrimination the chain of causation through cost to carrier and cost to shipper is so tenuous as to lead the Commission to rely heavily on factors (c) and (d), and then the problem is, if questions (c) and (d) are to be considered, what if they suggest answers not consistent with that indicated by (a)? Will this inconsistency create a Constitutional flaw in the Commission's action? Is the Commission going beyond the length of its statutory chain and engaging in extra-jurisdictional activities, if it attempts to determine, and by its action to influence, broad interterritorial economic relationships?⁴⁰ These are the questions underlying the superficial problems of procedure and reasoning suggested by the Supreme Court opinion in *New York v. United States*, and it is proposed to return to these questions after a consideration of that case.

The Organization of the Rate Systems Under the Act of 1920

The first post-war Congress, in 1919-20, faced the fact that the American railroad economy was in poor condition, and the Transportation Act of 1920 was its answer to the problem. It was an excellent time for a fairly extensive new deal in railroad legislation, for the roads had been under Governmental control and operation during the War, and as legislation was needed for the return of the railroads to private ownership, the breaking-off point from a wartime to a peacetime basis of rail operation provided a convenient starting point for needed major adjustments.

The really new departure in the 1920 Act stemmed from the fact that rail revenues had, for the previous decade, been insufficient to provide a decent return on invested capital, and attempts to secure rate adjustments to remedy this situation had been inadequately dealt with by the I. C. C., which owed under existing legislation no duty to consider the railroads' needs, in addition to the public interest, in fixing rates. The need for remedial legislation was universally conceded, and the Transportation Act of 1920 was as a consequence perhaps the most popular of the various acts which have gone to build the railroad regulation structure.⁴¹

40. See § 6 of the Act. This problem is discussed *infra*.

41. This fact may have averted or delayed criticism of some of the Act's provisions, which they might otherwise have been thought to merit. The labor provisions, for instance, were more than a decade ahead of the time when they would have been sure, standing alone, of popular approval.

The answer which the 1920 Act provided was contained essentially in its rate provisions, including the notorious "recapture clause", and in its provisions for consolidation of existing rail lines.⁴²

The rate provisions of this Act imposed on the I. C. C. an affirmative obligation, implementing the Constitutional requirement mentioned above, to fix rates at a sufficiently high level to afford rail investors a fair return on their capital, and further to review the rate structure in the light of the welfare of the railroad economy, as a public interest, rather than confining itself as theretofore with interests of the public against exorbitant or discriminatory⁴³ rates.

Of equal importance, especially in relation to the territorial organization of the Country for freight-rate classification purposes, were the provisions for consolidation of competing rail lines. These provisions recognized that enterprises as large as railroads are as unsuited to engage in free cut-throat competition as are elephants to prance the minuet. A part of the ills of the rail economy, particularly in financial structures, lay at the door of uncontrolled competition of businesses too large to fight in the arena available. The resultant statutory instructions to the I. C. C. to work out a plan of consolidation of competing lines adopted a principle of controlled competition—not of the "chosen instrument", but of the chosen gladiator. In each territory there was to be competition, but competition limited to a chosen few.

Under this statute, plans were prepared by the Commission at a leisurely pace, finally producing a plan in December 1929 which closely paralleled that used in the freight rate classification scheme. Under the latter, freight rates are fixed within territories according to two classifications. The first is a broad division of the Country into three territories;⁴⁴ while the second is a more detailed breakdown into eight territories.⁴⁵

Under the consolidation plan, twenty-one major systems were approved, it being contemplated that these might cannibalize other lines

42. Other important provisions dealt with labor problems, service, state interference with interstate commerce and rail security issues.

43. The "fair return" provision was phrased in terms of "the Country's railroad investment" and the so-called recapture clause was in furtherance of the recognition of a national interest in the railroad transportation system. It was designed to bolster up the weaker roads by providing a Robin Hood-like "take from the strong, give to the weak" fund derived from excess earnings recaptured from the stronger roads. This approach toward railroad socialism was, however, a dead letter, and was later repealed.

44. The Eastern (east of the Mississippi and north of the Ohio-Potomac line), the Southern, and the Western.

45. New England, Trunk Line (New York-Baltimore to Chicago-St. Louis), Southern, Southwestern and Northwestern (both west of the Mississippi and east of the Rockies), Central Western (the Mississippi to the Pacific), and Anthracite and Bituminous (both specialized short-line territories).

but not each other, as the twenty-one were grouped into areas of competition: two in the New England territory, five trunk line systems, three systems in the South, two Canadian-owned groups, and nine Western systems.⁴⁶

This broad pattern has been amended, and pressures are met from time to time for further amendment, but it still underlies Commission thinking and action on such diverse matters as rate regulation and security transfers. But there have been times when the pastures on the other side of territorial fences have seemed greener than those closer, for shippers, and this has built, ultimately, political pressures for readjustment of the territorial boundaries, system alignments, or the rate schedules within the parallel rate classification territories. These movements have been especially vigorous in the South, under the impetus of previous resentment against the railroads, and provided the immediate background of the litigation culminating in the case of *New York v. United States*, whose history will now be examined in some detail.

NEW YORK V. UNITED STATES: AN ANALYSIS

In 1939, of its own motion, the I. C. C. instituted two investigations into the legality of the freight rate classifications and class rate relationships throughout the Country.⁴⁷ This investigation was given added impetus by the Transportation Act of 1940,⁴⁸ which added the words "region, district, territory," to the section barring territorial discrimination,⁴⁹ and authorized and directed such an investigation as was already in progress, for the purpose of determining any relative injustice in the rates in their relation to each other, and of removing any such unlawfulness by appropriate orders.⁵⁰

The rate structure disclosed by this investigation was difficult to define, as the "normal" classification system was heavily cut into by exceptional cases, so that only about 6 per cent of the total freight traffic moved under "normal" class rates,⁵¹ and the rest mostly under "excep-

46. Grouped again into more directly competing areas in the northern, central, and southern portions of the territory.

47. See *Class Rate Investigations, 1939*, 262 I.C.C. 447, 454 (1945). See also 264 I.C.C. 41 (1945), supplementing the original report.

48. 54 STAT. 899, 49 U.S.C. §§ 301 *et seq.* (1946). See 262 I.C.C. 447, 689 for the relation of the 1939 investigation to this statute.

49. Section 3.

50. This Act also created the Transportation Board of Investigation and Research, whose *Report*, published in 1943, generally agreed with the substance of the I.C.C. report supporting its adjustment order two years later. The Board's vote tended to follow geographical lines, and thus expressed the Southern position in the controversy, together with some conflicting conclusions by way of dissent.

51. 262 I.C.C. 447, 479 (1945). See also 331 U.S. 284, 307 (1946).

tion”⁵² or “commodity”⁵³ rates, the latter being also exceptions to the usual classification, established for particular commodities.⁵⁴ A classification system which was so subject to economic pressures as to hold good for only 6 per cent of the traffic carried was obviously somewhat unrealistic, and did not fairly represent the actual criteria for rate payment, but the I. C. C. did not attack it from this point of view. On the theory that other types of rates represented deviations from the norm, and that the first step was to adjust that norm, the Commission confined its study and order to the “normal” classification, and to class rates, leaving commodity and exception rates out of the picture for the time being. This case, then, is concerned only with class rates under the basic classification system, that is, with the rates covering about 6 per cent of the total traffic.⁵⁵

Class rates were made up, it was found, by grouping everything to be carried into about thirty classes, and then fixing a rate for each class.⁵⁶ These classifications varied in different rate territories, so that a given item might fall in one class in the Official Territory classification, and in another under the Southern Territory classification. What was of more concern, as the case developed, was the differences in rate levels for the different classes of articles, among the five territories now existing.⁵⁷ The Southern average, for instance, was 137 per cent of the Official Territory average on the first class⁵⁸ and in the other territories the rates ranged from 129 per cent to 160 per cent.⁵⁹ It was to eliminate these inequalities that the Commission’s order was intended.

The position of the railroads has been that the rates they fixed, with Commission approval, have been based on unit cost of carriage, and that the higher unit cost in territories where traffic density is thin and terrain is difficult has justified a higher rate: that is, that to insure a uniformly fair return to the railroad investor, rates must vary in different parts of the Country. Further, a higher point-of-origin rate in Southern and other territories is justified, it was said, by the low

52. 262 I.C.C. 447, 562 (1945).

53. *Ibid.*

54. A fourth type of rate was the column rate, closely resembling the commodity rate. *Ibid.*

55. This figure varied between territories, and was actually only 4.1 per cent, tonnage-wise, for the entire country, but as between Southern and Eastern railroads, 6 per cent was taken as a fair average. The figures were also not complete for all territories. See note 44 *supra*.

56. Though such a rate existed only on paper if lower commodity or exception rates covered everything in the class, as frequently happened.

57. Official, Southern, Western Trunk Line, Southwestern, and Mountain Pacific.

58. Other classes being rated at percentages of the first.

59. 184 per cent under the Transportation Board report.

volume of use of terminal facilities there.⁶⁰ The Commission found this justification not to exist, or at least not to justify, sufficiently, the difference. Southern ton-mile costs, it was said, were actually less than those in the East.⁶¹ The actual background of the difference, according to the Commission report, was historical. The railroads grew up as feeders for the waterways, and were thus bounded by them, and no better reason than this lay behind the territorial boundaries which separated even the large rail lines. The Eastern economic territory, further, grew up first, and became strongest, and able to effect more favorable rate bargains than could the industrially undeveloped South and West.⁶²

The corrective plan adopted by the Commission contemplated a uniform country-wide freight classification system,⁶³ patterned on the Official classification, to replace the three previously in use.⁶⁴ Under this classification, rates were to be equalized, ultimately, at 115 per cent of the previous Official rate levels.⁶⁵ This would bring Eastern rates up 15 per cent, and Southern and Western rates down different amounts, as much as 37 per cent in some cases.⁶⁶

The uniform rate classification was not a great task, as there was about 60 per cent uniformity already, and only 13 per cent differing in all three systems.⁶⁷ The rate level adjustment was a serious matter, though, as freight generally accounted for two-thirds of the railroads' operating revenue, and class rates covered some of the items producing the highest relative profit.⁶⁸ To allow time for adjustment in such an area, an interim order was entered, for a flat 10 per cent class rate cut in all but Official Territory, and for a 10 per cent raise on intraterritorial hauls in Official Territory, and a 10 per cent cut on hauls out of Official Territory.⁶⁹

Suits were brought by some of the railroads affected, but principally by the states in Official Territory, to set aside the interim

60. 262 I.C.C. 447, 591-2, 642-88 (1945), *passim*; 331 U.S. 284, 314-5 (1946). See *e.g.* Dickson, *Full Cost Basis for Competitive Rates Favored*, 116 RAILWAY AGE 515 (1944).

61. 262 I.C.C. 447, 591 (1945).

62. *Id.* at 619 *et seq.*, p. 512 *et seq.*, *passim*. See also report, TRANSPORTATION BOARD OF INVESTIGATION AND RESEARCH (1943).

63. 262 I.C.C. 447, 509-12, 699-702 (1945).

64. The Official, the Southern, and the Western, used in three rate territories.

65. 262 I.C.C. 447, 701-2 (1945), and appendices cited.

66. Mountain Pacific rates were not affected, as coast-to-coast exception and commodity rates were already so favorable as to rule West Coast shippers out of the rate fight.

67. 262 I.C.C. 447, 468-71 (1945).

68. WORLD ALMANAC 443 (1948). This point was stressed in news reports, cited *supra* note 6 and *infra* note 71.

69. 262 I.C.C. 447, 702-7 (1945).

order;⁷⁰ this suit indirectly also affected the permanent adjustment, as it went in part to the power of the I. C. C. to issue such an order as was done here, and in part to the sufficiency of the justification for the order in the investigation and findings in this case—again touching the support for the permanent as well as for the temporary adjustment.

The District Court for the Northern District of New York, in which the suits were brought, sustained the Commission's orders,⁷¹ and appeals were taken to the Supreme Court, which affirmed the judgment below.⁷²

The Court's own opinion justifying its decision rested it on substantially the following points:

- a. The I. C. C. has power under existing law to regulate rates to eliminate interterritorial discrimination.⁷³
- b. In this case the I. C. C.'s findings, (1) that interterritorial discrimination existed, and (2) that it was economically prejudicial to the South, Midwest and Southwest territories, were adequately supported by the evidence.⁷⁴
- c. The I. C. C. finding that the rate discriminations were not justified by differing railroading conditions in the different territories was also supported by the evidence.⁷⁵
- d. In spite of some inconsistency the temporary reduction order as to less-than-carload class rates should not be set aside.⁷⁶
- e. The I. C. C. order increasing Official Territory rates 10 per cent and reducing those in other territories was proper even though Official Territory rates were previously reasonable.⁷⁷

A discussion in some detail of the reasoning behind each of these points seems indicated.

The Power of the I. C. C. to Eliminate Interterritorial Discrimination

This question must be divided into two components, as must any question of the power of an administrative agency:

70. A collateral question, not here discussed, concerns the states' standing to contest the order in court. See Davis, *Standing to Challenge and to Enforce Administrative Action*, 49 Col. L. Rev. 759 (1949).

71. 65 F. Supp. 856 (N.D.N.Y. 1946). See also newspaper accounts in the N.Y. Times, May 10, 1946, p. 29, col. 8, May 11, p. 34, col. 3, May 19, p. 10, col. 5, May 28, p. 33, col. 4.

72. *Sub nom.* New York v. United States, 331 U.S. 284 (1946).

73. *Id.* at 296-300.

74. *Id.* at 301-315.

75. *Id.* at 315-332.

76. *Id.* at 332-40.

77. *Id.* at 340-51.

- (1) The question whether there is statutory authority under the Commission's enabling legislation for the regulation; and
- (2) Whether any power so granted will if exercised transgress the constitutional boundaries to administrative or governmental authority.

The majority opinion and Justice Jackson's dissent were divided primarily on the existence of the legislative basis of the power—assumed *sub silentio* in Justice Frankfurter's dissent. The principal point of discussion as to the existence of power was the Ramspeck resolution of 1940, directing the Commission to remove any unlawfulness "which may be found to exist in respect to unreasonable rates discriminating against any region, district, or territory".⁷⁸

The majority held that the Ramspeck resolution merely enlarged the scope of a pre-existing section. The Interstate Commerce Act, they held, has always aimed to eliminate discrimination against localities. The Transportation Act of 1940 added the words "region, district, territory" to the previous anti-discrimination section along with instructions to the Commission to investigate existing rates and eliminate unlawfulness in interterritorial rates. The Commission acted under this resolution to remove interterritorial discriminations found in existing rates, "if not justified upon proper consideration of recognized elements of rate making applied in the light of the amended law," as unlawful.⁷⁹ The new words added by Congress in 1940 "made plain" the duty of the Commission to consider territorial rate problems and to eliminate differences "*which are not justified by differences in territorial conditions*".⁸⁰ This was merely a clarification of the statute, rather than a modification.

However, it must be noted that the Commission never openly indicated that the rate changes would have been lawful prior to 1940. On this it hedged.⁸¹ And Mr. Justice Jackson's position was in essence that there was no power given in any statute to raise rates in one territory merely to eliminate territorial competition. The 1940 act, he argued, made no change in the laws that previously stood, and debates indicated clearly that Congress did not believe that power existed to do what the Commission here did. Therefore, at least as to the increase

78. *Id.* at 297.

79. *Id.* at 299; 262 I.C.C. 447, 692 (1945).

80. 331 U.S. 284, 298-300 (1946).

81. It is unfortunate in some ways that disagreeing groups in the court are not required to resolve their difficulties by a procedure something like the common law pleading system, as otherwise their arguments may sometimes pass one another like skew lines, neither agreeing nor disagreeing. The majority say, "This is good because of reason *a*," and the minority "This is bad because of reason *b*," and the two run forever on these paths without ever meeting or committing the majority on the soundness of reason *b* or the minority on the soundness of reason *a*.

ordered in Northeastern rates, the Commission lacked power to support its order.⁸²

It cannot be denied that from the earliest days of the Commission's history there has been concern over rate discrimination against localities as well as discrimination against individual shippers or carriers.⁸³ That this concern had been a part of the philosophy of the Commission's regulatory work under Sections 3 and 4 of the Act is indicated by language in the reports of the Commission as early as the 1890's.⁸⁴ The existence of the problem as an evil in rate making was also judicially recognized well in advance of the 1920 statute. Yet other evidences should be borne in mind which reduce the scope both of proper regulation and of power to regulate by placing them in context. First, note the ambiguity of definition in any one of the several terms in the simple statement of the Commission's power. Second, consider the breadth of the word "unreasonable". In the language of the Commission itself there is an indication that some discriminations may be justified "upon proper consideration of the recognized elements of rate making applied in the light of the . . . law",⁸⁵ and in the language of the majority opinion relating to territorial differences in rates "not justified by differences in territorial conditions."⁸⁶ But these qualifications on the Commission's power are nowhere explored in either opinion. It is perhaps best to conclude that the Commission and Court majority are right in finding the existence of power to regulate against territory rate discrimination if they mean "power to regulate properly," and that Justice Jackson is right in his dissent in finding absence of power if he means "power to regulate improperly". The failure to resolve the difference as to the *precise scope* of the Commission's power merely transports the problem to the consideration of the propriety of the instant exercise of the power, and means that in considering the orders here entered the requirement of Commission power must be satisfied in addition to those of accuracy of findings and reasonableness of remedies adopted.⁸⁷

82. *Id.* at 360-1.

83. 1 SHARFMAN, *op. cit. supra* note 2, at 18, 21, 198 (citing the committee report submitting the McCullom Bill).

84. 12th ANNUAL REPORT, I.C.C. 23 *et seq.* (1898). See also SHARFMAN, *op. cit. supra* note 2, at 198, n. 42.

85. 262 I.C.C. 447, 692 (1945).

86. 331 U.S. 284, 300 (1946).

87. That the power has always had generally recognized limitations is indicated not only by the senatorial language quoted by Justice Jackson's dissent, but also by the almost universal condemnation of what was attempted to be done in the Hoch-Smith Resolution of 1925, which attempted to derive through Commission regulation of rates an adjustment of the general level of the agricultural economy. There is a striking parallel between what was sought to accomplish in that resolution with reference to one cross-sectional segment of the national economy and what was done in this case as between the sectional elements of the economy. See on the Hoch-Smith controversy 1 SHARFMAN, *op. cit. supra* note 2, at 227 *et seq.*, 223-4 n. 95.

The Conclusion of the Court as to the Existence of Economically Prejudicial Territorial Discrimination

Here is a problem of review of administrative findings as to the sufficiency of the supporting evidence. The Commission, of course, was relying heavily on so-called typical evidence,⁸⁸ and on the latitude which an administrative Commission may have in determining legislative as distinct from adjudicative facts.⁸⁹ The procedure of the Commission, as to the technical character of the evidence relied on, is not open to criticism within the framework of the existing law. But always in an attempt to arrive at any conclusion, legal or otherwise, of fact or of law, there must be a reliance on premises which logically sustain the conclusion in question. The evidence relied on by the majority of the Court as sustaining the factual conclusions of the Commission seems to fall somewhat short of that standard, and should therefore be examined in a little more detail.

The evidence in this case was in great bulk, much of it in the form of statistical tables, compilations, and analyses. That which was considered important by the majority of the Court, can be summarized as follows:

- (a) Class rates on shipments originating in Official Territory are materially lower than those on shipments originating in other territories.⁹⁰
- (b) Classifications are different in all territories, and in the majority of cases these differences add to the burden differential carried by shipments originating outside Official Territory.⁹¹
- (c) A very small percentage of total carload traffic is actually carried at class rates, as exceptions and commodity rates have largely swallowed up the business.⁹²
- (d) Official Territory is more prosperous than the other territories, on the measures of number of gainful workers, value of manufactures, average annual income, and relative contribution to the national industrial economy.⁹³

88. See GELLHORN, *ADMINISTRATIVE LAW—CASES AND COMMENTS* 536 n. 5 (2d ed. 1947); SHARFMAN, *THE INTERSTATE COMMERCE COMMISSION* 376 *et seq.* (1931).

89. See Davis, *An Approach to Evidence in the Administrative Process*, 55 *HARV. L. REV.* 364 (1942), especially at 402 *et seq.*

90. 331 U.S. 284, 301-5 (1946).

91. *Ibid.*

92. *Id.* at 306-7.

93. *Id.* at 310-14; 262 I.C.C. 447, 619 (1945).

- (e) The decrease in employment of class rates has been the result of competitive forces.⁹⁴
- (f) During the ten-year period preceding the Commission's investigation there was a marked decline in prosperity, according to trends in the factors listed above, in Official Territory, as contrasted with some increase in the other territories, particularly in the Southern Territory.⁹⁵
- (g) There are many differences in character of terrain, original concentration of population, availability of natural resources, and basic suitability for industrial activities, between Official Territory and the other territories.⁹⁶

This evidence was used to support two conclusions :

- (1) That territorial discrepancies existed, and
- (2) That these discrepancies were economically prejudicial to territories other than Official Territory.

It is the author's contention that much of this evidence is irrelevant, or worse, that it leads to a conclusion opposite to that reached by the court.

If the word "discrimination" is defined without any element of intent or concerted action, then the existence of discrimination is susceptible of mathematical proof, and the conclusion is but a restatement of the evidence [(a) above]. The illegality of the difference presents a more difficult problem. To this point the other evidence must be directed.

The conclusion of illegality was reached under the premise that the discrimination was illegal if it was economically prejudicial. (Note here that this premise itself presents another aspect of the problem of power; its soundness must be left open for further consideration in connection with the validity of the rate orders entered.) The only substantial evidence of economic prejudice relied on by the Commission and the Court was the evidence that, according to selected scales, Official Territory was, in 1930-40, more prosperous than other territories. This reasoning appears to reduce itself to the following:

- (a) Rates are higher outside Official Territory than in it.
- (b) Official Territory is more prosperous than other territories.

94. *Id.* at 504; 331 U.S. 284, 307 (1946).

95. *Id.* at 311-12.

96. *Id.* at 314-15.

- (c) Therefore the rate differential has operated to the prejudice of the relative prosperity of the territories outside Official Territory.

This may not be a fair presentation of the argument without including a premise relating to the general economic effect of shipping costs. Such a premise could be built into the argument about as follows:

- (a) Shipping costs are higher outside Official Territory than in it.
- (b) The level of shipping costs plays a part in determining the economic prosperity of shippers and of the area in which they operate.
- (c) Therefore the rate differential operates to the economic prejudice of the territories outside Official Territory.

But in this chain of reasoning the relative economic prosperity of the different territories at any particular time becomes unimportant, and, further, the Court itself excludes the mere differential as showing illegal discrimination, as the differential alone must always have some effect on relative prosperity, though perhaps not a critical one.

It is difficult to say how the mere fact of different prosperity levels between these territories on a given date can be ascribed to rate discriminations, without something more to tie the prosperity levels to shipping costs rather than to the many other factors admittedly contributing to over-all prosperity. In the absence of any such connecting link this item of evidence seems to become irrelevant.

Another block of evidence relates to the general desuetude of the class rate structure as distinct from commodity and exception rates. The Court rejected the contention that for this reason any class rate discrepancy should be disregarded under a *de minimis* approach, saying that the point could not thus be put in the scales against the Commission's conclusion, because its real significance is not that the discrepancy under paper rates is slight "but that the rate structure as constituted holds no promise of affording . . . that parity of treatment which territorial conditions warrant".⁹⁷ The Commission had concluded that the desired result could not be achieved unless traffic in the main was moved on class rates, and discounted the disuse of class rates as being "the result of competitive forces".⁹⁸

97. *Id.* at 309.

98. See note 94 *supra*.

A point not developed in the consideration of this evidence is that in an area where competitive forces are strong enough to nullify a rate system unpopular with shippers it can hardly be said that those shippers are suffering a critical economic loss from discrimination under the rates so nullified. Such an argument might tend to note the evidence of the disuse of class rates, and work *against* the Commission's conclusion. But certainly this evidence does not seem to be a very important factor tending in either direction.

It is hard to understand why the Court attached so little significance to the upward trend of Southern economy as against the general national and, in particular, Official-Territory decline. It would be an extraordinary fact if a region which for a century has been more sparsely populated and less actively developed should suddenly, within a decade, attain parity with a region favored by nature and history as the industrial focal area of the nation. Moreover the very fact that the difference in prosperity levels, on the selected scales, is ancient, tends to negative the importance of that difference. The fact that the trend of the decade during and just following the period of operation of the rates complained of has been so markedly in favor of the South is definitely evidence tending to defeat the conclusion of the Commission, and almost if not quite sufficient itself to defeat all the other evidence cited, even at its face value.

Judicial discretion in reviewing the fact findings of the Commission is of course quite limited; but assuming that the Court should open the record as far as it did it seems that it might properly have reached the opposite conclusion on the basis of the materials it took out of that record.

The Conclusion That the Territorial Rate Discrimination Was Justified by Railroading Conditions Peculiar to the Different Territories

The Commission and the Court relied primarily on a cost analysis of the carriers' expenses in making various types of hauls in the different territories. This evidence was extracted in the Court's opinion in tabular form,⁹⁹ and given at much greater length in the Commission's opinion in similar form.¹⁰⁰ Had it been graphically presented it seems that some of the curves would have been tended to support the Commission's conclusion, and some few to defeat it, but that the great majority would have been entirely inconclusive. In the

99. 331 U.S. 284, 319-24 (1946).

100. 262 I.C.C. 447, 571-91, 609-13 (1945).

form in which it was presented it created no greater impact, and indeed Justice Frankfurter's dissent was based largely on the inconclusive character "of the unsifted averages" relied upon.¹⁰¹ As bedtime reading this material compares unfavorably for interest with the paralipomenal genealogies, but the severest criticism leveled against it is that, on any set of premises, it just does not aid in the conclusions drawn as to relative haulage costs in different territories. The Court itself manifested some uneasiness on this point, saying that "these costs involve many estimates and assumptions and, unlike a problem in calculus, cannot be proved right or wrong. They are, indeed, only guides to judgment. Their weight and significance requires expert appraisal"¹⁰² and "the details of the cost study are too intricate and voluminous to relate here,"¹⁰³ and the Commission itself pointed out that "other factors along with costs must be considered and given due weight,"¹⁰⁴ and "discretion and flexibility of judgment . . . have always attended the use of costs."¹⁰⁵ That is, in the language of the Court, "While costs studies are highly relevant to these rate problems they are not conclusive."¹⁰⁶

It might have been simpler for both Court and Commission to discount the cost analysis entirely, on Hadley's theory that "not even God knows how much it costs to transport anything from one place to another,"¹⁰⁷ and start with the proposition that the sum of the costs of transportation is also the sum of the expenses properly incurred by the carrier. Then, in the absence of an indication that a given carrier had reported improper items in its profit and loss statements, the sum of the expenses so reported would be the sum of the costs to the railroads of the shipments carried by them. Where a railroad operated across territorial boundaries, there would still be a problem of allocation of total expenses to the various territories, but the railroads involved in this case are sufficiently confined within rate territories to make the allocation problem negligible. Then the total expenses of the Southern Railroad during a year will be the total costs of the shipments carried by it during the year, and the total expenses of the Pennsylvania

101. 331 U.S. 284, 351 (1946).

102. *Id.* at 328.

103. *Id.* at 317.

104. 262 I.C.C. 447, 693 (1945).

105. *Ibid.*

106. 331 U.S. 284, 328 (1946).

107. 3-B SHARFMAN, *THE INTERSTATE COMMERCE COMMISSION* 541 (1936) discusses the difficulties in the use of cost analysis. See Hamilton, *Cost as a Standard for Price*, 4 *LAW & CONTEMP. PROB.* 321, 329 (1937), cited by the Court, 331 U.S. 284, 335 n. 33 (1946). But *cf.* Amory, in a book review, 2 *J. LEGAL EDUC.* 112, 115 (1949).

Railroad represent the total cost of shipments it carried in the same year. These costs perhaps should be broken down further in proportionate scales and allocated to different types of shipments, as was attempted to be done in the cost study submitted, but any such further procedure is at best conjecture and not necessary to the purpose at hand; for the main issue was whether the total costs of carriers in the Southern Territory were sufficiently higher than the total costs of carriers in Official Territory to justify their generally higher rates. As it appeared, they were not, and thus the answer shown by the cost study does not appear to have been misleading; but so far as the sufficiency of the evidence actually relied upon is concerned, the important thing is that its accuracy can be measured only by checking it against overall figures not relied upon.¹⁰⁸

Another point of approach to the question would be to ask, must the rates complained of remain at their present levels in order to be within the area of reasonableness? If the basic criterion of a reasonable rate is that it must yield the carrier a reasonable return upon its total value (invested), then the next question might be, if the rate concerned were adjusted as suggested, would the result be that the yield on the carriers' investment would fall outside the area of reasonableness? This would be found simply by computing yield against revenue and expense figures available from actual operating data, and again on the basis of hypothetical suggested rates, with the maximum

108. If the cost study is relevant at all, as the Court says it is (see note 103 *supra*) that is, if the total yield and total expenses of the railroad are important in determining reasonableness, then the validity of the cost analysis rests on the following proposition:

"If $C_1 + C_2 + C_3$ (costs) \neq E (total expenses), then the cost study (or report) is inaccurate."

But if $C_1 + C_2 + C_3 = E$ ideally, then why not use E, a determinable factor, as the basis for the legal result?

This same proposition produces disturbing results, again, when applied to the flat ten per cent cut and raise involved in the adjustment order. Considering the Southern railroads' ten per cent cut, for instance, the following results:

R (rate) $- E$ (expenses) $= Y_1$ (yield).

$.9R - E = Y_2$; but although Y_2 is less than Y_1 , it cannot be said that $Y_2 = .9Y_1$.

Ten per cent to the Southern carriers is one thing and to the Eastern another. If the beginning ratio is 60:100, then adding ten per cent to one and subtracting from the other, we get 6:9; the ten per cent cut from the one is greater than that added to the other, and far more than ten per cent off Y , or the rate of return. If this was calculated in terms of rate of return, even on an approximate basis, it does not appear from the reports.

What, then, are the proper uses of a cost analysis, under this approach? It may be suggested, to reapportion costs in determining efficiency factors, or to destroy an argument made as to total costs sustained. But it was not here attempted to do either. Without some definition of the function of such figures, they become mere gobbledygook, and the Court's own doubts about them may have been reflected, not only in the language cited above, but also in its *de minimis* argument, discussed below. Such an approach tends, it seems, to break down the force of the other points on which the decision is rested.

and minimum level of yield prescribed by the Commission as a yardstick. The result of this computation would provide a ready answer to the question of justification for present rate levels.

One or two other points in the Court's discussions of the justification question should be noted in passing. The Court shrugs off the rule of *I. C. C. v. Diffenbaugh*,¹⁰⁹ saying the Commission made no effort in the case "to equalize fortune, opportunities, or abilities," the thing said by the *Diffenbaugh* case to be outside the scope of Commission activities.¹¹⁰ It is difficult to say whether the Court's position here means that it does not put its approval on the elimination of territorial discrimination as an end in itself, or that it gives it unqualified approval and considers the equalization point as a mere make-weight factor.

The other point is illustrated by the following language of the Court:

" . . . it is urged that without the rate advantage which the western carriers now enjoy, any comparison which now appears to favor the western carriers would disappear . . . but we are dealing here with the problem of discrimination—a western structure which as compared with the eastern is not warranted by territorial conditions and which prejudices the development and growth of the West. It would be a large order to say that the renewal of that trade barrier will have no effect in increasing traffic. The assumption on which the finding of prejudice is made is, indeed, to the contrary. Moreover, that argument would protect a discriminatory rate structure from the power of revision granted the Commission under § 3 (1) by the easy assumption that without discrimination the carriers would not thrive. But that flies in the face of history and is contrary to the Commission's expert judgment on these facts."¹¹¹

This language raises a cause and effect problem, whether freight rates regulate economic conditions or whether economic conditions regulate needed freight rates. This question raises in turn a more fundamental point—which may the Interstate Commerce regulate? If it may regulate only the carriers and their affairs, then it must assume economic conditions as a given factor, and the granted effect of the rate levels on those conditions is incidental; if, on the other hand, it is to regulate economic conditions, then it may consider the reasonable rate levels as tools rather than as ends in themselves.

109. 222 U.S. 42, 46 (1911).

110. 331 U.S. 284, 315 (1946).

111. *Id.* at 332.

The Conclusion That the Order Reducing Less-Than-Carload Rates Was Valid

Two attacks were made on the order reducing rates for fractional loads:

- (1) That no discrimination had been shown as to such rates, and
- (2) That the new rates ordered were confiscatory.

On the first point the Court supported the Commission's order, apparently, for the following two reasons:¹¹²

- (a) Failure to adjust fractional load rates with the others would redound to the competitive disadvantage of fractional load shippers as against carload lot shippers.
- (b) Fractional load traffic affected by the rate order constitutes a very small portion of total railroad freight tonnage, and in many cases rates as low as, or even lower than, those ordered are voluntarily maintained.

The first reason adduced by the Court in support of the Commission's position appears to be susceptible to formulation in about the following argument:

- A. The rate order must be viewed as a whole, from the viewpoint of the overall objective of eliminating improper discrimination.
- B. To adjust this portion of the rate order would result in a new discrimination between shippers, not presently existing.
- C. Therefore, no such readjustment should be made.

This argument seems to contain an inarticulate refusal to consider the valid basis for discrimination which may exist as between fractional load shippers and carload shippers. Under the classical laws of economics, it was true that one who bought in quantity or shipped in quantity could obtain more favorable rates than one who bought or shipped piecemeal. This may no longer be true, but it might have been well had the point been expressly covered in the Court's presentation of its reasoning.

The Court's second point reduces itself to the following argument:

- A. The rate order must be considered as a whole, and if its overall effect is desirable then it is not important that some small component part may, considered separately, operate improperly.

112. *Id.* at 333-4.

- B. The fractional load rates criticized form only an insignificant portion of the over-all structure affected by the order.
- C. Therefore, minor discrepancies in the fractional load orders should be disregarded in ruling on the over-all readjustment.

This is, of course, just one way of expressing the *de minimis* maxim, or of saying "don't bother us with trifles." Here the Court takes a position in the *de minimis* argument which seems inconsistent with its concern for the effect of the over-all class rate structure as against commodity and exception rates.

The minor premise of this argument also seems to contain an internal fallacy on the question of the relative importance of fractional load rates. It is said that "less-than-carload traffic is less than 2 per cent of total railroad freight tonnage, and much of that moves, not on class rates, but on exception rates and commodity rates";¹¹³ but the total traffic moved by class rates is only 6 per cent of total railroad freight tonnage, it is found, and thus the fractional load traffic at 2 per cent would carry one-third the weight of the entire structure affected by these rate orders. This proposition is illusory, of course, because "much" of the "less than 2 per cent" moves on non-class rates, but it can hardly be told whether fractional load rates are relatively important or not, keeping this proposition in mind, without knowing how much the "much" actually is.

On the point of confiscation the problem again becomes one of weighing the evidence adduced. The railroads had presented, according to the Court, "elaborate analysis" showing deficits resulting from fractional load shipments, and the increase in deficits which would result from the Commission's order.¹¹⁴ The Court met this with three arguments. First, the Commission's expertness must be relied upon in determining ultimately the rights and wrongs in disputes as to the cost-rate balance: "like other problems in cost accounting, it involves the exercise of judgment born of intimate knowledge of the particular activity and the making of adjustments and qualifications too subtle for the uninitiated,"¹¹⁵ and "the process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultants of factors that "must be valued as well as weighed",¹¹⁶ and "now and then a hardy soul, equipped with simple faith and a calculating machine,

113. *Id.* at 333.

114. *Id.* at 396.

115. *Id.* at 335. This language smacks of the serene attitude of the classical Sinologue toward his less fortunate fellows.

116. *Id.* at 335-6, quoting from *Board of Trade v. United States*, 314 U.S. 534, 546 (1942).

essays the adventure of rates based upon the *true costs* (emphasis added) of the particular services. The feat, of course, is technically impossible, for value judgments or empirical rules are essential to the distribution of overhead."¹¹⁷ Second, the railroad analysis of the rules is not accurate, because providing certain adjustments are made (that is, under a different computation, subscribed to by the Court) the cost-rate ratio is quite different from that derived under the railroads' "elaborate analysis".¹¹⁸ Third, the Commission has since the rate order in question granted a major increase in freight rates, so that "the actual rates chargeable *presumably* will be increased from the level fixed by the [interim rate] orders to the level prescribed by the recent order increasing all freight rates. *Thus no loss has been suffered* [because of the District Court injunction pending this decision] . . . and any loss which would have been suffered . . . has probably been at least lessened, if not eliminated, by the general rate increase."¹¹⁹

In short the Court relies completely on the Commission's judgment in matters of cost accounting, for they, and not the Court, are the experts.¹²⁰ This might be well enough, if it is recognized that it eliminates the possibility of any judicial consideration of the sufficiency of evidence to support administrative findings in this field—a rule which the Court has not cared to articulate.¹²¹ Furthermore, if the Court desires to include a further conclusive presumption of the correctness of the expert judgment of the Commission as against those experts whose testimony might be offered by other parties, that part too should be explicit rather than implicit.

The Court's second point, above, contains a concealed premise as to the accuracy of the Commission's analysis as against that of

117. 331 U.S. 284, 335, n. 33 (1946), quoting Hamilton, *Cost as a Standard for Price*, 4 LAW & CONTEMP. PROB. 321, 329 (1937).

118. 331 U.S. 284, 337 (1946). See also *id.* at 338 on the fluidity of the Court's approach to these figures.

119. *Id.* at 339 (Emphasis added). The use of the word "presumably" may or may not be taken as a confession of inability to find evidence for the minor premise on which the court wishes to rely.

120. There is a certain quality of CARROLL'S THROUGH THE LOOKING GLASS in these passages, not only in the "Off with their heads!" aspect of administrative absolutism, but also in the assumption that mere mortals cannot be expected to comprehend these matters if explained, so it is better on the whole merely to say "It's a secret!"

121. The antithetical suggestion that administrative findings be given the status of reports of masters or referees seems never to have been adequately developed. On the approach to the administrative commission as an "expert court," see Hanft, *Utilities Commissions as Expert Courts*, 15 N.C.L. REV. 12 (1936). In the tax field, the life and death of the Dobson rule may serve as an illuminating case history. See INT. REV. CODE §1141 (a), (c) (1). A discussion of some of the problems raised by *Dobson v. Comm'r*, 320 U.S. 489 (1943), 321 U.S. 231 (1944) before the latest amendments to the Statute may be found in Paul, *Dobson v. Commissioner: The Strange Ways of Law and Fact*, 57 HARV. L. REV. 753 (1944). Contrast the views of a generation past; see Berle, *The Expansion of American Administrative Law*, 30 HARV. L. REV. 430 (1917).

the railroad. But to sustain this there must be enough evidence of the Commission's superior expertness over the railroads'. Otherwise, it would seem that the Court has itself fallen into the computing-machine fallacy which it criticized so extensively.

The Court's third point, that no loss was suffered because of the subsequent general rate increase, also contains a concealed premise: a rate order is never confiscatory if it is balanced by another order restoring the cut, whether the basis of the restoring order is the same as that of the rate reducing order or not, and regardless of the fact that the problem dealt with by the restoring order differs from that dealt with by the order complained of.

The Conclusion That the Order Cutting Rates 10 Per Cent Outside Official Territory and Raising Them 10 Per Cent in Official Territory Was Proper

On both counts this order was attacked. It was first suggested that under previous case law the Commission, having found the existing rates discriminatory, must give the carriers an opportunity themselves to adjust the rates, before letting the Commission impose the adjustment.¹²² As to the order reducing rates in Official Territory it was contended that the order was illegal unless the existing rates were unreasonable, as a carrier cannot be compelled to alter a proper existing rate.¹²³

The Court met both these arguments by pointing out the nature of the problem: that here the purpose of the order was to reduce discrimination and not to adjust carrier revenue,¹²⁴ and that further the discrimination was not between rates charged by one carrier but between rates charged by different carriers.¹²⁵ There was some question under *Texas and Pacific Railroad v. U. S.*¹²⁶ whether there could be unlawful discrimination between rates charged by different carriers, but the Court said that there could, as otherwise "the 1940 amendment . . . fell far short of its goal. We do not believe Congress left the Commission so impotent".¹²⁷

Given that the discrimination is between rates not under the control of any one carrier, then it follows that adjustment could be made more conveniently by the Commission, as a single agency, than between carriers who would have to make an adjustment by agreement. But it

122. 331 U.S. 284, 340-1 (1946).

123. *Id.* at 343-4.

124. *Id.* at 341, 344.

125. *Id.* at 341-2.

126. 289 U.S. 627 (1933).

127. 331 U.S. 284, 343 (1946).

is not perfectly clear that the Commission is a single agency which can conveniently act unilaterally. Can the Commission act without hearing evidence from all carriers concerned? Is not this proceeding more cumbersome than a carrier agreement? Further, the very requirement that carriers have an opportunity for voluntary adjustment does not seem in spirit to be subject to a convenience limitation, but seems to be based on the principle that the Commission should not interfere unnecessarily in a matter that can be adjusted satisfactorily without the weight of its authority.

The Court, however, excused the Commission from giving the carriers an opportunity for voluntary adjustment on a different ground. Here the Commission was acting under a different section of the act, and this particular order was not subject to the requirement of such a tender as previously stated.¹²⁸ The Court's reasoning on this point is interesting, following about this pattern:

- (a) Under *Texas and Pacific Railroad v. U. S.* the Commission must give the carriers an opportunity to adjust their rates if it acts under Section 3, but not if it acts under Section 15.
- (b) Section 15 authorizes the Commission to prescribe proper rates in cases involving discriminatory rates.
- (c) Discriminatory rates include rates condemned by Section 3.
- (d) Therefore, here the Commission, entering an order under Section 3, is also entering an order under Section 15, and need not allow the carriers opportunity for voluntary adjustment.¹²⁹

This reasoning comes very close to saying that the *Texas and Pacific Railroad* case doesn't really say what it says, but there is no overt modification or derogation of that case in this opinion.

On the problem as to the reasonableness of the increase ordered in Official Territory rates the Court points out that both the higher and the lower rate might well be reasonable, as there is a zone of reasonableness for most rates, rather than a fixed point.¹³⁰ Therefore, said the Court, the mere fact that the rates were ordered raised, if it was for a proper reason (such as abatement of discrimination), does not render the rate unreasonable even though the previous rate may have also been reasonable.¹³¹ The Court cited previous cases in which

128. *Id.* at 341.

129. With apologies to the New Yorker, it may be suggested that the spinach content in this broccoli is inescapable.

130. *Id.* at 345-8.

131. *Ibid.*

rates had been raised even though compensatory so far as the carriers were concerned, on the ground that they were unreasonable because they offended other objectives of the Interstate Commerce Act. For instance, such a rate might be ordered raised to prevent destructive competition between different carriers. The mere requirement that rates be compensatory to the carrier is not conclusive, as "if the rates in Official Territory may not be increased unless the present ones are shown to be non-compensatory . . . shippers in Official Territory could still have a preferred rate . . . not shown to be warranted by territorial conditions."¹³² The Court conceded that such adjustments could not be made if they would carry the rate out of the zone of reasonable compensation.¹³³ The showing that the rate of return in recent years favored the Western and Southern carriers appears to be a factor which, standing alone and given greater weight, might have justified the result of the case, considering reasonableness of rates from the standpoint of the carriers alone.

Mr. Justice Jackson's Dissent

This dissent is almost entirely on what he thought improper about the order compelling Official Territory carriers to raise their rates. His argument, however, involves incidental disagreement with several of the other major conclusions of the majority.¹³⁴ It rests on essentially the following propositions:

- (a) The order compels the railroads in Official Territory to charge more than is needed to be compensatory.¹³⁵
- (b) The establishment of unreasonably high rates in Official Territory amounts to a surtax on Official Territory shippers for the purpose of handicapping Official Territory economy.¹³⁶
- (c) Such a surtax cannot be justified as an adjustment of discrimination, where the discrimination is based on varying economic conditions in the different territories, and in reality amounts to a Government attempt to "reshape the nation's official, economic and perhaps its political life more nearly to its heart's desire."¹³⁷

132. *Id.* at 346-7.

133. "We may assume, however, that if the rates of return of the Eastern carriers were substantially above that for the South and the West, an increase of the rates for the former would not be permissible, even in order to remove a discrimination." *Id.* at 347-8.

134. This and other cases reported in the same volume indicate that Mr. Justice Jackson may not have been at the time *au courant* with the current supreme judicial philosophy—like the Philadelphian who doesn't read the Bulletin.

135. *Id.* at 364.

136. *Id.* at 357-8, 363.

137. *Id.* at 359.

- (d) "No authority can be found in any Act of Congress for the imposition of this surtax on the Northeast solely to penalize it for being able to transport goods cheaper [*sic*] due to its density of population and volume of traffic."¹³⁸
- (e) The Act of 1940 "made no change in the substantive law of discrimination," and any attempt to make any such change is clearly negated by the legislative history of the Act.¹³⁹
- (f) Therefore, the arbitrary increase in rates, being without legislative or constitutional justification, is improper.

A collateral argument is found in Justice Jackson's opinion, to the effect that the Commission in issuing this rate order deviated from its legislative instructions as to the character of the adjustments it was to make.¹⁴⁰ These propositions are found in this argument:

- (a) The objective of the Commission's 1939 inquiry was not to adjust rates but to correct the evils in existing freight classifications.
- (b) The Commission in this order did not exercise its power of classification at all, but instead arbitrarily ordered a flat raise of rates in one territory and a flat reduction in other territories.
- (c) Such general raises and reductions leave specific inequalities, discrimination, and malclassifications unadjusted.
- (d) There is no proof of any specific discrimination before the Court, much less any showing of a general discrimination so extensive as to warrant a general rate adjustment.
- (e) Even though this is styled a classification order, it in effect is a revenue order, and should not be sustained without the basis needed for a revenue order.
- (f) Therefore, the rate order, not being directed to the evil the Commission was supposed to correct, and not being valid in what it does accomplish, should not be sustained.

Mr. Justice Frankfurter's Dissent

This opinion was directed to the character of the proof relied on by the Commission as supporting its order, while granting the assumption that the Commission had the power to do what was here

138. *Id.* at 360.

139. *Id.* at 360-2.

140. *Id.* at 363.

ordered, given properly supported findings of fact. He makes in his opinion substantially the following points:

- (a) The Commission's order must be supported by evidence showing clearly and definitely the economic facts establishing the existence of the discrimination and determining the appropriateness of the corrective action taken.¹⁴¹
- (b) While there was much evidence before the Commission, some of which might have supported its order, this evidence has not been adequately analyzed in the Commission's opinion to indicate just where it places its reliance.¹⁴²
- (c) An adjustment order of this magnitude is not adequately supported by the "unsifted averages" adduced by the Commission as justifying it.¹⁴³
- (d) It is extremely doubtful that the flat rate adjustment ordered is directed specifically to the correction of existing inequalities.¹⁴⁴
- (e) There are no adequate findings that the flat rate adjustment ordered will still leave rate levels within the zone of reasonableness.¹⁴⁵
- (f) The adjustment ordered cannot be justified as a tentative adjustment if it would not be proper as a portion of a permanent readjustment.¹⁴⁶

While this argument is directed precisely at the portion of the order which offended Mr. Justice Jackson, it will be noted that the basis of criticism is quite different, resting in one case on a concept of lack of power and in the other on one of defective procedure in the exercise of existing power. Justice Jackson says, in essence, "This sort of thing can't be done under existing legislation." Justice Frankfurter says, "This sort of thing can be done only if there are sufficiently explicit findings of fact to support the result. The Commission may have made a proper adjustment, but it has not adequately shown its justification."

141. *Id.* at 351-2 *et seq.*

142. *Id.* at 353-4.

143. *Id.* at 351-2.

144. *Id.* at 353-7, *passim.*

145. *Id.* at 354-5.

146. *Id.* at 355-6.

NEW YORK V. UNITED STATES: THE EFFECT OF THE CASE

A precise evaluation of a case as complex as this must contain an isolated examination of the separate points considered, but such a treatment necessarily leads to disjointed criticism, sometimes inconsistent with the conclusion one would reach on another estimate of a case. Inartistic reasoning may nevertheless lead to a sound result, through coincidence or through the Court's intuitive perception of the desired end. To provide some improvement over the kaleidoscopic view of the individual bits of light seen in the discussion above, it will be attempted to rearrange them into a mosaic whose pattern may be less misleading. The net over-all effect on preexisting case law will be considered, and then some attempt will be made to sum up the individual criticisms hinted at previously into an integrated estimate.

The sum of the law of this case and its effect on preexisting law can be considered conveniently by noting the principal leading cases which may have been affected, and asking the question, what does *New York v. United States* do to each of these cases?

In *Georgia v. Pennsylvania Railroad*,¹⁴⁷ decided in 1945, the State of Georgia sued a number of railroads to enjoin rate practices alleged to constitute illegal discrimination against Georgia products under the Federal anti-trust laws. The case was heard in the Supreme Court on the contention that the state of Georgia had no standing to bring such a suit, and thus that there was no justiciable cause. The Court held that the suit could be maintained, and it was docketed for further proceedings on the merits, as an original proceeding in the Supreme Court. Now, four years later, it is still there.

The obvious initial question is whether *New York v. United States* renders the *Georgia* case moot, that is, whether it adds to the result of that case the substantive determinations which were not involved in what was basically a procedural decision.¹⁴⁸

The position that has apparently been taken is that the *New York* case does not settle the State of Georgia's controversy, as it does no more at most than determine that the I. C. C. may, under its enabling act, adjust rates to eliminate the territorial discrimination of which Georgia complains, while the object in the *Georgia* case is to obtain

147. 324 U.S. 439 (1945), 58 HARV. L. REV. 741 (1945). The case is discussed in some detail in Tally, *The Supreme Court, The Interstate Commerce Commission, and the Freight Rate Battle*, 25 N.C.L. REV. 172 (1947). This article was written before the decision in *New York v. United States*, and its consideration of rate-making policy, at 184-90, furnishes an excellent reflecting point for evaluating the effect of the latter case on the former.

148. There were, of course, a few preliminary commitments on what the attitude of the Court might be on the basis of certain hypothetical showings under allegations in the plaintiff's bill, but none of these would be considered as decisions on the merits of a case involving rate law.

a ruling that such rates must be readjusted under the anti-trust laws. This difference between "may" and "must" alone would necessitate a further determination in the *Georgia* case, even if the difference in the statutory background would not. *New York v. United States* provides a stepping-stone for the state of Georgia and perhaps makes it necessary for only one more step to be surmounted there, but it does no more, and its result does not necessarily control the substantive result to be reached in that case.

In *Interstate Commerce Commission v. Mechling*,¹⁴⁹ the Commission had adjusted rates of competing water and rail carriers of grain from Chicago eastward to eliminate the competitive advantage which barge carriers over the water route had previously enjoyed as a result of the lower operating expenses required for carriage over those routes. The Supreme Court held the Commission action in this respect invalid, saying that the Commission's power to eliminate discriminations and inequalities did not extend to those resulting from the inherent advantage of one shipper as to cost or efficiency of operation. The fact that the advantage thus afforded of shipping by water routes resulted in an ultimate competitive disadvantage to grain shippers without access to water routes made no difference in this conclusion. The specific rate adjustments involved in this case were railroad rates: the Commission had permitted the railroads to discriminate against grain trans-shipped from barges by charging a higher rate for its carriage than for grain which had come into the shipping point by rail. The Court said that the only rate differential which could be justified would be one based on higher costs of carrying the ex-barge grain due to the necessity of reloading. There being no adequate evidence cited in justification by the Commission to relate the rate differential permitted to the cost factor, the order was improper.

As was pointed out by Justice Frankfurter in his dissent in the *New York* case,¹⁵⁰ at least the philosophy of the court seems inconsistent with its solicitude in the *Mechling* case for the preservation of inherent economic advantages, and its apparent determination to limit the scope of rate regulation to the area of voluntarily created rather than of accidentally occurring discrimination. Justice Frankfurter is concerned with the proof process permitted in *New York v. United States* as contrasted with that insisted upon in the *Mechling* case. Underlying this, though, is the requirement in the latter case that cer-

149. 330 U.S. 567 (1947).

150. 331 U.S. 284, 351. The point is also developed, as to the consistency of the policy implications, in Nutting, *Policy Making by the Supreme Court*, 9 U. OF PITT. L. REV. 59, 62-4 (1947). See 3-B SHARFMAN, *op. cit. supra* note 2, at 546, as to the *Mechling* philosophy. There was, of course, also a long-and-short-haul factor there.

tain things be proved which apparently under *New York v. United States* are no longer of controlling importance.

In *Interstate Commerce Commission v. Diffenbaugh*,¹⁵¹ the Court considered the railroad practice of channeling grain shipments through elevators to keep rolling stock from straying too far from the control of parent roads. The carriers paid elevator operators at standard Commission-approved rates for their services in this transshipment process, and it was found that such payments were received even by those who were themselves grain shippers as well as elevator owners. In effect, this meant that such a shipper paid the standard carriage rate, but was paid at the standard rate for elevator services, irrespective of the manner in which he accomplished the end result desired by the railroad. It was contended that this amounted to a rebate to the shipper, at least in so far as a profit over elevator expenses was involved, and the Commission cut down the rate payable to such shippers to an amount designed to cover actual elevator expenses only. The Court held this action improper, saying that "the law does not attempt to equalize fortune, opportunities or abilities."¹⁵² The rate paid for elevator services was not attacked as unreasonable, and, including the reasonable profit allowed, was the same as that which the elevator operator could get for handling grain other than his own, or that the carrier would pay to any elevator operator not a shipper. This being true, any disadvantage to shippers who did not own elevators was due to their circumstances and not to the contract complained of, and payments under it did not constitute an illegal rebate. The court cited an earlier case, *Penn Refining Co. v. Western N. Y. and Pa. R. R.*,¹⁵³ for the general principle as to undue advantage, but the rule has come to us through most modern cases in the language of Mr. Justice Holmes, who wrote the opinion in the *Diffenbaugh* case.

If *New York v. United States* means that rates will be adjusted so that Official Territory railroads must charge more for their haulage in proportion to the cost to them of carrying the goods involved than railroads in other territories, in order that shippers in outside territories may have railroad services as cheaply as they can be had in Official Territory, then the case is inconsistent with the *Diffenbaugh* case. But if the *New York* case merely means that railroads in other territories will be prevented from charging more, on a rate-cost ratio, than Official Territory railroads, and that Official Territory railroads will be prevented from levying charges on a lower ratio than others,

151. 222 U.S. 42 (1911).

152. *Id.* at 46.

153. 208 U.S. 208 (1908).

then the case may be reconciled in result, even if not in attitude, with the *Diffenbaugh* case. Which of these two things *New York v. United States* means depends on the degree of acceptability of the proofs submitted there, and to a certain extent on an interpretation of the Court's expression of its basis for action.

In *United States v. Illinois Central Railroad*¹⁵⁴ a Commission rate order involved the question of discrimination through joint rates. It was contended there that the through rates maintained jointly by two carriers resulted in discrimination against shippers from competing points from which higher rates were charged. The Court found that neither favoritism nor malice is an essential element of illegal discrimination under the Interstate Commerce Act, but that the only requirement is that the rate be unjust. It was further determined that a single rate may properly be found discriminatory irrespective of the combination of carriers establishing the rate. These decisions were set forth in cautionary language which was quoted by the majority opinion in *New York v. United States* with some apparent misgiving, although the holding, which would seem to gravitate generally in aid of *New York's* conclusion rather than otherwise, was not stressed. The language found important was that "mere discrimination does not render a rate illegal," but that "it must be shown that [it] . . . is unjust when measured by the transportation standard. In other words . . . not justified by the cost of the respective services, by their values, or by other transportation conditions".¹⁵⁵ This language appears to contain no more than a restatement of the principle running through all the cases in this field, and emphasized in the language of the *Diffenbaugh* and *Mechling* cases. Whatever the effect of *New York v. United States*, it has not strayed so far from this standard as to deny it lip service.

The other aspect of the *Illinois Central* case, the holding itself, seems to provide an intermediate stepping stone between the position that discrimination results from intentional differences in treatment by a single agency or as a result of concerted action, and the position that it can, within its direct and regular meaning, be based to so great an extent on coincidence as was true in *New York v. United States*.

*Texas & Pacific R. R. v. U. S.*¹⁵⁶ is one of the landmarks in the development of the law of undue rate preferences, and seems to have suffered the severest damage from the decision in the principal case, although the casualty reports have slurred this fact. The problem there

154. 263 U.S. 515, 44 S.Ct. 189, 68 L.Ed. 417 (1924).

155. 331 U.S. 284, 305 (1946), quoting 263 U.S. 515, 521, 524 (1924).

156. 289 U.S. 627 (1933), 47 HARV. L. REV. 494 (1934). See also note 136 *supra*.

involved rates from the various points to New Orleans and Galveston. Although Galveston was much nearer to most of the points of origin than New Orleans, the railroads had equalized the rates to the two ports. The Commission ordered a rate spread to eliminate this discrimination, but the Supreme Court held the Commission's order improper on the grounds, *inter alia*, that there can be no discrimination resulting from rates not controlled by the same carrier. This proposition seems to have been reworked by *New York v. United States*.

In each case the problem involved rates set by different carriers, and in the latter the discrimination was ordered removed, which is what was said could not be done in the earlier case. Without more, it would seem that the rule of the earlier case is no longer law. The *New York* result could have been reached, perhaps, by deciding that the *Texas & Pacific R. R.* case really rested on other grounds. This would involve stretching a point or two, but it need not now be analyzed in detail, as the court did not use that approach in reaching its result in the principal case. What was done was rested on a manipulation of statutory sections, a little difficult to follow.

The Court in *New York v. United States* limits the application of the *Texas & Pacific R. R.* to cases where the Commission directs individual carriers to remove discriminations, but not to cases where the Commission acts under Section 1 to require reasonable rules and regulations of carriers in connection with joint or direct rates, or under Section 15 to fix new reasonable rates. This process of avoiding the effect of earlier decisions under the Act by juggling its sections seems to be subject to the objection that it produces inconsistencies in the various sections of the Interstate Commerce Act, which should be administered not as a group of independent, unrelated, and even inconsistent individual sections, but rather, under the language of the Court itself, as an articulated whole, all of whose sections contribute in their own way to a consistent over-all administration of transportation, leading to parallel results in similar cases. The other objection to this rationale is that it tends to leave such ancient landmark decisions as the *Texas & Pacific R. R.* case standing, not as healthy living trees, but as hollow shells, liable to fall at any time and injure the passerby who has sought or relied on their shelter.¹⁵⁷

157. Commentary on the general subject of consistency in the Supreme Court is abundant. See *e.g.*, Bernhardt, *Supreme Court Reversals on Constitutional Issues*, 34 CORNELL L.Q. 55 (1948); Moore & Oglebay, *The Supreme Court, Stare Decisis and Law of the Case*, 21 TEX. L. REV. 514 (1943); Grinnell, *Stare Decisis and the Supreme Court of the United States*, 27 J. AM. JUD. SOC'Y 183 (1944). For a defensive view see Douglas, *Stare Decisis*, 49 COL. L. REV. 735 (1949).

SUMMARY OF CRITICISMS

The criticisms developed herein of the holding in *New York v. United States* may be summarized under the following headings.

The handling of precedent. The case appears to involve necessarily some changes in the law of rate regulation under the decisions reported by the *Diffenbaugh* case and the *Texas & Pacific R. R.* case, even if its result did not absolutely necessitate overruling or modifying those holdings. This process of inarticulate changes of the law is an unfortunate result of the judicial approach in a Court which pays lip service to the stare decisis doctrine, but is willing to modify the law to conform to changing opinions of the public, of those in other branches of the Government, or if its own members, more rapidly than is contemplated by the rules of the stare decisis game. If the function of the judicial opinion is to advise attorneys, potential litigants and the public as to what they may expect from the court in a particular type of case, then the guesswork involved in developing information of any accuracy in cases where, though previous precedent is dead, the court shies away from the task of writing its obituary, is an evidence of the failure of the opinion process to perform its designated function. Judicial feelings may recoil at the prospect of justifying the demise of a well-loved precedent, and equally so at the prospect of following its dictates, but it hardly seems arguable that the court should be permitted to flinch at the alternative. The *tertium quid* has done this Court and the legal system of which it is the head more harm than good since it came into common use.

Reliance on the difficulty of making precise judgments in this area as an excuse for clouded reasoning. Even though the facts justifying administrative action in a complicated area such as this may be difficult to ascertain precisely, it seems that the problem is aggravated rather than minimized by the acceptance of non-conclusive and irrelevant evidence, as seems to have been done in several instances in this case. Granted that judgments here cannot be advanced with the degree of confidence that attends the enunciation of a decision based on a rule of property, it is submitted that for that very reason all the more care should be taken to obtain the maximum clarity of thought on the problem and to direct that thought as closely as may be to the center of the target, in order to be even reasonably sure of an approximation of the ideally sound result. Certainly the approach of throwing up one's hands and saying, "we cannot be exactly clear here, so let us only deal in generalities, approximations and estimates", tends to broaden rather than narrow the average margin of error to be anticipated.

Undue reliance on the "expert feel" of the Interstate Commerce Commission. This tendency, manifested even in the dissenting opinion of Mr. Justice Jackson, is perhaps no more than a phase of the problem just discussed. However, to the extent that it amounts to a judicial abdication in favor of the administrative fact-finding process, it should be very carefully worked out in each case, lest the Court surrender the entire function of judicial re-examination of administrative fact findings for adequacy of evidence, at least in the areas where fact problems are complicated, without conscientiously thinking through the justification for such a step. If administrative processes are to be absolutely determinative of individual rights in matters that depend on questions of fact, or at least so where the true facts are hard to know and understand, then that proposition should be written into our law in large clear type, rather than being woven in between the lines.

The effect of broadening the Interstate Commerce Commission's Powers. If this decision means that the Interstate Commerce Commission may regulate the welfare of our national economy by adjusting the handicaps under which competitive processes are carried on, and if this was not true before the case, or if it was true only to a considerably more limited extent, then the case is a milestone not only in the law of rate regulation but also in the constitutional development of our governmental structure, and warrants the most serious consideration before finally evaluating it as a major piece of judicial legislation. Mr. Justice Jackson's dissent indicates that this is the effect of the case in part, and excerpts of governmental briefs in the case quoted by him show that the Government tended to regard the case in this light.¹⁵⁸ It is submitted that such a decision reads a great deal into the Interstate Commerce Act, and the points which should have been fought out, but were not, include not only the question, whether government should be permitted to regulate economy in this way at all, and whether the Interstate Commerce power of Congress is broad enough to include regulation for such a purpose, but also whether Congress had any such intent in enacting this Act, and if not whether it is at all proper for the Commission and the Court thus to enlarge the scope of this exercise of power. This is more than a question of technical constitutional and statutory interpretation; if such power is to be exercised over broad segments of the economy, is the Interstate Commerce Commission the proper agency to exercise it? Overt consideration of these points might raise, for instance, questions of the qualifications considered in making appointments to the Commission, and whether

158. 331 U.S. 284, 359-60 (1946).

commissioners are ever selected for their broad potential capacity to coordinate the economic welfare of the Nation as a whole, rather than merely on consideration of matters bearing on the efficient and equitable administration of our transportation systems.¹⁵⁹

Not only is there some problem apparent as to whether a Commission such as the I. C. C. should be given such powers as seem to be involved in this case at all; but also, granted that such matters are appropriate for adjustment by federal administrative agencies, if this particular power has not been consciously given to this particular Commission, then who can say without careful thought that the power has not been given or been intended to be given to some other agency? Again, if such powers have been conferred by expression or implication to several agencies in piecemeal fashion, how can the danger of economic disadvantage resulting from the overlapping efforts, perhaps in conflicting directions, of a number of different agencies without central co-ordination be avoided? To ask this question is to suggest an answer which need not be labored here. From one aspect or another, the need for consistency and coordination in governmental economic regulation is the underlying thesis of this study, to be developed further in its conclusions.

THE ANATOMY OF DISCRIMINATION

One of the black words in today's law and today's society is "discrimination". With the unpleasant connotations that have been built around this word, one way of rendering more forcible the presentation of a case or the wording of a statute criticizing any distinction in treatment is by the use of the word "discrimination". In many fields it has become true that when one has once succeeded in characterizing a practice as discrimination, he has half won the battle against the practice.

One of the fields in which discriminatory practices are condemned is that of rate regulation by public carriers, and the volume of litigation on the object has served to develop a specialized meaning for the term, accurate only in this field, so that discrimination now approaches the status of a word of art in the law of transportation, though perhaps the scope of the specialized meaning may extend also to some other aspects of governmental regulation of business. One of the important aspects of *New York v. United States* is the contribution it has made in the development of the meaning of this term. In considering this effect of the case, it may be well to start with the dictionary meaning of

159. A study of Congressional debates on appointments to the major administrative commissions during the past two years should prove enlightening on both these suggestions. Categorical conclusions cannot be advanced here.

discrimination, and to proceed from that to the point which has been reached in the judicial coinage of the term of art.¹⁶⁰

Webster gives two principal meanings of the word discriminate as an intransitive verb.¹⁶¹ 1. "to make a distinction; to distinguish accurately," and 2. "to make a difference in treatment or favor (of one as compared with others)." The applicable definition of discrimination is 4. "a distinction, as in treatment; especially an unfair or unjust distinction." Taking the discrimination condemned legally as "unfair or unjust distinction," which seems justified under the cases at least in this field of law, it may be broken down under this definition and the normal usage of the term to include the following elements:

- (a) Concerted action, or action by a single individual,
- (b) Intent (directed at the sufferer from the distinction) and
- (c) An abnormal result or purpose, that is, one which would not result from the equality of treatment taken as the norm.

To these elements the discrimination rule in Section 3 of the Interstate Commerce Act adds a fourth,

- (d) Actual prejudice to a territory or other entity protected against discrimination.¹⁶²

This may be considered similar to the abnormal result or purpose described above, but it seems that it is not included, as a discriminatory purpose in the ordinary sense might not necessarily result in actual economic prejudice.

Under this, it may be taken as the archeozoic discrimination rule in transportation law that discrimination could not be found without proof of a discriminatory purpose in the conduct complained of, and of a conspiracy toward that purpose in any case where more than one agency is involved in such conduct.

Starting with this rule, an intermediate stage seems to be found in the rule that any conduct resulting in unjustified prejudice to one party is discrimination, so that the favoritism or malice factor, (b) above, is not needed, though a result which is not only prejudicial to

160. The tendency in modern propaganda, international, governmental, legal, and political, to describe things in black words or white words according to the propagandists' liking or dislike for them—most marked in this country during the past decade and a half—is an unfortunate one insofar as the epithet value of the terminology used tends to obscure the reasoning which may be advanced on either side of an issue. Cf. HAYAKAWA, *LANGUAGE IN ACTION* (1939), c. 12, "Affective Communication."

161. 1 WEBSTER, *NEW INTERNATIONAL DICTIONARY* 745 (2d ed. 1949).

162. See 3-B SHARFMAN, *op. cit. supra* note 41.

one party, but also is not based on the relative natural advantages enjoyed by the parties, is still required. This intermediate stage of the rule has room within its bounds for the *Illinois Central Railroad* case, in the indication that a joint rate fixed by two carriers may be discriminatory even though there is no conspiratorial purpose or concerted malice in the action, and it also conforms to the line laid down by the *Diffenbaugh* case, recently reiterated in the *Mechling* case, and verbally saluted in *New York v. United States*, excluding results based on inherent advantages from the category of discrimination.

Even under this intermediate definition, however, a distinction in treatment between two different shippers by two different carriers acting independently but not jointly would not be discrimination, as unified or concerted action is still a requirement under the *Texas & Pacific R. R.* case. This requirement appears to have been smothered dialectically in *New York v. United States*, so that one clear contribution made by this case to the present-day structure of discrimination is in eliminating the requirement of concerted action from the definition. Under this case, then, it becomes discrimination not only if railroad *X* treats one shipper less favorably than it does another, or if railroads *X* and *Y* acting together treat one shipper less favorably than they do another, but also if railroad *X*, acting independently, treats a shipper less favorably than another shipper happens to be treated by railroad *Y*, operating in an independent and theoretically non-competing territory.¹⁶³ Of course, this places railroad *X* to some extent at the mercy of purely business judgments which may be arrived at by railroad *Y* with Commission approval or at Commission instigation, and the factor not only has one aspect of competition involved, but may subject railroad *X* directly to the impact of fortuitous economic conditions in the territory of railroad *Y*, unless the safeguards of the results of natural advantages are carefully preserved and closely examined in each case. Under the doctrine that result differentials based on natural advantages are not condemned, but are rather to be preserved, railroad *X* would still be permitted to treat its shippers less favorably than the shippers of railroad *Y* might be, where *Y* territory possessed natural advantages for the operation of an efficient and inexpensive transportation system, such as short distances, a large volume of business, an ample supply of efficient operating personnel, and a convenient source of railroad fuel. This doctrine is not reduced by the words of the majority opinion in *New York v. United States*, but it may well be open

163. A collateral result of this rule is that a competition concept is reintroduced into railroad law in a manner at some variance with the philosophy of the attempt in the 1920 Act to eliminate interterritorial competition and to draw territorial boundaries accordingly.

to inquiry whether the practical effect of the case is not to modify it, in view of the opinion expressed by the minority of the court and by the minority of the Commission, and in view of the apparent defects in the proof process approved, to the extent that those defects permit the Commission to issue such an order as this without a thorough, painstaking and accurate evaluation of the weight which "inherent natural advantages" bear in the result complained of. It is at least open to question whether the doctrine of the *Diffenbaugh* case and of the *Mechling* case has not been reduced in weight, albeit not expressly, by the decision in this case.

Another point may be whether the decision tends to insert into the definition of discrimination yet another possible meaning: that is, that any rate practice which tends to contravene the economic policy of the Government may be considered discriminatory. This thought would rest on a premise that whatever economic status or relationship the Government desired should be considered the normal, natural position of the parties, by definition, so that any practice tending to alter that position would become, by the same definition, discriminatory. This premise is certainly not articulate in the opinion, nor in the conclusion; but the insistence of the Government in its briefs and its administrative action on readjustment of the relative levels of economic welfare between territories as a matter, *pro forma*, of eliminating discrimination, and the tolerance with which this position was regarded by the majority of the Court,¹⁶⁴ lends some weight to this view. The public reaction to the decision did not disclose any general impression that the term discrimination had any such definition, but it certainly included the over-all evaluation of the case as a stepping stone in the campaign for jacking up the relative position of Southern economy, and specifically as a battle won in Governor Arnall's war for that purpose.¹⁶⁵

If weapons which have been tooled to eliminate discrimination can be directed toward other regulatory purposes by painting these latter with the discrimination label, then it should be noted that in each case the weapon will be aimed at the furtherance of policy as seen by the particular agency employing it, and as defined in that particular agency's enabling directives, rather than at any necessarily co-ordinated policy of the Government or of the people as a whole.

164. 331 U.S. 284, 359-60, 311-14 (1946). See also note 158 *supra*.

165. See *inter alia* news comments cited note 11 *supra*. See also, for a detailed discussion of railroad discrimination as affected by *Georgia v. Pa. R.R.*, written before the decision in *New York v. United States*, but with some discussion of *Texas & Pac. R.R. v. U.S.* and of the *Lake Cargo Coal* cases, as well as of long-and-short-haul aspects of the subject, Lake, *Discrimination by Railroads and Other Public Utilities*, 25 N.C.L. Rev. 273 (1947).

Unless this possibly unintended effect of narrow-scope legislation is reviewed and the ultimate aims of the economic regulatory program properly publicized in determining whether specific legislation furthers them, this particular legal tool may indeed be in the hands of a blind goddess. Whether the economic end furthered by this decision is the economic end of our Government, overt or otherwise, can best be considered by viewing the reflection of this decision in the mirror of the other case to be examined, to see whether the patterns of the two blend or clash.

(To be concluded)*

* In part II of his study, entitled *The FTC Versus The Delivered Price: A Study in Territorial Isolation*, Professor Peairs will analyze the FTC's approach to the problem of transportation costs and compare it with that of the ICC, with the objective of determining whether governmental agencies are exercising a consistent approach to this problem.