

constitutional interpretation. The doctrine of immunity of instrumentalities was characterized as one of political exigency and expedience and not proper for judicial consideration. Admittedly, significant particular differences between the constitutional and judicial systems of Canada, Australia, and the United States exist;⁵⁹ nevertheless, they are sufficiently alike to make comparison worthwhile.⁶⁰ In all three, the implied immunity doctrine was adopted and, after a rather uneasy existence, was then abolished. This process, which in Australia required but sixteen years,⁶¹ took thirty in Canada,⁶² and nearly seventy in the United States.⁶³

On the principle, heretofore mentioned,⁶⁴ that summary repudiation of a poorly conceived or formulated judicial doctrine is preferable to a policy of lingering attrition, the Australian and Canadian record in this connection is better than the American. It is to be hoped that we will not in other respects disregard the available constitutional experience of those federations and delay correction of our errors.

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THE NEGATIVE ORDER DOCTRINE: ROCHESTER TELEPHONE CORPORATION v. UNITED STATES

On April 17, 1939, the "negative order doctrine"¹ was unexpectedly overruled by the Supreme Court, through Justice Frankfurter, after a concise review of its scope, effects, and value. In *Rochester Telephone Corp. v. United States*,² the Federal Communications Commission adjudged a telephone company in Rochester, N. Y. under the "control" of the New York Tele-

59. *Webb v. Outtrim* [1907] A. C. 81.

60. *Higgins, McCulloch v. Maryland in Australia* (1905) 18 Harv. L. Rev. 559; *Kennedy, Some Aspects of Canadian and Australian Federal Constitutional Law* (1930) 15 Corn. L. Q. 345; *Kennedy, Essays in Constitutional Law* (1934) 109, 115; concurring opinion by Mr. Justice Frankfurter in *Graves v. New York* (1939) 59 S. Ct. 595, 603. This is illustrated in *Abel, Price Control by Government Competition in Anglo-American Federations* (1938) 23 WASHINGTON U. LAW QUARTERLY 459.

61. 1904 to 1920.

62. 1878 to 1908.

63. 1871 to 1939.

64. See *supra*, note 13.

1. For general discussion see Note (1938) 47 Yale L. J. 766; Note (1939) 6 U. of Chi. L. Rev. 277; Note (1934) 34 Col. L. Rev. 908; 2 Sharfman, *The Interstate Commerce Commission* (1931) 406-417; McGuire, *Judicial Reviews of Administrative Decisions* (1938) 26 Geo. L. J. 574; Rosenberry, *Power of the Courts to Set Aside Administrative Rules and Orders* (1938) 24 A. B. A. J. 279; Comment (1939) 52 Harv. L. Rev. 522.

2. (1939) 59 S. Ct. 754.

phone Co. and therefore subject to all common carrier provisions of the Federal Communications Act and to the Commission's orders pursuant thereto. On appeal, after a rehearing was refused, the jurisdiction of the District Court was challenged for the first time in the Supreme Court, the government urging that the order was not reviewable because it was a negative order, *i. e.*, one not enforceable and merely determinative of status under the Act. The Supreme Court unconditionally rejected the negative order doctrine in favor of other more realistic criteria of reviewability, but affirmed the lower courts' dismissal of the petition on the merits.

In 1912, in *Proctor and Gamble Co. v. United States*,³ an order of the Interstate Commerce Commission denying an injunction against demurrage charges by carriers was held nonreviewable because negative. This decision gave rise to the negative order doctrine, which has been freely applied, at first only to orders of the Interstate Commerce Commission and other agencies⁴ whose decisions were reviewable in the manner provided by the Urgent Deficiencies Act of 1913,⁵ but in recent years to other agencies.⁶ Evolved largely for protecting the Interstate Commerce Act's policy of achieving uniformity of rates through deliberation of experts, it was later extended to a heterogeneity of situations lacking a common basis.

3. 225 U. S. 282.

4. *Inghram v. Union Stock Yards Co. of Omaha* (D. C. D. Neb. 1933) 5 F. Supp. 486; *Packers and Stockyards Act* (1921) 42 Stat. 159, (1927) 7 U. S. C. A. secs. 181, 217.

5. (1913) 38 Stat. 219, (1927) 28 U. S. C. A. sec. 41 (27). *United States v. Griffin* (1938) 303 U. S. 226, contained dictum that the negative order doctrine operates only under the special review procedure of the Urgent Deficiencies Act; this dictum was not followed. See *Watkins, Has a Shipper Who Has Been Denied Relief by the Interstate Commerce Commission Any Remedy?* (1917) 17 Col. L. Rev. 34. The Urgent Deficiencies Act repealed the Commerce Court Act (1910) 36 Stat. 535, (1911) 36 Stat. 1146, (1927) 28 U. S. C. A. secs. 41 (27), 41 (28), and transferred the jurisdiction of the latter to the United States District Courts. The Commerce Court Act transferred the jurisdiction given by the Hepburn Act (1906) 34 Stat. 584, (1929) 49 U. S. C. A. sec. 1(1-9), to the Circuit Courts, to the Commerce Court.

6. Federal Power Act: *Newport Electric Corp. v. Federal Power Comm.* (C. C. A. 2, 1938) 97 F. (2d) 580; *Pacific Power & Light Co. v. Federal Power Comm.* (C. C. A. 9, 1938) 98 F. (2d) 835; *Carolina Aluminum Co. v. Federal Power Comm.* (C. C. A. 4, 1938) 97 F. (2d) 435; cf. *Federal Power Comm. v. Metropolitan Edison Co.* (1938) 304 U. S. 375; *Houston Natural Gas Corp. v. Securities and Exchange Comm.* (C. C. A. 4, 1938) 100 F. (2d) 5; cf. *Jones v. Securities and Exchange Comm.* (1936) 298 U. S. 1, aff'g (C. C. A. 2, 1935) 79 F. (2d) 617, and *American Sumatra Tobacco Corp. v. Securities and Exchange Comm.* (App. D. C. 1937) 93 F. (2d) 236. See *American Telephone & Telegraph Co. v. United States* (D. C. S. D. N. Y. 1936) 14 F. Supp. 121, 126.

Taking a very broad view of the scope of the negative order doctrine, Mr. Justice Frankfurter designated three categories into which the prior cases may be grouped.⁷ In the first, the action sought to be reviewed merely constituted the basis for future application of the laws: *e. g.*, preliminary property valuation of rail carriers;⁸ reopening proceedings to value property;⁹ refusal to re-examine railroad rates for carrying mail;¹⁰ determination of a railroad's status as outside the exemption from the Railway Labor Act;¹¹ assignment of a cause for further hearing;¹² and refusal by the Securities Commission to permit withdrawal of a registration statement.¹³ In the second category, the review sought was of action which declined to relieve the complainant from a statutory command forbidding or compelling certain conduct,¹⁴ such as a finding that, in violation of the Panama Canal Act,¹⁵ a common carrier by water was in competition with the railroad that owned it;¹⁶ a finding that certain railroad tracks were part of a general system of transportation so as to necessitate procuring a certificate of public necessity and convenience;¹⁷ a denial by the Interstate Commerce Commission of permission to depart from the long and short haul clause;¹⁸ and a determination that a consolidation of public utilities was inconsistent with public interest.¹⁹ The third category covered situations wherein review was sought of a refusal to enter an order directed to a third person,²⁰ as in case of a shipper's

7. (1939) 59 S. Ct. 754, 756.

8. *United States v. Los Angeles & S. L. R. R.* (1927) 273 U. S. 299; *Delaware and Hudson Co. v. United States* (1925) 266 U. S. 438.

9. *New York, O. & W. Ry. v. United States* (D. C. S. D. N. Y. 1926) 14 F. (2d) 850.

10. *United States v. Griffin* (1938) 303 U. S. 226.

11. *Shannahan v. United States* (1938) 303 U. S. 596; *Carolina Aluminum Co. v. Federal Power Comm.* (C. C. A. 4, 1938) 97 F. (2d) 435; cf. *Shields v. Utah Idaho Central R. R.* (1938) 305 U. S. 177.

12. *United States v. Illinois Central R. R.* (1917) 244 U. S. 82; cf. *Federal Power Comm. v. Metropolitan Edison Co.* (1938) 304 U. S. 375, where the same type of order was held affirmative in substance because it commanded definite action and was followed by penalties.

13. *Jones v. Securities and Exchange Comm.* (1936) 298 U. S. 1, aff'g (C. C. A. 2, 1935) 79 F. (2d) 617.

14. See discussion in Note (1934) 34 Col. L. Rev. 908, 913.

15. (1912) 37 Stat. 560, (1929) 49 U. S. C. A. sec. 5.

16. *Lehigh Valley R. R. v. United States* (1917) 243 U. S. 412.

17. *Piedmont & Northern Ry. v. United States* (1930) 280 U. S. 469.

18. *Cf. Atchison, T. & S. F. Ry. v. United States* (1914) 234 U. S. 476.

19. *Newport Electric Corp. v. Federal Power Comm.* (C. C. A. 2, 1938) 97 F. (2d) 580; cf. *Pacific Power and Light Co. v. Federal Power Comm.* (C. C. A. 9, 1938) 98 F. (2d) 835.

20. Here looms the bitter controversy between shippers and carriers: if shippers prevail and affirmative orders are issued, carriers are safeguarded through judicial review; if carriers prevail and affirmative relief

petition for change in rates,²¹ recovery of overcharges,²² or relief from charges for reweighing live stock.²³ In all of these situations the courts have refused to review orders of the respective commissions on the ground that they were "negative". These refusals were made without investigating whether abuse of discretion, lack of jurisdiction, mistake of law, or denial of due process were present.

The uncertain base of the negative order rule was reflected in judicial attempts to determine when particular orders constituted a negative variety. Review of some orders has been permitted on the ground that, although technically negative, in substance they were affirmative. In the *Intermountain Rate* cases,²⁴ the order was held affirmative since it refused that which the statute affirmatively declared should be granted if the specified conditions were found to exist. In *Pacific Power and Light Co. v. Federal Power Commission*,²⁵ disapproval of the proposed transfer of assets of one public utility to another was held affirmative in the sense that every petition seeks enforcement of a right, the denial of which raises a justiciable issue. In *United States v. New River Co.*,²⁶ the dismissal of a complaint was held affirmative because it altered the status quo in making an old rule reapply. In *Alton R. R. v. United States*,²⁷ a refusal to establish new divisions of reshipping rates was termed a "permissive" order. *Powell v. United States*²⁸ held an order was affirmative because it struck from the files a tariff of rates. And in *Chicago Junction R. R. v. United States*,²⁹ it was held that orders granting privileges might be enjoined or set aside even though they needed no enforcement.³⁰

The reasons which have been advanced to uphold the doctrine no longer apply, if they ever did.³¹ The first ground, ap-

is denied, shippers have no recourse. See 2 Sharfman, *op. cit. supra*, note 1, at 416; Frankfurter and Landis, *The Business of the Supreme Court* (1928) 170.

21. *Proctor & Gamble Co. v. United States* (1912) 225 U. S. 282.

22. *Standard Oil Co. v. United States* (1931) 283 U. S. 235; *Southern Transportation Co. v. Interstate Commerce Comm.* (App. D. C. 1931) 47 F. (2d) 411, cert. denied (1933) 289 U. S. 755.

23. *Inghram v. Union Stock Yards Co. of Omaha* (D. C. D. Neb. 1933) 5 F. Supp. 486.

24. *Atchison, T. & S. F. Ry. v. United States* (1914) 234 U. S. 476.

25. (C. C. A. 9, 1938) 98 F. (2d) 835.

26. (1924) 265 U. S. 533.

27. (1932) 287 U. S. 229.

28. (1937) 300 U. S. 276.

29. (1924) 264 U. S. 258.

30. See Note (1934) 34 Col. L. Rev. 908, 909; and Note (1938) 47 Yale L. J. 766.

31. See Note (1939) 6 U. of Chi. L. Rev. 277, 280.

pearing in the *Proctor and Gamble* case, was that the review section of the Commerce Court Act,³² mentioning first the enforcement and then the enjoining of orders, indicated that the "orders" which the Court had jurisdiction to enjoin were the same as those which it had power to enforce. Hence, any order that did not need to be "enforced" was not reviewable and was dubbed "negative."³³ Mr. Justice Frankfurter indicated that this technical ground had been overruled by later cases.³⁴ Even so, a second and main consideration in the *Proctor and Gamble* case was a desire to avoid frustrating the policy of the Act by usurping the expert determination of technical problems.³⁵ But this is no adequate basis; for, as will be shown, there are other and better means for protecting the function of the administrative agency. A third ground, advanced in *United States v. Griffin*,³⁶ was that negative orders, being refusals to change the status quo, are comparatively unimportant and should not receive the exceptional type of review afforded under the Commerce Court Act in conjunction with the Urgent Deficiencies Act.³⁷ This is sufficiently answered by an indication of some of the practical problems involved. Recognition that an order of a commission dismissing a complaint, and thus maintaining the status quo, is an exercise of administrative functions fully as much as an order directing some change in status,³⁸ calls for the equal reviewability granted to orders of the latter kind.

With respect to negative orders of the declaratory judgment type, it has been urged that they do not settle the issues and that review should come at a later stage. This ground, while true, is adequately provided for by the "final order" doctrine, which defines the stages at which administrative action can be challenged, and denies appeal from interim and interlocutory orders. Another ground, suggested as the real reason behind the negative order doctrine, was that it restricted appealability because of the desire of the courts to curtail the burden of review. This can be taken care of by amplification of the final order doctrine, permitting appeal only from the latter steps of

32. (1911) 36 Stat. 1148, (1927) 28 U. S. C. A. secs. 41(27), 41(28).

33. Note (1938) 47 Yale L. J. 766, 786, says that this juxtaposition had at most a "purposive plausibility."

34. (1939) 59 S. Ct. 754, 760.

35. Accord, Board of Railroad Comm'rs v. Great Northern Ry. (1930) 281 U. S. 412. See Note (1938) 47 Yale L. J. 766, 786; Sharfman, op. cit. supra, note 1, at 406.

36. (1938) 303 U. S. 226.

37. Note (1938) 47 Yale L. J. 766, 787.

38. Rochester Telephone Corp. v. United States (1939) 59 S. Ct. 754, 760.

an administrative proceeding. Indication that the exceptions to this doctrine were being limited even before the *Rochester Telephone Corp.* case, is found in *Myers v. Bethlehem Shipbuilding Corp.*,³⁹ in which it was held no injunction would be granted to an interlocutory order on an allegation that the mere holding of a hearing would work irreparable damage.⁴⁰

In short, there is no adequate justification for the doctrine of negative orders with its nebulous content.⁴¹ No clear test had been devised by which orders of administrative bodies could be classified into negative or affirmative, and therefore review was rendered arbitrary and uncertain. One result thereof was unwarranted differentiation between competing groups.⁴² "Negative," says Mr. Justice Frankfurter, "has really been an obfuscating adjective in that it implies a search for a distinction—non-action as against action—which does not involve the real considerations on which rest the reviewability of Commission orders within the framework of its discretionary authority and within the general criteria of justiciability."⁴³

In its place, Mr. Justice Frankfurter suggests two other tests to satisfy the policy considerations for which the doctrine was evolved. First is the doctrine of primary jurisdiction which safeguards the discretion and power of the administrative body.⁴⁴ As held in the so-called *Abilene* case,⁴⁵ exclusive primary jurisdiction was given to the Interstate Commerce Commission to make its determination concerning alleged unreasonableness of a charge before resort is allowed to courts for recovery of damages. Later the doctrine was applied to numerous other aspects of the regulatory process.⁴⁶ Its purpose is to secure that uniformity of policy which can be gained only through scientific analysis by a body of experts when the inquiry is one of fact and discretion in technical matters.⁴⁷ The second suggested test is the doctrine of administrative finality, which determines the conclusiveness of findings of the administrative body and the range of issues open to review. This depends upon constitutional

39. (1938) 303 U. S. 41.

40. Note (1938) 47 Yale L. J. 766, 777.

41. The doctrine of negative orders is "the most definite and perhaps the most questionable narrowing of the sphere of judicial interference after preliminary resort of the Commission." 2 Sharfman, *op. cit. supra*, note 1, at 406.

42. See *supra*, note 20.

43. (1939) 59 S. Ct. 754, 762.

44. See 2 Sharfman, *op. cit. supra*, note 1, at 393-406.

45. *Texas & Pacific Ry. v. Abilene Cotton Oil Co.* (1907) 204 U. S. 426.

46. 2 Sharfman, *op. cit. supra*, note 1, at 397, 401.

47. *Great Northern Ry. v. Merchant's Elevator Co.* (1922) 259 U. S. 285, 291.

issues, statutory authorization, and problems of proof and evidence. These two doctrines need revision⁴⁸ and clarification in some respects, but if carefully applied they will adequately guard both the discretion and the expertness of the administrative agencies and the traditional and proper functions of courts, without aid from an arbitrary designation of certain orders as "negative," and the formulation of distinctions based thereon.

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48. See Note (1938) 47 Yale L. J. 766, 772-778, where a number of the problems are outlined.