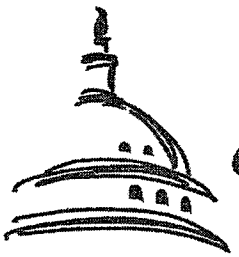
EXHIBIT 3



Congressional Research Service
Informing the legislative debate since 1914

Takings Decisions of the U.S. Supreme Court: A Chronology

Robert Meltz
Legislative Attorney

December 9, 2013

Congressional Research Service
7-5700
www.crs.gov
97-122

CRS REPORT
Prepared for Members and
Committees of Congress

Summary

This report is a reverse chronological listing of U.S. Supreme Court decisions addressing claims that a government entity has "taken" private property, as that term is used in the Takings Clause of the Fifth Amendment. The Takings Clause states: "[N]or shall private property be taken for public use, without just compensation." A scattering of related, substantive due process decisions is also included.

Under the Takings Clause, courts allow two distinct types of suit. *Condemnation* (also "formal condemnation") occurs when a government or private entity formally invokes its power of eminent domain by filing suit to take a specified property, upon payment to the owner of just compensation. By contrast, a *taking action* (also "inverse condemnation")—our topic here—is the procedural reverse. It is a suit by a property holder against the government, claiming that government conduct has effectively taken the property notwithstanding that the government has not filed a formal condemnation suit. A typical taking action complains of severe regulation of land use, though the Takings Clause reaches all species of property, real and personal, tangible and intangible. The taking action generally demands that the government compensate the property owner, just as when government formally exercises eminent domain.

Finding the line between government interferences with property that are takings and those that are not has occupied the Supreme Court in most of the 100-plus decisions compiled here. The Supreme Court's decisions in these takings actions reach back to 1870, and are divided in this report into three periods.

The modern period, 1978 to the present, has seen the Court settle into a taxonomy of four fundamental types of takings—total regulatory takings, partial regulatory takings, physical takings, and exaction takings. The Court in this period also has sought to develop criteria for these four types, and to set out ripeness standards and clarify the required remedy. In the preceding period, 1922 to 1978, the Court first announced the regulatory taking concept—the notion that government regulation alone, without appropriation or physical invasion of property, may be a taking if sufficiently severe. During this time, however, it proffered little by way of regulatory takings criteria, continuing rather its earlier focus on appropriations and physical occupations. In the earliest period of takings law, 1870 to 1922, the Court saw the Takings Clause as protecting property owners only from appropriations and physical invasions, two forms of government interference with property seen by the Court as most functionally similar to an outright condemnation of property. During this infancy of takings law, regulatory restrictions were tested under other, non-takings theories, such as whether they were within a state's police power, and were generally upheld.

The three takings cases decided by the Supreme Court during its 2012-2013 term attest to the Court's continuing interest in the takings issue.

Contents

Contacts

Introduction

Once in the constitutional wings, the Takings Clause of the Fifth Amendment today stands center stage. More than 50 takings cases have been decided by the Supreme Court since it launched the modern era of takings jurisprudence in 1978. No debate on the proper balance between private property rights and conflicting societal needs is complete without noting the Takings Clause.

The Takings Clause states: "[N]or shall private property be taken for public use, without just compensation." Until the late 19th century, this clause was applied by the Supreme Court only to *condemnation*: the formal exercise by government of its eminent domain power to take property coercively, upon payment of just compensation to the property owner. In such condemnation suits, there is no issue as to whether the property is "taken" in the Fifth Amendment sense; the government concedes as much by filing the action. The only question, typically, is what constitutes "just compensation."

Beginning in the 1870s, the Supreme Court gave its imprimatur to a different use of the Takings Clause. When the sovereign appropriated or caused a physical invasion of property, as when a government dam flooded private land, the Court found that the property had been taken just as surely as if the sovereign had formally condemned. Therefore, it said, the property owner should be allowed to vindicate his constitutional right to compensation in a suit against the government. In contrast with condemnation actions, then, such *takings actions* have the property owner sue government rather than vice-versa; hence the synonym "*inverse condemnation actions*." The key issue in takings actions is usually whether, given all the circumstances, the impact of the government action on a particular property amounts to a taking in the constitutional sense. Only if a taking is found does the question of just compensation arise.

In 1922, in the most historically important taking decision,[1] the Supreme Court extended the availability of takings actions from government appropriations and physical invasions of property, as described above, to the *mere regulation* of property use. This critical expansion of takings jurisprudence to "regulatory takings" acknowledged that purely regulatory interferences with property rights can have economic and other consequences for property owners as significant as appropriations and physical invasions. The regulatory taking concept opened up vast new legal possibilities for property owners, and underlies many of the Supreme Court's takings decisions from the 1970s on.

The ascendancy of the regulatory taking concept since the 1970s is hardly surprising. Starting with the advent of comprehensive zoning in the early 20th century, federal, state, and local regulation of private land use has become pervasive. Beyond comprehensive zoning, the past 60 years have seen explosive growth in the use of historic preservation restrictions, open-space zoning, dedication and exaction conditions on building permits, nature preserves, wildlife habitat preservation, wetlands and coastal zone controls, mining restrictions, and so on. Regulation of non-real-estate property has also proliferated. In the Supreme Court, the appointment of several conservative justices since the 1970s has prompted a new scrutiny of government conduct vis-à-vis the private property owner.

[1] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

As a result of these factors, the Court since the late 1970s has turned its attention toward the takings issue with vigor. Through the 1980s and 1990s, property owner plaintiffs scored several major victories; by and large, the substantive doctrine of takings shifted to the right. In 2000-2005, however, the Court's decisions moved the analytical framework in a more government-friendly direction. The pendulum may yet be swinging again: the three takings cases decided by the Court during its 2012-2013 term were all decided in favor of the property owner, though mostly as to narrow issues.

* * * * *

This report compiles only Supreme Court decisions addressing issues with special relevance to takings (inverse condemnation) actions, not those on formal condemnation or property valuation. Thus the headline-grabbing Supreme Court opinion in *Kelo v. City of New London*[2] (2005), principally a formal condemnation case, is not included here. On the other hand, a scattering of substantive due process decisions is interspersed where they have been cited by the Court as authority in its takings decisions.

In the interest of brevity, we mention no dissenting opinions, and almost no concurrences. Thus, the report does not reveal the closely divided nature of some Supreme Court takings opinions.

The reader desiring a more analytical discussion of inverse condemnation law should consult CRS Report RS20741, *The Constitutional Law of Property Rights "Takings": An Introduction*, also prepared by Robert Meltz.

[2] 545 U.S. 469 (2005).

I. Takings Law Today: *Penn Central* (1978) to the Present

In 1978, the Supreme Court ushered in the modern era of regulatory takings law by attempting to inject some coherence into the ad hoc analyses that had characterized its decisions before then. In *Penn Central Transportation Co. v. New York City*, *infra* page 10, the Court declared that whether a regulatory taking has occurred in a given case is influenced by three principal factors: the economic impact of the regulation, the extent to which it interferes with distinct (in most later decisions, "reasonable") investment-backed expectations, and the "character" of the government action. After *Penn Central*, ad hocery in judicial taking determinations emphatically still remains, but arguably is confined within tighter bounds.

The Supreme Court's many takings decisions since *Penn Central* have developed the jurisprudence in each of its main areas: ripeness, takings criteria, and remedy. As for takings criteria, the Court announced several "per se taking" rules in the two decades after *Penn Central*—see, for example, *Loretto*, *infra* page 9, and *Lucas*, *infra* page 6. Since 2000, however, it has again been extolling the multifactor, case-by-case approach of that decision—*see Palazzolo*, *infra* page 5; *Tahoe-Sierra*, *infra* page 4; and *Lingle*, *infra* page 4. In *Lingle*, one of its newest takings decisions, the Court summed up the four types of takings claims it now recognizes:

> a plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may ... alleg[e] a "physical" taking, a *Lucas*-type "total regulatory taking," a *Penn Central* taking, or a land-use exaction violating the standards set forth in *Nollan* and *Dolan*.[3]

Case	Action attacked	Holding/rationale
Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586 (2013)	Exaction condition demanded by district to approve landowner's proposed development of 3.7 acres, almost all wetland, of 14-acre tract. Condition was for landowner to pay for enhancing wetlands on district-owned land.	Exaction takings tests in *Nollan*, *infra* page 7, and *Dolan*, *infra* page 6, apply even when, as here, land-use permit applicant refuses exaction conditions and permit is denied. Immaterial that no exactions were imposed, since *Nollan* and *Dolan* are based on doctrine of unconstitutional conditions under which it is the impermissible burdening of right not to have property taken without compensation that offends. But in absence of a taking, remedy hinges on cause of action. Also, *Nollan* and *Dolan* tests apply to monetary as well as land-dedication exactions. Rule in *Eastern Enterprises*, *infra* page 5, that monetary liability payable with any funds cannot be taking, does not apply here where liability is tied to specific property.
Horne v. Dep't of Agriculture, 133 S. Ct. 2053 (2013)	Fines and civil penalties imposed on petitioners for failing to set aside raisin reserve contribution required under 1937 statute seeking to stabilize agricultural prices by controlling market surpluses.	Ninth Circuit erred in holding it lacked jurisdiction over takings claim. It incorrectly found that petitioners brought taking claim as raisin producers rather than raisin handlers, only handlers being covered by statute. Case is ripe because petitioners are subject to final agency order imposing fines and penalties, and because statute is comprehensive remedial scheme that withdraws Tucker Act jurisdiction over taking claim in Court of Federal Claims. Finally, takings defense may be raised by handler in USDA enforcement proceeding: statute does not forbid, and makes little sense to pay fine in one proceeding and then have to sue to recover same money in second, takings proceeding.

[3] 544 U.S. 528, 548 (2005).

Case	Action attacked	Holding/rationale
Arkansas Game & Fish Comm'n v. United States, 133 S. Ct. 511 (2012)	Corps of Engineers' 8 years of deviations from its long-standing water release plan for dam, extending flooding period in downstream wildlife preserve and killing bottomland hardwood trees there.	Even government-induced flooding that is temporary may, depending on circumstances, be a taking. Categorical rule extracted by court below from *Sanguinetti*, *infra* page 15—that unlike other physical invasions by government, flooding can be a taking only if permanent or "intermittent but inevitably recurring"—is inconsistent with later Supreme Court takings jurisprudence recognizing temporary takings. Circumstances pertinent to whether temporary flooding effects a taking include severity, duration, character of parcel, and owner's expectations regarding parcel's use.
Stop the Beach Renourishment, Inc. v. Florida Dep't of Environmental Protection, 560 U.S. 702 (2010)	Florida Supreme Court decision below holding that state does not, through beach restoration project, effect facial taking of beachfront property owners' littoral rights of accretion and direct contact with water.	No taking. Court holds unanimously that state supreme court decision did not contravene established property rights. Cannot be shown that littoral owners had rights to future accretions, nor that contact with water is superior to state's right to fill in its submerged land. Four justices nonetheless venture that "judicial taking" concept is sound. That is, Takings Clause applies to judicial branch just as to other branches; hence if a court declares "that what was once an established right of private property no longer exists, it has taken that property." In other opinions, four justices express reservations about judicial takings, or argue that issue need not be addressed here. Justice Stevens recused himself.
San Remo Hotel, L.P. v. City and County of San Francisco, 545 U.S. 323 (2005)	City requirement that hotelier pay $567,000 fee for converting residential rooms to tourist rooms, under ordinance seeking to preserve supply of affordable rental housing.	Federal full faith and credit statute (barring relitigation of issues that have been resolved by state courts of competent jurisdiction) admits of no exception allowing relitigation in federal court of takings claims initially litigated in state court pursuant to "state exhaustion" ripeness prerequisite of *Williamson County*, *infra* page 8. Court rejects argument that whenever claimant reserves his federal taking claim in state court, federal courts should review the reserved federal claim de novo, regardless of what issues the state court decided.
Lingle v. Chevron USA Inc., 544 U.S. 528 (2005)	State statute limiting rent that oil companies may charge service station operators who lease stations owned by oil companies, in order to hold down retail gasoline prices.	No taking. Rule announced in *Agins*, *infra* page 10, that government regulation of private property is a taking if it "does not substantially advance legitimate state interests," is not a valid takings test. Takings law looks at burdens a regulation imposes on property. Thus, physical taking, total regulatory taking, and *Penn Central* partial regulatory takings tests (*infra* page 10) each aims to spot government actions that are "functionally equivalent" to a direct appropriation. In contrast, "substantially advances" test focuses on regulation's effectiveness, a due-process-like inquiry. Moreover, assessing efficacy of regulations is a task to which courts are ill-suited.
Brown v. Legal Found. of Washington, 538 U.S. 216 (2003)	State's use of interest earned by small or short-lived deposits of title company's clients' funds to support legal services for the poor—under Interest on Lawyers' Trust Accounts (IOLTA) program.	IOLTA program satisfies "public use" requirement of Takings Clause, given compelling interest in providing legal services for the poor. As to whether there was a taking, a per se test like that in *Loretto*, *infra* page 9, seems appropriate, and we assume such a taking occurred. But there is still no constitutional violation, since Takings Clause proscribes only takings *without just compensation*. IOLTA mandates government use of interest only when it could generate no net funds for client, owing to administrative costs. Thus, just compensation owed under Takings Clause is zero.
Verizon Communications, Inc. v. FCC, 535 U.S. 467 (2002)	FCC regulations under Telecommunications Act of 1996 providing that rates charged by incumbent local exchange carriers to new competitors are to be based on forward-looking cost methodology, rather than historical costs.	Argument that historical costs should be used to avoid possibility of takings does not present a serious question. Incumbents do not argue that any particular rate is so unjust as to be confiscatory, but general rule is that any question about constitutionality of ratesetting is raised by rates, not ratesetting methods. Nor is FCC's action placed outside this rule by any clear signs that takings will occur if historical-costs interpretation is allowed.

Case	Action attacked	Holding/rationale
Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002)	Building moratoria imposed 1981-1984 until bistate agency could formulate new regional land-use plan—plus freeze on building permits from 1984 to 1987 under court injunction against 1984 plan, plus restrictions under 1987 plan.	1981-1984 moratoria are not per se takings. Argument that a moratorium prohibiting all economic use of a property, no matter how briefly, is a per se taking must be rejected. Rather, such moratoria are to be analyzed under ad hoc balancing test of *Penn Central, infra* page 10. Neither *First English, infra* page 7, nor *Lucas, infra* page 6, support the per se taking argument. And "parcel as a whole" rule bars segmentation of a parcel's temporal dimension, precluding consideration of only the moratorium period. Finally, "fairness and justice" and need for informed land-use planning support an ad hoc approach here. (Post-1984 restrictions not addressed.)
Palazzolo v. Rhode Island, 533 U.S. 606 (2001)	State denials rejecting developer's proposals to fill in all or most of principally wetland lot adjacent to coastal pond.	Taking claim is ripe. Given state's interpretation of its regulations, there was no ambiguity as to extent of development (none) allowed on wetlands portion of lot. Similarly, value of uplands portion, where a single home may be built, was also settled. Hence, lot owner need not make further applications to satisfy "final decision" prong of ripeness doctrine. On the merits, a taking claim is not barred by fact that property was acquired after effective date of state regulation. And, a regulation permitting a landowner to build a substantial house on a 20-acre parcel is not a total taking under *Lucas, infra* page 6, but must instead be evaluated under the *Penn Central* test, *infra* page 10.
City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999)	City's failure to approve property owner's development plans after five, progressively scaled-back proposals accommodating city's progressively lower development caps.	Issue of whether city was liable for taking, raised through civil rights claim under 42 U.S.C. §1983, was in this case an essentially fact-bound one, and thus properly submitted by district court to jury. Suit for legal relief under Section 1983 is action at law sounding in tort, and is thus within jury guarantee in Seventh Amendment. Also "rough proportionality" standard of *Dolan, infra* page 6, is not appropriate takings test. It was designed to address exactions on development permits, not, as here, denials of development.
Eastern Enterprises v. Apfel, 524 U.S. 498 (1998)	Federal statute requiring company to fund health benefits of miner who worked for it decades earlier, where company left mining business before promise of lifetime benefits in collective bargaining agreements became explicit in 1974.	Statute is unconstitutional as applied to Eastern. In opinion accompanying judgment, four justices find taking because statute imposes severe retroactive liability on a limited class of parties that could not have anticipated liability, and extent of liability is substantially disproportionate to company's experience in mining field. This points to taking under *Penn Central* test, *infra* page 10. Also, remedy for taking based on generalized monetary liability is invalidation rather than compensation, supporting jurisdiction in district court. Remaining justice supporting judgment sees instead a substantive due process violation.
Phillips v. Washington Legal Foundation, 524 U.S. 156 (1998)	State's use of interest earned on small or short-lived deposits of lawyers' clients' funds to support legal services for the poor—under Interest on Lawyers' Trust Accounts (IOLTA) program.	Interest is property of clients, not state. Despite fact that interest would not exist but for IOLTA program, state's rule that "interest follows principal" must be followed. Nor can interest be regarded as mere government-created value. Remanded for decision on whether taking occurred.
Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997)	Agency's ban on new land coverage in "Stream Environment Zones," under which plaintiff was barred from building home on residential lot.	Taking claim is ripe despite plaintiff's not having applied for TRPA approval of her sale of transferrable development rights (TDRs). "Final decision" requirement of *Williamson County, infra* page 8, does not embrace such TRPA approval, since parties agree on TDRs to which plaintiff is entitled and no discretion remains for TRPA. TDRs' value here is simply an issue of fact, which courts routinely resolve without benefit of a market transaction.

Case	Action attacked	Holding/rationale
Babbitt v. Youpee, 519 U.S. 234 (1997)	Federal statute's ban on descent or devise of small interests in allotted Indian land—as ban was narrowed by amendment.	Taking occurred. The amendment, made in 1984, did not cure taking that *Hodel v. Irving, infra* page 7, found in pre-amendment version of statute. Amendment narrowed ban only as regards income-producing ability of the land, not its value. More important, amendment's allowance of devise to current owners in same parcel still offends Hodel by continuing to "severely restrict[]" Indian's right to direct descent of his property.
Bennis v. Michigan, 516 U.S. 442 (1996)	Forfeiture of car, owned jointly by plaintiff and her husband, because of husband's illegal sexual activity in car.	No taking (of wife's joint interest in car). To be sure, wife had no prior knowledge of husband's planned use of car. But government may not be required to compensate an owner for property which it has already lawfully acquired under authority other than eminent domain. Then, too, cases authorizing forfeiture are "too firmly fixed" to be now displaced.
Dolan v. City of Tigard, 512 U.S. 374 (1994)	Conditions imposed by city for granting building permit, requiring applicant to dedicate public greenway along stream and adjacent bike/pedestrian pathway.	Taking occurred. While greenway dedication condition rationally advanced a purpose of permit scheme (flood prevention), requiring landowner to allow public access to greenway did not. Hence, latter violated "nature of the permit condition" taking criterion in *Nollan, infra* page 7. Other condition, that pathway be dedicated, was not shown by city to impose burden on applicant that was "roughly proportional" to impact of applicant's proposed project on community. Hence, it violates "degree of burden" taking criterion that Court announces here. Also, burden of proof is on government to demonstrate "rough proportionality."
Concrete Pipe & Products, Inc. v. Construction Laborers Pension Trust, 508 U.S. 602 (1993)	Federal statute requiring that employer who withdraws from multi-employer pension plan pay a fixed debt to plan.	No taking. Taking claim is not aided by fact that collective bargaining agreement predating statute protected employer from liability to plan beyond specified contributions. Three-factor *Penn Central* test, *infra* page 10, does not point to taking: (1) government action merely adjusted benefits and burdens of economic life; (2) withdrawal liability was not disproportionate; and (3) given long-standing federal regulation in pension field, employer lacked reasonable expectation it would not be faced with liability for promised benefits.
Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)	Development ban imposed on vacant lots under state's beachfront management statute.	Government regulation of land that completely eliminates economic use is a per se taking, even when the legislature asserts a prevention-of-harm purpose. There is a prior inquiry, however, as to whether proposed use is inherent in landowner's title in light of "background principles of the state's law of property and nuisance" existing when land was acquired. If not, there is no taking, since regulation does not take any right owner ever had.
Yee v. City of Escondido, 503 U.S. 519 (1992)	Mobile home rent-control ordinance, combined with state law forcing mobile home park owner to accept purchasers of mobile homes in park as new tenants.	No physical taking occurred. Neither state nor local law on its face requires landowner to dedicate his land to mobile home rentals, nor overly limits his ability to terminate such use. Per se rule in *Loretto, infra* page 9, applies only when permanent physical occupation is coerced. Claim that procedure for changing use of park is overly burdensome is not ripe, since plaintiff has not gone through procedure. Regulatory taking claim is not properly before Court, since not subsumed by questions in petition for certiorari.
Preseault v. ICC, 494 U.S. 1 (1990)	Federal "rails-to-trails" statute, under which unused railroad rights of way are converted to recreational trails notwithstanding reversionary property interests under state law.	Premature for Court to evaluate taking challenge to statute, because even if it causes takings of reversionary interests, compensation is available under Tucker Act (authorizing suits against U.S. for compensation). Nothing in statute suggests the "unambiguous intention" to withdraw Tucker Act remedy which this Court requires. For example, Congress's expressed desire that program operate at "low cost" might merely reflect its rejection of a more ambitious federal program, rather than withdrawal of Tucker Act remedy.

Case	Action attacked	Holding/rationale
United States v. Sperry Corp., 493 U.S. 52 (1989)	Statutory 1½% deduction from awards of Iran-United States Claims Tribunal as reimbursement to United States for expenses incurred in the arbitration.	No taking. 1½% deduction is a reasonable "user fee" intended to reimburse United States for its costs in connection with tribunal. Amount of fee need not be precisely tailored to use that party makes of government services. Fee here is not so great as to belie its claimed status as a user fee.
Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989)	State agency's refusal to allow inclusion of cost of canceled nuclear plants in utility's rate base.	No taking. Under the circumstances, overall impact of preventing amortization of such costs was small, and not shown to be unjust or confiscatory.
Pennell v. City of San Jose, 485 U.S. 1 (1988)	Rent control ordinance allowing rent increases of greater than set percentage only after considering economic hardship caused to tenants.	Not ripe. There was no evidence that hardship provision had in fact ever been relied upon to limit a rent increase. Also, ordinance did not require rent limit in event of tenant hardship, only that hardship be considered.
Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987)	State's grant of building permit on condition property owners record easement allowing public to traverse beach on property.	Taking occurred. Permit condition (recording easement) did not substantially advance a government purpose that would justify denial of permit (ensuring visual access to beach). Where such linkage exists, however, no taking occurs even if outright appropriation of the property infringement (here, the easement) would be a taking.
Bowen v. Gilliard, 483 U.S. 587 (1987)	Amendments to federal welfare program resulting in lower benefits and assignment of child support payments to entire family.	No taking. Family has no property right to continued welfare benefits at same level. Child receiving support payments suffers no substantial economic impact, since payments were likely used for entire family before amendments.
First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987)	Interim ordinance prohibiting construction of any structures in flood zone.	If a regulation is held to have taken property, Takings Clause requires compensation for the time during which regulation was in effect—i.e., until date of repeal or judicial invalidation. Mere invalidation of regulation is not a constitutionality sufficient remedy. (Existence of taking assumed by Court owing to posture of case.)
Hodel v. Irving, 481 U.S. 704 (1987)	Federal statute declaring that small interests in allotted Indian land may not descend by intestacy or devise, but must escheat to tribe.	Taking occurred. Statute amounts to complete abrogation, rather than regulation, of right to pass on property—a right which, like the right to exclude others, is basic to the concept of property.
Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987)	State regulation requiring that at least 50% of underground coal be left in place, where mining coal might cause subsidence damage to surface structures.	No taking. Unlike similar anti-subsidence law held a taking in *Pennsylvania Coal Co.*, *infra* page 15, the statute here has a broad public purpose and does not rule out profitable mine operation.
FCC v. Florida Power Corp., 480 U.S. 245 (1987)	Federal regulation requiring that utility greatly reduce rent charged cable TV company for attaching its cables to utility's poles.	No taking. Per se rule in *Loretto*, *infra* page 9, applies only when permanent physical occupation is coerced, unlike here where utility voluntarily entered into contract with cable company. And new rent ordered by FCC was not confiscatory, hence not a taking.

Case	Action attacked	Holding/rationale
MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986)	County's rejection of developer's first-submitted subdivision plat.	Not ripe. Developer must first obtain "final and authoritative determination" of the type and intensity of development that will be permitted. County's rejection of first-submitted plat does not preclude possibility that submissions of scaled-down version of project might be approved. Also, a court cannot determine whether compensation is "just" until it knows what compensation state or local government will provide.
Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41 (1986)	Statutory repeal of provision in federal-state agreements allowing states to end social security coverage of state and local employees.	No taking. Repealed provision is not "property," since Congress reserved right to amend agreements in enacting governing statute, and clause was not a debt or obligation of United States.
Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211 (1986)	Federal act requiring that employers who withdraw from a multi-employer pension plan pay a fixed debt to the plan.	No taking. Taking does not occur every time law requires one person to use his assets for benefit of another. Nor can statute be defeated by pre-existing contract provision protecting employers from further liability.
United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985)	Corps of Engineers' assertion of dredge and fill jurisdiction over certain freshwater wetlands.	Not ripe. Mere assertion of regulatory jurisdiction by Corps is not taking; only when permit is denied so as to bar all beneficial use of property is there a taking. Also, fact that broad construction of statute might yield more takings is not reason to construe statute narrowly, since taking is unconstitutional only if no means to obtain compensation exists. Such means does exist here, since Tucker Act authorizes compensation for federal takings.
Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985)	County's rejection of developer's subdivision plat.	Not ripe. Taking claim against state/local government in federal court is not ripe unless (1) there is final and authoritative decision by government as to type and intensity of development allowed, and (2) avenues for obtaining compensation from state forums have been exhausted. Here, developer failed to seek variances following initial denial, thus has not received a final decision. Nor did developer use an available state procedure for obtaining compensation. Absence of exhaustion requirement in 42 U.S.C. §1983 distinguished.
United States v. Locke, 471 U.S. 84 (1985)	Federal statute voiding unpatented mining claims when claim holder fails to make timely annual filings.	No taking. Loss of claim could have been avoided with minimal burden. No taking when property can continue to be held through owner's compliance with reasonable regulations. *Texaco, Inc., v. Short, infra* page 9, found controlling.
Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984)	Public disclosure and other use by EPA of industry-generated trade-secret data submitted with application for pesticide registration.	Taking occurred. Trade secrets are property, but only those submitted 1972-78, when federal pesticide statute contained a confidentiality guarantee, were taken. Before and after this period, there was no investment-backed expectation of confidentiality, hence no taking. Tucker Act remedy (right to seek money from U.S. in Court of Federal Claims) was not withdrawn by pesticide act. Pesticide act reveals no such intention, and withdrawal would amount to disfavored repeal by implication of Tucker Act. Also, federal pesticide act sets up exhaustion of agency remedies as precondition to any Tucker Act claim.
Kirby Forest Industries, Inc. v. United States, 467 U.S. 1 (1984)	Filing of condemnation action by U.S. to acquire land for national park.	No taking. Mere act of filing leaves landowner free, during pendency of condemnation action, to make any use of property or to sell it (but loss in market value from such action is not compensable).

Case	Action attacked	Holding/rationale
United States v. Security Industrial Bank, 459 U.S. 70 (1982)	Retroactive use of bankruptcy statute to avoid liens on debtor's property that attached before statute was enacted.	Statute will not be applied retroactively to property rights established before enactment date, in absence of clear congressional intent. There is substantial doubt whether retroactive destruction of liens comports with Takings Clause, and statutory reading raising constitutional issues should be avoided where possible.
Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)	State statute requiring landlords to allow installing of cable TV equipment on premises, for one-time payment of $1.	Taking occurred. Whereas here government causes a "permanent physical occupation" of property, it is a per se taking—no matter how important the public interest served or how minimal the economic impact. In contrast, temporary physical invasions must submit to balancing of factors.
Texaco, Inc. v. Short, 454 U.S. 516 (1982)	State statute extinguishing severed mineral estates unused for long time unless owner filed statement within prescribed period.	No taking. It is the owner's failure to use the mineral estate or timely file a statement, not the state's imposition of reasonable conditions on estate retention, that causes the property right to lapse.
Dames & Moore v. Regan, 453 U.S. 654 (1981)	President's nullification of attachments on Iranian assets in U.S., during hostage crisis.	No taking. Attachments were revocable and subordinate to President's power under International Emergency Economic Powers Act. Hence, there was no property in the attachments such as would support claim for compensation. Also, possibility that suspension of claims against Iranian assets may effect taking makes ripe the question whether there is Tucker Act remedy here. We hold there is.
Hodel v. Indiana, 452 U.S. 314 (1981)	Restrictions in federal statute on surface mining of prime farmlands.	No taking. Plaintiffs failed to allege that any specific property was taken. Mere enactment of statute was no taking, since prime farmland provisions do not on their face deny landowners all economic use of such land—e.g., do not restrict non-mining uses thereof.
Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981)	Demand in federal act that surface miners restore steep slopes to original contour, and surface mining prohibitions therein.	No taking. Plaintiffs failed to allege that any specific property was taken. Mere enactment of statute was no taking, since challenged provisions do not on their face deny landowners all economic use of affected land. In any event, taking claim is not ripe, since plaintiffs never used avenues for administrative relief in act—e.g., variance from original-contour requirement.
San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621 (1980)	City's adoption of open-space plan.	No final judgment by state court below as to whether a taking had occurred, hence no Supreme Court jurisdiction under 28 U.S.C. §1257.
Webb's Fabulous Pharmacies, Inc., v. Beckwith, 449 U.S. 155 (1980)	County court declaring as public money the interest on interpleader fund deposited by litigants with the court.	Taking occurred. On facts presented, interest could not be viewed simply as fee to cover court costs. State may not take interest simply by calling a deposited fund "public money."
United States v. Sioux Nation of Indians, 448 U.S. 371 (1980)	1877 statute abrogating Sioux Nation's rights to Black Hills, thus abrogating 1868 treaty with tribe.	Taking occurred. In giving tribe rations until they became self-sufficient, 1877 statute did not effect a mere change in the form of investment of Indian tribal property (land to rations) by the federal trustee. Rather, it effected a taking of tribal property set aside by the 1868 treaty. This taking implied an obligation by the U.S. to make just compensation to the Sioux.

Case	Action attacked	Holding/rationale
Agins v. City of Tiburon, 447 U.S. 255 (1980)	Municipal rezoning under which property owner could build between one and five houses on his land.	No facial taking; as-applied claim not ripe. Zoning law effects taking if it does not substantially advance legitimate state interests or denies owner economically viable use of his land. Thus, no facial taking here: enactment of ordinance is rationally related to legitimate public goal of open-space preservation, ordinance benefits property owner as well as public, and owner may still be able to build up to five houses on lot. As-applied challenge is premature, since owner never submitted development plan for approval under the new zoning.
Prune Yard Shopping Center v. Robins, 447 U.S. 74 (1980)	State constitutional mandate that persons be allowed to engage in political expression in private shopping center.	No taking. Will not unreasonably impair value or use of property as a shopping center, since facility is open to public at large. And owner may restrict time, place, and manner of expression.
United States v. Clarke, 445 U.S. 253 (1980)	Municipalities' entering into physical possession of land without bringing condemnation action.	Federal statute providing that allotted Indian lands may be "condemned" under state law does not allow cities to take land by physical possession in absence of formal condemnation proceeding. Term "condemned" refers only to filing of condemnation by government, not filing of "inverse condemnation" action by landowner.
Kaiser Aetna v. United States, 444 U.S. 164 (1979)	Federal order that owners of exclusive private marina, made navigable by private funds, grant access to boating public.	Taking occurred. Infringement of marina owner's right to exclude others, particularly where there's investment-backed expectation of privacy, goes beyond permissible regulation. Navigation servitude does not grant government absolute taking immunity.
Andrus v. Allard, 444 U.S. 51 (1979)	Federal ban on sale of eagle parts or artifacts made therefrom, as applied to stock lawfully obtained before ban.	No taking. Denial of one traditional property right (selling) does not necessarily amount to taking, even if it is most profitable use of property. Plaintiff retained right to possess, pass on, or exhibit for an admission price, the affected inventory.
Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978)	City's use of historic preservation ordinance to block construction of office tower atop designated historic landmark.	No taking. Generally, there are three factors of "particular significance" in a takings determination: (1) economic impact of regulation on property owner; (2) extent to which regulation interferes with distinct investment-backed expectations; and (3) "character" of government action (meaning principally that regulation of use is less likely to be taking than physical invasion). Here, landmark owner may earn adequate return from building as is, and more modest additions to building still might be approved. City's offering of transferrable development rights to building owner also weighs against a taking. Finally, building owner cannot segment air rights over building from remainder of property and claim that all use of air rights was taken.

II. The Dawn of Regulatory Takings Law: *Pennsylvania Coal Co.* (1922) to 1978

The principle that government may "take" property in the Fifth Amendment sense merely through regulatory restriction of property use—that is, without physical invasion or formal appropriation of the property—was announced in 1922. In *Pennsylvania Coal Co. v. Mahon*, the redoubtable Justice Oliver Wendell Holmes wrote for the Supreme Court that a state law prohibiting coal mining that might cause surface subsidence in certain areas was a taking of the mining company's mineral estate.

The first steps taken by this infant doctrine, however, were unsteady ones. Aside from making clear that takings occur only with the most severe of property impacts, the Court's opinions during this period display little in the way of principled decisionmaking. Moreover, the Court refused at times to part with its long-standing due-process approach to testing property-use restrictions, vacillating between the two theories.

Case	Action attacked	Holding/rationale
Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978)	Federal statute limiting amount recoverable by injured parties in the event of a nuclear accident.	Where individuals seek declaratory judgment that statute (Price-Anderson Act) is unconstitutional because it does not assure adequate compensation in the event of a taking, rather than seeking compensation, they may do so in district court under 28 U.S.C. §1331(a), and may do so before potentially uncompensable damages are sustained. (Footnote 15.) Also, it is unnecessary to reach taking claim here, because statute does not withdraw Tucker Act remedy (right to seek compensation from U.S. in Court of Federal Claims). (Footnote 39.)
Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974)	Federal statute directing transfer of bankrupt railroads' assets to federally created corporation and forcing continued operation of unprofitable lines.	Availability of Tucker Act remedy (right to seek compensation from U.S. in Court of Federal Claims) if rail act effects "erosion taking" is ripe issue in view of distinct possibility that compelled rail operations at a loss would erode railroad's value beyond constitutional limits. Similarly, issue of remedy's availability if rail act effects "conveyance taking" is ripe, since act will lead inexorably to conveyance of assets. On merits, Tucker Act remedy is available for both alleged takings because rail act indicates no contrary intent; availability need not be stated.
Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974)	Puerto Rico's seizure of yacht used for unlawful activity by lessee, but having innocent lessor.	No taking. Forfeiture is not rendered unconstitutional because it applies to property of innocents. The property itself is treated as the offender, making owner's conduct irrelevant. Also, owner voluntarily entrusted yacht to lessee, and there was no allegation that owner did all it could to avoid having property put to unlawful use.
Hurtado v. United States, 410 U.S. 578 (1973)	Pre-trial detention of federal criminal witnesses who are likely to flee and cannot post bond; payment of only $1 per day.	No taking. There is public duty to provide evidence; fact that pre-trial detention is involved here, and that financial burden may be great, is immaterial. Takings Clause does not make U.S. pay for performance of duty it is already owed. Hence, issue of whether $1 is adequate compensation need not be reached.

Case	Action attacked	Holding/rationale
New Haven Inclusion Cases, 399 U.S. 392 (1970)	Accumulation of losses by New Haven Railroad from inception of bankruptcy reorganization plan in 1961 to inclusion in Penn Central Railroad in 1968.	No taking of bondholders' interests. They invested in a public utility that has obligations to public, thus assuming risk that interests of public would be considered in any reorganization along with their own. Bondholders' rights do not dictate that vital rail operations be jettisoned despite feasible alternatives. And no bondholder petitioned court to dismiss reorganization proceeding and permit foreclosure until 1967.
YMCA v. United States, 395 U.S. 85 (1969)	Occupation of plaintiff's buildings in Canal Zone by U.S. troops seeking to protect buildings from Panamanian rioters.	No taking. Where private party is intended beneficiary of government activity, resultant losses need not be compensated even though activity was also intended incidentally to benefit public. Also, damage by rioters was not caused directly and substantially by government occupation.
Permian Basin Area Rate Cases, 390 U.S. 747 (1968)	Federal determination of maximum producers' rates for interstate sale of natural gas on an area, rather than individual producer, basis.	The Constitution does not forbid area-wide rate determinations. Also, recall that the "just and reasonable" rate standard of the Natural Gas Act coincides with constitutional standards. Thus, there is no constitutional objection if the Federal Power Commission, in setting rates, takes fully into account the various interests that "just and reasonable" requires it to reconcile.
Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964)	Federal statute banning racial discrimination in public accommodations.	No taking. "The cases are to the contrary [of the taking claim]."
Dugan v. Rank, 372 U.S. 609 (1963)	Threatened storage and diversion of water at federally operated Central Valley Project dam.	If plaintiffs have valid water rights that are partially taken, their remedy is not an injunction stopping reclamation project but a taking suit against United States under Tucker Act. Damages are to be measured by difference in market value of plaintiffs' lands before and after the taking.
Goldblatt v. Hempstead, 369 U.S. 590 (1962)	Ordinance barring excavation below water table.	No taking. Fact that ordinance deprives property of its most beneficial use, even an existing one, does not render it a taking. No evidence that ordinance will reduce value of lot, and ordinance is valid police-power regulation.
Griggs v. Allegheny County, 369 U.S. 84 (1962)	Low and frequent flights over home near county-owned airport.	Taking occurred of an air easement, per rule of *United States v. Causby, infra* page 13. County, rather than U.S., must assume taking liability, since notwithstanding federal airport standards that must be met for receipt of federal funds, county promoted, built, owns, and operates airport.
Armstrong v. United States, 364 U.S. 40 (1960)	Required transfer to U.S. of title to unfinished boat, making a materialmen's lien unenforceable.	Taking occurred. Destruction by government of all value of lien (which is property) is not mere consequential injury, hence non-compensable, but is rather a direct result of United States' exercising option under contract to take title to vessel.
United States v. Central Eureka Mining Co., 357 U.S. 155 (1958)	Federal wartime order requiring non-essential gold mines to close.	No taking. Government did not occupy, use, or possess mines; rather it sought only to free up essential equipment and manpower for critical wartime uses. Such a temporary restriction during wartime is not a taking.
Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955)	Removal by U.S. of timber from certain Indian-occupied lands in Alaska.	No taking. Permissive Indian occupancy—i.e., occupancy not specifically recognized by Congress as ownership—may be extinguished without compensation.
United States v. Caltex (Philippines), Inc., 344 U.S. 149 (1952)	Destruction by U.S. army of private oil terminal, to prevent its capture by advancing enemy.	No taking. Wartime destruction of private property by U.S. to prevent imminent capture by an advancing enemy is exception to taking clause.

Case	Action attacked	Holding/rationale
United States v. Pewee Coal Co., 341 U.S. 114 (1951)	Temporary seizure and operation of coal mine by U.S. during wartime to avert strike.	Taking occurred. Government asserted total dominion and control over the mines.
United States v. Kansas City Life Insurance Co., 339 U.S. 799 (1950)	Maintaining river level at high water mark by federal lock and dam, raising water table on farm and thus destroying its agricultural value.	Taking occurred. Government is not shielded from takings liability by its navigation servitude here; farm is above ordinary high water mark, which defines limit of servitude. Destruction of farm's agricultural value is taking under principle that destruction of private land by flooding is taking. As with flooding, land was permanently invaded, and it matters not whether invasion was from above or below.
United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950)	Building of federal dam that ended seasonal inundation of plaintiffs' grasslands, turning them parched.	Need not reach taking question, since Congress has not attempted to take, or authorized the taking without compensation, of any rights valid under state law.
United States v. Dickinson, 331 U.S. 745 (1947)	Flooding of land by federal dam in gradual, successive stages.	When government takes by a continuing process of physical events, owner is not required to resort to piecemeal or premature takings actions. Date of taking occurs when situation becomes "stabilized."
United States v. Causby, 328 U.S. 256 (1946)	Frequent flights of military aircraft over chicken farm at low altitude.	Taking occurred of air easement. Flights over private land that are so low and frequent as to be direct and immediate interference with use and enjoyment of land effect a taking.
United States v. Willow River Power Co., 324 U.S. 499 (1945)	Raising of water level by U.S., impairing efficiency of upstream hydro-electric dam.	No taking. Dam operator's interest in river's water level is subordinate to paramount authority of United States to improve navigation.
Bowles v. Willingham, 321 U.S. 503 (1944)	Federal statute authorizing restriction of rents in "defense areas" to levels that are "generally" fair, rather than fair to each landlord.	No taking. Impossibility of fixing rents landlord by landlord and existence of war are germane to constitutional issue. Nothing in act requires offering accommodations for rent. Price control may reduce value of property, but that does not mean there is taking.
Federal Power Comm'n v. Natural Gas Pipeline Co. of America, 315 U.S. 575 (1942)	Federal regulation of rates for interstate sale of natural gas.	By long-standing usage in the field of rate regulation, the lowest reasonable rate is one which is not confiscatory in the constitutional sense. It follows that the "just and reasonable" standard for interstate gas rates in the Natural Gas Act "coincides with that of the Constitution."
United States v. Chicago, M., St. P. & P. Railroad Co., 312 U.S. 592 (1941)	Raising of water level by U.S., forcing railroad to incur costs to protect embankment.	No taking. Embankment was built on low-water mark in bed of navigable stream; government's navigation servitude covers entire bed of such streams to high-water mark.
Danforth v. United States, 308 U.S. 271 (1939)	Enactment of flood control statute authorizing condemnation.	Mere enactment of statute authorizing future action cannot be taking, since "[s]uch legislation may be repealed or modified, or appropriations may fail."
United States v. Sponenbarger, 308 U.S. 256 (1939)	Enactment of flood control act and operations pursuant to act.	No taking of land within floodway. Improvements under act had not increased flood hazard. Also, government effort to lessen flood hazard did not constitute taking of those lands not afforded as much protection as others.
Chippewa Indians v. United States, 305 U.S. 479 (1939)	Federal statute creating national forest on land held by U.S. in trust for tribe.	Taking occurred. Mere enactment deprived tribe of all its beneficial interest in the land.

Case	Action attacked	Holding/rationale
Wright v. Vinton Branch of Mountain Trust Bank, 200 U.S. 40 (1937)	Elimination of certain rights of mortgagees in property held as security, by statute amended in response to *Louisville Joint Stock Land Bank, infra* page 14.	No due process violation. Amended statute shortened stay of foreclosure proceedings (during which debtor remained in possession paying rent) from five years to three years, and included new provision requiring that judicial sale be held if debtor failed to pay rent or comply with court orders.
Shoshone Tribe v. United States, 299 U.S. 476 (1937)	Federal sanction of Arapahoe occupancy of land promised by treaty to exclusive occupancy of Shoshone.	Federal guardianship of tribal land does not include requiring tribe to which exclusive occupancy has been pledged to share land with another tribe absent compensation.
Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935)	Federal statute eliminating certain rights of mortgagees in property held as security.	Taking occurred. At the outset, bankruptcy power is subject to Takings Clause. The statute as applied deprives mortgagee bank of its property rights under state law to retain lien until indebtedness is paid, to realize on the security through judicial public sale, to control property during default period, etc. Aggregate loss of these rights effects substantial impairment of the security. Act has taken from bank and given to mortgagor rights of substantial value.
Railroad Retirement Bd. v. Alton Railroad Co., 295 U.S. 330 (1935)	Required federal retirement scheme for interstate carriers.	Due process violation occurred. Under scheme, a railroad must, in addition to making its own contributions to pension fund, act as insurer of contributions required of other railroads and railroad employees. Though property of railroads is dedicated to public use, it remains private property of its owners, and may not be taken without compensation.
United States v. Creek Nation, 295 U.S. 103 (1935)	Portion of treaty lands taken by survey error of United States, given to another tribe.	Federal guardianship of tribal land does not allow appropriation by U.S. without compensation.
Norman v. B. & O. Rd. Co., 294 U.S. 240 (1935)	Federal mandate that obligations be dischargeable by payment of legal tender, voiding gold clause in pre-existing private contract.	No taking. Relies entirely on *Legal Tender Cases, infra* page 19.
Mullen Benevolent Corp. v. United States, 290 U.S. 89 (1933)	Acquisition by U.S. of lands, frustrating the replenishment of town's fund for repayment of bonds.	No taking of bonds. No lien remained on land at time of purchase by U.S., and frustration of ability to replenish fund is merely consequential damage, hence noncompensable.
International Paper Co. v. United States, 282 U.S. 399 (1931)	Wartime requisition by U.S. of all power producible by power company from water in canal, cutting off paper company's lease right to use portion of such water.	Taking occurred. Fact that requisition occurred by contract is of no moment, since power company was bound under governing requisition statute to obey. Paper company had water right, a property right, to use of canal water, and federal action terminated that right in its entirety. *Omnia Commercial Co., infra* page 15, can be distinguished, since here government took the property that petitioner owned, rather than merely frustrating future deliveries under contract.
Nectow v. City of Cambridge, 277 U.S. 183 (1928)	Euclid-style comprehensive zoning ordinance, as applied to designate portion of plaintiff's tract residential.	Due process violation occurred. Because of industrial uses to which adjoining lands on two sides are devoted, subject land has little value for limited purposes permitted in a residential zone. Land-use restriction cannot be imposed where, as here, it does not bear substantial relation to public health, safety, morals, or general welfare.

Case	Action attacked	Holding/rationale
Miller v. Schoene, 276 U.S. 272 (1928)	State order that cedar trees infected with infectious rust disease be cut down, so as not to endanger nearby cash crop.	State did not exceed due process or proper bounds of police power. State may order destruction of one class of private property to save another of greater value to public.
Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)	Comprehensive zoning ordinance.	No due process violation. Zoning, as a general matter, is reasonable use of police-power to deal with increasingly crowded urban conditions. Fact that non-offensive as well as noxious uses are barred from a zone is not fatal.
Everard's Breweries v. Day, 265 U.S. 545 (1924)	Federal statute prohibiting doctors from prescribing intoxicating malt liquors for medicinal purposes.	No taking of brewery's property. (No further discussion.)
Brooks-Scanlon Corp. v. United States, 265 U.S. 106 (1924)	Wartime requisition by U.S. of all ships under construction by shipyard and related contracts, including plaintiff's purchase contract.	Taking occurred. U.S. put itself in plaintiff's shoes and appropriated to its own use all the rights and benefits that an assignee of the contract would have had—such as credit for payments already made by plaintiff. U.S. sought to enforce the contract. This case is easily distinguished from *Omnia Commercial Co., infra* page 15, where U.S. frustrated, but did not take over, the contract.
Sanguinetti v. United States, 264 U.S. 146 (1924)	Flooding of land between river and slough, following construction of canal connecting the two to divert flood waters from slough to river.	No taking. Overflow must be direct result of government structure, and constitute a permanent invasion of land. These conditions are not met here. The land was subject to same periodic overflows before canal; it was not shown that overflow was direct result of canal. And owner was not ousted, nor was customary use of land prevented.
Omnia Commercial Co. v. United States, 261 U.S. 502 (1923)	Wartime requisition by U.S. of steel plant's entire output, precluding plaintiff from buying steel at favorable price under preexisting contract with plant.	No taking. Though contract rights are property, U.S. did not "take" those rights, but merely frustrated their exercise. The Constitution does not demand compensation for such consequential harm.
Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)	State law barring coal mining that might cause subsidence of overlying land, applicable only where surface estate owner is different from mineral estate owner.	Taking occurred. "While property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." By eliminating right to mine coal, state law leaves the mineral estate owner with nothing. Moreover, because state law applies only where surface is in different ownership, it benefits a narrow private interest rather than a broad public one. And surface owners had expressly contracted away their right to subjacent support.

III. Appropriations and Physical Takings Only: 1870 to 1922

The 1870s marked the Supreme Court's first clear acknowledgment that the Takings Clause is not only a constraint on the government's formal exercise of eminent domain, but the basis as well for suits by property owners challenging government conduct not attended by such formal exercise. However, until 1922 the Court believed such "inverse condemnation" suits to be confined to government appropriations or physical invasions of property. Cases involving the impacts of government water projects (flooding, reduced access, etc.) were typical. When cases involving mere restrictions on the use of property reached the Court, they were tested under due process, scope of the police power, or ultra vires theories.

Case	Action attacked	Holding/rationale
Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 (1922)	Positioning of military guns for firing over private resort island, and actual firing on several occasions.	Occasional firings and other evidence showed that U.S. might have installed guns not simply as wartime defenses, but to subordinate resort to right of government to fire across it at will, in peacetime. If so, effects an appropriation of a servitude and requires compensation.
Corneli v. Moore, 257 U.S. 491 (1922)	Federal refusal under National Prohibition Act to allow plaintiffs to remove purchased liquor barrels from warehouse, despite pre-act purchase.	No taking. Application of National Prohibition Act to plaintiffs, despite their purchase of the liquor prior to its enactment, does not effect a taking. Takings argument is "answered ... by the National Prohibition Cases, 253 U.S. 350, 387."
John Horstmann Co. v. United States, 257 U.S. 138 (1921)	Construction of federal irrigation project, which raised groundwater and lake water, destroying value of plaintiffs' property.	No taking. To bind federal government, there must be implication of a contract to pay, but circumstances here rebut that implication. The project's consequences for the plaintiffs' properties could not have been foreseen, given the "obscurity" of the movement of percolating waters.
Block v. Hirsh, 256 U.S. 135 (1921)	Statute allowing tenants to remain in possession at same rent upon expiration of lease.	No taking. Validity of rate regulation in the public interest is well settled. Statute is justified only as temporary measure related to war effort. Landlord is assured of rents that are "reasonable."
Bothwell v. United States, 254 U.S. 321 (1920)	Government flooding of private land, forcing sale of cattle at low prices and destroying business.	No taking as to cattle or business. The U.S. need only pay for property it actually takes.
Walls v. Midland Carbon Co., 254 U.S. 300 (1920)	State ban on non-heating uses of natural gas, forcing closing of plant that used gas to make carbon black.	Within state's police power and does not take property without due process. State may curtail extravagant uses of a natural resource in which many have rights, limiting one person's rights in order that others may enjoy theirs.
Jacob Ruppert, Inc., v. Caffey, 251 U.S. 264 (1920)	Federal statute extending wartime ban on domestic liquor sales to beer, including supplies on hand at enactment.	No taking. As in *Hamilton, infra* page 17, there was no appropriation of private property, but merely a lessening of value due to a permissible restriction on its use. Nor is it significant that ban took effect immediately.

Case	Action attacked	Holding/rationale
Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146 (1919)	Federal statute imposing wartime ban on domestic liquor sales, including supplies on hand at enactment.	No taking. There was no appropriation for public purposes. Moreover, statute gave plaintiff nine months after enactment to sell liquor, and imposed no restriction at any time on export. Finally, restrictions here are less severe than ones upheld in state takings cases under Fourteenth Amendment.
Corn Products Refining Co. v. Eddy, 249 U.S. 427 (1919)	State food and drug law requiring that table syrup manufacturer affix labels on product disclosing ingredients.	No taking. Though plaintiff's syrup is a proprietary food, made under a secret formula, there is no constitutional right to sell goods without giving information to purchaser as to what it is that is being sold. Hence, cannot be said that there is "taking of ... property without due process of law."
United States v. Cress, 243 U.S. 316 (1917)	Federal lock and dam project that raised water above natural levels, periodically flooding private land.	Taking of flowage easement occurred. Government's right to make navigational improvements is subject to taking clause when natural bounds of stream are exceeded.
Hadacheck v. Sebastian, 239 U.S. 394 (1915)	Ordinance barring brick manufacture in residential section of city, allegedly reducing site's value by 92½%.	Police power not exceeded. Only limit on police power is that it not be exercised arbitrarily. Fact that when brick manufacturing commenced, residences on surrounding land had not yet been built, does not avail manufacturer.
Houck v. Little River Drainage District, 239 U.S. 254 (1915)	Tax of 25 cents per acre levied upon all land within drainage district to pay district's preliminary organizing expenses.	No taking. Argument that plaintiff's land will not be benefitted by newly formed district, and thus that tax is to that extent a taking without just compensation, must be rejected. "[T]he power of taxation should not be confused with the power of eminent domain. Each is governed by its own principles."
Greenleaf Johnson Lumber Co. v. Garrison, 237 U.S. 251 (1915)	Demand by Secretary of War that portion of pier outside redrawn pier line be removed, even though within pier line when built.	No taking. Though pier was built with state approval, state's authority is subordinate to federal navigation servitude. Where it applies to a body of water, as here, the servitude exonerates the United States from takings liability when acting to promote commerce and navigation.
Reinman v. Little Rock, 237 U.S. 171 (1915)	Ordinance barring livery stables in section of city.	Police power not exceeded; due process not violated. It is within police power to declare that in certain situations, a type of business shall be deemed a nuisance and prohibited, even if it is not a nuisance per se, as long as this power is not exercised arbitrarily or with unjust discrimination.
Richards v. Washington Terminal Co., 233 U.S. 546 (1914)	Harm to property from operation of nearby railroad located, constructed, and maintained under acts of Congress.	Property owner's nuisance action against railroad may proceed. While Congress may legalize what would otherwise be a public nuisance, it may not immunize congressionally chartered railroad from private nuisance actions so as to amount to taking of private property. Private nuisances amounting to takings in this context are those where railroad operation subjects property owner to more than typical injury, as is the case here.
Peabody v. United States, 231 U.S. 530 (1913)	Positioning of military guns with capability of firing over private resort island; last fired in 1902.	No taking. If U.S. had installed guns to establish right to fire over land at will in peacetime, would be a taking. But here, practice shots can be aimed elsewhere, and indeed, guns have not been fired for many years. Cf. *Portsmouth Harbor Land & Hotel Co., supra* page 16.

Case	Action attacked	Holding/rationale
Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U.S. 82 (1913)	Federal contractor's dredging of navigation channel across submerged lands leased for oyster cultivation, destroying oysters	No taking. Under federal navigation servitude, property rights in submerged land may be destroyed by dredging of channel in interest of navigation without compensation. See also *United States v. Chandler-Dunbar Co.*, 229 U.S. 63 (1913), addressing effect of navigation servitude on property rights in a direct condemnation case decided the same day.
Noble State Bank v. Haskell, 219 U.S. 104 (1911)	State statute requiring banks to pay assessment to fund designed to secure full repayment of deposits.	No taking. A public advantage may justify a small taking of private property for what, in its immediate purpose, is a private use. In addition, benefit conferred on plaintiff bank through this scheme of mutual protection is sufficient compensation for correlative burden that it must assume.
United States v. Welch, 217 U.S. 333 (1910)	Flooding from government dam, cutting off right of way.	Taking occurred. Destruction of an easement is as much a taking of it as is an appropriation.
Welch v. Swasey, 214 U.S. 91 (1909)	State statute limiting height of buildings in area containing plaintiff's land to lower height than elsewhere.	No taking. Height limitation here, even though a discrimination, is not so unreasonable as to deprive owner of property of its profitable use without justification. The discrimination was justified by the police power.
Juragua Iron Co. v. United States, 212 U.S. 297 (1909)	Wartime destruction of U.S. company's property in enemy territory, on order of U.S. military officer, to prevent spread of yellow fever.	No taking. American company doing business in enemy territory is deemed enemy of the U.S. with respect to its property located in that territory. No compensation is owed when such property is destroyed through military action justified under laws of war.
Sauer v. City of New York, 206 U.S. 536 (1907)	Construction of elevated public viaduct in city street, impairing access, light, and air reaching plaintiff's property.	No taking. Under New York law, public-highway abutter has easements of access, light, and air against erection of elevated roadway by private corporation, but not against erection of same for public use.
Union Bridge Co. v. United States, 204 U.S. 364 (1907)	Order by Secretary of War that bridge be altered at owner's expense to eliminate obstruction to navigation	No taking. U.S. actions under its navigation servitude are not takings but rather exercise of dominant government power to which riparian property has always been subject. Fact that bridge was lawfully constructed and did not obstruct navigation when built is immaterial.
Manigault v. Springs, 199 U.S. 473 (1905)	Construction of state-authorized dam, compelling plaintiff to raise his dikes and impairing access to his lands.	No taking. Flooding effects taking only where there is material impairment of flooded land's value—not, as here, where plaintiff is merely put to some extra expense in raising dikes (and even though dam's sole purpose is to enhance value of downstream lowlands for agriculture). No compensation for impaired access either, since within state's police power.
California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306 (1905)	Ordinance requiring that waste generated within city be disposed of at designated site, at transporter's expense.	No taking. Imposing expense on waste generator (assuming transporter passes on disposal fees) was not taking, since it has always been generator's duty to have garbage removed from his premises. Nor did destruction of waste amount to taking, even if some of its constituents had value.
New Orleans Gaslight Co. v. Drainage Comm'n of New Orleans, 197 U.S. 453 (1905)	Requirement by drainage district that gas utility move some of its pipes at its own expense.	No taking. Plaintiff's franchise gave it only right to locate its pipes under streets of city, not right to any particular place such that plaintiff must be compensated should relocation be required.

Case	Action attacked	Holding/rationale
Bedford v. United States, 192 U.S. 217 (1904)	Government revetments along river to halt widening, causing river to flow faster and erode/flood downstream property.	No taking. Damage to land, if caused by revetment at all, was but an incidental consequence; distinguished from instance where government dam in river causes flooding of private land directly.
United States v. Lynah, 188 U.S. 445 (1903)	Flooding from government dam, completely destroying land's value.	Taking occurred. Where government dam floods land so as to substantially destroy its value, there is a taking.
Scranton v. Wheeler, 179 U.S. 141 (1900)	Pier constructed by United States in navigable waters in aid of navigation, eliminating riparian owner's access to navigable water	No taking. Congress's power to regulate commerce, and therefore navigation, may be exercised without compensation. Riparian owner's right of access to navigable waters is subject to being thwarted by government erection of structures on submerged land in front of property to improve navigation. Irrelevant whether title to submerged land on which pier was built was in state or private riparian owner.
Norwood v. Baker, 172 U.S. 269 (1898)	Ordinance assessing landowner the costs to condemn strip of his land for road, including village's expenses in connection with condemnation.	Taking occurred. Special assessments to meet cost of public improvements are justified on ground that property owner on which they are imposed is specially benefitted by the improvement. Still, when such assessments are in substantial excess of those special benefits, they are, to the extent of such excess, a taking.
Meyer v. Richmond, 172 U.S. 82 (1898)	City-authorized railroad obstruction to street, reducing traffic at plaintiff's properties nearby.	No taking. Obstruction was not on plaintiff's land. Hence, impact on plaintiff amounted only to consequential damages, which are noncompensable.
Gibson v. United States, 166 U.S. 269 (1897)	Construction of government dike near plaintiff's land, preventing ingress and egress of vessels to commercial wharf on plaintiff's land.	No taking. No appropriation or direct invasion occurred, only incidental injuries from lawful exercise of federal navigation servitude. No water was thrown onto plaintiff's land; dike did not physically touch land or cause deposits thereon.
Mugler v. Kansas, 123 U.S. 623 (1887)	Ban in state constitution on manufacture or sale of liquor, greatly reducing brewery's value.	No taking. A prohibition simply upon use of property for purposes declared by valid legislation to be noxious cannot be deemed a taking.
United States v. Pacific Rd., 120 U.S. 227 (1887)	Government's offset of its costs in rebuilding bridges destroyed in Civil War, against railroad's claim for services.	Related discussion asserts that government cannot be charged for injury to private property caused by wartime operations in the field, or by measures necessary for army's safety. But when property of loyal citizens is taken for army's use, it has been practice to compensate, though "it may not be within the terms of the constitutional clause."
United States v. Great Falls Mfg. Co., 112 U.S. 645 (1884)	Building of dam, which occupied plaintiff's land and took his water rights.	Taking occurred. Where United States by its agents proceeds under act of Congress to occupy property for public use, it must compensate.
Transportation Co. v. Chicago, 99 U.S. 635 (1878)	Construction of tunnel under river, temporarily limiting access to wharf.	No taking. Acts done in proper exercise of government powers, and not directly encroaching on private property, are not a taking.

Case	Action attacked	Holding/rationale
Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871)	Dam that flooded plaintiff's land continuously.	Taking occurred. It is not required that property be formally taken in order to implicate Takings Clause. Serious interference with the common and necessary use of property, as by continuous flooding, effects a constitutional taking.
Legal Tender Cases (Knox v. Lee), 79 U.S. (12 Wall.) 457 (1870)	Federal statutes making U.S. currency legal tender for payment of all debts, even those entered into before enactment.	No taking. Takings Clause "has always been understood as referring only to a direct appropriation"; it has no bearing on laws such as this one that only indirectly cause loss. Overrules *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1870) (finding legal tender acts violative of due process, but briefly raising taking issue).

Author Contact Information

Robert Meltz
Legislative Attorney
rmeltz@crs.loc.gov, 7-7891

EXHIBIT 4

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

LIMITATION OF LOWER FEDERAL COURT JURISDICTION OVER PUBLIC UTILITY RATE CASES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

42. 285 U. S. at 60.

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

58. Delaware alone has no commission regulation.

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

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

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

---

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

60. Colo. Ann. Stat. (Mills, 1930) § 5933z1; Me. Laws 1933, c. 6; Utah Rev. Stat. Ann. (1933) §§ 76-6-16.

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

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

63. Va. Const. § 156 (g) (transportation and transmission companies); Okla. Const. art. 9, § 23 (transportation and transmission companies).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

INTERSTATE COMMERCE COMMISSION CONTROL OF INTRASTATE RATES

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

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

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

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

EXHIBIT 5

ARTICLE: California Supreme Court Review of Decisions of the Public Utilities Commission -- Is the Court's Denial of a Writ of Review a Decision on the Merits?

AUGUST, 1988

Reporter
39 Hastings L.J. 1147

Length: 12462 words

Author: BORIS H. LAKUSTA * and DAVID H. RENTON **

* Partner, Graham & James, San Francisco, California; Member, California Bar. A.B. 1933, Harvard University; LL.B. 1936, Harvard Law School; LL.M. 1938, Stanford Law School.

** Member of California Bar engaged at McKenna & Co., London, England; B.A. 1973, Sussex University; J.D. 1976, Boalt Hall School of Law, University of California, Berkeley.

The authors are especially indebted to Arthur T. George, Esq., former Chief Counsel of the California Railroad Commission and former General Solicitor of The Pacific Telephone & Telegraph Co., for valuable historical information and advice.

LexisNexis Summary

... When the California Supreme Court *grants* a petition for writ of review of a CPUC decision, the judicial remedy satisfies the relevant constitutional and statutory requirements. ... In the first few years after passage of the Public Utilities Act, the California Supreme Court rendered a written opinion in all utility cases coming before it, including those in which a petition for writ of review was denied. ... The sole means provided by law for judicial review of a commission decision is a petition to this court for writ of review . . . which thereby serves in effect the office of an appeal. ... The California procedure for reviewing CPUC rate decisions meets the ***Johnson Act*** condition of providing a "plain, speedy and efficient" judicial ***remedy*** when the California Supreme Court grants a petition for writ of review. ... In addition, this Article advocates that until remedial legislation is enacted and so long as the California Supreme Court continues to deny petitions for writ of review without opinion, attorneys should not hesitate to file actions in the federal district court to challenge CPUC decisions that involve a federal question. ...

Text

[*1147] Over seventy-five years ago, the Public Utilities Act of 1912 [1] imposed upon the California Supreme Court the obligation to review decisions of the California Railroad Commission, now known

[1] Public Utilities Act, ch. 91, 1915 Cal. Stat. 115 (original version at ch. 20, 1911 Cal. Stat. 13).

as the California Public Utilities Commission (CPUC). [2] The Act was amended in 1933, adding language to remove doubt about the sufficiency of the protection afforded constitutional rights by the California Supreme Court's review. [3] Apart from this addition, the provisions for review have remained essentially unchanged since 1912.

[*1148] In 1951, the review provisions were incorporated into the *California Public Utilities Code sections 1756*, 1757, and 1760. [4] Section 1756 provides that after exhaustion of the administrative remedy

the applicant may apply to the Supreme Court of this state for a writ of certiorari or review for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined. The writ shall be made returnable at a time and place then or thereafter specified by court order and shall direct the commission to certify its record in the case to the court within the time therein specified. [5]

Section 1757 provides:

No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of the commission as certified to by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State.

The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review except as provided in this article. Such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination. [6]

Section 1760 embodies the language added to the Act in 1933:

In any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall not be final. [7]

---

[2] The name of the Commission was changed from Railroad Commission to Public Utilities Commission by amendment, adopted on November 5, 1946, CAL. CONST. art. XII, § 22 (current version as amended at CAL. CONST. art. XII, §§ 1-9 (1974)). The Commission is referred to in this article from time to time as the CPUC.

[3] Act of May 18, 1933, ch. 442, 1933 Cal. Stat. 1157 (current version at CAL. PUB. UTIL. CODE § 1760 (Deering 1970)). The United States Supreme Court delineated these standards in Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287, 289-91 (1920).

[4] Act of May 31, 1951, ch. 764, 1951 Cal. Stat. 2025 (current version at CAL. PUB. UTIL. CODE §§ 1757, 1760 (Deering 1970 & Supp. 1988)).

[5] CAL. PUB. UTIL. CODE § 1756 (Deering Supp. 1988).

[6] *Id.* § 1757 (Deering 1970).

[7] *Id.* § 1760.

The prescribed method of direct access to the California Supreme Court is by petition for "writ of certiorari or review," [8] rather than by appeal. The California Supreme Court, however, holds the exclusive review authority. *Section 1759 of the Public Utilities Code* provides that "No court of this State, except the Supreme Court to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the Commission. . . ." [9]

When the California Supreme Court *grants* a petition for writ of [*1149] review of a CPUC decision, the judicial remedy satisfies the relevant constitutional and statutory requirements. [10] The court receives the record, hears argument, and renders an opinion setting forth its reasoning. If legal issues are determined, the decision is given both res judicata and stare decisis effect.

In some ninety percent of the cases coming up from the CPUC, however, the court denies the petition for a writ of review. [11] In such cases, the court does not have the record before it, does not hear oral argument, and issues its denial without opinion or explanation. Despite these limitations the United States Supreme Court held, in a decision rendered a few years after passage of the Public Utilities Act of 1912, that denial of the writ in that particular case was a determination on the merits. [12] For nearly sixty years thereafter, the California Supreme Court interpreted that case as holding that denial of a writ is *always* a determination on the merits.

What prompted this sweeping interpretation? Did the California Supreme Court, as it became increasingly burdened with cases, strike an internal, unspoken compromise not long after enactment of the Public Utilities Act -- characterizing a denial of a writ of review as a "decision on the merits" to satisfy the constitutional and statutory right of parties to a determination by a court of law, but in fact treating the issuance of these writs as discretionary, indistinguishable from the treatment accorded petitions for writs of review emanating from actions of lower courts?

This Article examines the historical development of cases involving the California Supreme Court's review of CPUC decisions, which leads one to think that the answer is yes. Following an analysis of the relevant cases in section I, section II discusses the several unsatisfactory consequences of the court's practice of denial-without-opinion. Finally, section III presents both short-term and long-term remedies for the California Supreme Court's present, undesirable practice.

I. Case Law Until 1979

In the first few years after passage of the Public Utilities Act, the California Supreme Court rendered a written opinion in all utility cases coming before it, including those in which a petition for writ of review [*1150] was denied. [13] It was not long, however, before the court developed the practice, when

---

[8] *See supra* note 5 and accompanying text.

[9] § 1759.

[10] *See infra* notes 46-51 and accompanying text.

[11] The authors have derived this figure by examining the records of the CPUC over a period of approximately forty years. *See* Comment, *The California Supreme Court and Selective Review,* 72 CALIF. L. REV. 720, 722 (1984).

[12] Napa Valley Elec. Co. v. Railroad Comm'n, 251 U.S. 366, 373 (1920).

[13] These opinions were very brief indeed, often no more than a single paragraph. *See, e.g.,* City of Santa Monica v. Railroad Comm'n, 179 Cal. 467, 177 P. 989 (1918); E. Clemens Horst Co. v. Railroad Comm'n, 175 Cal. 660, 166 P. 804 (1917); C. A. Hooper & Co. v.

it denied such a petition, of issuing a minute order without opinion -- an order containing the single word "Denied," devoid of explanation or articulated reason.

A few years after the passage of the Public Utilities Act of 1912, the California Supreme Court decided *Napa Valley Electric Co. v. Railroad Commission.* [14] In that case, the electric company had petitioned for writ of review on the ground that a Railroad Commission order fixing rates lower than those agreed to by contract violated the electric company's rights under article I, sections 10 and 14 of the United States Constitution. The California Supreme Court denied the petition without opinion. [15] The electric company then went to the federal district court to enjoin the Commission from enforcing the rate order. The district court dismissed the action on the ground that the California Supreme Court's denial of the petition rendered the issue res judicata. [16] On appeal, the United States Supreme Court affirmed. [17]

The electric company contended that the California Supreme Court's denial of the petition could not be res judicata because no writ of review was issued, no hearing was held on a certified record, and no order was issued setting aside or affirming the Commission's decision. The United States Supreme Court rejected this contention, observing that "insistence upon the literalism of the statute meets in resistance the common, and at times, necessary practice of courts to determine upon the face of a pleading what action should be taken upon it." [18]

The United States Supreme Court then concluded that the California Supreme Court had itself interpreted the Public Utilities Act as not requiring the issuance of a writ of review in every case to render a court decision res judicata. [19] This opinion recognized that in some cases a court could decide, simply upon the face of the pleadings, that the Commission regularly pursued its authority, and thus, simply denying the writ would be sufficient.

[*1151] In reaching this conclusion the United States Supreme Court relied on four California Supreme Court decisions denying petitions for writ of review, which were accompanied with an opinion. In one case, *Ghriest v. Railroad Commission,* the California court held that the Commission's assumed failure to require notice was cured when the Commission gave the complaining party an opportunity to be heard -- the failure did not warrant holding that the Commission had failed to regularly pursue its authority. [20] The second case, *Mt. Konocti Light & Power Co. v. Thelen,* held that there was no substantial departure by the Commission from the procedure provided by the Public Utilities Act, and therefore no basis for granting a writ of review. [21] The third case, *E. Clemens Horst Co. v. Railroad Commission,* denied a writ because the Commission's order merely directed a railroad

Railroad Comm'n, 175 Cal. 811, 165 P. 689 (1917) (mem.); City of Pasadena v. Railroad Comm'n, 175 Cal. 812, 166 P. 356 (1917) (mem.).

14 174 Cal. 411, 163 P. 497 (1917).

15 ***Id. at 411, 163 P. at 497.***

16 Napa Valley Elec. Co. v. Railroad Comm'n, 257 F. 197, 199 (N.D. Cal. 1919), *aff'd,* 251 U.S. 366 (1920).

17 Napa Valley Elec. Co. v. Railroad Comm'n, 251 U.S. 366, 373 (1920).

18 Id. at 372.

19 *Id.*

20 170 Cal. 63, 63, 148 P. 195, 195 (1915).

21 170 Cal. 468, 470, 150 P. 359, 360 (1915).

to enforce its tariff and did not attempt to adjudicate liability to the railroad. [22] Finally, in *Hooper & Co. v. Railroad Commission,* the court denied a petition for writ of review because the Commission's order did not deprive consumers of any prior right. [23]

Based on its reference to these four cases, one may reasonably conclude that the United States Supreme Court meant simply that in some situations the merits can be determined from the face of the pleadings, making the issuance of a writ an idle gesture. The California Supreme Court had so interpreted the statute respecting its review authority, thus allowing the denial of a writ in those situations to have res judicata effect.

Notwithstanding the likelihood that the United States Supreme Court intended its decision to have this limited meaning, for nearly sixty years *Napa Valley Electric* was interpreted as holding that a denial of a writ of review of a CPUC decision is always a determination on the merits, having both res judicata and stare decisis effect. This interpretation prevailed although it was obviously difficult in some cases to fathom how the California Supreme Court could make an intelligent determination on the merits without having the record before it and without the benefit of oral argument. In its 1936 decision of *Southern California Edison Co. v. Railroad Commission,* the court might have cast doubt on the prevailing interpretation, but instead held that the 1933 addition to the review provisions of the Public Utilities Act "did not, in any substantial degree, change the rules in force prior thereto." [24]

[*1152] *People v. Western Air Lines,* [25] decided in 1954, also contributed to a broad reading of *Napa Valley Electric.* In that case, the state brought an action in the superior court to collect statutory penalties from the airline for failure to charge the fares prescribed by the CPUC. The superior court dismissed the action, holding that the CPUC lacked jurisdiction to fix the rates of an airline. [26] The California Supreme Court reversed on the ground that the CPUC had determined in a prior proceeding that it did have such jurisdiction and that jurisdiction had been sustained by the California Supreme Court's denial of a writ of review without opinion in *Western Air Lines v. Public Utilities Commission.* [27] The court in *People v. Western Air Lines* relied on *Southern California Edison Company* for the proposition that a denial of a writ "is a decision on the merits both as to the law and the facts presented in the review proceedings," [28] and on *Napa Valley Electric* for the proposition that "[t]his is so even though the order of this court is without opinion." [29] Because there was an identity of issues and parties, the matter was res judicata. [30]

Despite the court's position that the prior denial of the writ without opinion in *Western Air Lines v. Public Utilities Commission* was a decision on the merits of the issues presented in the instant case,

---

22 175 Cal. 660, 661, 166 P. 804, 804 (1917).

23 175 Cal. 811, 811, 165 P. 689, 689 (1917).

24 6 Cal. 2d 737, 746, 59 P.2d 808, 812 (1936).

25 42 Cal. 2d 621, 268 P.2d 723, *appeal dismissed,* ***348 U.S. 859 (1954).***

26 Id. at 629, 268 P.2d at 730.

27 Id. at 630, 642-43, 268 P.2d at 728, 735-36 (noting Western Air Lines v. Public Util. Comm'n, S.F. No. 18,427 (Aug. 2, 1951) (order denying petition for writ of review)).

28 Id. at 630, 268 P.2d at 728 (citing Southern California Edison Co. v. Railroad Comm'n, 6 Cal. 2d 737, 747, 59 P.2d 808, 812 (1936)).

29 *Id.* at 630-31, 268 P.2d at 728 (citing Napa Valley Electric Co. v. Railroad Comm'n, 251 U.S. 366, 372-73 (1920)).

30 *Id.* at 630, 268 P.2d at 728.

the court in *People v. Western Air Lines* proceeded to list those issues and to discuss the relevant legal principles, thereby supplying the explanation which the parties had failed to obtain in the earlier proceeding. [31] Logically there was no need in *People v. Western Air Lines* to do more than recite the issues and declare that they had been resolved by the denial-without-opinion in the cognate case. One wonders if the court was uncomfortable with the notion that issues of such serious magnitude could really be resolved properly without a full record and oral argument, followed by a written opinion. In any case, the unusual circumstance of the penalty proceeding in the superior court, followed by [*1153] appeal, did supply the elements of a hearing and a record, and the court did write a full opinion. As the court explained:

Since the conclusions on this appeal . . . are to be the same as those which to that extent formed the basis for the order denying the writ, . . . it is deemed desirable to state all of the reasons . . . *to the end that none of the reasons for such denial be left to implication or conjecture.* [32]

The court seems to recognize, by this comment, the essential unfairness of the denial-without-opinion procedure when important issues are involved. Why should parties ever be compelled to resort to inference and conjecture respecting the basis for the supreme court's action? Would not the court want parties to know the grounds on which it denied the writ? Most importantly, would not the court be more likely to give careful attention to the issues if it had to provide written reasoning for all to see?

Despite apparent discomfort with the issuance of denials-without-opinion, the court continued the practice. It was not until 1979 that the court in *Consumers Lobby Against Monopolies v. Public Utilities Commission* partially destroyed the prior interpretation by holding that a denial-without-opinion is res judicata but does not have the impact of stare decisis. [33] In the CPUC proceedings, representatives of ratepayer interests challenged rates proposed by the Pacific Telephone and Telegraph Company. Each of those participants sought an award of attorney fees. The issues were: (1) whether the CPUC had power to award attorney fees in a quasi-judicial proceeding; (2) whether in such a proceeding a non-attorney representative would be eligible for attorney fees; and (3) whether the CPUC had power to award attorney fees in a quasi-legislative rate making proceeding. [34]

The CPUC held that it lacked power to award attorney fees. [35] Petitions for a writ of review were granted by the California Supreme Court. The CPUC and Pacific Telephone both contended that the court had previously decided the issue in the negative by denying several prior petitions for writs of review and that the court should rely on these denials under the doctrine of stare decisis. [36]

---

[31] As stated by the court, the issues in question were: (1) whether the CPUC had jurisdiction to fix intrastate fares of an air carrier operating in interstate and intrastate commerce, (2) whether the airline was a public utility within the meaning of the state constitution, and (3) whether state jurisdiction had been preempted by the federal Civil Aeronautics Act. *Id.* at 629-30, 268 P.2d at 728. The California Supreme Court in this instance did have the benefit of the record and oral argument in the superior court proceeding below.

[32] *Id.* at 633, 268 P.2d at 730 (emphasis added).

[33] 25 Cal. 3d 891, 901-02, 603 P.2d 41, 47, 160 Cal. Rptr. 124, 130 (1979).

[34] Id. at 897, 603 P.2d at 44, 160 Cal. Rptr. at 127.

[35] Id. at 906, 603 P.2d at 57, 160 Cal. Rptr. at 140.

[36] Id. at 899, 603 P.2d at 45, 160 Cal. Rptr. at 128.

In holding that a denial of a writ to review a CPUC decision makes the matter res judicata only, and not stare decisis, [37] the court sought to extricate itself from a dilemma. On the one hand, it recognized that it is [*1154] the only California court empowered to review CPUC decisions. It must, therefore, make a determination on the merits when a petition for writ of review is filed if the petitioner is to be accorded the right to a law court determination -- a right to which the petitioner may be entitled under the state and federal constitutions. [38] On the other hand, the court wanted to continue, and perhaps justify, the policy of limiting the instances in which it would engage in the time consuming process of examining the record, hearing oral argument, and rendering a formal opinion. Thus, the court resorted to a fiction: if it denies without opinion a petition for writ of review, and such denial is not, in fact, a decision on the merits, such denial will nevertheless be "deemed a decision on the merits." [39] As such, it will be entitled to less respect than a decision actually on the merits, in that the doctrine of res judicata will apply, but the doctrine of stare decisis will not. As the court explained:

The sole means provided by law for judicial review of a commission decision is a petition to this court for writ of review . . . which thereby serves in effect the office of an appeal. If our ruling on such a petition were not a final "decision on the merits both as to the law and the facts presented," the parties would be denied their right to such review. Because it must therefore be deemed a decision on the merits, our denial of such a petition raises the bar of res judicata against relitigation of the same cause of action between the same parties or their privies. [40]

The court attempted to explain why stare decisis does not apply even though the denial is "deemed" on the merits:

As we have seen, the merits of the decision may well be procedural rather than substantive; yet because there is no opinion, its *ratio decidendi* does not appear on its face. It would therefore be sheer speculation for litigants to rely on such decisions as precedents. In addition, such reliance may well prove a trap for the unwary: members of the public who have potentially meritorious petitions for review to present to this court may be dissuaded from doing so by the mere fact that we declined to take an earlier case allegedly raising the same question. [41]

In short, the court resorted to semantic rationalization, using the phrase "on the merits" to extend even to procedural matters. Accordingly, a denial "on the merits" may be based on procedural grounds, such as failure to raise the issue below, failure to file the petition on time, or failure to recognize that the issue has become moot.

Again, one must ask: Why does the court drive litigants to guess what "merits" formed the basis of the court's decision? The excerpt [*1155] quoted above suggests that, in a given case, there may be no principled basis for the decision and the denial may be purely an act of discretion.

II. Deficiencies in the Practice of Denial-Without-Opinion

---

[37] Id. at 902, 603 P.2d at 47, 160 Cal. Rptr. at 130.

[38] *See* 5 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 28:3, at 259-61 (2d ed. 1978).

[39] Consumers Lobby, 25 Cal. 3d at 901, 603 P.2d at 46, 160 Cal. Rptr. at 129.

[40] *Id.*

[41] Id. at 905, 603 P.2d at 49, 160 Cal. Rptr. at 132.

The court's practice of denial-without-opinion of petitions for writ of review of CPUC decisions leads to several problems -- problems exacerbated by the court's indulgence in the fiction that these denials are "deemed to be on the merits." This section considers several deficiencies in this practice: (A) failure to reveal the grounds for a denial; (B) failure to meet statutory requirements; (C) failure to observe requirements of the California Constitution; (D) failure to provide a "plain, speedy and efficient ***remedy***" for rate cases within the meaning of the ***Johnson Act*** of 1934; (E) failure to provide assurance of judicial review on the merits to protect federal rights; and (F) failure to justify abstention from exercise of jurisdiction by the federal district court.

A. Failure to Reveal Grounds for Denial

The most obvious objection to the denial-without-opinion practice is that while it purportedly results in a decision by the supreme court on the merits, there is no way of discovering the court's reasoning. Did the court agree with the rationale for each issue raised, or only with the conclusion? Did the court possibly deny the petition on a procedural ground pleaded by a party or raised by the court on its own initiative? Finally, did the court deny the petition for an administrative reason, such as an overcrowded calendar, which would normally fail to qualify as being "on the merits"? One is left to speculate.

When a court has discretion to grant or deny a petition without reference to the merits, as in the case of a petition for a writ of certiorari to the United States Supreme Court, it is acceptable that the court deny such a petition simply by an order without opinion. This practice seems reasonable since the court's motivations in this instance are of little significance to the parties. When the court's action is based on the merits, however, the considerations are very different; in those situations, an understanding of the court's reasoning can help a party decide what subsequent steps to take. Such knowledge can also guide future parties faced with similar issues.

Knowledge of the court's reasoning is just as valuable when a writ is denied on the merits as it is when the court grants a writ, hears oral argument, and writes an opinion. In the former case, it may be that the circumstances may justify only an abbreviated decision, but at a bare minimum the parties should be entitled to know whether the court [*1156] agreed with the commission's reasoning on each issue or only with the conclusion. Moreover, the parties should be informed whether the denial was based solely on a procedural ground such as lack of standing or the expiration of the applicable statute of limitations. Finally, if the denial was based on administrative considerations such as an overcrowded calendar, the parties should be entitled to know that fact.

A California court of appeal in *People v. Rojas* expressed the value of an articulated decision by a reviewing court: "In our opinion, the requirement [of a written opinion] is designed to insure that the reviewing court gives careful thought and consideration to the case and that the statement of reasons indicates that appellant's contentions have been reviewed and consciously, as distinguished from inadvertently, rejected." [42]

The California Supreme Court has recognized the value of requiring an administrative body, notably the CPUC, to articulate the basis for its conclusions. In *California Motor Transport Co. v. Public Utilities Commission,* Justice Traynor, speaking for the court, quoted Professor Davis with approval:

---

[42] 118 Cal. App. 3d 288, 288-89, 174 Cal. Rptr. 91, 92, *denying reh'g to* ***118 Cal. App. 3d 278, 173 Cal. Rptr. 64 (1981).***

"'[A] disappointed party, whether he plans further proceedings or not, deserves to have the satisfaction of knowing why he lost his case.'" [43] Justice Traynor also emphasized that findings on material issues would be helpful to anyone planning activities involving similar questions and could also help prevent careless or arbitrary action by the deciding body. [44]

One must conclude that the California Supreme Court, while recognizing the importance of articulated reasoning by the CPUC, has, by the denial-without-opinion process, adopted a lesser requirement for its own actions.

B. Failure to Meet Statutory Requirements

As early as 1920, counsel argued before the United States Supreme Court in *Napa Valley Electric* that considering a summary denial of a petition for review of a Railroad Commission order to be a judgment on the merits and thus given res judicata effect is not consistent with the judicial review provisions of the Public Utilities Act. [45] These provisions, now incorporated in the Public Utilities Code, provide that judicial review [*1157] may be had only from the California Supreme Court [46] by means of an application for a writ of certiorari or review. [47] The writ shall direct the CPUC to certify its record to the supreme court [48] and the cause shall be heard on the record of the CPUC as certified by it. [49] Further, the CPUC and each party to the action or proceeding before the CPUC may appear in the review proceeding and, upon the hearing, the supreme court shall enter a judgment either affirming or setting aside the CPUC decision. [50] The provisions of the Code of Civil Procedure relating to prerogative writs of review apply to the extent they are compatible with the provisions of the Public Utilities Act. [51]

The court does not observe these essential elements of the review procedure when a petition for writ of review is summarily denied without opinion. First, the record of the CPUC proceeding is not certified to the supreme court. Second, there is no hearing, in the sense of oral argument before the court, although oral argument is required by the state constitution in all cases in which the court issues a judgment on the merits [52] unless oral argument is waived. [53] Third, the court does not enter a judgment either affirming or setting aside the CPUC decision but enters a minute order that the petition

---

43 59 Cal. 2d 270, 274, 379 P.2d 324, 327, 28 Cal. Rptr. 868, 871 (1963) (quoting 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 16.05, at 448 (1958)).

44 *Id.*

45 Napa Valley Elec. Co. v. Railroad Comm'n, 251 U.S. 366, 371 (1920).

46 CAL. PUB. UTIL. CODE § 1759 (Deering 1970); *see supra* text accompanying note 9.

47 § 1756 (Deering Supp. 1988); *see supra* text accompanying note 5.

48 *Id.*

49 § 1757 (Deering 1970); *see supra* text accompanying note 6.

50 § 1758.

51 *Id.*

52 CAL. CONST. art. VI, § 2; *see* Metropolitan Water Dist. v. Adams, 19 Cal. 2d 463, 468, 122 P.2d 257, 259 (1942).

53 CAL. R. CT. 28(g); OP. LEGISLATIVE COUNSEL, 1966 JOURNAL OF THE SENATE 1047-48.

for writ of review is denied. Finally, the Code of Civil Procedure relating to writs of review [54] is not followed, particularly since the court does not enter a judgment on the merits of a petition for a prerogative writ unless it grants at least an alternative writ. [55]

Counsel for the Napa Valley Electric Company argued that since the Public Utilities Act prohibits judicial review of Commission orders other than in the manner specified in the Act, a summary denial of a petition for review could not be treated as a judgment on the merits but rather must be understood as a decision by the court to exercise its discretion not to grant judicial review. [56] While the United States Supreme [*1158] Court rejected this argument, it may have intended to hold only (1) that there are situations in which the grant of a writ would be an idle gesture, and (2) that the California Supreme Court had itself recognized that in such situations there is no need to observe the literalism of the statute by going through the motions of granting a writ and receiving oral argument. [57] Despite this probably limited holding, *Napa Valley Electric* was construed, until *Consumers Lobby* in 1979, as holding that every denial of a writ without opinion is a denial on the merits.

It is reasonable to concede that literalism should give way to common sense when adherence to statutory formalities would be an idle gesture. But what of all the cases in which a petition for writ of review raises not only questions of law, which the California Supreme Court might be able to determine on the pleadings, but questions of fact as well? Although the findings and conclusions of the CPUC on questions of fact are said to be final and not subject to judicial review, [58] finality attaches only to those findings and conclusions that are supported by evidence in the record of the CPUC proceedings. [59] The California Supreme Court cannot determine whether findings of fact are supported by evidence in the record if the court does not have the record of the CPUC proceedings certified to it. Yet, unless the court grants the writ of review, no such certification occurs.

Moreover, when the validity of a CPUC decision is challenged on the ground that it violates any of the petitioner's rights under the Federal Constitution, the California Supreme Court may make an independent review of the evidence relevant to the constitutional issue, [60] although it is not authorized to substitute its own judgment for that of the commission as to the weight afforded conflicting evidence. [61] Again, the court cannot make an independent review of the evidence when constitutional issues are raised unless it has the CPUC's record certified to it by granting the writ of review.

A remarkable instance of the court's use of the denial-without-opinion process occurred recently in

---

54 CAL. CIV. PROC. CODE §§ 1067-1077 (Deering 1973).

55 Funeral Directors Ass'n v. Board of Funeral Directors, 22 Cal. 2d 104, 106, 136 P.2d 785, 786 (1943); Board of Equalization v. Superior Court, 20 Cal. 2d 467, 470-71, 127 P.2d 4, 7 (1942).

56 Napa Valley Elec. Co. v. Railroad Comm'n, 251 U.S. 366, 371 (1920).

57 *See supra* text accompanying notes 20-24.

58 CAL. PUB. UTIL. CODE § 1757 (Deering 1970).

59 Pacific Tel. & Tel. Co. v. Public Util. Comm'n, 62 Cal. 2d 634, 647, 401 P.2d 353, 360, 44 Cal. Rptr. 1, 8 (1965); Southern Pac. Co. v. Public Util. Comm'n, 41 Cal. 2d 354, 362, 260 P.2d 70, 75 (1953), *appeal dismissed,* ***346 U.S. 919 (1954).***

60 § 1760. This provision was not part of the Public Utilities Act when the *Napa Valley* case was decided. *See supra* notes 3 & 7 and accompanying text; *see also* American Toll Bridge Co. v. Railroad Comm'n, 12 Cal. 2d 184, 190, 83 P.2d 1, 3-4 (1938), *aff'd,* 307 U.S. 486 (1939).

61 Goldin v. Public Util. Comm'n, 23 Cal. 3d 638, 652-53, 592 P.2d 289, 298, 153 Cal. Rptr. 802, 811 (1979).

Kern River Gas Transmission Company [*1159] *v. Public Utilities Commission.* [62] The case raised serious mixed questions of law and fact as to the applicability of the California Environmental Quality Act (CEQA) to a series of CPUC decisions mandating a dramatic restructuring of California's natural gas industry. [63] In addition to other requirements, the California public utility gas corporations, as traditional providers of gas sales service, were ordered to provide transportation service through their pipelines for gas owned by end users or third parties. While these mandates would inevitably produce significant environmental impacts, the CPUC conducted no environmental evaluation. [64] When challenged, the CPUC claimed immunity from CEQA on the ground that the decisions involved rates. [65] The petitioner, Kern River, argued that the presence of a rate element did not create immunity from CEQA. [66] The court granted a writ of review in 1986, when Chief Justice Bird and Justices Reynoso and Grodin were still on the court. Before the matter had been set for oral argument, however, the composition of the court changed. Approximately one year after the grant of the writ, the new court issued the following order without explanation: "The writ of review is discharged and the petition for writ of review is dismissed as improvidently granted." [67]

One must inevitably ask, what was in fact the reason for the court's reversal of position. Was it due to the new court's huge backlog and an eagerness to clear its calendar? [68] The court could not have acted on the merits, since significant mixed questions of law and fact were involved and the court did not examine the record. Under the rule of *Consumers Lobby,* however, the court's action must be "deemed" to have been on the merits even though this may not be the case.

C. Failure to Observe the Requirements of the California Constitution

It is extremely difficult to reconcile the doctrine that a summary [*1160] denial of a petition for review without opinion is a judgment on the merits with the state constitution's requirement that the supreme court must explain in writing the reasons for its decisions that determine causes. [69] The requirement of written opinions was incorporated into the state constitution by the constitutional convention of 1879. [70] Although the provision was not the subject of much debate, one speaker, Samuel Wilson, suggested that the court's increasing workload had forced it to adopt the undesirable practice of deciding cases without explaining its reasoning:

I think every lawyer will agree with me, that in every case there should be an opinion in writing. It tends to purity and honesty in the administration of justice. But . . . [the supreme court] is unable to

---

62 S.F. No. 25,003 (Cal. filed Aug. 6, 1987).

63 Investigation into Operations of Gas Corporations, CPUC Decision 85-12-102 (Dec. 20, 1985).

64 Investigation into Operations of Gas Corporations, CPUC Decision 86-03-045 (Mar. 5, 1986).

65 *Id.*

66 *Kern River,* S.F. No. 25,003 (Cal. filed Aug. 6, 1987) (petition for writ of review).

67 S.F. No. 25,003 (Cal. filed Aug. 6, 1987) (order denying writ of review and dismissing petition for writ as improvidently granted).

68 *See* San Francisco Chron., Sept. 2, 1987, at 9, col. 1. Justice Marcus Kaufman was reported as saying at a luncheon meeting that he and his fellow justices are so busy that they handle nearly 200 cases each day, and there is still a huge backlog. He was quoted as saying: "A court can't function forever with this kind of backlog and this kind of pressure." *Id.* For further commentary on the court's caseload, see *infra* note 110.

69 CAL. CONST. art. VI, § 14, provides in part: "Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated."

70 *Id.*

dispose of the cases annually coming before it and render written decisions, for no five men on the face of the earth can deliberately determine five hundred and sixty case a year, and render written opinions on them commensurate with the importance and character of the cases brought in this Court. [71]

In 1942, the California Supreme Court described the summary denial of petitions for writs of review of CPUC decisions as an exception to the general rule that decisions of the California Supreme Court which determine causes should be in writing with reasons stated. [72] The supreme court, however, never attempted to justify the exception in light of the apparently categorical language of the state constitution. Years later in *Consumers Lobby,* the court suggested that a written opinion may not be required when the decision is "deemed" to be on the merits, or "'when the sole possible ground for the denial is on the merits. . . .'" [73] This reasoning is unconvincing, however, since the state constitution requires the supreme court to explain the reasons for its decisions, not merely to state whether or not its decisions are on the merits.

[*1161] The California Supreme Court has held that the state constitution does not require that petitions for prerogative writs, such as writs of prohibition and mandate, must be accompanied with an opinion. [74] Summary denial of a prerogative writ, however, unlike the denial of a petition for writ of review of a CPUC decision, is normally considered to be a discretionary act by the court [75] made for policy reasons rather than a decision on the merits determining a cause. Thus, analogy to prerogative writ practice fails to support the summary denial procedure in CPUC cases.

Another possible justification of the position that the constitutional requirement of written opinions does not apply to judicial review of CPUC decisions is found in article XII, section 5 of the California Constitution. The section provides that "The Legislature has plenary power, unlimited by the other provisions of this Constitution . . ., to establish the manner and scope of review of commission action in a court of record. . . ." [76] Any exercise by the legislature of its plenary power to disregard other provisions of the state constitution, however, must be "cognate and germane" to the constitutional powers conferred on the Commission by article XII to regulate public utilities. [77] Exempting the California Supreme Court form the requirement that it render written opinions would not seem to meet the "cognate and germane" test. In any case, legislation has never been enacted to exempt the supreme court from that requirement.

---

[71] 2 DEBATES AND PROCEEDINGS OF CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA 951 (1879). Mr. Wilson went on to explain that while the constitutional amendment would end the undesirable practice of rendering decisions without explanation, such an amendment had to be accompanied by other reforms that would permit the supreme court to render "pure and honest" opinions in all cases before it. Mr. Wilson's committee therefore recommended increasing the number of justices from five to seven and authorizing the court to sit in two chambers. *See also* Radin, *The Requirement of Written Opinion,* 18 CALIF. L. REV. 486 (1930) (reviewing the history of the requirement and arguing for a narrower interpretation than the California Supreme Court had given it).

[72] Funeral Directors Ass'n v. Board of Funeral Directors, 22 Cal. 2d 104, 107-10, 136 P.2d 785, 787-89 (1942).

[73] Consumers Lobby Against Monopolies v. Public Util. Comm'n, 25 Cal. 3d 891, 901 n.3, 603 P.2d 41, 46 n.3, 160 Cal. Rptr. 124, 129 n.3 (1979) (quoting People v. Medina, 6 Cal. 3d 484, 491 n.6, 492 P.2d 686, 690 n.6, 99 Cal. Rptr. 630, 634 n.6 (1972)).

[74] People v. Medina, 6 Cal. 3d 484, 490, 492 P.2d 686, 689-90, 99 Cal. Rptr. 630, 633-34 (1972); Funeral Directors, 22 Cal. 2d at 106, 136 P.2d at 786.

[75] Consumers Lobby, 25 Cal. 3d at 901 n.3, 603 P.2d at 46 n.3, 160 Cal. Rptr. at 129 n.3.

[76] CAL. CONST. art. XII, § 5.

[77] Pacific Tel. & Tel. Co. v. Eshleman, 166 Cal. 640, 655-56, 137 P. 1119, 1124 (1913).

Therefore, it appears that at the very least the California Constitution requires an opinion in writing, however brief, setting forth the reasons for the court's denial of a writ of review respecting a CPUC decision.

D. Failure to Provide a "Plain, Speedy and Efficient ***Remedy***" in Rate Cases Within the Meaning of the ***Johnson Act*** of 1934

The CPUC joined other state utility commissions in the early 1930s to press for federal legislation that would remove rate cases from the reach of the federal district courts. The result was passage of the Johnson Act of 1934. [78] The Act removes from federal district courts the jurisdiction to review rate cases decided by a state commission if the state [*1162] law provides, among other things, "a plain, speedy and efficient ***remedy***" in a state court. [79]

As background to the ***Johnson Act***, it is important to note that utility companies previously had viewed federal court proceedings to enjoin decisions of the CPUC as an attractive alternative to review by the California Supreme Court. [80] There were several advantages to federal, rather than state, court review. First, in the California Supreme Court, if review was granted, it was conducted solely on the record before the Commission and no additional evidence could be introduced. [81] The federal court, on the other hand, permitted the utility to present whatever evidence it wished and, in some cases, the federal court was not required to review the record of the Commission proceeding. [82] Second, when the utility raised federal constitutional objections to a Commission decision, the federal court was required to exercise its independent judgment as to the weight of the evidence relating to the constitutional issue. [83] Thus, review in federal court constituted a trial de novo on issues that had already been determined by the Commission.

Sometimes, a utility company pursued both its state and federal remedies concurrently until it could assess its chances of success in each forum. It would then dismiss the proceeding less likely to succeed and rely exclusively on the other. [84]

Prompted by resentment from state commissions and the public toward federal interference in state utility regulation; by the expense and delay that federal interference caused; [85] and perhaps also by concern over the flood of state utility rate cases clogging the federal courts, Congress finally took steps

---

78 Johnson Act, ch. 283, 48 Stat. 775 (1934) (current version at 28 U.S.C. § 1342 (1982)).

79 *Id.*

80 It was normally not difficult to find a federal question. A utility company wishing to challenge a commission rate order could allege that the rates were confiscatory and that the Commission had violated the company's rights under the due process clause of the fourteenth amendment of the federal constitution. Alternatively, questions arising under the commerce or impairment of contracts clauses could often be found.

81 CAL. PUB. UTIL. CODE § 1757 (Deering 1970).

82 *See, e.g.*, Prendergast v. New York Tel. Co., 262 U.S. 43, 50 (1923).

83 Crowell v. Benson, 285 U.S. 22, 46 (1932). *See generally* Dickinson, Crowell v. Benson: *Judicial Review of Administrative Determinations of Questions of "Constitutional Fact,"* 80 U. PA. L. REV. 1055 (1932) (arguing that *Crowell* should be limited to instances when federal courts sit as courts of admiralty).

84 S. REP. NO. 701, 72d Cong., 1st Sess. 2-3 (1932).

85 *See* Comment, *Limitation of Lower Federal Court Jurisdiction over Public Utility Rate Cases,* 44 YALE L.J. 119, 124-27 (1934).

to restrict the right of federal court review of state public utilities commission rate decisions by enacting the Johnson Act in 1934. [86] The proponents of the Act argued that state public utility regulation [*1163] was a matter of particular concern to the states. So long as the states created sufficient safeguards to prevent state public utilities commissions from violating federal constitutional rights, considerations of federalism dictated leaving the primary responsibility for judicial review of ratemaking decisions to the state courts. As John E. Benton, General Solicitor for the National Association of Railroad and Utilities Commissioners, stated:

When the people of a State have exercised that degree of care to guard the legal rights of public-service corporations . . . by placing the regulation of rates in the hands of a qualified commission, properly equipped with experts to enable it to exercise its powers intelligently, and when they have guarded against any inadvertent misuse of the power thus delegated, by providing for a review in court of orders of such commission, it is offensive to their proper sense of State pride, and tends to diminish their respect for and confidence in the Federal courts, if such courts nevertheless summarily issue injunctions whereby the orders of their commission are suspended and held in litigation for years. [87]

Supporters of the Johnson Act also argued that it should be assumed that state courts are as scrupulous as federal courts in upholding federal constitutional rights. If the utility company remained dissatisfied with the determination of the federal constitutional question after exhausting its state judicial remedies, it could still seek appeal to the United States Supreme Court. [88]

As finally adopted, the Johnson Act of 1934 provides:

The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a state administrative agency or a rate-making body of a state political subdivision, where: (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and (2) The order does not interfere with interstate commerce; and (3) The order has been made after reasonable notice and hearing; and (4) A plain, speedy and efficient ***remedy*** may be had in the courts of such state. [89]

Before the ***Johnson Act*** deprives the federal district courts of jurisdiction over decisions of a state's public utilities commission, the state must provide a "plain, speedy and efficient" judicial remedy for violations of federal rights. The chief counsel of the CPUC, knowing that such a condition was to be written into the Johnson Act, feared that the [*1164] existing California review procedure would not meet the standard declared by the United States Supreme Court to protect rights under the federal constitution. [90] Thus, he urged the CPUC to take action which led to the adoption of the 1933

---

[86] 28 U.S.C. § 1342 (1982).

[87] *Limiting Jurisdiction of Federal Courts, 1932: Hearings on S. 937, S. 939 and S. 3243 Before a Subcomm. of the Senate Comm. on the Judiciary,* 72d Cong., 1st Sess. 125-26 (1932) (statement of John E. Benton, General Solicitor for the National Association of Railroad and Utilities Commissioners).

[88] Id. at 120-21.

[89] § 1342.

[90] Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287, 289-91 (1920). The CPUC's chief counsel in 1934, Arthur T. George, Esq., through several conversations during 1987 and 1988, has informed the authors of his concern and involvement as expressed in the text.

amendment to the Public Utilities Act. [91] The 1933 amendment provides that whenever a violation of a federal constitutional right is alleged in a petition for writ of review of a CPUC decision, the California Supreme Court "shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall not be final." [92]

The California procedure for reviewing CPUC rate decisions meets the ***Johnson Act*** condition of providing a "plain, speedy and efficient" judicial ***remedy*** when the California Supreme Court grants a petition for writ of review. In that situation, the parties are given the opportunity to present oral argument, and the court writes an opinion. In the vast majority of cases, however, the California Supreme Court denies a petition without opinion. When this occurs, the petitioner has not been afforded a full hearing [93] and has no means of knowing whether the supreme court made a judicial determination of the federal question raised in the petition. [94] In such cases it is doubtful that there is a "plain, speedy and efficient" judicial remedy.

The meaning of a "plain, speedy and efficient" judicial remedy was examined in a 1981 case, *Rosewell v. La Salle National Bank.* [95] The United States Supreme Court was called upon to interpret this phrase in the Tax Injunction Act of 1937. [96] The words were identical to and actually modeled after those in the Johnson Act. The Court held the state's judicial procedure met the "plain, speedy and efficient" requirements because they provided a "full hearing and judicial determination" at which the taxpayers could raise any and all constitutional objections to the tax [*1165] being challenged. [97]

Rosewell implies that anything less than a "full hearing and judicial determination" would fail to meet the "plain, speedy and efficient" test in the Johnson Act. The denial-without-opinion practice of the California Supreme Court appears to fail that test: the practice plainly does not provide a "full hearing," nor does it provide a "judicial determination" if the denial is only "deemed" to be on the merits.

E. Failure to Provide Assurance of Judicial Review on the Merits to Protect Federal Rights

Under the federal judicial system, a party may seek redress in federal court to protect a federal right if a proceeding has been brought before a state tribunal and the state fails to provide an adequate remedy. [98] A state remedy is inadequate if the proceeding denies an applicant an absolute right to a state court determination of the federal claim on the merits. [99]

---

91 Act of May 18, 1933, ch. 442, 1933 Cal. Stat. 1157 (current version at CAL. PUB. UTIL. CODE § 1760 (Deering 1970)).

92 *Id.*

93 The supreme court does not have the record certified to it and does not receive oral argument.

94 Consumers Lobby Against Monopolies v. Public Util. Comm'n, 25 Cal. 3d 891, 905, 603 P.2d 41, 49, 160 Cal. Rptr. 124, 132 (1979).

95 450 U.S. 503 (1981).

96 Tax Injunction Act of 1937, ch. 726, 50 Stat. 1738 (codified at 28 U.S.C. § 1341 (1982)).

97 Rosewell, 450 U.S. at 514.

98 Bell v. Burson, 402 U.S. 535, 541-43 (1971); *see* HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 434-36 (2d ed. 1973).

99 Hillsborough v. Cromwell, 326 U.S. 620, 624, 629 (1946).

In *Hillsborough v. Cromwell,* the United States Supreme Court considered whether New Jersey's scheme of judicial review of decisions by the state board of tax appeals adequately protected the federal due process and equal protection rights under the fourteenth amendment. [100] While the New Jersey Supreme Court had jurisdiction to review such decisions by writ of certiorari, the granting of the writ was not a matter of right but was within the discretion of the court. The United States Supreme Court concluded that "there was such uncertainty surrounding the adequacy of the state remedy as to justify the federal district court in retaining jurisdiction of the cause." [101]

It follows from *Hillsborough* that if denials-without-opinion by the California Supreme Court are only "deemed" to be, and are not in fact, determinations on the merits, the state remedy is inadequate to protect federal rights and, thus, parties claiming violation of federal rights may seek redress in a federal court.

F. Failure to Justify Abstention from Exercise of Jurisdiction by the Federal District Court

The Johnson Act's restrictions on federal district court jurisdiction [*1166] in public utilities cases are supplemented by considerations of federalism. Although the federal courts may have jurisdiction over a particular matter, they should exercise their jurisdiction "with proper regard for the rightful independence of state governments in carrying out their domestic policy." [102] When a state provides a unified method of formulating policy in an area involving substantial state interests, federal courts should apply the *Burford v. Sun Oil Co.* abstention doctrine and abstain from exercising their jurisdiction if intervention by the lower federal courts would interfere with state policies. [103]

The principle of federal abstention has been applied to federal district court injunctive proceedings against state public utilities commission decisions, even when the Johnson Act has been inapplicable because the challenged decision was not one setting rates. [104] As in cases under the Johnson Act, however, federal abstention will apply only if the state judicial review procedures are "adequate." [105] What remains unclear is whether the standard of adequacy under the *Burford* abstention doctrine is necessarily the same as the "plain, speedy and efficient" standard discussed in *Rosewell,* [106] or the certainty standard applied in *Hillsborough.* [107]

Regardless of the exact standard used, however, "adequacy" for the purposes of federal abstention is measured in broader terms. In *Burford* and *Alabama Public Service Commission v. Southern Railway,*

---

100 Id. at 622.

101 Id. at 626.

102 Pennsylvania v. Williams, 294 U.S. 176, 185 (1941); *see* Railroad Comm'n v. Pullman Co., 321 U.S. 496, 500-01 (1941).

103 319 U.S. 315, 332-34 (1943).

104 *See, e.g.,* Alabama Pub. Serv. Comm'n v. Southern Ry. Co., 341 U.S. 341, 350-51 (1951); Zucker v. Bell Tel. Co., 373 F. Supp. 748, 756 (E.D. Pa. 1974), *cert. denied,* ***422 U.S. 1027 (1975).***

105 Alabama, 341 U.S. at 349 n.11.

106 Rosewell v. La Salle Nat'l Bank, 450 U.S. 507, 512 (1981); *see supra* text accompanying note 102.

107 Hillsborough v. Cromwell, 326 U.S. 620, 626 (1946); *see supra* text accompanying notes 98-101.

[108] the United States Supreme Court emphasized that the state scheme of judicial review is an integral part of the regulatory process established by the state and that in determining the adequacy of the state review procedure, the federal courts should look at the state system as a whole. [109] The [*1167] courts, therefore, must be particularly careful before condemning a state system of judicial review as inadequate.

Nevertheless, the adequacy requirement for state judicial remedies must have some meaning. So long as the California Supreme Court continues to deny without opinion most petitions for a writ of review of CPUC decisions, there is little basis on which a federal court can assess the adequacy of the California procedure. Thus, if the federal courts accept the California Supreme Court's assertion that it reviews all petitions on the merits they seem to be abdicating their duty to ensure the vindication of federal rights. It is time for the federal courts to recognize that continued deference is not appropriate.

III. Possible Remedies

Given the long history of the California Supreme Court's treatment of petitions for writs of review respecting CPUC decisions and the court's enormous case load, it would be unreasonable to expect the court to indulge in the time consuming procedures set forth in the Public Utilities Code each time a petition for writ of review is filed. Requiring the court to direct the CPUC to certify the record to the court, conduct oral argument, and render a detailed opinion seems quite unnecessary even if an effective argument can be made that the process is technically required by the California Constitution and the California Public Utilities Code. The workload of the court has dramatically increased over the years, and efforts should be made to reduce its burdens rather than increase them. [110]

One significant change, which would not exacerbate the court's burdens appreciably, and yet would be welcome by the bar, is a statement in every CPUC case setting forth the rationale for the action taken. When the court decides that a writ of review should be denied, it need only state the reasons for the denial. If the denial is because no error of law has been committed, the court should at least state that conclusion. If the denial is based upon a procedural deficiency the court should state that deficiency. If the denial is due to discretionary considerations that require the court to invoke the concept of a decision "deemed to be on the [*1168] merits," in order to comply with statutory and constitutional considerations, that fact should be made known to the parties.

Second, until the procedure for reviewing CPUC decisions is reformed, or at least until such time as the court adopts the practice of stating the reasons for its denial of a petition for writ of review, the bar should attempt to persuade federal courts that the present procedure often fails to meet the "plain,

---

[108] 341 U.S. 341 (1951).

[109] Statutory appeal from an order of the Commission is an integral part of the regulatory process under the Alabama Code. Appeals, concentrated in one circuit court, are 'supervisory in character.'" Alabama Pub. Serv. Comm'n, 341 U.S. at 348 (quoting ***Avery Freight Lines v. White, 245 Ala. 618, 622-23, 18 So. 2d 394, 398 (1944)).*** "In describing the relation of the Texas court to the Commission no useful purpose will be served by attempting to label the court's position as legislative . . . or judicial . . . -- suffice it to say that the Texas courts are working partners with the Railroad Commission in the business of creating a regulatory system for the oil industry." Burford v. Sun Oil Co., 319 U.S. 315, 325-26 (1943) (citations omitted).

[110] For earlier comments on the burdensome caseload in the California Supreme Court, see Comment, *The California Supreme Court and Selective Review,* 72 CALIF. L. REV. 720 (1984); Comment, *Case Disposition by the California Supreme Court: Proposed Alternatives,* 67 CALIF. L. REV. 788 (1979); Kleps, *Can Our Supreme Court Survive?,* L.A. Daily J., Aug. 18, 1982, at 4, col. 4.

speedy and efficient" standard required by the Johnson Act for rate cases [111] and the related standard of "adequacy" for judicial remedies required by the due process clause of the federal constitution. [112] In such cases, the federal courts could then exercise jurisdiction to review CPUC decisions.

Third, remedial legislation should be enacted by the California Legislature to ensure that decisions of the CPUC are in fact subject to judicial scrutiny on the merits whenever a colorable basis for challenging a CPUC decision has been made in the petition for a writ of review and when no procedural infirmities exist. In view of the desirability, if not necessity, of relieving the California Supreme Court of some of its workload, the Select Committee appointed by Chief Justice Lucas has recommended that the California Supreme Court seek constitutional and legislative changes to place original review of CPUC decisions in the courts of appeal. [113] Review authority could be lodged in one appellate court designated to hear all petitions for writ of review or in the appellate court sitting in the district where the utility has its principal office. While the issue of which court or courts should be granted review authority was not addressed by the Select Committee Report, lodging review authority in one court seems preferable to promote consistency and enable the chosen court to gain expertise in this area. Regardless of the approach taken, however, if such legislation is adopted, its most important aspect must be to ensure that judicial review is accorded as a matter of right.

As an interim measure (pending adoption of remedial legislation), it has been suggested that the California Supreme Court invoke power under the state constitution to transfer to a court of appeal any CPUC decisions coming before it that do not present issues of great importance. [114] This proposal assumes a power which the supreme court appears [*1169] not to possess. *Section 1759 of the Public Utilities Code* declares that "No court of this State, except the Supreme Court . . . shall have jurisdiction to review . . . any order or decision of the commission. . . ." [115] Nonetheless, the Legislature could amend section 1759 to grant the court this power. Serious consideration should also be given to legislation requiring the transfer of all cases to a court of appeal when it is not feasible for the supreme court to make a determination on the merits. Such legislation should mandate that the court of appeal review the decision on the merits and provide a written opinion.

Conclusion

This article advocates short-term and long-term action to address the current inadequacies of the California Supreme Court's review of decisions of the California Public Utilities Commission. For the present, efforts should be made to persuade the supreme court to set forth its reasons whenever it denies a petition for writ of review. The document denying the writ should reveal whether the denial

---

[111] *See supra* notes 78-97 and accompanying text.

[112] *See supra* notes 98-101 and accompanying text.

[113] *See* SELECT COMM. ON INTERNAL PROCEDURES OF THE SUPREME COURT, REPORT TO HON. M. LUCAS, CHIEF JUSTICE OF CALIFORNIA 24-25 (Feb. 16, 1988) (on file at *The Hastings Law Journal*).

[114] Letter from Judicial Council of California to Janice E. Kerr, General Counsel, California Public Utilities Commission (Sept. 14, 1987) (on file at *The Hastings Law Journal*). The letter advises that Chief Justice Malcolm Lucas has recently appointed a Select Committee on Supreme Court Procedures, and that such Committee seeks comments from those interested. The letter has been circulated with a cover letter dated September 29, 1987 from the CPUC's General Counsel, Janice E. Kerr, addressed "To Those Who Practice Before the CPUC."

[115] CAL. PUB. UTIL. CODE § 1759 (Deering 1970).

is in fact on the merits, is to be taken as "deemed" on the merits, or is based on procedural grounds. If the court adopts this practice, parties will be in a position to know what further steps, if any, to take. The dissatisfaction with the court's current practice will be reduced while the court's workload will not be appreciably increased.

In addition, this Article advocates that until remedial legislation is enacted and so long as the California Supreme Court continues to deny petitions for writ of review without opinion, attorneys should not hesitate to file actions in the federal district court to challenge CPUC decisions that involve a federal question. Attorneys should urge the federal district court to entertain jurisdiction because the state ***remedy*** is not "plain, speedy and efficient" under the ***Johnson Act***, [116] or is not "adequate" under the doctrine of *Hillsborough v. Cromwell.* [117]

For the long-term, remedial legislation should be enacted to ensure court review on the merits of challenged CPUC decisions. Legislation could take either of two forms. The Public Utilities Code could be amended to provide that whenever the California Supreme Court decides [*1170] not to issue a writ of review, the court shall, except in cases where denial is for procedural reasons, certify the matter to a court of appeal, and the latter court shall be required to issue a writ, conduct a hearing, and write an opinion on the merits. Alternatively, the Public Utilities Code could be amended to provide that all petitions for writ of review of CPUC decisions be addressed to a court of appeal instead of the supreme court. The court of appeal should be required to issue a writ, hear argument, and write an opinion except when it appears on the face of the pleading that denial of a writ can be made without reference to the record, as in the case of an obvious procedural defect. Under either alternative, review authority should be lodged in only one court of appeal and the court of appeal should be required to state its reasoning. This will avoid conflicting decisions, promote consistency, and enable the chosen court to gain particular expertise in matters pertaining to the CPUC.

---

116 *See supra* notes 78-97 and accompanying text.

117 *See supra* notes 98-101 and accompanying text.