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THE SUPREME COURT UNDER THE JUDICIARY ACT OF 1925

SINCE May 13, 1925, the Supreme Court of the United States has been adjudicating under a new dispensation. To enable the Court to cope with the growth in its business and to conserve its energies for issues appropriate to the Supreme Bench, Congress by the Act of February 13, 1925,[1] acceded to the Court's desire for drastic limitations upon its jurisdiction. Speaking on behalf of the Court in 1924, Mr. Justice Van Devanter reported to Congress that "more than two-thirds of the cases which come to us under our obligatory jurisdiction — from State courts, circuit courts of appeals, district courts, and the Court of Claims — result in judgments of affirmance by our court, and also a goodly number are ultimately dismissed for want of prosecution. This, we think, illustrates that the present statutes are too liberal — that they permit cases to come to us as of right with no benefit to the litigants or the public. What we learn of the cases in examining them confirms and emphasizes this conclusion. Of course, in proportion as our attention is engaged with cases of that character, it is taken away from others which present grave questions and need careful consideration." [2]

The remedy proposed by the Supreme Court and adopted by Congress was a transference of numerous classes of cases from obligatory review by appeal or writ of error to discretionary review

[1] 43 STAT. 936, 28 U. S. C. §§ 344–50 (1926).

[2] Hearing before the Judiciary Committee, House of Representatives, on H. R. 8206, 68th Cong. 2d Sess., Dec. 18, 1924, at 13.

by *certiorari*. It will be recalled that the Act of 1925 entirely shut off access to the Supreme Court as a matter of right from the Court of Claims, the courts of the dependencies, and the Court of Appeals of the District of Columbia.[3] From the circuit courts of appeals review without leave was retained only in cases in which such a court finds a state statute in conflict with "the Constitution, treaties, or laws of the United States."[4] The Chief Justice enumerated not less than fourteen types of controversies in which a second right of appeal was thus eliminated.[5] Direct review by the Supreme Court was abolished as to decisions of the district courts, except as to five strictly confined categories of litigation: (1) suits under the Anti-trust and Interstate Commerce Acts; (2) suits to enjoin the enforcement of state statutes or administrative orders; (3) suits to enjoin orders of the Interstate Commerce Commission; (4) suits under the Stockyard and Packers Act of 1921; (5) writs of error by the United States in criminal cases. All other litigation arising in the district courts can now be reviewed only by the circuit courts of appeals. Finally, the litigation coming as of right to the Supreme Court from the state courts was restricted to two classes: (1) where the validity of a state statute was challenged under the Federal Constitution and its validity sustained; (2) where a federal statute or treaty was invoked and its validity denied. The 1925 Act has left the Supreme Court power to decide every case that could have come to it before that Act, but under the Act only controversies in which issues

[3] It remains doubtful whether any review as of right may be had over the decisions of the Court of Appeals of the District of Columbia. Section 240(b) of the Judicial Code as amended by the Act of February 13, 1925, provides for writs of error and appeals from circuit courts of appeals in cases where a state statute has been held repugnant to the Constitution, treaties, or laws of the United States. 43 STAT. 936, 28 U. S. C. 347(b) (1926). It may be that the Court of Appeals in a collateral proceeding might be called upon to determine the validity of a state statute. *Cf.* Wisconsin v. Pelican Ins. Co., 127 U. S. 265 (1888); Huntington v. Attrill, 146 U. S. 657 (1892). It is true that in the interpretation of other jurisdictional statutes the Supreme Court has held that the Court of Appeals is to be included within the general designation of circuit courts of appeals. Swift & Co. v. United States, 276 U. S. 311 (1928). But the express mention of the Court of Appeals in Sections 240(a) and 240(c) and its omission from Section 240(b), make doubtful such inclusion in the latter section.

[4] Section 240(b), JUDICIAL CODE, 28 U. S. C. 347(b) (1926).

[5] FRANKFURTER AND LANDIS, THE BUSINESS OF THE SUPREME COURT (1927) 261–62.

of a national or at least general concern are at stake can be carried to the Court as of right.[6] For all other cases, the Act requires leave of the Court through individual petitions of *certiorari*.

I

The Act has been in force for a little over three years, but its effective influence has been shorter. The new era really begins with the 1927 term. Many cases which originated prior to the Judiciary Act of 1925 were disposed of during the 1925 and 1926 terms. However, these terms reflected decisive changes. The last five terms cover the work of the Court under the old jurisdiction, the transition from the old to the new, and the operation of the new régime. A study of the 1923–1927 terms will thus afford a basis for a survey of tendencies under the present Act and lay the foundation for future comparisons.

A similar study of the work of British or continental courts would base its data upon official annual judicial statistics. Unfortunately, such a system of authoritative balance sheets of the business of the Supreme Court has not yet been established. Since 1922, Mr. Ernest Knaebel, the present Reporter of the Court, has prepared a very summary statement of the gross items in the Court's business for each term.[7] And since 1875 the annual reports of the Attorney General of the United States give a more detailed analysis of the year's business for the Supreme Court, and also for the lower federal courts. Neither set of figures purports to analyze the sources of the Court's business, the modes by which the cases reach the Court, the character of the litigation, its disposition, or the distribution of opinions and votes among the Justices. Until the European system of official judicial statistics finds its counterpart in the United States,[8] any analysis

[6] In the Revised Rules of the Supreme Court of the United States, adopted on June 5, 1928, a new practice was inaugurated by the adoption of Rule 12. 275 U. S. 595, 603 (1928). Within thirty days after docketing a case, counsel are required to file a detailed statement disclosing the basis for the Supreme Court's jurisdiction. Opposing counsel are then permitted to file a counter statement. These statements are then submitted to the Court without oral argument, unless at the special invitation of the Court. In this way the Court hopes to avoid the waste of oral arguments upon the merits, where no ground of jurisdiction is established.

[7] 262 U. S. 763 (1922).

[8] For the Supreme Court of New York in the First Judicial Department,

of the business of the Supreme Court must be based upon an independent investigation of the adjudged cases in the United States Reports.[9]

We are here concerned solely with the appellate jurisdiction of the Court. To be sure, issues of great moment and of considerable complexity arise under the Court's original jurisdiction. But in volume this head of litigation is relatively meager, and in any event beyond jurisdictional control by Congress.[10] The Court's appellate work may be broadly divided between the determination of cases that are before the Court for adjudication and the disposition of petitions seeking to bring the cases before the Court. Again, cases for adjudication may terminate without consideration by the Court, as, for instance, by consent of counsel. The great bulk of cases, however, requires consideration. These in turn fall into two modes of adjudication: decisions with opinions, and *per curiam* decisions, that is, without opinion.

Table I shows the volume of considered cases [11] for the period under scrutiny. It will be noticed that the variations in the totals of such cases between 1923 and 1927 are not very significant. The Act of 1925 was, on the whole, not intended to contract the volume of annual dispositions, but to guard against the inevitable increase and the resulting congestion. Indeed, the Act was an effort by the Court to cut the coat of jurisdiction according to the cloth of the time and energy of the nine Justices. While the total dispositions remain substantially unchanged, there is a noticeable readjustment in the proportions between cases disposed of by opinion and *per curiam* decisions. *Per curiams* are largely used in dismissals for want of jurisdiction.[12] On the other hand, some

detailed and comprehensive statistics have, since 1914, been published annually. In 1926 the Conference of Senior Circuit Judges appointed a committee to consider and report upon methods for securing and publishing appropriate statistics of the work of the federal courts. See REP. ATT'Y. GEN. (1926) 7. The death of Judge Hough, a leading member of the committee, has for a time apparently postponed the realization of this much needed reform.

[9] The figures in the following tables differ slightly from the attorney general's computations. The variations may be due to differences in classification.

[10] Marbury v. Madison, 1 Cranch 137 (U. S. 1803).

[11] The tabulation represents cases and not opinions. Several cases may be disposed of by one opinion.

[12] That dismissals for want of jurisdiction ordinarily present stereotyped situations governed by prior decisions of the Court, is illustrated by the constant

TABLE I

DISPOSITION OF CASES ON APPELLATE DOCKET

Cases Disposed of by Full Opinion

	1923	1924	1925	1926	1927	Total
Affirmed	130	135	159	108	78	610
Reversed	83	93	78	95	112	461
Dismissed *	12	11	13	7	8	51
Certificate	5	10	9	7	6	37
Transferred	6	3	0	3	0	12
Miscellaneous †	4	3	4	3	10	24
Total	240	255	263	223	214	1195

Cases Disposed of Per Curiam ‡

Affirmed	19	25	20	36	28	128
Reversed	8	3	3	11	10	35
Dismissed	45	59	55	74	73	306
Certificate	1	4	0	1	1	7
Transferred	2	7	3	3	0	15
Miscellaneous	2	0	0	0	1	3
Total	77	98	81	125	113	494

Total Dispositions With Consideration

Affirmed	149	160	179	144	106	738
Reversed	91	96	81	106	122	496
Dismissed	57	70	68	81	81	357
Certificate	6	14	9	8	7	44
Transferred	8	10	3	6	0	27
Miscellaneous	6	3	4	3	11	27
Total	317	353	344	348	327	1689

* Including petitions for *certiorari* dismissed by full opinion.
† Including partial affirmances, decisions on petitions for *certiorari*, on motions, etc.
‡ Excluding petitions for *certiorari* disposed of *per curiam*.

important decisions are thus disposed of on the merits, by reference to authority.[13] It is significant that in several instances the controlling character of prior decisions on pending litigation has evoked the expression of dissents in *per curiams* — apparently an innovation, due to the use of *per curiams* on controverted issues.[14] If the Court's time were wholly given to the adjudication of cases and the preparation of opinions, the annual output of opinions would remain substantially the same. But if its labors also demand the prompt disposition of petitions for leave to come before the Court, there is a necessary deflection of the intellectual resources of the Court available for opinion writing. Therefore the desire and, indeed, the necessity to keep abreast of business will operate as a pressure to decide cases without opinions.[15] Thus we see the increase in opinions for the three terms beginning with 1923 and their decrease for the last two terms,[16] and the striking increase of nearly forty per cent in *per curiams* since the Act of 1925.

One other trend in the total dispositions during the last five terms is arresting. It will be noticed in Table I that since the Act of 1925 there has been a striking change in the proportion of reversals to affirmances. For years prior to the 1926 term, affirmances overwhelmingly exceeded reversals. The 1926 term discloses a decided rise in reversals, and at the last term of court there were 122 reversals as against 106 affirmances. This result was to be expected. In fact, the large percentage of affirmances was adduced by Mr. Justice Van Devanter as evidence of the un-

repetition of the same controlling authorities, such as Farrell v. O'Brien, 199 U. S. 89 (1905); Shulthis v. McDougal, 225 U. S. 561 (1912); Central Land Co. v. Laidley, 159 U. S. 103 (1895); Jett Bros. Distilling Co. v. City of Carrollton, 252 U. S. 1 (1920).

[13] See, *e.g.*, State Industrial Board of N. Y. v. Terry & Tench Co., 273 U. S. 639 (1926), commented upon in Note (1927) 40 HARV. L. REV. 485; Standard Oil Co. v. City of Lincoln, 275 U. S. 504 (1927), commented upon in Note (1928) 41 HARV. L. REV. 775.

[14] Murphy v. Sardell, 269 U. S. 530 (1925); Donham v. West-Nelson Mfg. Co., 273 U. S. 657 (1927).

[15] Of the significance of opinions in the development of English law, Edmund Burke said: "To give judgment privately is to put an end to reports; and to put an end to reports is to put an end to the law of England." Quoted in MAITLAND, ENGLISH LAW AND THE RENAISSANCE (1901) 78, n.50; 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY (1907) 193.

[16] Compare also the figures given in Table VII, *infra* pp. 16–17.

due liberality in the right of review prior to the Act of 1925. That legislation attempted, in part, to shut off types of litigation presumably unworthy of review by the Supreme Court. Since such litigation can now come to the Court only by permission, the probability is enhanced that cases on the docket present more doubtful issues than characterized the litigation prior to the present Judiciary Act.

A large proportion of these reversals, as disclosed by Table II, arises in cases coming from the circuit courts of appeals. Thus, for the 1923 term, in reviews of circuit courts of appeals decisions, there were 43 affirmances and 36 reversals compared with 29 affirmances and 72 reversals for the 1927 term. The Judiciary Act of 1925 made those courts the ultimate tribunals of review for the vast bulk of litigation arising in the federal courts. Further review by the Supreme Court was limited to cases of exceptional importance. Only in one class of cases, nominally negligible, was review as of right retained; the review in the remainder was subjected to specific leave of the Court. *Certiorari* is thus the normal method by which cases from the circuit courts of appeals reach the Supreme Court. Among the grounds for granting *certiorari,* as formulated by the Supreme Court in its Rules, is the probability of error in the decisions of the circuit courts of appeals in the light of the applicable local or general law.[17] Prior

[17] Revised Rules of the Supreme Court of the United States, Rule 38, § 5(b); 275 U. S. 595, 624 (1928). In cases where the issue does not concern the applicable local or general law but raises a problem of federal law, the scope of review upon *certiorari* to the circuit courts of appeals should be limited to federal questions. Where the case comes from a circuit court of appeals as a matter of right, the Supreme Court under the provisions of Section 240(b) of the Judicial Code is "restricted to an examination and decision of the Federal questions presented in the case." 43 STAT. 939 (1925), 28 U. S. C. § 347(b) (1926). It is difficult to justify a broader review where the same type of case comes from the same court by *certiorari.* The wise restriction imposed upon reviews by right should be extended to reviews by grace. In some instances the Supreme Court in granting *certiorari* has limited itself to the consideration of constitutional questions raised by the case. Olmstead v. United States, 48 Sup. Ct. 207 (U. S. 1928). Mr. Justice Stone, speaking for a minority, contended that the effect of the order was simply to limit the scope of argument, but did not restrain the Court from a consideration of any question presented by the record, inasmuch as the scope of review by *certiorari* was specifically stated by Section 240(a) of the Judicial Code to be the same as if the case "had been brought . . . by unrestricted writ of error or appeal." 48 Sup. Ct. 564, 576 (U. S. 1928).

TABLE II

COURTS FROM WHICH CASES CAME

	1923	*1924*	*1925*	*1926*	*1927*	*Total*
DISTRICT COURTS	**91**	**102**	**78**	**98**	**25**	**394**
Affirmed	47	60	48	47	16	218
Reversed	31	25	18	28	6	108
Dismissed	5	7	9	17	3	41
Transferred	8	10	3	6	0	27
CIRCUIT COURTS OF APPEALS	**103**	**82**	**83**	**83**	**119**	**70**
Affirmed	43	33	41	34	29	180
Reversed	36	31	25	38	72	202
Dismissed	15	6	7	4	5	37
Certificate	5	9	9	7	7	37
Miscellaneous	4	3	1	0	6	14
HIGHEST STATE COURTS	**94**	**119**	**100**	**124**	**160**	**597**
Affirmed	40	35	26	39	51	191
Reversed	18	28	26	27	33	132
Dismissed	36	56	48	58	73	271
Miscellaneous	0	0	0	0	3	3
COURT OF APPEALS, DISTRICT OF COLUMBIA	**10**	**15**	**28**	**12**	**4**	**69**
Affirmed	5	4	26	4	1	40
Reversed	3	6	1	5	2	17
Dismissed	0	5	1	2	0	8

TABLE II (*continued*)

	1923	*1924*	*1925*	*1926*	*1927*	*Total*
Certificate	1	0	0	1	0	2
Miscellaneous	1	0	0	0	1	2
Court of Claims	**18**	**34**	**53**	**27**	**14**	**146**
Affirmed	13	27	37	21	6	104
Reversed	3	6	13	6	8	36
Dismissed	1	0	3	0	0	4
Miscellaneous	1	1	0	0	0	2
Court of Customs Appeals	**0**	**1**	**0**	**1**	**2**	**4**
Affirmed	0	1	0	0	1	2
Reversed	0	0	0	1	1	2
Dismissed	0	0	0	0	0	0
Philippine Supreme Court	**1**	**0**	**2**	**3**	**3**	**9**
Affirmed	1	0	0	2	2	5
Reversed	0	0	2	1	0	3
Dismissed	0	0	0	0	0	0
Miscellaneous	0	0	0	0	1	1
Total	**317**	**353**	**344**	**348**	**327**	**1689**

to 1925, cases dependent on *certiorari* had to compete unduly with the extensive obligatory jurisdiction, the disposition of which operated as a practical restriction upon the Court's opportunities to exercise its discretionary corrective powers over the decisions of the circuit courts of appeals. Now that the Court has been relieved of the burden of litigation which heretofore came to it as of right, but ought never to have been there at all, it is freer to exercise its discretionary authority over the business of the circuit courts of appeals.

The expectation of reducing litigation from courts over which there ought not to be review as of right in the Supreme Court has been realized. The most marked decrease is in reviews of the district courts. The Court of Claims and the Court of Appeals of the District of Columbia also show a notable falling off. The decrease in litigation from these sources wrought by the Act of 1925 is far greater than the figures disclose. That Act not only secured a considerable decrease, but forestalled a considerable increase in Supreme Court litigation.

By the Act of 1925 the Supreme Court sought for itself a selective jurisdiction. The legislation which it obtained is a notable application of the principle of individualization in the exercise of appellate review. From this aspect the effect of the Act of 1925 is already decisive.

TABLE III

EXTENT OF DISCRETIONARY REVIEW

	1923	*1924*	*1925*	*1926*	*1927*	*Total*
Obligatory Jurisdiction	246	290	282	260	166	1244
Discretionary Jurisdiction	71	63	62	88	161	445
Total	317	353	344	348	327	1689
Obligatory Jurisdiction	80.8%	82.1%	81.5%	74.7%		50.8%
Discretionary Jurisdiction	19.2%	17.9%	18.5%	25.3%		49.2%

For the three terms preceding the Act, as shown in Table III, eighty per cent of the cases came to the Court as a matter of course, regardless of the Court's judgment as to the seriousness of the questions at issue. In less than twenty per cent did the

Court exercise discretion in assuming jurisdiction. The 1926 term already shows a drop in the obligatory jurisdiction to less than seventy-five per cent, and at the last term, the Court's business was almost evenly divided between its obligatory and discretionary jurisdiction. The analysis made in Table IV indicates that this enlargement of the use of *certiorari* is most operative in the Supreme Court's review of the labors of the circuit courts of appeals. Review as of right arises mainly in cases coming from the state courts, and these courts are likely to continue as the chief feeders of the Supreme Court's obligatory jurisdiction.

The future administration of the Court's business thus largely turns on *certioraris*. The number increased, as will be seen from Table V, from 389 in the 1923 term to 587 in the last term. Petitions for *certiorari* are disposed of without argument or opinions. But, as we have been authoritatively told, all the members of the Court make independent examination of these petitions, the underlying records, and supporting briefs preliminary to their disposition after deliberation by the full Court.[18] Petitions for *certiorari* will steadily increase. This means a growing absorption of the Court's time not in the adjudication of cases and the writing of opinions, but in determining whether cases should be adjudicated. How heavy the drain is likely to become is indicated by the action taken by the Court at the beginning of the present term. On October 1, the Chief Justice announced that since the close of the last term 244 petitions had been filed. Much time had already been devoted to them by members of the Court during the vacation, but in order that the accumulation might be disposed of "in the early days of this term," the Court set aside the entire first week of the term "for the consideration of the pending petitions for *certiorari*." [19] Here then are the seeds of competition between the task of deciding cases and the necessity of disposing of petitions for *certiorari*.

Undoubtedly, the 1925 Act has relieved the Court of some needless burdens for the more effective discharge of its great duties. No less true is it that the enlargement of the area of discretionary

[18] See Mr. Justice Van Devanter in Hearing before a Subcommittee of the Committee on the Judiciary, U. S. Senate, 68th Cong. 1st Sess., on S. 2060 and S. 2061, Feb. 2, 1924, at 29.

[19] N. Y. Times, Oct. 2, 1928, at 53.

TABLE IV

Mode of Arrival

	1923	*1924*	*1925*	*1926*	*1927*	*Total*
District Courts						
Appeal	75	64	56	74	19	288
Error	16	38	22	23	1	100
Circuit Courts of Appeals						
Appeal	27	20	31	13	2	93
Error	18	10	10	4	2	44
Certiorari	53	42	33	59	108	295
Certificate	5	10	9	8	11	43
Highest State Courts						
Appeal	0	0	0	0	2	2
Error	77	100	75	108	123	483
Certiorari	17	19	25	16	35	112
Court of Appeals, District of Columbia						
Appeal	5	8	26	7	0	46
Error	4	2	1	2	0	9
Certiorari	0	1	1	2	4	8
Certificate	1	4	0	1	1	7
Court of Claims						
Appeal	18	33	52	20	5	128
Error	0	1	0	0	0	1
Certiorari	0	0	1	7	9	17
Court of Customs Appeals						
Certiorari	0	1	0	1	2	4
Philippine Supreme Court						
Certiorari	1	0	2	3	3	9
Total	**317**	**353**	**344**	**348**	**327**	**1689**

TABLE V

PETITIONS FOR CERTIORARI *

	1923	1924	1925	1926	1927	Total
Granted	69	63	98	117	102	449
Denied	291	352	423	458	468	1992
Quashed	4	1	0	0	0	5
Denied for Failure to File in Time	3	4	0	1	1	9
Denied on Motion	14	4	7	6	6	37
Dismissed per Stipulation	3	2	3	2	1	11
Dismissed for Failure to Prosecute	0	4	0	0	0	4
Dismissed Pursuant to Rules of Court	4	4	0	0	5	13
Denied for Lack of Jurisdiction	1	0	1	0	0	2
Dismissed on Authorities Cited	0	0	1	0	0	1
Revocation of Prior Grant of Writ	0	0	2	1	4	7
Stricken from Files	0	0	0	1	0	1
Total	389	434	535	586	587	2531

TABLE VI

APPELLATE BUSINESS FINALLY DISPOSED OF

	1923	1924	1925	1926	1927	Total
Cases Disposed of with Consideration	317	353	344	348	327	1689
Cases Disposed of without Consideration	37	58	71	67	32	265
Petitions for Certiorari Denied and Dismissed	320	371	437	469	485	2082
Total	674	782	852	884	844	4036

* Exclusive of writs of error treated as petitions for *certiorari* under the provisions of the Act of Feb. 13, 1925, of petitions for *certiorari* disposed of by full opinion of the court, and of petitions for *certiorari* granted to enable reversal of a case without consideration. The disposition of these petitions has been excluded from this table in order to prevent duplication in the statistics relating to the disposition of cases.

jurisdiction opened the door to new difficulties. *Certioraris* have been granted sparingly enough — 102 out of 587 petitions is a fair index to the present law of probabilities governing this exercise of the Supreme Court's discretion. The greater the denials the less the load of adjudication. This is one way of relief. But the whole operation of the device of *certiorari* will be seriously affected if selection is determined not by the intrinsic importance of legal issues but by the arbitrary exactions of the size of the docket. Again, increase in petitions for *certioraris* may suggest other methods for their disposition than the present collective deliberation by the Court. It is inconceivable that the Court itself will ever accede to such a departure from the traditional habits of its judicial process. The Court, we may be confident, will not diminish the greatest source of its strength. But one thing is clear. If the present scope of the jurisdiction of the federal courts continues,[20] a steady increase in the present volume of litigation at Washington must be expected. Before long the dockets of the Supreme Court will again show signs of congestion, and the conditions under which the Court does business will once more call for relief.

Thus far the 1925 Act has enabled the Court to gain upon its arrears. Not for a hundred years has the Court reached for argument on the regular calendar cases docketed during the term. Last term it achieved this dispatch in its business.[21] When the Court rose last June only 190 cases were undisposed of as against 295 at the close of the preceding term.[22] This has recently led Mr. Justice Stone to express the hope that " by the end of another term the Court may be able to hear cases on their merits as soon after they are docketed as counsel are prepared to present

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[20] See Frankfurter, *Distribution of Judicial Power between United States and State Courts* (1928) 13 CORN. L. Q. 499.

[21] The Supreme Court has demonstrated that the expedition of criminal appeals — so important an element in the efficacy of criminal justice — is largely within the control of courts. By its order of June 1, 1926, it advanced of its own motion the criminal cases on its docket and set them for hearing at the earliest opportunity. (1925) SUP. CT. J. 326. The automatic advancing of criminal cases upon the Court docket is now its established practice and they are promptly disposed of.

[22] Stone, *Fifty Years' Work of the United States Supreme Court* (1928) 14 A. B. A. J. 428, 435.

them." [23] The vindication of this hope will depend on the volume of business that may in the future arise in the lower federal courts, upon the stream of *certioraris*, and the extent to which non-federal questions will remain open for review before the Supreme Court.[24]

A survey of the Court's work makes abundantly clear that opinions only in part tell the story of its labors. Nevertheless, the most enduring and interesting activity of the Court is expressed through its opinions. Having noted a diminution in the number of adjudicated cases since the Act of 1925, we are prepared to find a decrease in opinions. Their distribution among the members of the Court is happily not determined by a mechanical rule in their assignment, as is the case in some state courts. Here again considerations of individualization are operative. The complexity and bulk of the record, specialized equipment in certain fields of the law, and the burden of judicial administration are all factors which determine the nature and the volume of cases assigned to individual Justices and account for the differences set forth in Table VII in the number of opinions rendered by members of the Court.

The expression of dissents began with the first opinion of the Court,[25] and its practice may well be characterized as one of the settled traditions of the Court. Dissenting opinions have been among the most important influences in the development of our constitutional law.[26] Dissents prevent undue or premature generalizations of specific instances into rigid doctrine. The more constitutional adjudications turn upon judgment upon social and economic data, the more will they provoke differences of opinion among members of the Court. The last five terms reflect a rise in dissents and an increase in their expression. Dissents entail as

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[23] *Ibid.*

[24] See *supra* note 12.

[25] Georgia v. Braislford, 2 Dall. 402 (U. S. 1792), 2 Dall. 415 (U. S. 1793).

[26] See HUGHES, THE SUPREME COURT OF THE UNITED STATES (1928) 67–70. "I am of the opinion," wrote Mr. Justice Story, in Briscoe v. Bank of Kentucky, 11 Pet. 257, 350 (U. S. 1837), "that upon Constitutional questions, the public have a right to know the opinion of every judge who dissents from the opinion of the court, and the reasons of his dissent." In Rhode Island v. Massachusetts, 12 Pet. 657, 752 (U. S. 1838), Chief Justice Taney wrote: "It has, I find, been the uniform practice in this Court, for the justices who differed from the Court on constitutional questions, to express their dissent."

TABLE VII

DISTRIBUTION OF OPINIONS

Opinions of the Court

	1923	*1924*	*1925*	*1926*	*1927*	*Total*
Taft	35	33	37	31	23	159
McKenna	17	4	0	0	0	21
Holmes	27	33	24	25	21*	130
Van Devanter	21	12	17	10	8	68
McReynolds	17	33	20	23	22*	115
Brandeis	25	31	27	23	24	130
Sutherland	25	27	17	20	9	98
Butler	25	24	26	21	22	118
Sanford	20	24	20	16	22	102
Stone	0	11	21	30	24	86
Total	212	232	209	199	175	1027

Concurring Opinions

Taft	1	0	0	0	0	1
McKenna	1	0	0	0	0	1
Holmes	0	0	0	0	0	0
Van Devanter	0	0	0	0	0	0
McReynolds	0	0	0	1	0	1
Brandeis	0	0	0	3	1	4
Sutherland	0	0	0	0	0	0
Butler	0	0	0	1	0	1
Sanford	0	0	0	0	0	0
Stone	0	0	0	2	1	3
Total	2	0	0	7	2	11

Dissenting Opinions

Taft	0	0	0	0	0	0
McKenna	1	0	0	0	0	1
Holmes	1	2	3	3	10	19
Van Devanter	1	0	0	0	0	1
McReynolds	3	7	5	3	3	21

* Including the opinion of four Justices in a divided court.

TABLE VII (*continued*)

	1923	1924	1925	1926	1927	Total
Brandeis	5	1	2	8	9	25
Sutherland	2	2	0	2	1	7
Butler	0	1	0	1	3	5
Sanford	0	0	0	1	0	1
Stone	0	0	1	3	5	9
Total	**13**	**13**	**11**	**21**	**31**	**89**
Total Opinions Delivered						
Taft	36	33	37	31	23	160
McKenna	19	4	0	0	0	23
Holmes	28	35	27	28	31	149
Van Devanter	22	12	17	10	8	69
McReynolds	20	40	25	27	25	137
Brandeis	30	32	29	34	34	159
Sutherland	27	29	17	22	10	105
Butler	25	25	26	23	25	124
Sanford	20	24	20	17	22	103
Stone	0	11	22	35	30	98
Total	**227**	**245**	**220**	**227**	**208**	**1127**
Dissenting Votes						
Taft	1	5	0	2	0	8
McKenna	4	1	0	0	0	5
Holmes	7	2	3	10†	20	42
Van Devanter	2	2	1	2	0	7
McReynolds	13	12	11	11	10	57
Brandeis	13	6	9	14†	17	59
Sutherland	2	8	4	8	7	29
Butler	3	3	1	9	5	21
Sanford	2	3	3	3	7	18
Stone	0	0	4	10†	16	30
Total	**47**	**42**	**36**	**69**	**82**	**276**

† Including one "opinion dubitante."

much labor as majority opinions. They constitute a burden in addition to the average quota of opinions written by the individual Justice. A wise determination of the Court's jurisdiction ought to assure its members ample time for adequate expression of dissents, no less than for careful preparation of the Court's opinions.

2

The history of the Supreme Court since the Civil War shows a steady atrophy of ordinary private litigation and growing preoccupation by the Court with public law. In freeing the Court for litigation of national and public importance, the Act of 1925 furthered that tendency. When the Act of 1925 was passed, common law controversies constituted about five per cent of the Court's business,[27] and Table VIII indicates that the amount of common law litigation appears to be stabilizing at that ratio. Although the increased rôle played by *certiorari* has greatly enlarged the Court's power of preventing cases without a real public interest from reaching it, in several instances during the last term the Court assumed jurisdiction in cases where a public or general interest is hardly discernible. Special mention may be made of several cases under the Federal Employers' Liability Act presenting unique circumstances for decision rather than occasions for the formulation of general rules.[28]

Issues of public law, then, constitute the stuff of Supreme Court litigation. But the conflicts which they engender are due far less to differences over abstract principles than to disagreements in the application of recognized doctrine to the complex problems of modern industrial society. Differences of degree become more and more the vital differences. And a perception of these differences depends on familiarity with social and economic details and an understanding of their significance. What led the Supreme Court to sustain the Packers and Stockyards Act of 1921 was not any technical interpretation of the Commerce Clause but a vivid

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[27] FRANKFURTER AND LANDIS, *op. cit. supra* note 5, at 306.

[28] *E.g.*, Atlantic Coast Line R. R. v. Southwell, 275 U. S. 64 (1927); Missouri Pac. R. R. v. Aeby, 275 U. S. 426 (1928); Gulf, M. & N. R. R. v. Wells, 275 U. S. 455 (1928); Toledo, St. Louis & Western R. R. v. Allen, 276 U. S. 165 (1928). See also Book Review (1928) 28 COL. L. REV. 516, n.4.

realization of the rôle played by the stockyards " as great national public utilities to promote the flow of commerce from the ranges and farms of the West to the consumers in the East." [29] And so again, Congress was justified in the novel provisions for the recapture of railroad earnings not by any abstruse legal dialectic but by due regard to the concrete consideration of railroad economics which the experience of the World War wrote into the Transportation Act of 1920.[30] Explicitly or implicitly, considerations of a like nature determine judgment upon legislation affecting economic enterprise through direct limitations upon the conduct of business or its indirect control through taxation. And this is true whether the controversies involve the determination of state powers under the Fourteenth Amendment or the eternal adjustments of authority under the Commerce Clause between the Federal Government and the states. In passing upon zoning laws, in sanctioning or disallowing " yellow dog contracts," in formulating the bases for rate fixing, the process of adjudication necessarily implies judgment upon the economic and social considerations from which such policies derive. The validity of the judgment made will therefore depend upon the adequacy and relevance of the extra-legal data upon which it ultimately rests.

A technique which will assure the effective presentation of these determining issues of fact becomes thus a matter of crucial importance in the administration of American public law. Since these adjudications turn so largely on the particularities of fact in individual cases, the specific circumstances should be established decisively by the record before the Court and not be shrouded in ambiguity or left to speculation. Otherwise, the Court will be driven to hypothetical judgments and moot decisions. Adherence to the traditional considerations against intruding into controversies regarding political power, whether as between the different departments of the Federal Government or as between the Federal Government and the states, becomes the more vital since the demarcation of power may depend upon minor variations of fact in individual cases. Unless adequate provision be made for the

[29] Stafford v. Wallace, 258 U. S. 495, 516 (1922).

[30] Dayton-Goose Creek Ry. v. United States, 263 U. S. 456 (1924).

TABLE VIII

SUBJECT MATTER OF OPINIONS

	1923	*1924*	*1925*	*1926*	*1927*	*Total*
Admiralty	6	11	8	7	12	44
Antitrust Laws	5	7	2	13	1	28
Bankruptcy	9	10	9	1	7	36
Bill of Rights (other than Due Process)	7	10	3	11	7	38
Commerce Clause						
1. Constitutionality of Federal Regulation	2	2	2	1	2	9
2. Constitutionality of State Regulation	3	7	2	10	6	28
3. Construction of Federal Regulation						
a. General	21	20	24	9	8	82
b. Federal Employers' Liability Act	3	5	5	0	11	24
Common Law Topics	9	8	11	8	11	47
Construction of Miscellaneous Statutes						
1. Federal	22	19	15	23	11	90
2. State	2	0	0	1	2	5
3. Territorial	1	4	0	3	0	8

TABLE VIII (*continued*)

	1923	*1924*	*1925*	*1926*	*1927*	*Total*
Due Process						
1. Regulation of Economic Enterprise	17	12	20	21	13	83
2. Relating to Procedure	1	5	3	4	4	17
3. Relating to Liberties of the Individual Citizen	4	2	0	7	1	14
Impairment of Contract	3	1	4	1	2	11
Indians	3	4	7	1	4	19
International Law	2	3	6	5	0	16
Jurisdiction, Practice and Procedure						
1. Supreme Court	12	10	9	8	8	47
2. Inferior Courts	23	23	20	19	18	103
Land Laws	6	8	3	3	3	23
Patents and Trademarks	10	1	4	4	4	23
Separation of Powers	1	1	0	2	2	6
Suits Against Government in Contract	6	24	17	10	2	59
Suits by States	6	3	8	2	2	21
Taxation						
1. Federal	9	19	19	13	20	80
2. State	18	13	8	12	13	64
3. Territorial	1	0	0	0	0	1
Total	212	232	209	199	174	1026

ascertainment of these controlling details, issues of gravest public concern may be determined in violation of the root principle of American constitutional theory, to wit, that the Supreme Court decides cases and does not announce abstract policy.

The dependence on fact in modern Supreme Court litigation was strikingly illustrated in two cases at the last term of the Court.[31] They involved perplexing problems of control over motor bus lines. Abstractly, the legal questions concerned limitations imposed by the Commerce Clause upon the state's power to regulate traffic and promote safety, but the decision turned on the particular traffic conditions and transportation facilities in the city of Hammond, Indiana. The record in these cases, however, failed to furnish the necessary light upon these decisive circumstances. In this state of the record, the Supreme Court found itself unable to decide the legal questions argued before it, and remanded the cases to the lower court for determination of the facts essential to their decision:

"These questions have not, so far as appears, been considered by either of the lower courts. The facts essential to their determination have not been found by either court. And the evidence in the record is not of such a character that findings could now be made with confidence. The answer denied many of the material allegations of the bill. The evidence consists of the pleadings and affidavits. The pleadings are confusing. The affidavits are silent as to some facts of legal significance; lack definiteness as to some matters; and present serious conflicts on issues of facts that may be decisive. For aught that appears, the lower courts may have differed in their decisions solely because they differed as to conclusions of fact. Before any of the questions suggested, which are both novel and of far reaching importance, are passed upon by this Court, the facts essential to their decision should be definitely found by the lower courts upon adequate evidence." [32]

The *Hammond* cases indicate forcibly the burden cast upon the Court in searching the record for proof of facts underlying legal issues. The Supreme Court should be free from such tasks. Lower courts ought to be required to report findings of those facts which determine Supreme Court decisions. Such findings are

[31] Hammond v. Schappi Bus Line, Inc., 275 U. S. 164 (1927); Hammond v. Farina Bus Line & Co., 275 U. S. 173 (1927).

[32] Hammond v. Schappi Bus Line, Inc., 275 U. S. 164, 171 (1927).

demanded by the whole range of public law litigation — the review of rate regulation, the respective fields of control over interstate commerce, the various instances of state legislation challenged under the Fourteenth Amendment. It is not for the Supreme Court to disentangle confused testimony, nor for a Court charged with keeping our constitutional system in equilibrium to pass upon disputation over evidence. The credibility of witnesses, the reconciliation of conflicting testimony, the proof of economic data, and the reliability of experts are problems with which, as a rule, the Supreme Court ought not to be inflicted.[33] Carefully framed findings by the lower courts should serve as the foundation for review, leaving for the Supreme Court the ascertainment of principles governing authenticated facts, the accommodation between conflicting principles, and the adaptation of old principles to new situations. The mechanism for review of decisions of the Court of Claims and of common law actions tried without a jury should be generally adapted to cases coming from the federal courts, whether arising in equity or at law.[34]

The Supreme Court is equally dependent upon the thoroughness with which issues are sifted and explored before they reach the Court. In this process, the opinions below play an important rôle. They compel analysis and formulation of the issues in a controversy, sharpen responsibility in adjudication, and advise litigants and the appellate court of the factors that control decision. Only by such a process is the controversy adequately focussed for the consideration of the Supreme Court. Opinions by the lower courts are therefore indispensable for the adequate exercise by the Supreme Court of its *reviewing* function. Without them, as the Supreme Court has remarked on several occasions during the last two terms,[35] "the appellate court is denied an important aid in the consideration of the case; and the defeated party is often unable to determine whether the case presents a question worthy of consideration by the appellate court. Thus,

[33] FRANKFURTER AND LANDIS, *op. cit. supra* note 5, at 290.

[34] *Id.* at 291, notes 134–35.

[35] Cleveland, etc. Ry. v. United States, 275 U. S. 404, 414 (1928); Virginian Ry. v. United States, 272 U. S. 658, 674 (1926). *Cf.* Lawrence v. St. Louis-San Francisco Ry., 274 U. S. 588 (1927); Arkansas R. R. Comm. v. Chicago, R. I. & Pac. R. R., 274 U. S. 597 (1927); Hammond v. Schappi Bus Line Co., Inc., 275 U. S. 164 (1927); Hammond v. Farina Bus Line & Co., 275 U. S. 173 (1927).

both the litigants and this court are subjected to unnecessary labor." [36]

Furthermore, as the questions coming before the Court are " rooted in history and in the social and economic development of the nation," [37] the Court requires aid from counsel for a full presentation of the issues in the light of their political and social history.[38] The determination of the scope of the President's power of removal, in the famous *Myers* case, compelled an investigation into practices and opinions since the foundation of our government.[39] The constitutionality of legislation such as the New Jersey Employment Agency Act, considered at the last term of Court, cannot fairly be determined without regard to the voluminous data set forth in Mr. Justice Stone's dissenting opinion.[40] Their ascertainment, however, involves laborious research which counsel should supply. If the task of independent inquiry is left to the Court, only in relatively few cases will time permit its adequate pursuit. There is thus real danger that constitutional adjudications will be determined by abstractions or jejune generalizations on obsolete data. No longer does the Supreme Court possess a specialized bar of constitutional lawyers. But the character of its business requires a bar fully equipped to deal with the social and economic implications of the issues presented by modern Supreme Court litigation.

3

Judiciary acts have always required clarification through litigation, and the Act of 1925 has not proved an exception. The Supreme Court has been called upon to remove doubts and resolve ambiguities. In so doing it has determined the ambit of its jurisdiction, and thereby influenced the volume of its future litigation. In four cases [41] the Court construed the amendment to

[36] Cleveland, etc. Ry. v. United States, 275 U. S. 404, 414 (1928).

[37] Stone, *supra* note 22, at 435.

[38] FRANKFURTER AND LANDIS, *op. cit. supra* note 5, at 312–17.

[39] Myers v. United States, 272 U. S. 52 (1926).

[40] Ribnik v. McBride, 48 Sup. Ct. 545, 548–52 (U. S. 1928).

[41] *Ex parte* Buder, 271 U. S. 461 (1926); Moore v. Fidelity & Deposit Co., 272 U. S. 317 (1926); Smith v. Wilson, 273 U. S. 388 (1927); Board of Pub. Util. Comm'rs v. Middlesex Water Co., 275 U. S. 483 (1927).

Section 266 of the Judicial Code,[42] whereby the provision for a hearing before three judges in suits for an interlocutory injunction against the enforcement of state statutes or administrative orders was extended to apply " to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suits." The Court had to decide " whether the phrase 'such suit' was intended to refer only to a suit in which a preliminary injunction had in fact been sought or to a suit in which an application for such an interlocutory injunction might have been but in fact was not made." [43] In deciding that the Act did not " extend the application of the section with respect to the requirement of three judges or the right of direct appeal to any case in which an interlocutory injunction is not sought," the Court placed reliance on the fact that " the general purpose of the Act of February 13, 1925, was to relieve this Court by restricting the right to a review by it." [44]

These four decisions indicated that the Supreme Court would, when free to do so, deny obligatory jurisdiction. But in *King Manufacturing Co. v. City Council of Augusta* [45] it rejected an opportunity for realizing this purpose by a restrictive interpretation, which, as the minority forcibly contended, was supported by history and precedent. Prior to the Act of 1925, Section 237 of the Judicial Code allowed review on writ of error of judgments of state courts

" where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitutions, treaties, or laws of the United States, and the decision is in favor of their validity. . . ." [46]

That Act struck from this section the words " or an authority exercised under any State." In the *King* case the challenge was to the validity of a city ordinance, and the question before the Court was whether such a case could come to the Court as a matter of right or only by grace through *certiorari.* More specifically, the Court had to determine whether a city ordinance was included in the phrase " statute of any State." In holding

[42] Now 28 U. S. C. § 380 (1926).

[43] Smith v. Wilson, 273 U. S. 388, 390 (1927). [44] *Ibid.*

[45] 48 Sup. Ct. 489 (U. S. 1928). [46] Act of Sept. 6, 1916, § 2, 39 STAT. 726.

that it was, the Court has opened the door to obligatory review in every case involving an attack upon an ordinance from the thousand municipalities throughout the country. The dissenting opinion of Mr. Justice Brandeis persuasively maintained that prior to the Act of 1925 the Court founded its jurisdiction in such cases on the fact that a municipal ordinance was " an authority exercised under any State," and not on the identification of such subordinate law making with a " statute of any State." The elimination of " an authority exercised under any State " in 1925 as a basis for obligatory jurisdiction transferred reviews affecting city ordinances to discretionary jurisdiction. And the dissenting opinion thus stated the reasons of policy that justified withdrawal of the right to review in such cases:

" When it is borne in mind that the severe limitations upon the right of review by this court imposed by the act of 1925 were made solely because the increase of the court's business compelled, the reasons why Congress should have taken away the right to a review by writ of error to the highest court of a state in cases involving the validity of ordinances, while leaving unaffected the right in cases involving the validity of statutes, becomes clear. There are only 48 states. In 1920 there were 924 municipalities in the United States of more than 8,000 inhabitants. The validity of ordinances of even smaller municipalities had come to this court for adjudication. The increasingly complex conditions of urban life have led, as this court noted in Village of Euclid v. Ambler Realty Co. 272 U. S. 365, 386, 387, 47 S. Ct. 114, 71 L. Ed. 303, to a corresponding increase in municipal police legislation. Recently, two classes of municipal ordinances, new in character — those relating to zoning and those relating to motor vehicles — had become the subject of many controversies. The constitutionality of these ordinances can rarely be determined simply by applying a general rule. The court must consider the effect of the ordinance as applied. As the validity of the particular ordinance depends ordinarily upon special facts, these must be examined whenever there is jurisdiction. Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, 42 S. Ct. 106, 66 L. Ed. 239. Though no burdensome factual inquiry is involved, the controversy may often be of trifling significance, as in the case at bar. Thus, persuasive reasons existed why Congress should have denied, in 1925, review by writ of error in cases which involved only the validity of a municipal ordinance." [47]

[47] King Mfg. Co. v. City Council of Augusta, 48 Sup. Ct. 489, 499 (U. S. 1928).

Three weeks later, in *Ex parte Collins*,[48] the Court had before it a cognate question of jurisdiction. It was called upon to decide whether a suit to enjoin the enforcement of a municipal ordinance is one to restrain "the enforcement . . . of any statute of a State" within the meaning of Section 266 of the Judicial Code. The Court unanimously held that the phrase applied only to the enforcement of a statute within the conventional meaning of the term, that is, an enactment of the state legislature.

The two decisions in combination create a further jurisdictional problem for the Court. Review in a case like *Ex parte Collins* cannot be taken directly from the district court to the Supreme Court inasmuch as it does not involve "a statute of a State." But after an adverse decision by a circuit court of appeals it may apparently be reviewed as a matter of right by the Supreme Court as a case "where is drawn in question the validity of a statute of any State . . . and the decision is against its validity."[49] For it is hardly conceivable that a municipal ordinance is a "statute of any State" within section 237(b) but not a "statute of any State" under section 240(b) of the same Act.[50]

A final change affecting the jurisdiction of the Supreme Court remains to be noticed. Professing to simplify the appellate procedure of the Supreme Court, Congress by Act of January 31, 1928,[51] abolished writs of error except in cases coming from the state courts. On April 26, 1928, this Act had to be amended.[52] The history of the original enactment and its amendment ought to serve as a warning on how not to legislate. Here was a reversal of methods of review which had prevailed since 1789. One would suppose that the reasons for such change would be clearly defined and the consequences of the change thoroughly explored. The fact is that the origin and the purposes of the Act of January 31, 1928, are shrouded in confusion and its implications appear hardly to have been canvassed.[53] Apparently the Act had its ori-

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[48] 48 Sup. Ct. 585 (U. S. 1928).

[49] Section 240(b), JUDICIAL CODE, 28 U. S. C. 347(b) (1926).

[50] The language in Section 240(b), which was a Senate amendment to the Judges' Bill, was obviously taken from that employed in Section 237(b).

[51] 28 U. S. C. A. §§ 861(a), 861(b) (1928). See (1928) 41 HARV. L. REV. 673.

[52] 28 U. S. C. A. § 861(b) (1928).

[53] The full history of the Act is set forth in (1928) 41 HARV. L. REV. 673.

gin with the American Bar Association. That body in 1921 proposed legislation with a view to eliminating the mishaps due to pursuing the wrong method of review in the Supreme Court.[54] The evil, however, had previously been remedied by allowing writs of error and appeals to serve interchangeably and to permit a writ of error to be treated as a petition for *certiorari*.[55] But the American Bar Association continued to urge legislation which, in substance, had been achieved. In passing the Act of January 31, 1928, Congress registered what it believed to be the desire of the American Bar Association on a technical matter and exercised practically no independent judgment.[56] It overlooked, too, its own legislation of 1922 and 1925. Not only was the new legislation redundant and empty; it was mischievous.[57] For no safeguards were provided in granting an appeal, no provision made against its abuse, and the usual conditions governing its allowance were neglected.[58] Plainly, the Supreme Court could have had nothing to do with the promotion of this legislation. But the Court promptly became aware of its difficulties and urged upon

[54] 46 A. B. A. REP. (1921) 387–88, 396. "In 1922 a bill passed the Senate similar to the one enacted, except that amendments were adopted omitting the proviso as to state courts, and inserting a provision for security as under the former practice with writs of error. 62 CONG. REC. 12, 298. The bill in one or the other of these forms was recommended each year thereafter by the American Bar Association. 47 A. B. A. REP. (1922) 356; 48 *ibid.* (1923) 332, 336; 49 *ibid.* (1924) 341; 50 *ibid.* (1925) 409–10; 51 *ibid.* (1926) 430; 52 *ibid.* (1927) 308." (1928) 41 HARV. L. REV. 673.

[55] Act of Sept. 6, 1916, 39 STAT. 726–27; Act of Feb. 13, 1925, 43 STAT. 936–37.

[56] The bill passed both Houses of Congress without debate. See (1928) 41 HARV. L. REV. 673.

[57] Referring to the effect of the Act of Jan. 31, 1928, Mr. Graham from the committee said: "It would appear, and an instance of it has already transpired, that this section would create such a loose method of practice with regard to cases in which the writ of error is abolished that there is great necessity for remedial legislation limiting the freedom with which appeals can be taken and restoring those safeguards which surrounded the granting of the writ of error and protected it from abuse." H. R. REP. No. 1071, 70th Cong. 1st Sess., Mar. 28, 1928.

[58] Section 2 of the Act provided "that the review of judgments of State courts of last resort shall be petitioned for and allowed in the same form as now provided by law for writs of error to such courts." It is significant of the slipshod method in which this Act and the amendatory Act were hurried through Congress that the report of the Judiciary Committee of the House of Representatives in recommending the passage of the amendatory Act, purports to quote Section 2 of the earlier Act, but its quotation omits any reference to this proviso. No reference to it can be found in the debates in either house. *Ibid.*

Congress their correction.[59] By the Act of April 26, 1928 the protective provisions governing review prior to the abolition of writs of error were restored.

The total effect of this legislation is that the writ of error has ceased to be one of the descriptions of review by the Supreme Court, and the term "appeal" is now applicable to what was heretofore either appeal or writ of error, but as a matter of substance the scope of review remains unaltered.[60] Though reviews will indiscriminately be called appeals, a differentiation must still be enforced by the Supreme Court between those cases which were traditionally reviewable by appeal and those traditionally reviewable by writ of error. In the former, facts were open for review, but not in the latter. That important distinction survives the simplification of nomenclature.

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[59] "The chief justice and another member of the court" appeared before the Judiciary Committee of the House of Representatives and "approved of the amendment." *Ibid.*

[60] Following the passage of these Acts, the Supreme Court on June 5, 1928, revised its rules of practice. It substituted the expression "appeal," "appellant," and "appellee" wherever the former rules used the terms "writ of error," "plaintiff in error," and "defendant in error." By Rule 46 it specifically stated that appeals in equity were not affected by the recent legislation but were governed by the statutes formerly in force. It confirmed the fact that the change effected by this legislation was simply a change in nomenclature, by requiring a petition, its accompaniment by an assignment of error, its allowance by the appropriate judge or justice, and the taking of adequate security, the traditional incidents in the allowance of a writ of error. 275 U. S. 595, 630 (1928).