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ADMINISTRATIVE FINALITY
IN CLAIMS FOR OVERCHARGES

THOMAS P. HARDMAN*

For many years it has been well settled at common law that when
a public utility exacts an unreasonable rate the aggrieved patron may
invoke the ordinary machinery of judge and jury to recover the over-
charge. Under modern legislation, however, or, as some think, under
cover thereof, the trend toward administrative finality has made such
vast inroads on the traditional theory of the supremacy of law that now-
adays in most jurisdictions the question of the retroactive unreasonable-
ness of charges made by public utilities has largely slipped from the con-
trol of the courts and, in certain far-reaching respects, from all judicial
control. In what may be classed as reparation cases there is, to a re-
markable degree, an inflexible adherence to the published rate without
regard to the merits of the particular controversy; the tariff filed with
the appropriate commission and administratively approved or put into
effect is the yardstick of legality.

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1 The following authorities are illustrative: Churchman v. Tunstal, Hardres
162, 163 (1659); Parker v. Great Western Ry., 7 Man. & G. 253 (1844); Lafay-
ette & Indianapolis R. R. v. Patterson, 41 Ind. 312 (1872); Mobile & M. Ry. v.
Steiner, McGehee & Co., 61 Ala. 559 (1878); Heiserman v. Burlington, C. R.
& N. Ry., 43 Iowa 732 (1884); Peters, Ricker & Co. v. Railroad Co., 42 Ohio St.
275 (1884); W. Va. Transportation Co. v. Sweetzer, 25 W. Va. 434 (1885);
Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 397 (1894); Clegg v.
Chandler Cotton Oil Co., 25 Okla. 82, 106 Pac. 10 (1909); 2 Hutchinson,
CARRIERS (3d ed. 1906) §805; 2 Wyman, PUBLIC SERVICE CORPORATIONS
(1911) §1072; cf. Allnutt v. Inglis, 12 East 527, 540, 542 (1810). The charges of
innkeepers have not been much disputed in court. See BEALE, INNKEEPERS AND
HOTELS (1906) §241. As to whether an excessive rate has been exacted or vol-
298 (1885).

2 A "reparation case," in the sense in which the term is used in this article, is
confined to that class of controversies in which it is sought to upset a filed rate
retroactively and recover the difference between that rate and a reasonable rate.
Claims for charges in excess of the filed tariffs are beyond the scope of this dis-

Discussion.
In an era when mechanical jurisprudence is moribund, if not dead, in most branches of the law, and especially in the domain of public law where economic and social facts are rarely constant, it has come as something of a shock to many to learn that this inelastic method of deciding cases is in vogue today in such an ever-important field as public utilities. That this generally outmoded technique has made headway in reparation cases over the judicial protest of such noted liberals as Holmes and Brandeis\(^3\) has served to emphasize this apparent anachronism in the law—an anachronism and yet a neolegal development radically at variance with our traditional common-law thinking.

This protest has not, however, gone wholly unheeded. Indeed, there are some significant indications, observable here and there, of dissatisfaction with rigid rate structures. This is particularly noteworthy in the federal system where the advocates of flexible tariffs have had great opportunities to present their views. Rates, they contend, should be "experimentally laid down and experimentally tried out."\(^4\)

In their principal opportunity before the United States Supreme Court, however, the proponents of this theory suffered a major setback. In that instance, Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry.,\(^5\) it appeared that the Interstate Commerce Commission had, upon complaint and after hearing, prescribed a maximum rate which, as the Commission subsequently found, was unreasonable. The Interstate Commerce Act provides that rates shall be reasonable\(^6\) and empowers the Commission to award damages for injuries caused by violation of the Act.\(^7\) A charge, filed pursuant to the original administrative order,

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\(^5\) 284 U. S. 370 (1932).


\(^7\) The section of the Interstate Commerce Act authorizing the Commission to make reparation awards declares that "if, after hearing on a complaint made as provided in section thirteen of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named." 34 STAT. 590 (1906), 49 U. S. C. A. §16(1) (1929).
was collected by the utility. The short question before the Court was whether the Commission could award reparation to a patron who had paid the excessive rate. The Court held, Holmes and Brandeis, JJ., dissenting, that there could be no retroactive redress.

Roberts, J., speaking for the majority of the Court, makes the decision turn on the distinction under the federal system—a court-drawn distinction—between commission-approved rates and utility-made rates. As to the latter, if unreasonable, reparation may be awarded. As to the former, however, there is no retroactive remedy, says the learned Justice, for the reason that the action of the Commission in prescribing or approving such rates is legislative in character and therefore "is subject to the same tests as to its validity as would be an act of Congress intended to accomplish the same purpose." Mr. Justice Holmes and Mr. Justice Brandeis, relying upon an opinion by Judge Hutcheson in *Eagle Cotton Oil Co. v. Southern Ry.*, take the position that, under the federal system as distinguished from the state system, nothing turns on whether the rate is utility-made or commission-approved; that in either situation reparation may be awarded if the rate is in fact unreasonable.

Although a so-called state rule, having the same core as the doctrine enunciated in the *Arizona Grocery* case, and, apart from procedural problems, differing from it only in scope, existed at the time the *Arizona Grocery* case was decided, both the majority opinion and the dissent seem to assume that the rule under the usual state system is something quite alien to the applicable federal doctrine. In fact the major-

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8 The power of the commission to award reparation with respect to utility-made rates is unquestioned. *Eagle Cotton Oil Co. v. Southern Ry.*, 51 F. (2d) 443 (C. C. A. 5th, 1931), *cert. denied* 284 U. S. 675 (1931); *Arizona Grocery Co. v. Atchison, T. & S. F. Ry.*, 284 U. S. 370 (1932); *Atlantic & Y. Ry. v. Carolina Button Corp.*, 74 F. (2d) 870 (C. C. A. 4th, 1935). If, however, the Commission refuses to award reparation, the administrative action is not reviewable. *Standard Oil Co. v. United States*, 283 U. S. 235 (1931). The Court based this conclusion on the ground that "negative" orders of the Commission are not subject to judicial review. But in a comparatively recent case Frankfurter, J., speaking for the Court, disapproved the distinction in this regard between "negative" and "affirmative" orders and explained the *Standard Oil Co.* case by saying that the main basis of the decision was not the "negative order" doctrine but the statutory scheme dealing with reparations. *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 140 n. 23 (1939); cf. *George Allison & Co. v. Interstate Commerce Comm.*, 107 F. (2d) 180 (App. D. C. 1939).


10 51 F. (2d) 443, 445 (C. C. A. 5th, 1931).

11 See authorities cited in note 19, *infra*.

12 The whole theory of Judge Hutcheson's opinion in the *Eagle Cotton Oil Co.* case, on which the dissent relies, is that the state systems are radically different from the federal system.
ity opinion does not even mention the state rule, except perhaps by
indirection. Quaere, however, whether the federal doctrine, whatever its
scope may be, is not, as a matter of substantive law, fundamentally the
same as the general state rule, having the same rationale but a more
limited orbit. If so, it would seem that, except in those jurisdictions in
which the rule does not obtain, the whole problem may be generalized
into a single inquiry, namely, the scope of the doctrine of the finality of
the "commission-approved" rate in claims for reparation.

The basic sameness of the two rules is well illustrated by one of the
earliest cases in point, T. R. Miller Mill Co. v. Louisville & Nashville
R. R., decided by the Supreme Court of Alabama in 1921.18 In that case
an action was brought to recover an alleged overcharge. The challenged
rate had been filed with the appropriate commission. To what extent
and in what manner the commission had approved it does not clearly
appear. The court held that the rate, whether reasonable or not, could
not be retroactively upset in a reparation case. Said the court:

"The evidence shows without dispute that the tariff in ques-
tion was filed with the Railroad Commission and approved by that
body, and that it was published by the carrier, and became effect-
ive in practical and exclusive operation for about a year. It is true
that the evidence does not directly disclose the making of any pre-
cise and formal order of approval. But it must be presumed, in
the absence of evidence to the contrary, that the Commission made
such an order in the premises as the law and their own orderly
practice required them to make . . .

"Manifestly there can be but one lawful rate in force at any
given time, and that rate by the very terms of the statutes quoted,14
is the rate which has been filed with and approved by the Com-
misson, and published by the carrier. Behind that rate, so long as
it remains unchanged, and so far as its application to specific ship-
ments is concerned, neither shipper nor carrier can go, and courts
cannot inquire . . .

"It seems to us that this proposition is self-evident and fund-
damental, and that it is the foundation of our regulatory system,
without which it would fail in its primary purposes, which are to
stabilize rates and charges, and to insure equality to shippers in
their application."15

18 207 Ala. 253, 92 So. 797 (1921).
14 The statutory provision quoted by the court reads as follows: "No railroad
or common carrier shall charge, demand, collect, or receive a greater or less com-
penation for the transportation of passengers or property, or for any service in
connection therewith, than is specified in such printed schedules and schedules of
joint rates, as may at the time be in force, except as provided by law, or the rail-
road commission, and the rates, fares, and charges named therein shall be the
lawful rates when approved by the railroad commission."
15 207 Ala. at 256, 92 So. at 800 (1921).
In a later case, Western Ry. of Alabama v. Montgomery County, decided after the Arizona Grocery case and under a statute differing somewhat from the one under which the first case was decided, the Alabama court held that reparation could be awarded with respect to a rate which had not been specifically approved by the commission, thereby apparently conforming its doctrine to the federal rule and exemplifying the fundamental sameness of the two rules. The doctrine originally enunciated by the Alabama court is the usual state rule and one of the best expressions of it to be found in the books.

From that formulation of the general rule, and from numerous decisions in point, it would seem that the perfunctory administrative

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16 228 Ala. 426, 153 So. 622 (1934).
17 4 Ala. Code (1923) §§9722, 9723, 9703; cf. 2 Ala. Code (1907) §§5553, 5554, 5525, 5527, 5669, 5678. The difference between these statutes is discussed infra.
18 In the second Alabama decision the court distinguishes the Arizona Grocery case by way of justification for limiting its own rule so as to make it seemingly identical with the federal rule. The court relies largely on Eagle Cotton Oil Co. v. Colorado & N. R. Co., 151 F. (2d) 445 (C. C. A. 9th, 1931), in which the court held under the federal rule that the rate in question was utility-made and therefore not reparation-proof.
20 See cases cited supra note 19.
approval inherent in putting a tariff into effect is sufficient to make a rate commission-approved within the meaning of the rule. Some state courts scarcely discuss the question whether a challenged rate which has been duly filed and put into effect has been administratively sanctioned. In a much-cited case dealing with the need or quality of administrative approval necessary to make a rate reparation-proof under the usual state rule, the Virginia Supreme Court of Appeals said:

"It is true, as contended by plaintiff, that there is nothing in the statute passed by the legislature which imposes upon the Commission the duty to affirmatively determine the reasonableness of all rates proposed or petitioned for by transportation companies, but the Constitution and statutes contemplate that all rates shall be presented to and changes in rates shall be approved by the Commission, and all these upon notice, publication, etc., a procedure which gives finality of character to the action of the Commission upon rates, ... We are not concerned with the methods pursued or the roles adopted and followed by the Commission in such matters."21

In the Arizona Grocery case, on the other hand, a filed rate is not treated as reparation-proof unless the Commission has in some formal way, not yet definitely settled, determined that the rate is reasonable. But both under the federal system and under the usual state system, once a tariff has been administratively approved, either in fact or in theory, it cannot be retroactively invalidated in a claim for overcharges. Thus, not only under the federal rule but also under the so-called state rule, the adjudication of a claim for reparation would seem to resolve itself into a determination of the question whether the administrative sanction of a challenged rate is such as to make it "commission-approved" (a) within the federal form of the rule if the problem arises under the Interstate Commerce Act,22 or (b) within the meaning of the so-called state rule if the question arises under a state statute of the usual type. Cases decided under a state statute which differs materially from the general type must be considered separately, although the substantive-law doctrines laid down in these cases are, in general, mere variations of the usual state rule, differing from the federal version only in scope and, in the most important type of variation, perhaps not even in that regard.

21 Mathieson Alkali Works v. Norfolk & W. Ry., 147 Va. 426, 442-443, 137 S. E. 608, 612 (1927). The last statement in the quotation from the court's opinion was made with respect to "the physical impossibility of investigation and ... approval by the Commission of every proposed rate advance, and of the practice followed by the Commission with reference to proposed advances." In the court's opinion this statement precedes the first part of the quotation.

Where, as in some states, there is no statutory provision authorizing a reparation proceeding, the problem is simple. Under such a state system the only possible method of retroactive redress would be the common-law action to recover an overcharge. However, this remedy is generally held to be inconsistent with the wide administrative control granted to the commissions with respect to filed rates.\textsuperscript{23} The usual attitude of the courts in this regard has been well expressed by the New York Court of Appeals in \textit{Purcell v. New York Central R. R.}\textsuperscript{24} In holding that a filed rate, which the commission had found to be unreasonable, could not be retroactively upset, the court said:

"... The statute creating the Public Service Commission and empowering it to supervise rates and charges was intended to cover the whole subject of rates and supersede all common law remedies. As long as the charges enforced are those on file with the Commission, they are the only lawful charges which may be collected. No departure from the filed rates is permitted."

"The Legislature has provided a means for the protection of shippers against unreasonable rates. The action at law resulted in different rates for different shippers dependent upon the opinion of juries as to what was reasonable. The statute makes the specified rate as fixed uniform and lawful until changed by or with the permission of the Commission."

Basically the whole problem is, of course, one of statutory construction and therefore its solution under any present-day system depends primarily on the applicable legislative provisions. But what principle of statutory interpretation determines the extent to which the courts should accord retroactive finality to a rate filed with, and theoretically or actually approved by, a regulatory commission? Though many statutory


Also, under the Interstate Commerce Act, it is held that the common-law remedy is superseded by the statutory remedy even though the Act purports to secure to the patron his common-law action. Texas & Pacific Ry. v. Abilene Cotton Oil Co., 204 U. S. 426 (1907).

\textsuperscript{24} 268 N. Y. 164, 197 N. E. 182 (1935).

\textsuperscript{25} \textit{Id.} at 171-172, 197 N. E. at 184. In connection with this type of state statute, it should be noted that the Federal Power Commission, which regulates certain interstate rates, has no authority to make reparation awards. \textit{Federal Power Comm. v. Hope Natural Gas Co.}, 320 U. S. 591 (1944).
provisions relating to the reparation problem are, to some extent at least, in derogation of the common law in that, as the courts apply them, they have the effect of limiting or abolishing the common-law right to recover overcharges, does it follow that they should be construed strictly? Certainly not a few courts, including the United States Supreme Court in the Arizona Grocery case, have been guided by some other principle or policy than the hackneyed one so often invoked in dealing with such legislation. Nor have they been guided greatly by the supposedly fundamental theory of the common-law system that everyone who, by the act of another, has been injured in person or property has a right to have his grievance adjudicated ultimately by the ordinary courts, for there can be no denying that, with respect to the problem of the finality of the filed rate in reparation cases, the once-dreaded droit administratif has found a wide footing in the law of the land.

Since the orbit of any given rule is largely dependent on its rationale and on the extent to which that rationale is considered sound, it will be well, at the outset, to examine the justification for the doctrine that administrative approval of a filed tariff is final in cases in which it is sought to upset a rate retroactively and recover reparation with respect thereto. The Arizona Grocery case deserves special study in this connection if for no other reason than that it is undoubtedly the most important and most provocative case in point that has yet been decided.

At first blush it might be thought, and indeed it has been so thought by some, that the doctrine of that case unduly favors the public utilities in that their knowledge of the operation of a new schedule of rates is

26 See, e.g., Shaw v. Railroad Co., 101 U. S. 557, 565 (1879): "No statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express." See, collecting authorities, 3 Sutherland, Statutory Construction (3d ed. 1943) §§6201-6205. The cliché that statutes in derogation of the common law are to be construed strictly, whatever its usefulness may be in some situations, should not be applied to statutes which, like the Interstate Commerce Act and the state public service acts, have as their objective the setting up of administrative machinery designed to supplant or supplement the traditional common law touching on the same subject. Cf. id. at §§6204, 6205. Nor would it help greatly to resort to the opposing cliché that remedial legislation is to be construed liberally. What is "remedial" legislation?

superior to that of the patrons and therefore utilities can judge the question of the reasonableness of a rate far better and far earlier than can the less informed patrons. Consequently, it has been contended, all rate structures under the federal system should be flexible, and even a commission-approved rate should not be reparation-proof. One of the best arguments yet advanced in support of this view is a dictum of Judge Hutcheson in the Eagle Cotton Oil Co. case, and inasmuch as the reasons therein stated are the sole basis of the dissent of Mr. Justice Holmes and Mr. Justice Brandeis in the Arizona Grocery case, it seems justifiable to quote them here in some detail:

"In my opinion neither specific approval by the Commission of a general schedule of rates, nor the specific promulgation of a particular rate, prevents the Commission from granting reparation as to that rate, if, upon complaint, it is advised that reparation should be made . . .

"The invoked decisions of the state courts do not support the position of appellee here. They make strongly against it. They show that instead of the states having a rate-making system like the federal one, not rigid, but flexible, which permits its commissions from time to time and at any time to make orders changing rates, correcting abuses, reforming conditions, and awarding reparations, while in reliance upon the power of the Commission to retroactively repair injuries sustained as the result of their prospective orders, shippers may experimentally try out rates before resorting to the courts for relief, their systems are rigid and inflexible . . .

"In the opinion of the Circuit Court of Appeals in Atchison, Topeka & Santa Fe R. Co. v. Arizona Grocery Co., 49 F. (2d) 563, 568, holding that the Commission could not award reparation as to the rates specifically theretofore prescribed by it, it is said that under such circumstances 'the shipper's remedy would be a seasonable application for a change of rate before any serious damage had been suffered.'

"In my opinion this will not do. This is indeed the remedy, and the only remedy, the shipper has under the state system. This is, however, not the case under the federal system. Here the remedy is simpler, more efficacious, more reasonable, more just to shipper and carrier alike, and more consonant with the experimental character of rates and rate making. This system permits rates to be experimentally laid down and experimentally tried out. It preserves that flexibility of adaptation, the maintenance of

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29 51 F. (2d) 443 (C. G. A. 5th, 1931).
which is necessary to the life and growth of our great and changing commerce, which would be lost and defeated if immediate resort to the courts were necessary, as in the state systems, to protect the rights of shippers against the burdens of an experimental rate.\textsuperscript{30}

No one could deny the weightiness of this argument. On the other hand, an adoption of the view therein advocated might well mean economic ruin to many utilities and, in general, not only make the position of the utilities more difficult than that of the patrons but also inadequately secure what is commonly the most important interest of both the patrons and the utilities, namely, an assurance that the rates upon which their business transactions are based shall be certain and not subject to retroactive readjustment if they should subsequently be found to be unreasonable.

The Court's opinion in the \textit{Arizona Grocery} case does not discuss the position of the patrons,\textsuperscript{31} but the possibilities of a contrary decision with respect to the patrons' interests are strikingly illustrated by the litigation which grew out of the famous \textit{Lignite Coal} case.\textsuperscript{32} In that controversy a carrier claimed that the filed rate was confiscatory and the United States Supreme Court upheld this contention. Thereupon the utility sued a patron to recover the difference between the filed confiscatory rate, which had been collected, and a reasonable rate. The state court held that the utility was not entitled to reparation,\textsuperscript{33} and the United States Supreme Court, in dismissing a writ of error, quoted, apparently with approval, the following excerpt from the opinion of the state court:

"Manifestly, if shippers cannot rely upon the rates as so published and filed, the requirement of publication becomes a mere trap for the unwary."\textsuperscript{34}

Although the rate in the \textit{Lignite Coal} case was made by the legislature and not by a commission, the applicable principle is clearly the same as if it had been a commission-made rate which, as we have seen, the Supreme Court now holds "is subject to the same tests as to its validity [in reparation cases] as would be an act of Congress [and presumably

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\textsuperscript{30} \textit{Id.} at 445-447.

\textsuperscript{31} The Court does, however, have this to say: "If that body [the Commission] sets too low a rate, the carrier has no redress save a new hearing and the fixing of a more adequate rate for the future. It cannot have reparation from the shippers for a rate collected under the order upon the ground that it was unreasonably low." 284 U. S. at 387-388.


\textsuperscript{33} \textit{Minneapolis, St. P. & S. S. M. Ry. v. Washburn Lignite Coal Co.}, 40 N. Dak. 69, 168 N. W. 684 (1918); (1919) 32 HARV. L. REV. 428.

\textsuperscript{34} \textit{Minneapolis, St. P. & S. S. M. Ry. v. Washburn Lignite Coal Co.}, 254 U. S. 370, 374 (1920).
a state statute] intended to accomplish the same purpose. 35 In situations in which it applies, the doctrine of the retroactive sanctity of a rate approved by a commission or prescribed by a legislature works both ways: it allows both patron and utility to rely upon such rate without fear that it may be retroactively upset and made the basis of a reparation award. 36 On this point the law seems clear, both under the federal system and under the usual state system.

Under the federal form of the doctrine, however, the question whether a given rate is utility-made and therefore open to a possible recovery of reparations is shrouded in considerable uncertainty, and attempts to determine the problem have occupied no small part of the time not only of the Commission but of the courts. Moreover, these attempts have resulted in a conflict in the decisions of the lower federal courts 37 and also in some vacillation by the Commission. 38

Three years after the Arizona Grocery case was decided the question of the extent to which a utility may rely on a commission-approved rate was collaterally presented to the United States Supreme Court in Atlantic Coast Line R. R. v. Florida. 29 In that case a state public service commission had duly put into effect an intrastate rate. Thereafter the Interstate Commerce Commission, in order to remove an alleged discrimination against interstate commerce, prescribed a higher intrastate rate. Later the United States Supreme Court held that this rate order of the Commission was invalid because based on inadequate findings. 40 Still later the Commission upon new evidence and new findings made the same order it had made before, and the United States Supreme Court confirmed its action. 41 In a suit for restitution of the overcharges collected by the utility while the first order of the Commission stood un-

36 The United States Supreme Court expressly states in the Arizona Grocery case that the utility cannot have reparation with respect to a commission-approved rate. See note 31, supra.
37 This conflict is hereinafter discussed.
38 Soon after the decision in the Arizona Grocery case the Commission refused to award reparation where the challenged rates had been promulgated pursuant to what the Commission considered a general adjustment order. The Commission apparently thought that such a rate was commission-approved within the meaning of the Arizona Grocery case. Coal Trade Ass'n of Indiana v. Baltimore & Ohio R. R., 185 I. C. C. 225 (1932). Later, however, on a reconsideration of the case, the Commission fund that the rates were not unreasonable. 190 I. C. C. 743 (1933). More recently the Commission does not regard such rates as commission-made. See, e.g., Fifteen Percent Case, 226 I. C. C. 41, 140, 141 (1938); Express Rates, 231 I. C. C. 471, 500, 501 (1939). That such a rate is not commission-approved, see, e.g., Eagle Cotton Oil Co. v. Southern Ry., 51 F. (2d) 443 (C. C. A. 5th, 1931), cert. denied, 284 U. S. 675 (1931).
39 295 U. S. 301 (1935).
41 Florida v. United States, 292 U. S. 1 (1934).
condemned, the Supreme Court held, four Justices dissenting, that restitution could not be awarded.

Although the case did not squarely present the question whether the Commission could award reparation with respect to a rate in effect not actually approved by the Commission, the Court nevertheless said in passing that the "Commission was without power to give reparation for the injustice of the past."42 It would seem therefore that under the federal system a rate invalidly prescribed by the Commission in its legislative capacity is, or may be, commission-approved within the meaning of the federal rule.43 At least Mr. Justice Roberts, speaking for the four dissenting Justices, evidently thought so, for he said:

"To hold that the claimants may not have restitution is to say that invalid, void or voidable orders of the Commission have precisely the same force and effect as orders lawfully made, if from extrinsic facts and matters not cognizable by the court the conclusion may be drawn that the Commission might have made a valid order in the circumstances. So to hold is to recognize in a restitution proceeding, a jurisdiction which in no other circumstances and in no other case could a federal court exercise; and to permit that court to ignore and nullify action in a field within the State's sovereign power."44

The question of the orbit of the federal rule was directly and interestingly raised in Arizona Wholesale Grocery Co. v. Southern Pacific Co.45 In that case the Commission had found that a challenged rate was not unreasonable but had not prescribed the rate for the future, and the precise point before the court was whether the rate was therefore commission-approved within the doctrine of the Arizona Grocery case. The court held that it was: that an administrative adjudication that a tariff is not unreasonable amounts to a "positive finding of a negative fact,"46 and that consequently a rate so sanctioned could not be retroactively invalidated in a claim for overcharges. The same federal court, differently constituted, employed the same reasoning in El Paso & Southwestern R. R. v. Phelps-Dodge Mercantile Co.47 But in Pitzer Transfer Corporation v. Norfolk & Western Ry.,48 a different federal court arrived at a diametrically opposite conclusion.49 The United States Supreme Court has not

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42 295 U. S. at 312.
44 295 U. S. at 329-330.
45 68 F. (2d) 601 (C. C. A. 9th, 1934).
46 Id. at 605.
47 75 F. (2d) 873 (C. C. A. 9th, 1935).
yet come to the rescue, although a dictum in a recent case hereinafter considered perhaps indicates, to some extent, the general course which the federal rule may be expected to take.\footnote{50}

What, then, is the orbit of the Arizona Grocery case? A doctrinaire approach to the problem, based on the separation of powers—the approach used by the lower federal courts in the three cases just mentioned and by the Supreme Court in the principal case—would seem to favor the conclusion arrived at in the Pitzer Transfer Corporation case; for there can be no doubt that, where a commission determines, as in a reparation proceeding, that a filed rate is not unreasonable, it is acting judicially, not legislatively; it is adjudicating a controversy on present or past facts and is not promulgating a rule for the future;\footnote{51} it is acting essentially as a court does in a common-law proceeding to recover an overcharge.\footnote{52} But does not the solution of such a far-reaching business problem as the present one call for a rationale that smacks of something more pragmatic than an abstract separation-of-powers argument, something more than formal “logic-chopping”?\footnote{53} Fortunately the Supreme Court has not left us wholly without an answer; for in the opinion in the Arizona Grocery case there appears, unstressed, one sentence which, it is submitted, suggests both the practical justification for the decision and the rationale which determines, or should determine, its orbit. By way of buttressing its separation-of-powers argument, the Court said:

"As respects its future conduct the carrier is entitled to rely upon the [Commission's] declaration as to what will be a lawful, that is, a reasonable, rate; and if the [Commission's] order merely sets limits it is entitled to protection if it fixes a rate which falls within them."\footnote{54}

This reason seems eminently sound. Once a commission has approved a rate as reasonable, and it is filed and put into effect, the result would often be economically disastrous if the utility could not rely upon...

\footnote{50} Interstate Commerce Comm. v. Inland Waterways Corp., 319 U. S. 671, 685-687 (1943).

\footnote{51} See Holmes, J., in Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 226 (1908): "A judicial inquiry investigation, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future and therefore is an act legislative not judicial in kind. . . ."

\footnote{52} See Hardman, Judicial Review as a Requirement of Due Process in Rate Regulation (1921) 30 YALE L. J. 681, 683 et seq.


\footnote{54} 284 U. S. at 383.
the rate so long as it has not been duly set aside, or at least so long as it has not been challenged. This line of reasoning, stated from the point of view of the utility, has been forcefully expressed as follows by a lower federal court:

"... Assume, for instance, a railroad whose earnings largely depend upon one commodity. A coal-carrying road is an apt illustration. The revenues of this road depend upon coal which we will assume is 80 per cent. of its traffic. We will further assume that, after an investigation the Interstate Commerce Commission has fixed the rate to be charged on this coal. This rate has remained in effect for a number of years without complaint from any shipper. A tremendous amount of tonnage has moved on said rate. The revenues derived from said rate have been distributed in the payment of dividends and interest on bonds; taxes have been paid; betterments have been made. Can it be contended that the Interstate Commerce Commission has the power to later on declare that the rate was unlawful and unreasonable and then require the carrier to make reparation on every single shipment which moved on said rate? Such a condition would result in chaos. The great transportation systems of this country could not exist in such circumstances... If the carriers cannot use the revenues received from the charging of a rate which the Interstate Commerce Commission has declared to be reasonable and lawful, it is clear to this court that it would result in chaos in the finances and credit of the carriers and would likewise result in breaking down the stability in rate structures which was one of the cardinal reasons for the passing of the Interstate Commerce Act."55

As has already been indicated in part, this reasoning, mutatis mutandis, applies equally to the position of the patrons. If a commission-approved rate (or a rate approved by the legislature) could be retroactively upset—if both patrons and utilities could not transact business on an assurance that such a rate is retroactively unassailable—their respective interests in the security of transactions and acquisitions would be inadequately protected. Without such assurance neither patrons nor utilities could safely make the necessary plans for future business undertakings, undertakings which are, in general and in the long run, geared to the rates upon which business enterprises are largely and often primarily dependent.

Moreover, it is frequently of the utmost importance to patrons not only that rates shall be reasonable but also that, as between various patrons, there shall be equality in the application of rates. It was not always possible to insure such equality prior to the modern regulatory

55 Eagle Cotton Oil Co. v. Southern Ry., 46 F. (2d) 1006, 1009 (D. Miss. 1931).
system, for the action at law to recover an overcharge resulted in different rates for different patrons dependent upon the opinion of juries as to what was reasonable. This equality is, however, adequately secured if the filed rate is inflexibly adhered to in reparation cases.

While rates should, of course, be reasonable, to the extent that an insistence that they be so would not sacrifice more important considerations, here, as elsewhere in the law, the judicial process, and, indeed, the administrative process, too, generally involve a compromise of conflicting interests. In reparation cases it is obviously impossible to secure in full both the interest of the patrons that charges shall not be unreasonably high or the corresponding interest of the utilities that rates be not unreasonably low, and also the often opposing interest of both patrons and utilities that rates be certain. Hence, since the end of law today is to secure the most important interests involved in a case, with a minimum sacrifice of interests, the question for both courts and commissions in claims for overcharges is, essentially: which of these conflicting interests is the weightier and to what extent and in what manner the paramount interest should be legally secured. Although the Court did not so reason in the Arizona Grocery case and in fact, as has already been indicated, did not even discuss the interests of the patrons, it may perhaps be inferred from the result reached by the Court that in its estimation the need that rates should be certain and that there should be equality in their application outweighs all countervailing interests in claims for reparation, provided that the rates are commission-approved.

How, then, should a rate be treated in a claim for overcharges if the Commission has previously found that the challenged rate was not unreasonable but has not specifically approved any particular rate for the future? While it might be argued with considerable plausibility that such

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60 See note 31, supra.
administrative approval is, within the meaning of the *Arizona Grocery* case, a "declaration" of the Commission on which the public utility has a right to rely as to the future, this argument would seem to overlook the essential character of such an administrative finding; for, being a judicial determination, it is, by its very nature, an approval only as to the past. Consequently there would seem to be no sufficient reason for considering a rate so sanctioned as commission-approved within the meaning of the federal rule. Moreover, the very crux of the Court's argument in the *Arizona Grocery* case is that a commission-approved rate is legislative in character and for that reason cannot be retroactively invalidated in a reparation proceeding.\(^{61}\) It seems highly improbable therefore that the Supreme Court would regard such a rate as commission-approved,\(^{62}\) and it is significant that the Interstate Commerce Commission, apparently in pursuance of a policy of construing the federal rule narrowly,\(^{63}\) has refused to follow the view that such a rate is reparation-proof.\(^{64}\)

The chief significance of this refusal is believed to lie largely in a rather widespread tendency of the federal courts to limit the orbit of the federal rule, a tendency favoring the conclusion reached in the *Pitzer Transfer Corporation* case. One of the most important examples of this trend is found in the judicial interpretation put upon general rate orders, *i.e.*, orders by which the Commission approves an over-all adjustment of rates without specifically sanctioning particular rates. Although such an order would seem to be legislative in character, since

\(^{61}\) In that case Roberts, J., says: "When ... the commission declares a specific rate to be the reasonable and lawful rate for the future, it speaks as the legislature, and its pronouncement has the force of a statute ... Where, as in this case, the Commission has made an order having a dual aspect, it may not in a subsequent proceeding, acting in its quasi-judicial capacity, ignore its own pronouncement promulgated in its quasi-legislative capacity and retroactively repeal its own enactment as to the reasonableness of the rate it has prescribed." 284 U. S. 386, 389.


\(^{63}\) For example, the Commission construes its "directory" action with respect to rates as not constituting such administrative approval as will make a rate reparation-proof. Schmidt Lumber Co. v. Cleveland, C., G. & St. L. Ry., 191 I. C. C. 141, 145 (1933); A. B. Cole & Sons v. Missouri P. R. R., 198 I. C. C. 252, 256 (1933); In re Refrigeration Charges on Fruits, Vegetables, Berries, and Melons from the South, 222 I. C. C. 245, 268, 269 (1937); cf. United States v. Atlanta, B. & C. R. R., 282 U. S. 522, 527, 528 (1931): "Its [the Commission's] functions are manifold in character. In some matters it is merely to investigate and to report facts ... Even in the regulation of rates, as to which the Commission possesses mandatory power, it frequently seeks to secure the desired action without issuing a command. In such cases it customarily points out in its report what the carriers are expected to do. Such action is directory as distinguished from mandatory." See, also, Read Phosphate Co. v. Atchison, T. & S. F. Ry., 194 I. C. C. 73 (1933); note 38, *supra*.

the Commission in such a case is authorizing a rate structure for the future and is not adjudicating a claim on present or past facts, it is held that a rate filed pursuant to such administrative sanction is not commission-approved within the meaning of the federal rule.65

Perhaps the most interesting illustration of this tendency with respect to general adjustment orders of the Commission is found in the Eagle Cotton Oil Co. case66 where the Commission had authorized a general increase in freight rates, but without approval of any particular rate.67 The carriers thereupon raised the rate in question to $2.25 per ton. Later the Commission recommended a general reduction in rates, also without approval of any particular rate.68 The carriers then reduced the rate in question to $2.03 per ton. The Commission subsequently found that this rate was unreasonable and awarded reparation.69 In upholding this award the court said that “orders of the Commission authorizing a general upward revision or adjustment of rates are not to be construed as giving approval of or prescribing particular rates”70 and that therefore a rate promulgated pursuant to such orders is a utility-made rate and consequently not reparation-proof.71

A contrary conclusion could have been reached without much difficulty; for, as Judge Hutcheson pointed out in his concurring opinion in this case, it seems clear “that, speaking generally, the rate had received the Commission's approval and sanction.”72 But for the most part the federal courts show no great love for the federal doctrine and therefore interpret it strictly.

A somewhat similar situation exists where the Commission, in prescribing a schedule of rates based on distances, has not affirmatively approved any combination rate but has merely declared in its report that nothing has been shown which would authorize its disapproval of the use of a combination rate. In such a situation it has been held that a

67 Ex parte 74. In the Matter of the Applications of Carriers in Official, Southern, and Western Classification Territories for Authority to Increase Rates, 58 I. C. C. 220 (1920).
68 Reduced Rates, 68 I. C. C. 676 (1922).
69 Eagle Cotton Oil Co. v. Southern Ry., 140 I. C. C. 131 (1928).
70 51 F. (2d) at 445.
71 Cert. denied, 284 U. S. 675 (1931).
72 51 F. (2d) at 445.
tariff filed pursuant to such administrative sanction is not commission-made within the meaning of the Arizona Grocery case.\(^{73}\) Such a finding is at most a negative sanction, not greatly unlike a determination, as in a reparation case, that a rate is not unreasonable.\(^{74}\) Perhaps such an administrative order may be classed as a general adjustment order. It seems fairly clear therefore that a combination rate, so promulgated, is not commission-approved within the meaning of the federal rule, at least if the orbit of the rule is to be confined narrowly.\(^{76}\)

Another interesting limitation upon the logical implications of the Arizona Grocery case is possibly indicated, though only by way of dictum, by the United States Supreme Court in Interstate Commerce Commission v. Inland Waterways Corporation,\(^{76}\) decided in 1943. In that case, in which an injunction was sought against a rate order of the Interstate Commerce Commission, it appeared that the Commission had found that "The proposed schedules are shown to be just and reasonable and are not shown to be otherwise unlawful." In disposing of a contention that by this finding the Commission had approved or prescribed a rate structure containing certain unlawful discrepancies, the Court, per Jackson, J., said:

"True, the Commission stated that the railroads 'are justified under section 1 in treating the ex-barge traffic the same as local or ex-truck traffic,' and found that 'the proposed schedules are shown to be just and reasonable.' But this does not constitute a finding that the rates were lawful; they 'may lie within the zone of reasonableness and yet result in undue prejudice' or otherwise violate the Act. The Commission also stated that the facts of record show that 'the proposed schedules cannot be condemned as unlawful under sections 2 and 3 of the act.' But this statement followed immediately upon the Commission's statement that from its conclusion that protesters' claim as a matter of right to the existing proportionals was erroneous, 'It follows that the protesters' allegations cannot be sustained in this proceeding, although in a proper proceeding we might prescribe proportional rates on the ex-barge traffic lower than local rates or joint barge-rail rates lower than the combinations.' Read in the context, we think it meant only that the proposed schedules could not be struck down upon the erroneous view advanced by the protesters. The finding of the Commi-

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\(^{74}\) This analogy was stressed by counsel in the case but the court distinguished Arizona Wholesale Grocery Co. v. Southern Pacific Co., 68 F. (2d) 601 (C. C. A. 9th, 1934), in which it was held that such negative sanction makes a rate commission-approved.


\(^{76}\) 319 U. S. 671 (1943).
sion that the proposed schedules ‘are not shown to be otherwise unlawful’ is, we think, to be similarly read. This form of finding has been held by the Commission not to constitute an approval or a prescription of the rates under suspension.77 Since the Commission refused to approve or prescribe them, they stand only as carrier-made rates which, under the Commission’s decisions, leaves them open to possible recovery of reparations.78

If by this argument the Court means that the sanction which the Commission gave to the proposed schedules of rates was not sufficient to make them commission-approved within the doctrine of the Arizona Grocery case, this dictum would seem to indicate an inclination on the part of the Court to limit the orbit of that case to situations in which the Commission has determined that the rates prescribed or approved are lawful in all respects;79 a positive finding by the Commission, when acting legislatively, that rates are just and reasonable will not suffice in a subsequent reparation proceeding if the rates so sanctioned can be upset on any ground other than unreasonableness; rates so approved “stand only as carrier-made rates.”80 Probably, though, the Court merely meant that a schedule of rates, so sanctioned by the Commission, is open to a recovery of reparations only with respect to loss sustained through some violation of the Act other than the charging of unreasonable rates.81 If so, the same tariff would be commission-made on the question of its unreasonableness and utility-made on all other questions of alleged unlawfulness. In any event, the language of the Court is perhaps susceptible of the broader interpretation, and in this connection it is interesting to note that in support of its statement that such rates are “open to possible recovery of reparations” the Court cites the Arizona Grocery case.82 Interestingly, too, the opinion cites, in support of this assertion, a note in a law review in which it is argued at some length that the rule of the Arizona Grocery case should, if adhered to at all, be confined to the precise type of fact situation out of which the case arose.83 But whatever


78 319 U. S. at 685-687.


80 319 U. S. at 687.

81 With respect to reparation for violations of the Act on other grounds than charging unreasonable rates, see Terminal Warehouse Co. v. Pennsylvania R. R., 297 U. S. 500 (1936).

82 319 U. S. at 687 n. 22. The Court, however, prefaches the citation of the Arizona Grocery case with the word “Compare.”

83 The note cited by the Court is (1941) 50 Yale L. J. 714. The Court prefaches the citation with the word “Compare.”
may be the import, if any, of the Court's argument in regard to the question whether a rate so sanctioned is reparation-proof with respect to the question of its unreasonableness, the whole tenor of the Court's discussion seems to indicate a definite inclination to interpret narrowly administrative approvals of rate structures, to the end that appropriate reparation may be recovered within wide limits. That much, at least, seems fairly clear.

A somewhat similar inclination exists in some states with respect to the so-called state rule. In several jurisdictions the doctrine does not obtain, and in a few others the decisions disclose two significant types of variation from the usual rule.

An early case holding that filed rates can be retroactively upset on the ground of unreasonableness is Turner Creamery Co. v. Chicago, Milwaukee & St. Paul Ry., 84 decided by the Supreme Court of North Dakota in 1915. In that case the applicable statutory provisions purported, in rather general terms, to authorize the commission to make reparation awards. Acting under this authority, the commission found that a challenged rate was unreasonable and awarded reparation. The court held that the commission's action was valid. The case was decided before the general question was much litigated and the reasoning of the court is extremely meager. In fact little more can be deduced from the opinion than that, under the particular statute, a filed rate has no finality in claims for overcharges.

A leading authority rejecting the usual state rule is Bonfils v. Public Utilities Commission, decided by the Supreme Court of Colorado in 1920. 86 In that case, too, the regulatory commission had statutory authority to grant reparation with respect to excessive rates. 87 In upholding the power of the commission to make reparation awards, the court said:

"It is contended for the carriers that no claim for an overcharge can be maintained because the charges collected were those prescribed by the tariffs on file 'which were never at any time changed or required to be changed, and departure from which was expressly prohibited.' The defect in this proposition is that the tariffs on file were illegal from the fact that they were unreasonable. While the carrier was prohibited from departure from the filed charges, it was not prohibited from filing a new, reasonable and lawful tariff.

"If, by filing an unreasonable tariff, the carrier could success-

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84 96 S. Dak. 310, 154 N. W. 819 (1915).
85 1 S. DAK. COMP. LAWS (1913) p. 113, §6, p. 116, §13, p. 118, §16, p. 119, §§17, 18, p. 120, §19.
86 67 Colo. 563, 189 Pac. 775 (1920).
87 Colo. Laws 1913, c. 127, §56.
fully assert that its collection did not result in overcharge, all reparation for overcharges would be made impossible.  

Except where there is explicit legislative authority to upset a filed rate retroactively on the ground of unreasonableness, the doctrine laid down in these two cases finds very little support in the decisions; and there seems to be no great likelihood that it will have any considerable following, for the general rule, in one form or another, is now so deeply ingrained in the usual state system that, in the absence of a statutory change, widespread repudiation of the rule would be too much to expect even if it were desirable. Many states, however, have enacted statutes authorizing reparation awards with respect to filed rates which may be found to be unreasonable, and the United States Supreme Court has held that state legislation empowering a commission to grant reparation with respect to a commission-approved rate does not violate the Federal Constitution.

But the other two types of decisions—those confining the scope of the rule without rejecting it—present theories which may be readily applied in several states without the aid of additional legislation. One of these types, and one which for a time seemed to hold considerable promise, is the view that a filed rate is retroactively unassailable in a

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88 67 Colo. at 576-577, 189 Pac. at 780.
90 The extent to which these statutes authorize or purport to authorize reparation differs considerably in different states; and in a number of instances the authority—so far as it exists, or if it exists—must be sought in several sections of the statute. The following legislative provisions are particularly noteworthy: ALA. CODE (1940) tit. 48, §§124, 125; ILL. REV. STATS. (1943) c. 111 2/3, §76; 10 IND. STATS. ANN. (Burns, 1933) §§54-706, 54-201, 54-428, 55-123; IOWA Code 1939 §§7892, 7893, 7894, 8048, 8055 (see note 117, infra); KAN. GEN. STATS. ANN. (1935) §§66-154a, 66-154b; Ky. Rev. Stat. (Baldwin, 1942) §§276.200, 276.280, 276.330, 276.340, 276.370; NEB. COMP. STATS. (1929) §§75-510; N. C. Code Ann. (1939) §1067; OKLA. STATS. (1941) tit. 17, §121; 8 ORE. COMP. LAWS ANN. (1940) §112-453 to §112-458, inclusive; PA. Stats. Ann. (Purdon, 1941) tit. 66, §1153; R. I. GEN. LAWS (1938) c. 122, §§35, 40; S. DAK. CODE (1939) §§2.0303; 4 UTAH CODE ANN. (1943) §§76-6-20; WASH. REV. Stat. ANN. (Remington, 1943 Supp.) §§10433, 10433-2; W. VA. CODE (1931) c. 24, art. 3, §1, art. 4, §§6, 7 (see note 117, infra); WIS. STATS. (1941) §193.37.
claim for overcharges until challenged but that reparation may be had from the date of the filing of a complaint. Under this view a flexibility of rate structure is maintained within reasonable limits and at the same time the interest of both patrons and utilities that rates be certain are, until the date of challenge, adequately secured. In promulgating this variation of the usual state rule, the Supreme Court of Washington said:

"... when a rate is filed, published and permitted to become effective by the department, it is and remains, until challenged in the manner provided by statute, the lawful rate, and the only lawful rate, to be charged and collected. Otherwise, the carrier would never know what its lawful earnings were, and could never allocate its earnings to betterments and dividends without the possibility of being embarrassed by delayed orders to make restitution ... Therefore, when a scheduled rate is challenged, that challenge should affect the scheduled rate only from the date of the filing of the complaint."\(^9\)

In applying this doctrine in a later case, the same court justified its rule as follows:

"The appellant argues that to deny recovery as against an allegedly unreasonable rate prior to the date of filing a complaint with the department, is in effect the denial of a common law right and leaves a wrong without a remedy. But our statute requires that all rates be reasonable and, to insure this, prescribes that they be filed and published with the regulatory authority for a named period before their effective date, so that everyone concerned may have notice with an opportunity to challenge them; and the department of public works may, upon its own motion, suspend them pending investigation. They are also subject to challenge after their effective date by anyone affected. So long as they remain effective and unchallenged, they are presumed to be reasonable."\(^9\)

Recently, however, the legislature of the state of Washington, the principal home of this theory, wrote into its statutes some of the most sweeping and emphatic reparation provisions to be found in any state.\(^9\)

These provisions not only make it mandatory upon the commission to award reparation with respect to any rate found by the commission to be unreasonable but specifically require that damages be awarded whether the excessive rate was charged and collected before or after the filing of a complaint. Furthermore, the statute, after laying down in some detail the procedure to be followed by the courts in dealing with reparation cases, declares that "neither the Supreme Court nor any


Superior Court shall have jurisdiction save in the manner hereinbefore provided.

This statutory change, which may perhaps be regarded as a legislative indictment of the court for supposed failure to interpret a reparation provision so as to secure flexible rate structures, does not stand alone in this regard. Moreover, these statutory changes—if not legislative warnings—may have special significance in connection with the second type of variation from the usual rule, for in this second form of variation it is, in general, the legislatures rather than the courts that seem to have evinced dissatisfaction with rigid rate structures and have sought to inject flexibility.

This latter type of variation from the so-called state rule, and the most important one, is essentially the same as the doctrine laid down by the majority of the Court in the Arizona Grocery case. According to this view the administrative approval inherent in permitting a filed rate to become effective is not enough to make it reparation-proof; perfunctory sanction will not suffice; the rate must be “commission-made” or, at least, there must be formal approval.

One of the most interesting cases expressing this view is Western Ry. of Alabama v. Montgomery County, decided by the Supreme Court of Alabama in 1934 and hereinbefore mentioned in another connection. In Alabama, it will be recalled, the court originally enunciated the usual state doctrine. But in the Western Ry. of Alabama case, the court, apparently conforming its rule to the federal doctrine, held that a filed rate is not reparation-proof when it is utility-made and implied that no reparation may be had with respect to commission-approved rates. The second case was, however, decided under a statute differ-

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97 228 Ala. 426, 153 So. 622 (1934).
99 Although the second Alabama case did not decide that commission-approved rates are reparation-proof, the court, in holding the utility-made rate to be subject to a reparation award, distinguished the Arizona Grocery case in a way which would seem to indicate that the court would probably follow the federal rule with respect to commission-approved rates. The court seemed to adopt the doctrine laid down in Eagle Cotton Oil Co. v. Southern Ry., 51 F. (2d) 443 (C. C. A. 5th, 1931), in which, as the Alabama court put it, “reparation was awarded upon the theory the rate enforced was a carrier-made rate as distinguished from one fixed by law.”
ing appreciably from the one under which the first case was decided. The later statute, like the Interstate Commerce Act, authorized reparation awards in terms seemingly broad enough to sanction retroactive redress even with respect to commission-made rates, whereas the earlier statute not only was rather indefinite as to any right to recover overcharges but was pretty specific as to the legality of filed rates. The doctrine of the second Alabama decision must therefore be regarded largely as a legislative rather than a judicial modification of the general rule.

The leading case propounding this variation of the usual rule is State ex rel. Boynton v. Public Service Commission, decided by the Supreme Court of Kansas in 1932. There the applicable legislation in general terms empowered the commission to make reparation awards. In interpreting the statute the court said:

"... it seems clear that when a rate has been the subject of a deliberate inquiry in which the carriers, the shippers and the commission's own experts have participated, as well as any and all other persons who cared to take a hand in it as the statute provides and permits (R.S. 66-111, 66-112, 66-113), any rate so prescribed by the commission and put into effect by the carriers may be confidently collected and retained by them as their very own, without misgiving that at some future time a further hearing of the commission may be had and more evidence taken and a different conclusion reached, and those rates condemned as unreasonable, and reparation certificates allowed for the difference between the rates which the commission did authorize and the rates which it should have authorized ... Nor would it be worth the while of any shipper to receive such a reparation certificate, for it would not serve as a justifiable basis of recovery. That point, at least, was laid at rest by the recent decision of the Supreme Court of the United States in Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co., 284 U. S. 370 ...

"Yet another question is submitted for our solution. It relates to the shippers' right to a reparation certificate in cases where the rates exacted were filed with the commission and perfunctorily approved by it without hearing and determination of their reasonableness, but which rates are afterwards found to have been unjust, unreasonable or otherwise unfair and discriminatory against

100 See Ala. Code (1923) §§9722, 9723, 9703.
101 See Ala. Code (1907) §§5555, 5554, 5525, 5527, 5669, 5678.
102 135 Kan. 491, 11 P. (2d) 599 (1932).
103 The statute provides: "... upon complaint in writing made to the public service commission that an unfair, unjust, unreasonable ... rate or charge has been exacted, such commission shall investigate said complaint, and if sustained, shall make a certificate under its seal setting forth what is, and what would have been, a reasonable and just rate or charge for the service rendered, which shall be prima facie evidence of the matter therein stated." Kan. Gen. Stat. Ann. (1935) §66-154a.
the shipper. Under the interstate commerce act, as administered by the federal commission, reparation is permitted in such cases . . .

"The point is made on behalf of the carriers that rate schedules filed with a state commission are on a different footing from those filed with the federal commission in this respect: A schedule of interstate freight rates filed with the interstate commerce commission goes into effect in thirty days unless that commission makes an order suspending them, whereas no schedule of intra-state rates filed with the usual state commission goes into effect unless and until the state tribunal makes an order authorizing them. A majority of this court holds that this procedure is one of form merely, not of substance. The public service commission is not equipped to make a critical analysis of an entire schedule of rates, and its approval is necessarily pro forma, and the rates thus approved will merely stand as legal for the carriers to exact until it develops in actual practice that particular instances reveal them to be oppressive or otherwise unreasonable."

An interesting case adopting this view is *Cheltenham & Abington Sewerage Co. v. Pennsylvania Public Utility Commission*, decided by the Supreme Court of Pennsylvania in 1942. The case is particularly interesting for the reason that in an earlier decision the same court, in allowing reparation with respect to a filed rate, had used language sufficiently comprehensive to include all filed rates. Moreover, the language of the statute is apparently broad enough to warrant a construction which would permit a reparation award even with respect to rates specifically prescribed by the commission. The court, however, adopted the distinction drawn by the United States Supreme Court in the *Arizona Grocery* case, and held that "commission-made" rates are reparation-proof up to the time when the commission determines, if it determines, that the challenged rates are retroactively unreasonable. Until such determination, the utility has a right to rely on them.

It should be noted therefore that in adopting this view the Pennsylvania court was not enlarging the field of reparation awards; it was really doing what the United States Supreme Court did in the *Arizona Grocery* case and what the Supreme Court of Kansas did in the case just mentioned: it was limiting the field. In fact the case purports to follow

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104 135 Kan. at 504, 506, 11 P. (2d) at 1006-1007.
108 But see Cheltenham & Abington Sewerage Co. v. Pennsylvania Public Utility Comm., 355 Pa. 377, 49 A. (2d) 707 (1947). In this case the Pennsylvania supreme court upheld an award of reparation by the commission, but it is not clear from the court's opinion whether the court actually retreated from the position which it took in 1942.
the *Arizona Grocery* case. Consequently these two cases, and perhaps the Alabama case, are setbacks for the proponents of flexible rate structures.

Similarly the Supreme Court of Nebraska has recently construed the seemingly all-comprehensive provisions of its reparation statute\(^{109}\) so as to preclude a retroactive upsetting of a filed rate which has been commission-approved within the meaning of the *Arizona Grocery* case, relying upon and expressly following the federal form of the rule.\(^{110}\) It is to be observed that here, too, the court is creating, not limiting, a field of administrative finality with respect to the recovery of reparations on the ground that a filed rate is unreasonable.

The same result as that reached by the Nebraska court was reached by the Supreme Court of Oklahoma in *St. Louis-San Francisco Ry. v. State.*\(^{111}\) In a prior decision the Oklahoma court had allowed reparation with respect to a utility-made rate.\(^{112}\) But in the later case the court distinguished its earlier decision and held that there could be no reparation where the challenged rate had been prescribed by the commission.\(^{113}\) It is perhaps not without significance that, although the court did not cite the *Arizona Grocery* case, which had been decided only two months before, the court injected into its decision the philosophy underlying the federal rule, namely, that rate structures should be stable where the commission has specifically prescribed them: that flexibility, with all its advantages, is purchasable at too high a price when interested parties are not allowed to rely on commission-approved rates until such rates are duly set aside. It is also pertinent to note that here, once again, the court is creating a field of administrative finality, not confining one.

A significant feature of these decisions, except the Oklahoma decision, is that in professing to follow the federal doctrine they recognize the fundamental sameness of a reparation problem under the federal system and under any state system in which the applicable statutory provisions are not essentially unlike the corresponding provisions of the Interstate Commerce Act.\(^{114}\) This form of variation from the usual rule could

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\(^{109}\) *Neb. Comp. Stats.* (1929) §75-510.

\(^{110}\) *Farmers Union Livestock Comm. v. Union Pacific R. R.*, 135 Neb. 689, 283 N. W. 498 (1939). Apparently the court would allow reparation as to rates which are not commission-made, although the court does not decide the question. *Cf.* *Central Bridge & Construction Co. v. Chicago & N. W. Ry.*, 129 Neb. 726, 262 N. W. 852 (1933).

\(^{111}\) 155 Okla. 236, 6 P. (2d) 744 (1932).


\(^{113}\) It should be observed, however, that the court based its second decision on the ground that the state constitution forbids the commission to change its rate orders retroactively.

\(^{114}\) In the *Boynton* case the court says: "Moreover, it is not possible to distinguish in principle a case where the interstate rate exacted is promulgated after
easily find acceptance in other state systems, for several state courts have not yet fully committed themselves with respect to the general problem and in some jurisdictions the applicable statutory provisions are susceptible of an interpretation similar to that enunciated in these cases. 116

Under this view, as under the federal doctrine, rates may be "experimentally laid down and experimentally tried," except where the regulatory commission has specifically approved them. Also, under this form of the rule, as under the federal rule, a large percentage of filed rates would remain utility-made and therefore not reparation-proof. 117 Within rather wide limits, therefore, this view preserves the advantages of flexible rates. But beyond those limits it recognizes the paramount interests to be secured by stable rate structures.

Although the rationale of the Boynton case, namely, that the utilities (and presumably the patrons) have a right to rely on a rate which has been deliberately approved by a commission, is preferable to the separation-of-powers argument of the Arizona Grocery case, it is not altogether easy to see why, as a practical matter, the same reason does not apply to a tariff which the commission has approved for the future but only pro forma. If the interests of utilities and patrons that rates shall be certain are best secured by regarding as reparation-proof a rate which has been deliberately approved, why does not an adequate securing of these same interests require that a rate approved pro forma be similarly treated? No one could question many of the obvious advantages of a flexible rate structure. But they can be purchased only at a very high price: often costly litigation, and the uncertainty and possible inequality inherent in the enforcement of flexible tariffs. For example, a query immediately presents itself under this variation of the usual state rule as to what constitutes a "deliberate" as distinguished from a "pro forma" approval? Would a filed rate which a commission has authorized by specific order, pursuant to an agreement of interested parties but without a hearing, be reparation-proof? Or would specific administrative sanction given after an inadequate hearing suffice? 118 Perhaps this is a

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116 See note 90, supra; note 118 infra.
117 See note 90, supra; note 118 infra.
field in which the rights of the parties should not depend on uncertainties. Perhaps, on the whole, the paramount interests of both patrons and utilities would be best secured by a system of stable tariffs.

At any rate, to date, most courts have not seriously questioned the so-called state rule. Even where the public service act could arguably be construed as authorizing a reparation proceeding, it seems to be widely assumed, when not decided, that there can be no retroactive relief with respect to a filed tariff which has been administratively allowed to become effective: that the patron’s only remedy, in case the rate is excessive, is to seek the establishment of a new and reasonable rate.\footnote{118} This conclusion is buttressed by a recent important case decided by the Supreme Court of Michigan in 1946.\footnote{119} In that case the part of the applicable state statute which was relied upon provided, \textit{inter alia}, that “the Michigan public service commission is hereby vested with complete power and jurisdiction to regulate all public utilities in the state except any municipally owned utility and except as otherwise restricted by law.”\footnote{120} There was, it seems, no statutory restriction as to making reparation awards. The Michigan public service commission construed this statute as authorizing it to award reparation with respect to a filed commission-approved rate which was found to have been unreasonable. But the Supreme Court of Michigan, adhering to the so-called state rule, held that the retroactive relief awarded was unauthorized, saying, among other things, that “all statutes are prospective in their operation excepting in such cases as the contrary clearly appears from the context of the statute itself.”

\footnote{118} In Iowa, for example, the public utilities act is perhaps susceptible of an interpretation which would permit a more or less flexible rate structure. \textit{Iowa Code} (1939) §§7892, 7893, 7894, 8048, 8055. However, the Iowa court does not seem to have committed itself very far on the general question. \textit{Cf.} Barris & Co. v. Chicago, B. & Q. Ry., 102 Iowa 375, 71 N. W. 339 (1897). For a discussion of the Problem in Iowa, see Crooks, \textit{Reparation Actions Before Regulatory Commissions} (1943) 28 Iowa L. Rev. 650. So, too, in West Virginia the applicable statutory provisions are seemingly susceptible of a construction which would authorize reparation on the theory advanced in the Boynton case or, arguably, on other theories. \textit{W. Va. Code} (1931) c. 24, art. 3, §1, art. 4, §§6, 7. The West Virginia court, however, apparently takes the position that these provisions are applicable only to charges made in excess of the “legal” rate as distinguished from “reasonable” rate. Wheeling Steel Corp. v. Public Service Commn., 90 W. Va. 74, 110 S. E. 489 (1922); Natural Gas Co. of W. Va. v. Sommerville, 113 W. Va. 100, 166 S. E. 852 (1932); Wilson v. Brennan, 114 W. Va. 777, 174 S. E. 696 (1934); Charleston Apartments Corp. v. Appalachian Electric Power Co., 118 W. Va. 694, 192 S. E. 294 (1937). See Hardman, \textit{The Finality of the Filed Rate in West Virginia} (1943) 49 W. Va. L. Q. 143. It remains to be seen whether the courts in such jurisdictions will deviate greatly, if at all, from the so-called state rule.


The pertinent West Virginia statute, the applicable provisions of which are set out in the accompanying footnote,\textsuperscript{121} is much more specific and far more favorable than the Michigan statute with respect to the possibility of retroactive relief. Yet the Supreme Court of Appeals of West Virginia has apparently adopted the usual state rule, at least as to filed rates which have been specifically approved by the commission. The West Virginia cases in point have been discussed at considerable length by the present writer in a prior issue of the Law Quarterly.\textsuperscript{122} Whether the West Virginia court would apply the so-called state rule to a filed rate which has not been "specifically" approved remains to be seen.

To sum up, it seems fairly clear that, notwithstanding a tendency to confine the scope of the doctrine of the finality of "commission-approved" rates in reparation cases, the core of the rule remains firmly entrenched both under the federal system and, with a few variations and several statutory rejections or modifications, under the state system. Under the federal form of the doctrine a filed rate, if commission-approved, is inviolate in claims for overcharges; and this proposition, though differently interpreted, is equally true under most state systems where, in general, the routine administrative approval inherent in putting a tariff into effect is regarded as sufficient to make it repair-proof. If the administrative approval is erroneous, the mistake cannot be retroactively corrected either under the federal form of the rule or under the form or forms adopted in a majority of the states; the statutory requirement that rates shall be reasonable is not even a subject of

\textsuperscript{121} "All charges, tolls and rates shall be just and reasonable," W. Va. Rev. Code (1931) c. 24, art. 3, §1; "Any person, firm, association of persons, corporation, municipality or county, complaining of anything done or omitted to be done by any public utility subject to this chapter, in contravention of the provisions thereof, or any duty owing by it under the provisions of this chapter, may present to the commission a petition which shall succinctly state all the facts. Whereupon, if there shall appear to be any reasonable ground to investigate such complaint, a statement of the charges thus made shall be forwarded by the commission to such public utility, which shall be called upon to satisfy such complaint or to answer to the same in writing within a reasonable time to be specified by the commission. If such public utility within the time specified shall make reparation for the injury alleged to have been done, or correct the practice complained of and obey the law and discharge its duties in the premises, then it shall be relieved of liability to the complainant for the particular violation of the law or duty complained of. If such public utility shall not satisfy the complainant within the time specified, it shall be the duty of the commission to investigate the same in such manner and by such means as it shall deem proper." Id. at art. 4, §6; "Any person, firm, or corporation claiming to be damaged by any violation of this chapter by any public utility subject to the provisions of this chapter, may make complaint to the commission, as provided herein, and bring suit in his own behalf for the recovery of the damages for which such public utility may be liable under this chapter in any circuit court having jurisdiction." Id. at art. 4, §7.

\textsuperscript{122} See Hardman, The Finality of the Filed Rate in West Virginia (1943) 49 W. Va. L. 2. 143.
judicial inquiry; the commission-approved rate is the yardstick of its own legality. Flexibility, a generally accepted attribute of administrative law, has yielded here to considerations of certainty and, apparently, to a neolegal insistence that the doctrine of the supremacy of law, long thought of as all-inclusive, has only a limited application to matters entrusted to administrative control.