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The Solely-for-Voting-Stock Requirement in "B"
Reorganizations Satisfied by Cash Payments
for Fractional Shares—*Mills v.*
Commissioner*

The Internal Revenue Code requires recognition of gains or losses realized upon a sale or exchange of property.¹ An exception to this general rule is found in section 354(a)(1), the basic non-recognition provision for stock-for-stock reorganizations. This sec-

* 331 F.2d 321 (5th Cir. 1964).

1. INT. REV. CODE OF 1954, § 1002.

tion provides that a stockholder need not recognize gains or losses "if stock or securities in a corporation a party to a *reorganization* are, in pursuance of the plan of reorganization, exchanged *solely for stock or securities* in such corporation or in another corporation a party to the reorganization."² However, before section 354 can be reached, the exchange must satisfy one of the definitions of reorganization found in section 368.³ Unless one of these definitional requirements is met, section 354 will be inapplicable and all gains and losses must be fully realized. On the other hand, even though section 368 is satisfied, section 354 will not be applicable if property other than stock or securities has been transferred to a shareholder in the acquired corporation. In that situation a companion clause, section 356, the so-called "boot" provision, requires total nonrecognition of losses⁴ and the recognition of gains but in an amount not to exceed the fair market value of the boot received.⁵

This tight interrelationship among sections 368, 354, and 356 has severely limited the possibility of partial nonrecognition in the case of a stock-for-stock "B" reorganization. This type of reorganization is defined in section 368(a)(1)(B) as

"The acquisition by one corporation, in exchange *solely for all or a part of its voting stock* (or in exchange solely for all or a part of the voting stock of a corporation which is in control of the acquiring corporation), of stock of another corporation if, immediately after the acquisition, the acquiring corporation has control of such other corporation (whether or not such acquiring corporation had control immediately before the acquisition)."⁶

When voting stock is the sole consideration for the stock acquired, the definitional language of section 368(a)(1)(B) is explicitly satisfied, total nonrecognition is provided by section 354, and a shareholder need not resort to section 356 for partial nonrecognition. However, if the acquiring corporation gives up property in addition to its voting stock, it would appear that the definitional lan-

2. INT. REV. CODE OF 1954, § 354(a)(1). (Emphasis added.) The effect of this provision is to defer recognition rather than to eliminate the taxable event. See generally Cavitch, *Reorganization Techniques in Corporate Planning*, 19 Bus. LAW. 429, 432 (1964).

3. INT. REV. CODE OF 1954, § 368(a)(1). There are six kinds of reorganizations. They are commonly referred to as "A," "B," "C," "D," "E" and "F" reorganizations. These letter designations refer to the subsections of § 368(a)(1) in which they are defined.

4. INT. REV. CODE OF 1954, § 356(c).

5. INT. REV. CODE OF 1954, § 356(a)(1). "Boot" refers to cash or other property which does not qualify as either stock or securities.

6. INT. REV. CODE OF 1954, § 368(a)(1)(B). (Emphasis added.) Control is defined as the ownership of stock possessing at least 80% of the total combined voting power of all classes of stock entitled to vote and at least 80% of the total number of shares of all other classes of stock of the corporation. INT. REV. CODE OF 1954, § 368(c).

guage of section 368(a)(1)(B) is not met. As a result, the transaction does not qualify as a reorganization for purposes of section 354, and 356 can never be reached. Thus, unless boot is permitted under the solely-for-voting-stock definition of section 368(a)(1)(B) itself, section 356 has no operative effect in stock-for-stock "B" reorganizations and gains and losses are fully recognized.⁷

In *Helvering v. Southwest Consol. Co.*,⁸ which arose in the context of a stock-for-property "C" reorganization, the United States Supreme Court construed language identical to that now found in section 368(a)(1)(B)⁹ and held that "'solely' leaves no leeway. Voting stock plus some other consideration does not meet the statutory requirement."¹⁰ In addition, until recently, lower court cases which had explicitly ruled on the solely requirement in the context of a "B" reorganization had followed the *Southwest Consol.* decision.¹¹ Thus, even fractional interests in "B" reorganizations had to be handled so that no cash flowed directly from the acquiring corporation to the shareholders of the acquired corporation.¹² However,

7. In *Howard v. Commissioner*, 238 F.2d 943 (7th Cir. 1956), it was held that the boot provisions of § 112(c) of the 1939 Code (now INT. REV. CODE OF 1954, § 356(a)(1)) were applicable even though there was no reorganization under § 112(g)(1)(B) (now INT. REV. CODE OF 1954, § 368(a)(1)(B)). The United States Supreme Court overruled the *Howard* decision in *Turnbow v. Commissioner*, 368 U.S. 337 (1961), but did not decide the issue of whether some boot might be allowed under § 112(g)(1)(B). *Id.* at 344. See generally Note, 71 YALE L.J. 1316 (1962).

8. 315 U.S. 194 (1942).

9. The relevant statute in the *Southwest Consol. Co.* case, *supra* note 8, was the Revenue Act of 1934. In that act the stock-for-stock "B" reorganization and the stock-for-property "C" reorganization were defined in the same subsection as follows: "The term 'reorganization' means . . . (B) the acquisition by one corporation in exchange solely for all or a part of its voting stock: of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of another corporation; or of substantially all the properties of another corporation. . . ." Revenue Act of 1934, ch. 277, § 112(g)(1)(B), 48 Stat. 705. (Emphasis added.) In 1939 the "B" reorganization was separated from the "C" reorganization definition. See Int. Rev. Code of 1939, §§ 112(g)(1)(B),(C), 53 Stat. 870 (now INT. REV. CODE OF 1954, §§ 368(a)(1)(B),(C)).

10. *Helvering v. Southwest Consol. Co.*, 315 U.S. 194, 198 (1942). *Accord*, *Central Kan. Tel. Co. v. Commissioner*, 141 F.2d 213 (10th Cir. 1944); *Pressed Steel Car Co. v. Commissioner*, 3 T.C. 1293 (1944), *aff'd per curiam*, 152 F.2d 280 (3d Cir. 1945), *cert. denied*, 328 U.S. 838 (1946).

11. See, e.g., *Commissioner v. Air Reduction Co.*, 130 F.2d 145 (2d Cir.), *cert. denied*, 317 U.S. 681 (1942) (alternative holding); *Hubert E. Howard*, 24 T.C. 792 (1955), *rev'd on other grounds*, 238 F.2d 943 (7th Cir. 1956).

12. The arrangements for handling fractional interests which have been permitted without recognition of gain include the following: (1) payments of cash by the acquired corporation to its shareholders so that the acquiring corporation need not issue fractional shares (see *Southland Ice Co.*, 5 T.C. 842 (1946)); (2) payment of cash by the shareholders of the acquired corporation to the acquiring corporation sufficient to subscribe to an additional whole share (see Merritt, *Tax-Free Corporate Acquisitions—The Law and the Proposed Regulations*, 53 MICH. L. REV. 911, 934-35 (1955)); (3) issuance by the acquiring corporation of script redeemable for full shares (see Rev. Rul. 55-59, 1955-1 CUM. BULL. 35); (4) purchase by the acquiring corporation or its agent, at the direction of a shareholder entitled to a fractional share, of an additional fraction to make a whole share (*Mills v. Commissioner*, 331 F.2d 321, 324

in the recent case of *Mills v. Commissioner*¹³ the Court of Appeals for the Fifth Circuit successfully prevented the harsh tax treatment which may result when "solely" is given its literal meaning in a situation where a minimal amount of boot is paid for fractional interests in a transaction that is, in substance, a "B" reorganization.¹⁴

In the *Mills* case, General Gas Corporation agreed to transfer some of its voting stock in exchange for taxpayers' shares in three small gas companies. The agreement provided that if the value of the acquired corporations' stock, as determined by audit, was not evenly divisible by the fourteen dollar valuation of General's shares, a cash payment would be made in lieu of fractional shares. In return for their shares, each taxpayer received twenty-seven dollars in cash in addition to voting shares of General valued at 29,912 dollars. When the taxpayers did not report any income for this transaction in their federal income tax returns, the Commissioner of Internal Revenue assessed deficiencies on the theory that the transaction failed to qualify as a "B" reorganization. The Tax Court ruled for the Commissioner, holding that a plan of reorganization did exist but that the exchange was not solely for voting stock and, therefore, did not qualify as a "B" reorganization.¹⁵ In reversing the Tax Court decision, the Court of Appeals for the Fifth Circuit held that the cash paid was not additional consideration within the mean-

(5th Cir. 1964)); (5) sale of a fractional share by the acquiring corporation or its agent for the account of shareholders in the acquired corporation. (*Ibid.*)

Two other arrangements seem permissible under the "B" definition. The acquired corporation could issue sufficient additional shares to its shareholders prior to the reorganization so that the relative value of shares in the acquired and acquiring corporation would be such that the exchange could be carried out in terms of whole shares, or the acquiring corporation could actually issue fractional shares which it would later repurchase from the former shareholders of the acquired corporation.

For a full discussion of these arrangements, see Rubinfeld, *Handle Expenses, Fractional Shares, Escrows in Reorganization With Great Care*, 15 J. TAXATION 66 (1961).

13. 331 F.2d 321 (5th Cir. 1964). See Kanter, *Does Small Amount of Cash Boot Kill B-type Reorganization?*, 21 J. TAXATION 24 (1964).

14. The *Mills* case is the first dealing with the interpretation of "solely" to arise under the 1954 Code. It would seem that the interpretation under the 1954 Code would be the same as under the 1939 Code because the relevant language is unchanged. However, several commentators have argued that in order to satisfy § 368(a)(1)(B) of the 1954 Code only 80% of that which passes to stockholders of the acquired corporation need be stock. The remaining 20% may be paid in cash or other non-qualifying property. See Kanter, *Cash in a "B" Reorganization—Effect of Cash Purchases on "Creeping" Reorganization*, 19 TAX L. REV. 441 (1964); Kanter, *Boot of \$27 Kills B-type Reorganization—De Minimis Rule Does Not Apply*, 18 J. TAXATION 138, 140 (1963); Kanter, *CA-9 Says Boot Makes B Reorganization Impossible*, 14 J. TAXATION 222, 226 (1961); Merritt, *supra* note 12, at 928-29. As yet, this position has not been adopted by any court.

15. Richard M. Mills, 39 T.C. 393 (1962). Three judges concurred, holding that the transaction was an outright sale. Six judges dissented on the theory that the cash paid for fractional shares was not additional consideration within the meaning of the statute.

ing of the "B" definition and that the exchange did qualify as a stock-for-stock "B" reorganization.¹⁶

The court of appeals in *Mills* did not indicate the tax consequences of its determination. As a result, the exact theory employed by the court to sustain its decision and the breadth of the holding are not easily ascertainable. Arguably, the court reached its decision by ignoring the cash payments for purposes of the "B" definition, although viewing the cash as taxable boot for purposes of section 356.¹⁷ Alternatively, the court may have treated the cash received as if it were voting stock, thereby affording total nonrecognition to the transaction under section 354.¹⁸ If either of these interpretations is correct, it would seem that the *Mills* decision stands for the proposition that direct cash payments from an acquiring corporation are permissible not only in the fractional share context but also in a broader undefined category of cases. However, neither of these theories seems likely. In view of the fact that the court relied heavily upon the similarity of the method used in *Mills* to handle fractional interests and those currently permitted in conjunction with a "B" reorganization,¹⁹ it would seem that the court treated the transaction as if the shareholders of the acquired corporation received fractional shares and immediately sold them to the acquiring corporation. Under this interpretation, the holding in *Mills* would appear to be limited to the fractional share context.

Although the use of a fiction does not alter the fact that the *Mills* decision is contrary to the express language of section 368(a)(1)(B) and the apparent import of the Supreme Court's language in the *Southwest Consol.* case, the court of appeals reached a very sensible result. In permitting direct cash payments for fractional shares the court has not only sanctioned the simplest and most efficient method of handling fractional interests but also seems to have fostered,

16. *Mills v. Commissioner*, 331 F.2d 321 (5th Cir. 1964).

17. This is probably not the correct interpretation of the *Mills* decision because it seems to be an application of the so-called *de minimis* rule, which the court said it would not consider. See *Mills v. Commissioner*, *supra* note 16, at 325. The Tax Court expressly rejected the *de minimis* rule. *Richard M. Mills*, 39 T.C. 393, 401 (1962). However, there is secondary authority to the effect that a *de minimis* rule is applicable to § 368(a)(1)(B). See 3 MERTENS, FEDERAL INCOME TAXATION, § 20.89, at 324 (Zimet & Weiss rev. 1957).

18. The taxpayers argued for the adoption of this interpretation. See Brief for Petitioners, pp. 7-9, *Mills v. Commissioner*, 331 F.2d 321 (5th Cir. 1964). Supporting the possibility that the court adopted this interpretation is the court's statement that "the reorganization involved in these cases qualified under section 368(a)(1)(B) as one involving an exchange of stock solely for stock of another corporation without any additional independent consideration." *Mills v. Commissioner*, *supra*, at 324. Furthermore, this interpretation would seem to be the import of the dissenting opinion in the Tax Court decision upon which the court heavily relied. See *Richard M. Mills*, *supra* note 17, at 403 (dissenting opinion).

19. See note 12 *supra*.

rather than frustrated, basic congressional policies with respect to the tax treatment of reorganizations.

Prior to 1934, a corporate readjustment literally qualified as a tax-free reorganization without regard to the type of consideration given by the acquiring corporation.²⁰ One consequence of this definition was that an outright sale of at least a majority of the stock of a corporation could qualify as a reorganization. To prevent this means of avoiding a tax on the sale of property, the courts developed the so-called continuity of interest test. According to this test, a transaction does not qualify as a reorganization unless a substantial part of the consideration received by the shareholders of the acquired corporation consists of an ownership interest in the continuing corporation.²¹ In 1934, Congress made substantial alterations in this basic statutory pattern.²² One of the changes was to include the solely-for-voting-stock language in the provision which was the predecessor of both the stock-for-stock "B" definition and the stock-for-property "C" definition.²³ In so doing, Congress made it clear that it intended to restrict the nonrecognition treatment of corporate reorganizations to changes in the form of continuing investments.²⁴ However, there is nothing in the legislative history to indicate conclusively why the term "solely" was used or to suggest that the use of solely was intended to prohibit cash payments for fractional shares. In a case like *Mills*, if a court adheres strictly to the "solely" requirement, all gains, even those in excess of boot, must be recognized, and a stockholder may be forced to dispose of his interest in the continuing corporation in order to meet his tax obligation.²⁵

20. See Revenue Act of 1924, ch. 234, § 203(h)(1), 43 Stat. 257: "The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation)."

The relevant nonrecognition provisions were similar to §§ 354(a) and 356(a)(1) of the 1954 Code. See Revenue Act of 1924, ch. 234 §§ 203(b)(2), (d)(1), 43 Stat. 256, 257.

21. See, e.g., *Helvering v. Minnesota Tea Co.*, 296 U.S. 378 (1935) (stock of corporation making up approximately 55% of the consideration held to satisfy test); *Cortland Specialty Co. v. Commissioner*, 60 F.2d 937 (2d Cir. 1932) (assets exchanged for cash and short-term notes held not to qualify as a reorganization). See generally PAUL, *STUDIES IN FEDERAL TAXATION* 91 (1940).

22. See generally Revenue Act of 1934, ch. 277, § 112, 48 Stat. 704.

23. Revenue Act of 1934, ch. 277, § 112(g)(1)(B), 48 Stat. 705. See note 9 *supra*.

24. See H.R. REP. NO. 704, 73d Cong., 2d Sess. 12-14 (1934); S. REP. NO. 558, 73d Cong., 2d Sess. 16-17 (1934).

25. On the other hand, under present law, a stockholder may benefit from a strict interpretation of solely by including a small amount of cash in a loss transaction which would otherwise qualify as a "B" reorganization. Although this would appear to create a large loophole, losses to shareholders in the acquired corporation can be no more useful than capital losses in general. See INT. REV. CODE OF 1954, §§ 1211, 1212.

Such a result is contrary to the basic philosophy of the nonrecognition provisions that a mere change in form of ownership should not be a taxable event.²⁶ Since cash payments for fractional interests will generally result in only a minimal diminution of the continuing ownership interest, it would seem to be more in conformance with congressional policy to limit the recognition of gains as was done in *Mills*. In addition, the *Mills* decision fosters express congressional intent to minimize interference with legitimate corporate adjustments which tend to strengthen the financial condition of the participating companies.²⁷

Although *Mills* is clearly justified on policy grounds, there is no reason to believe that the Internal Revenue Service will acquiesce in the decision because of the solely-for-voting-stock language in section 368(a)(1)(B). Therefore, it would be unwise for taxpayers to rely upon *Mills* in planning future "B" reorganizations unless they are prepared to litigate and to risk the very real possibility that another court may not follow *Mills* but may adhere instead to the literal meaning of the "solely" requirement. Thus, in spite of *Mills*, utilization of direct cash payments for fractional interests in "B" reorganizations will continue to be unnecessarily and unreasonably thwarted unless legislative action is taken to amend section 368 so that an exchange otherwise qualifying as a "B" reorganization will not be disqualified because direct cash payments are made for fractional shares.²⁸ Such an amendment would be in accord with basic congressional policy regarding the tax treatment of reorganizations and would facilitate contemplated stock-for-stock "B" reorganizations in which fractional interests are involved. However,

26. See Treas. Reg. § 1.368-1(b) (1955); H.R. REP. NO. 704, *supra* note 24, at 14. One of the underlying justifications for this policy is that when a stockholder has only altered the form of his corporate ownership he has received no funds from which to pay a tax. See *Barker v. United States*, 200 F.2d 223, 230 (9th Cir. 1952).

27. See S. REP. NO. 1622, 83d Cong., 2d Sess. 52 (1954); H.R. REP. NO. 704, *supra* note 24, at 14; S. REP. NO. 398, 68th Cong., 1st Sess. 14-15 (1924).

28. Congress has previously refused to act on a more extensive proposal which would have relaxed the solely requirement itself to a specified percentage of voting stock. See H.R. 4459, 86th Cong., 1st Sess. § 26 (1959). See generally *Hearings Before the Subcommittee on Internal Revenue Taxation of the House Committee on Ways and Means*, 86th Cong., 1st Sess. 409-16 (1959).

There have been a number of other proposals for the amendment of the solely-for-voting-stock requirement of § 368(a)(1)(B). See *Hearings Before the Subcommittee on Internal Revenue Taxation of the House Committee on Ways and Means*, 85th Cong., 2d Sess. 2485, 2557 (1958); 2 ALI FED. INC. TAX STAT. §§ x601, x602, x603, x605, comments at 209-10, 245-47, 308-17, 319-22 (Draft No. 2, 1954). See generally A.B.A. SECTION OF TAXATION, PROGRAM AND COMMITTEE REPORTS TO BE PRESENTED AT THE TWENTIETH ANNUAL MEETING 21 (1959); Greene, *Proposed Definitional Changes in Reorganizations*, 14 TAX L. REV. 155 (1959); Surrey, *Income Tax Problems of Corporations and Shareholders—American Law Institute Tax Project—American Association Committee Study on Legislative Revision*, 14 TAX L. REV. 1 (1959).

since there is no indication that this legislative action will be forthcoming, taxpayers should continue to act with utmost care to avoid direct cash payments for fractional interests in contemplated "B" reorganizations.

arose and in which the carrier neither owns nor operates any facilities.³

Decisions subsequent to *Davis* indicate that the Court is reluctant to extend that decision beyond its facts.⁴ Thus, the commerce clause objection may be raised only against the maintenance of a suit on a cause of action arising outside of the forum state⁵ against a foreign corporation not operating in the forum state.⁶ Although the rationale of *Davis* extends to any legal entity in interstate commerce, it is questionable whether the defense is available other than to incorporated common carriers.⁷ Moreover, the fact that the plaintiff is a resident of the forum state is often sufficient to dispose of the defense.⁸ In addition, courts have had little difficulty in finding that the defendant carries on sufficient activities in the forum state to obviate the commerce clause objection.⁹ However, regardless of the concern in *Davis* about the dilatory effect on commerce caused by the necessity of removing trained employees from their jobs to appear as witnesses in distant forums,¹⁰ later decisions indicate that there has been no incorporation of a requirement of distant witnesses to limit this defense.¹¹ Although this defense is of limited

3. 262 U.S. at 317.

4. See *International Milling Co. v. Columbia Transp. Co.*, 292 U.S. 511 (1934); *Denver & R.G.W.R.R. v. Terte*, 284 U.S. 284 (1932); *Michigan Cent. R.R. v. Mix*, 278 U.S. 492 (1929); *Hoffman v. Missouri ex rel. Foraker*, 274 U.S. 21 (1927); *Missouri ex rel. St. Louis, B. & M. Ry. v. Taylor*, 266 U.S. 200 (1924); *Atchison, T. & S.F. Ry. v. Wells*, 265 U.S. 101 (1924). See generally Farrier, *Suits Against Foreign Corporations as a Burden on Interstate Commerce*, 17 MINN. L. REV. 381 (1933); McGowan, *Litigation as a Burden on Interstate Commerce*, 33 ILL. L. REV. 875 (1939); Comment, 45 YALE L.J. 1100, 1114-17 (1936); 44 HARV. L. REV. 863 (1931).

5. See Farrier, *supra* note 4, at 393-95; McGowan, *supra* note 4, at 880-82; Comment, 45 YALE L.J. 1100, 1114-17 (1936).

6. See generally Farrier, *supra* note 4, at 393-95 (1933); McGowan, *supra* note 4, at 880-82 (1939); 42 HARV. L. REV. 1062, 1067 (1929).

7. See *Standard Oil Co. v. Superior Court*, 44 Del. (5 Terry) 538, 62 A.2d 454 (1948), *appeal dismissed*, 336 U.S. 930 (1949). *But see Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.*, 239 F.2d 502 (4th Cir. 1956) (*semble*); *Uhlich v. Hilton Mobile Homes*, 126 N.W.2d 813 (S.D. 1964). See generally McGowan, *supra* note 4, at 882; Comment, 45 YALE L.J. 1100, 1117 (1936).

8. See *Moss v. Atlantic Coast Line R.R.*, 157 F.2d 1005, 1007 (2d Cir. 1946), *cert. denied*, 330 U.S. 839 (1947); *Barnett v. Texas & P. Ry.*, 145 F.2d 800 (2d Cir. 1944); *Canadian Pac. Ry. v. Sullivan*, 126 F.2d 433, 438-40 (1st Cir. 1942); *Isenberg v. Atlantic Coast Line R.R.*, 82 F. Supp. 927, 928 (D. Mass. 1949). *But see Zuber v. Pennsylvania R.R.*, 82 F. Supp. 670 (N.D. Ga. 1949); *Hayman v. Southern Pac. Co.*, 278 S.W.2d 749 (Mo. 1955).

9. See *Moss v. Atlantic Coast Line R.R.*, *supra* note 8; *Barnett v. Texas & P. Ry.*, *supra* note 8; *Moore v. Atlantic Coast Line R.R.*, 98 F. Supp. 375 (E.D. Pa. 1951); *Western Smelting & Ref. Co. v. Pennsylvania R.R.*, 81 F. Supp. 494 (D. Neb. 1948); *Gregg Co. v. Koninklijke Nederlandsche Stoomboot-Maatschappij N.V.*, 205 Misc. 378, 128 N.Y.S.2d 65 (Munic. Ct. New York 1953). *But see Overstreet v. Canadian Pac. Airlines*, 152 F. Supp. 838 (S.D.N.Y. 1957); *Zuber v. Pennsylvania R.R. Co.*, *supra* note 8; *Jablonski v. Southern Pac. Co.*, 76 F. Supp. 1022 (S.D.N.Y. 1948); *Hayman v. Southern Pac. Co.*, *supra* note 8.

10. 262 U.S. at 315.

11. *International Milling v. Columbia Transp. Co.*, 292 U.S. 511 (1934); *Denver &*

vitality today,¹² it continues to be verbalized¹³ and occasionally to be successfully invoked.¹⁴

While recognizing its limited scope, the federal courts have not agreed on whether the defense of an undue burden on commerce can be asserted in the federal courts in an ordinary diversity action. One view is represented by *Overstreet v. Canadian Pacific Airlines*,¹⁵ where a district court on the authority of *Davis* dismissed the suit as an unconstitutional burden on commerce. Another view was expressed in *Wadell v. Green Textile Associates*,¹⁶ where a district court found the defendant subject to jurisdiction conferred by the general diversity jurisdiction and venue statutes.¹⁷ Since it is clear that Congress has the constitutional power to burden commerce,¹⁸ the court reasoned that congressional action in conferring jurisdiction was an exercise of that power.¹⁹ A third view, expressed in *Wahl*, is that actions brought originally in federal courts on a diversity basis can never unduly burden commerce since the negative implications of the commerce clause limit state but not federal power.

It would seem difficult to maintain the position of *Wadell* that, merely because the action is proper under the general venue and jurisdiction provisions, Congress has exercised its power to burden commerce by permitting jurisdiction to be asserted over a foreign corporation having only a general sales agent in the forum state. In *Baltimore & Ohio R.R. v. Kepner*,²⁰ the United States Supreme Court did hold that the venue provisions of the Federal Employers' Liability Act²¹ compelled the federal courts to adjudicate any action that was proper under those provisions.²² The Court found, how-

R.G.W.R.R. v. Terte, 284 U.S. 284 (1932). See McGowan, *supra* note 4, at 886-87; 32 COLUM. L. REV. 541 (1937).

12. See 33 IND. L.J. 358 (1958).

13. See, e.g., *Kirkland v. Atchison, T. & S.F. Ry.*, 104 Ga. App. 200, 121 S.E.2d 411 (1961); *Barrett v. Boston & Me. R.R.*, 104 N.H. 70, 178 A.2d 291 (1962); *Fuss v. French Nat'l R.R.*, 35 Misc. 2d 680, 231 N.Y.S.2d 57 (Sup. Ct. 1962).

14. See, e.g., *Pendzimas v. Eastern Metal Prod. Corp.*, 218 F. Supp. 524 (D. Minn. 1961) (*semble*); *Glaser v. Pennsylvania R.R.*, 82 N.J. Super. 16, 196 A.2d 539 (Law Div. 1963).

15. 152 F. Supp. 838 (S.D.N.Y. 1957); *accord*, *Zuber v. Pennsylvania R.R.*, 82 F. Supp. 670 (N.D. Ga. 1949); *Jablonski v. Southern Pac. Co.*, 76 F. Supp. 1022 (S.D.N.Y. 1948); *Klepper v. Canadian Pac. Ry.*, 271 App. Div. 53, 62 N.Y.S.2d 627 (1946); *Cotugno v. Union Pac. Ry.*, 12 Misc. 2d 235, 177, N.Y.S.2d 126 (Sup. Ct. 1958).

16. 92 F. Supp. 738 (D.C. Mass. 1950); *accord*, *Cooke v. Kilgore Mfg. Co.*, 105 F. Supp. 733 (N.D. Ohio 1952); *Brown v. Canadian Pac. Ry.*, 25 F. Supp. 566 (W.D.N.Y. 1938).

17. 28 U.S.C. §§ 1332, 1391 (1958).

18. See, e.g., *United States v. Darby*, 312 U.S. 100 (1941); *Ferguson v. Ford Motor Co.*, 77 F. Supp. 425, 434 (S.D.N.Y. 1948).

19. 92 F. Supp. at 742.

20. 314 U.S. 44 (1941).

21. 35 Stat. 291 (1908), 45 U.S.C. § 56 (1958).

22. 314 U.S. at 54. Compare *Jablonski v. Southern Pac. Co.*, 76 F. Supp. 1022, 1023 (S.D.N.Y. 1948).

ever, that Congress specifically intended those special venue provisions to have that effect.²³ On the contrary, the general diversity power given the federal courts has not been interpreted to compel adjudication.²⁴ Significantly, in *Woods v. Interstate Realty Co.*,²⁵ the Court held that the doctrine of *Erie R.R. v. Tompkins*²⁶ precludes federal courts from entertaining diversity actions barred in state courts by "door-closing" statutes.²⁷ Although Congress has the power to permit the federal courts to adjudicate these suits,²⁸ the grant of general diversity power has not been considered an exercise of this power.²⁹ In terms of the implied effect of the general diversity provisions to override limitations on federal adjudicatory power, it would seem inconsistent with the approach in *Woods*, therefore, to limit the *Davis* doctrine by holding that the general diversity provisions are an exercise of congressional power to burden commerce by permitting suits in federal courts which *Davis* prohibits in state courts.

The intimation in *Wahl* that the *Davis* doctrine is inapplicable in the federal courts because the commerce clause limits only state power³⁰ is interesting, but unsupported. It is true that the Supreme Court has never considered a defense based on *Davis* in a case arising in the federal courts.³¹ However, the rationale of the Court in *Davis*

23. 314 U.S. at 49-50. See Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty*, 35 CORNELL L.Q. 12, 15 n.21 (1949).

24. This was explicitly recognized in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 505 (1947), a forum non conveniens case, in which the Court, discussing the *Kepner* line of cases, said that: "Those decisions do not purport to modify the doctrine as to other cases governed by the general venue statutes." Another example of the absence of compulsion under the general diversity provisions is the abstention doctrine, which prevents federal courts from hearing certain diversity cases in which the controlling state law is not clear. See, e.g., *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

25. 337 U.S. 535 (1949).

26. 304 U.S. 64 (1938).

27. See also *Angel v. Bullington*, 330 U.S. 183 (1947). See generally Meador, *State Law and the Federal Judicial Power*, 49 VA. L. REV. 1082, 1094-96 (1963).

28. U.S. CONST. art. III, § 2, cl. 1.

29. See generally Hill, *The Erie Doctrine and the Constitution*, 53 NW. U.L. REV. 541, 570 (1958); Weintraub, *The Erie Doctrine and State Conflict of Laws Rules*, 39 IND. L.J. 228, 249 (1964).

30. 227 F. Supp. at 841. If the court is correct that the commerce clause limits only state power, an argument that the federal courts would still have to follow state law under *Erie* is possible. If, in addition to the constitutional limitation, the state has an affirmative policy in its refusal to assert jurisdiction, for example the encouragement of limited activities in the state by foreign corporations, *Erie* would seem applicable. Certainly, there is no absolute due process right to sue in an American court. See Comment, 103 U. PA. L. REV. 830 (1955). In the absence of an affirmative state policy, however, it is clear that *Erie* would not preclude the federal courts from adjudicating the suit. Cf. Hill, *supra* note 29, at 570-71; Weintraub, *supra* note 29, at 249-51.

31. In *Atchison, T. & S.F. Ry. v. Wells*, 265 U.S. 101 (1924), the Court held that the enforcement of a judgment obtained in a state court against a foreign railroad corporation in violation of the *Davis* doctrine could be enjoined by a federal court.

that the general submission of common carriers to suit will unreasonably obstruct commerce applies as well to the federal courts,³² and the language of the Court broadly encompasses suits in both court systems.³³ Moreover, since the power to regulate commerce is vested in the legislative branch of the federal government,³⁴ it would seem that the federal courts have no power to burden commerce. This question seems analogous to that question of executive power presented in *Youngstown Sheet & Tube Co. v. Sawyer*,³⁵ where there were at least four different views among the Justices of the Supreme Court as to whether the President could exercise any powers which fell within the legislative powers of Congress.³⁶ Nevertheless, each member of that Court considered all powers of the President *to regulate commerce* to be delegated powers.³⁷ It would seem clear by analogy, therefore, that the federal courts could not burden commerce in the absence of congressional delegation of that power to them.³⁸ The inability to find a specific intent in the general diversity provisions to burden commerce, as existed in *Kepler*, would seem to preclude finding such a delegation.

Although its range of application has been narrowed,³⁹ the commerce clause still remains a possible defense to jurisdiction, particularly appropriate to common carriers in foreign commerce. As a constitutional method of adjusting place of trial, analogous to the doctrine of *forum non conveniens*,⁴⁰ its value has diminished with the expanded use of that doctrine.⁴¹ Nevertheless, as long as the Supreme Court does not view the *Davis* doctrine as discretionary,⁴²

32. See *Davis v. Farmers Co-op. Equity Co.*, 262 U.S. 312, 315 (1923), where the Court took notice "that litigation in *States and jurisdictions* remote from that in which the cause of action arose entails absence of employees from their customary occupations." (Emphasis added.)

33. *Id.* at 315-17.

34. U.S. CONST. art. I, § 8, cl. 3.

35. 343 U.S. 579 (1952).

36. See Kauper, *The Steel Seizure Case—Congress, the President and the Supreme Court*, 51 MICH. L. REV. 141, 177 (1952). Justices Black and Douglas considered the President powerless to act in the sphere of legislative powers of Congress without express authorization. See *ibid.*

37. *Id.* at 175. See also *United States v. Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955).

38. See *In re Debs*, 158 U.S. 564 (1895), where the argument was made that the federal courts could not enjoin conduct interfering with interstate commerce unless authorized to do so by Congress. The Court sustained the injunction on the basis of a finding of congressional policy. See Kauper, *supra* note 36, at 148.

39. See notes 4-14 *supra* and accompanying text.

40. See Farrier, *supra* note 4, at 392.

41. See generally Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380 (1947); Comment, 29 U. CHI. L. REV. 740 (1962).

42. Mr. Justice Jackson viewed *Davis* as really a *forum non conveniens* case. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 31 (1945). See also Bickel, *supra* note 23, at 17 n.28. This view has been criticized. See Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908, 913 (1947).

as is *forum non conveniens*, and as long as there is no specific congressional authorization to burden commerce by permitting suits in the federal courts in these situations, the defense to the assertion of jurisdiction of an undue burden on commerce must be considered applicable in the federal courts.